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DEC 18 2002 IN THE UNITED STATES DISTRICT COURT
KENNETH J. MURPHY, Clerk IN THE SOUTHERN DISTRICT OF OHIO
DAYTON, OHIO WESTERN DIVISION-DAYTON

MICHAEL A. GALLUZZO
PLAINTIFF,

CASE NO. C-3-01-174

VS.

Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

CHAMPAIGN COUNTY COURT
OF COMMON PLEAS, et al.
DEFENDANT.

MOTION FOR SUMMARY JUDGMENT &
THE MERIT BRIEF
OF PLAINTIFF MICHAEL A. GALLUZZO
PURSUANT TO THE CERTIFIED CONSTITUTIONAL QUESTION
CHALLENGING THE CONSTITUTIONALITY OF
OHIO REVISED CODE 3109.04 & OHIO RULE OF CIVIL
PROCEDURE 75(N)

Plaintiff Michael A. Galluzzo moves the Court for summary judgment on all matters of law and respectfully requests that Ohio Revised Code 3109.04 and Ohio Rule of Civil Procedure 75(N) be declared unconstitutional pursuant to the jurisdiction provided under Title 28 United States Code § 1331 and this Federal Court's Certificate of Constitutional Question filed August 12, 2002.

Plaintiff requests that Ohio Rule of Civil Procedure 75(N)¹, attached hereto as **EXHIBIT 1**, be found unconstitutional as explicitly written.

And Plaintiff requests that Ohio Revised Code 3109.04, jointly or severally, attached hereto as **EXHIBIT 2**, be found unconstitutional as explicitly written.

¹ Ohio Rule of Civil Procedure 75(M) was changed to paragraph 75(N) in 1999. Plaintiff requests that the Federal Court take notice of the paragraph change. The facial language of 75 (N) did not change.

Plaintiff addresses the Merits of his constitutional challenge to Ohio's statutory scheme, and hereby incorporates and attaches hereto, his Memorandum of Law.

Respectfully Submitted,


Michael A. Galluzzo, Plaintiff

MEMORANDUM of LAW

RECENT HISTORY OF THE SECOND DISTRICT APPELLATE COURT OF OHIO (MONTGOMERY COUNTY) FINDING THAT PROVISION R.C. 3109.04(D)(2) IS UNCONSTITUTIONAL AS WRITTEN ON ITS FACE

Ohio Revised Code 3109.04 (D)(2) was found unconstitutional in the unpublished opinion of Ohio's Second District Court of Appeals for Montgomery County in the case captioned *Esch v. Esch*, C.A. Case No. 18489, 2001 Ohio App. LEXIS 670, February 23, 2001, a certified copy of the decision is attached hereto as **EXHIBIT 3**.

The *Esch* Court found that a state domestic court granting custody to a nonparent unconstitutionality infringes on a parent's fundamental right to make child-rearing decisions, without a finding of parental unfitness, "thereby violating the Due Process Clause" {citing the United States Supreme Court decision in *Troxel v. Granville* (2000), 530 U.S. 57, 120 S. Ct. 2054}.

CERTIFIED CONSTITUTIONAL QUESTION {Filed AUGUST 12, 2002}

The question before this Federal Court is whether an Ohio domestic relations court is permitted to deprive a biological parent, in a divorce situation, of equal custodial status without a finding by clear and convincing evidence that the parent so deprived is an unfit parent.

THE PRECEDENT DECISIONS OF THE UNITED STATES SUPREME COURT IN TROXEL, Id. AND THE SECOND APPELLATE COURT OF OHIO IN ESCH, Id. ARE APPLICABLE TO THE CERTIFIED CONSTITUTIONAL QUESTION

The *Esch* case involved a challenge to the constitutionality of custody being awarded to a nonparent under R.C. 3109.04(D)(2) citing the comparative decision in *Troxel, id.* where the court awarded visitation to grandparents. The *Troxel* Court found that the award of visitation to a nonparent was unconstitutional for “...the United States Supreme Court stressed that since a parent has a fundamental right to raise his child, the **best interests of the child standard is insufficient to challenge a child rearing decision of a parent.**” *Esch, id.* citing *Troxel, id.*@12. [Emphasis added.]

The matter of whom gains custody, *i.e.*, a parent, the state, or a nonparent, upon the state’s implication of a parent’s right to custody of their minor children, is not at issue.

Wherefore, the issue rests with **the parent whose fundamental right to custody is infringed upon by the state.**

Troxel found that a state court cannot “unconstitutionally infringe on a parent’s right to make child rearing decisions.” *Id.* The instant Certified Constitutional Question involves the infringement of a parental right “with respect to the asserted effect of this rule and statute to permit an Ohio domestic relations court to deprive a biological parent, in a divorce situation, of equal custodial status”.

Whether the benefactor of a custody award is a parent or nonparent is not relevant. The only issue is Ohio’s written process, and the lack thereof in complying with federal law, that denies fundamental protections of implicated parental rights.

A PARENT'S RIGHT TO CUSTODY OF THEIR MINOR CHILDREN IS A FUNDAMENTAL LIBERTY RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION

The biological parent's fundamental right to custody of their minor children is an implied substantive liberty right recognized under the Fourteenth Amendment to the U.S. Constitution. The equal protection clause of the Fourteenth Amendment provides that strict constitutional review is warranted whenever governmental action seriously burdens fundamental rights.² Ohio law must be narrowly drawn where a statute affects a fit parent's right to custody of their children. And, also under the equal protection clause, this amendment recognizes that persons (parents) similarly situated must be treated similarly.

The Fourteenth Amendment does not prohibit the deprivation of the liberty right to custody, but a rebuttable presumption to custody exists. Yet, this rebuttable presumption requires a process to protect parental rights against unwarranted intrusions by the state. Where this process is explicitly provided, and where a particularized finding of parental unsuitability cannot be met, the state *cannot* deprive a parent of their fundamental parental rights.

State intervention can only be implemented where a reasonable basis exists that a child is in imminent harm (neglect, abuse, or abandonment). Under federal law, and upon notice of state intervention by implication of a parent's right, the state must provide the parent their process due. The due process procedures were designed to protect the parent against unwarranted state intervention. Procedural requirements of due process are federal mandates protected under the Fourteenth Amendment.

The state can deny the parent's fundamental right only *after* the procedures *have been met*. Once the requirements, *i.e.*, notice of the charge, a hearing, the ability to present and cross-examine evidence, and where an evidentiary standard of proof that is constitutionally compliant are provided, *and* where a particularized finding of parental unfitness has been determined, can the state *then* intervene to protect the welfare or "best interests" of the child. The child's "best interests" are competing interests to the parent's fundamental rights, *but only where the threat of imminent harm exists*, for fit parents are legally and implicitly presumed to protect the welfare of their children.

State intervention can only occur *after* the parent is proven to be an unsuitable³ parent by clear & convincing evidence.

Otherwise, the state has no compelling reason to intervene in the autonomous parent-child relationship and impinge upon the parent's substantive right to the care, custody, and companionship of their child.

However, *where a parent is suitable, i.e., fit, a child's welfare is implicitly protected.*

Accordingly, where the state has no compelling reason to intervene, the state cannot arbitrarily deprive one parent of their constitutional liberty right to custody of their child.

The liberty right to custody of a minor child inheres to the individual parent, not to the marriage. Therefore, where each parent is similarly situated to the other parent, *both* parents retain their autonomous liberty right to legal custody of their minor children

² The "Fundamental Interests" strand of Equal Protection Strict scrutiny. The requirement of a compelling state interest to intervene upon implication of a fundamental federal right, *e.g.*, a parent's liberty interest in the care, custody, and companionship of their minor children.

and the equal protection of physical custody of their minor children. The state cannot deprive either parent of their right to *legal custody*; therefore both parents are similarly situated and the state must equally protect and enforce both parents' right to *physical custody, i.e.,* companionship, of their minor children.

The presumption that both parents are similarly situated requires both parents to retain their autonomous right to custody and an equal distribution of parental rights and obligations.

This presumption is rebuttable *only* when the state is *compelled* to intervene to protect the welfare of a child from imminent harm, *i.e.,* the alleged competing interests.

It is important to recognize that there are *no* competing interests when the minor child's welfare, *i.e.,* "best interest", is implicitly protected by suitable and fit parents.

And where a parent's substantive right to custody of their minor children is implicated, the state law must be strictly scrutinized. Constitutional scrutiny requires that the state must show a *compelling* reason, *e.g.,* the threat of imminent harm to a minor child, before the state may permissibly intervene and implicate a parental right.

The United States Supreme Court has consistently asserted that the "liberty" protected by the due process clause of the Fourteenth Amendment includes the right of parents to "establish a home and bring up children." *Meyer v. Nebraska* (1923), 262 U.S. 390; "[T]he rights to conceive and raise one's child have been deemed 'essential'" *Skinner v. Oklahoma* (1941), 316 U.S. 535. "[A]s rights far more precious than property rights." *Id.* "We have recognized on numerous occasions that the relationship between

³ *Unsuitable* is defined as a parent being *unfit, unwilling, or unable* to protect the welfare of their child from *abuse, neglect, or abandonment.*

parent and child is constitutionally protected.” *Quillon v. Walcott* (1978), 434 U.S. 246 @ 255.⁴

“The liberty interest at issue in this case...the interest of parents in the care, custody, and control of their children...is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel, id.*

THE “RATIONAL RELATIONS” ARGUMENT IS AN INSUFFICIENT BASIS OF SCRUTINY WHERE A FUNDAMENTAL RIGHT IS IMPLICATED

Pursuant to the instant constitutional challenge to Civ.R 75(N) and R.C. 3109.04, Ohio law classifies parents as “custodial” and “noncustodial” as defined in R.C. 3109.04 (K). The bare minimum method of scrutinizing suspect classifications merely requires a rational basis for the suspect classification.⁵

The State of Ohio rationally asserts that it has an interest in the welfare of its minor citizens. There is no disagreement of the state’s interest. And the triggering mechanism of the state’s interest is the filing of a petition for divorce in a state domestic court which provides the state with the jurisdiction to assert its’ interest in minor children. But the state has no right to intrude upon the parent-child relationship where the welfare of the child is not in imminent harm. The state would have no compelling reason to intrude where the parent is fit, for the legal presumption provides that a fit parent implicitly protects the interests of the minor children at issue.

⁴ The history of the U.S. Supreme Court’s rulings on the fundamental nature of parental rights includes a multitude of cases: *Pierce v. Society of Sisters* (1925), 268 U.S. 510; *Prince v. Massachusetts* (1944), 321 U.S. 158; *May v. Anderson* (1952), 345 U.S. 528; *Stanley v. Illinois* (1972), 405 U.S. 645; *Wisconsin v. Yoder* (1972) 406 U.S. 205; *Parham v. J.R.* (1979), 442 U.S. 584; *Santosky v. Kramer* (1982), 455 U.S. 745; *Planned Parenthood of SE Pennsylvania v. Casey* (1992), 505 U.S. 833; *Washington v. Glucksberg* (1997), 521 U.S. 702; *Troxel v. Granville* (2000), 530 U.S. 57.

⁵ Intermediate scrutiny is not applicable to the instant constitutional challenge to Ohio law and therefore will not be addressed. Suffice it to say that heightened scrutiny is primarily applicable in matters of gender discrimination. Plaintiff makes no claim to gender discrimination in his First Amended Complaint.

Assuming *arguendo* that the child was in imminent harm, the state's rational basis would be the appropriate basis to scrutinize the law. But where the child is not in imminent harm, the state has no rationally related reason to impermissibly infringe upon the parental right to the care, custody, and companionship of the child.

There is no rational argument that the state can provide to infringe upon the fundamental right of a fit parent.

The patterned argument raised by Ohio's courts assert that alleged parental conflict is not in the best interests of the child, and therefore parental conflict is a rational basis for the state's arbitrary intervention and implication of a parent's custody right. However the state fails miserably to recognize that the implication of a federal liberty right requires the highest level of constitutional scrutiny, for the state's rational theory of conflict (with varying degrees of conflict being a common denominator in many divorces) totally ignores the superiority of the parental right to the care, custody, and companionship of the minor child.

No constitutional basis exists to deny a federal right where the parent is suitable.

“Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.”

Stanley v. Illinois (1972), 405 U.S. 645 @ 657.

“The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove.”

Stanley, id. at 658.

The State of Ohio's interest in caring for minor children of divorce is minimal where parents are fit. Likewise, the state insists on presuming that *alleged* parental

conflict is a fitness issue compelling the state to intervene on behalf of the supposed competing interests of the child. Yet, the state cannot prove that *alleged* parental conflict places a child in imminent harm!

The rational relations test *fails* on *several* levels...

First, the state cannot support the argument that a child is in imminent harm just because the parents are divorcing, for alleged parental conflict *may or may not* rise to a level compelling state intervention, and where such imminent level of harm does not occur in the vast majority of custody divorces; then the state cannot impermissibly intervene in the private realm of the parent-child relationship.

Second, the suspect classification of “noncustodial” parent implicates a fundamental parental right, *i.e.*, the right to custody; and where such right is implicated the state must have a compelling reason to intrude into the private realm of the parent-child relationship. The triggering mechanism of a divorce, of and by itself, is not a sufficient-enough reason to require the state to impermissibly intervene and interrupt the associative right of the child and parent in the parent-child relationship.⁶

Third, the implication of a fundamental right requires protection pursuant to the Fourteenth Amendment that must be narrowly drawn and construed. The rational relations standard is only applicable to the alleged “competing” interests of the minor child, for the state has a rationally-related interest in the welfare of its minor citizens. Constitutional scrutiny is the appropriate standard of review to scrutinize the implication of a fundamental parental right.

Where a parent is fit, the legal presumption implies that the child is not in imminent harm, therefore the child’s best interest, *aka* the competing interest, is

protected. Where the child's best interests are protected; the child cannot be in imminent harm. Where the child is not in imminent harm; there are no competing interests to a parent's right to the care, custody, and companionship of the child.

Fourth, the classification must serve a legitimate public purpose that transcends the harm to members of the disadvantaged class, *i.e.*, "noncustodial" parents. There is no public purpose that demands the harm and **social damage** to the fundamental parent-child relationship where the child is implicitly protected by a fit parent.⁷

There is no rational reason to implicate a fundamental right to the custody, care, and companionship of children, by suspect classification, where:

- the child's interests are protected, therefore *no* competing interest of the child warrants intrusion by the state;
- a fit parent has never been alleged to be unfit;
- a parent has never been provided a predeprivation hearing to determine fitness;
- and
- the parent has not been found to be unfit by clear and convincing evidence.

"If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."

Romer v. Evans (1996), 116 S.Ct. 1620.

The "Rational Relations" test does not bear any relation to a legitimate end where fit parents are presumed to protect the welfare of their minor children. Upon implication of a parental right, the "Rational Relations" test does not obtain here.

⁶ Right of Association, First Amendment.

⁷ See concurring opinion of Justice Stevens & Chief Justice Burger agreeing with the plurality in *Cleburne v. Cleburne Living Center, Inc.* (1985), 473 U.S. 432.

STRICT SCRUTINY IS REQUIRED WHERE A FUNDAMENTAL RIGHT IS IMPLICATED

The procedures to deny a federal liberty right must be facially explicit. Where state law impinges upon a substantive federal right, the statutory scheme must be strictly construed under federal law. Where such right is fundamental, the state must have a compelling reason to intervene, and likewise, where the protected right is a fundamental liberty right, the statutory scheme must meet the strictest constitutional scrutiny.

And finally, the state must use the least intrusive means possible to achieve a result where a fundamental right is implicated.

Plaintiff asserts that Civ.R 75(N) and R.C. 3109.04 deny equal protection of legal and physical custody upon statutory designation, where such designation implicates a federal right by suspect classification. The U.S. Supreme Court held that statutory designation requires constitutional scrutiny of the law where the designation implicates a federal right.⁸

And, as a pattern and practice, the state does not use the least intrusive means possible to achieve a result, it actually utilizes the *most intrusive means*, *i.e.*, the deprivation of a parent's most precious liberty right.⁹

CURRENT PRACTICE PURSUANT TO OHIO RULE OF CIVIL PROCEDURE 75(N) aka "TEMPORARY ORDERS"

The State of Ohio failed to provide constitutionally compliant and facially explicit due process procedures in Ohio Civil Rule of Procedure 75(N), whereupon the

⁸ *Harper v. Virginia State Board of Elections* (1966), 383 U.S. 663.

⁹ Presently, the deprivation of a parent's custody right is allegedly modifiable *based on changed circumstances* subject to the arbitrary discretion of the domestic court, as opposed to termination adjudications which destroy all recognition of the parental relationship; but where the state arbitrarily denies one parent of the care, custody, and companionship of their child, that parent is deprived of **the full entitlement of their individual right**. The simple fact that a parental right is implicated requires the same

implication of a parent's right to custody of their minor children, the procedural rule denies every parent an oral predeprivation hearing. And at the same time, Civ.R 75(N) denies each parent the federal standard of clear & convincing evidence of parental unfitness where a parent's fundamental right to custody of their minor children is implicated. Mandatory due process procedures must be explicitly written in the procedural law as a matter of federal law.

Such federal requirements do not exist on the face of Civ.R 75 (N).

Current Practice in Ohio

After a petition for custody divorce is filed, the state immediately impinges upon one parent's custody right pursuant to the issuance of temporary orders. Yet, there is no *prima facie* evidence of imminent harm to the children at issue compelling the state to intrude by implicating parental rights. Procedures written in Ohio Rule of Civil Procedure 75(N)¹⁰ do not meet minimum due process requirements. This procedural rule is not constitutionally compliant. Two critical due process violations in the construction of the procedural rule deny mandatory federal protection:

due process requirements where the full entitlement to the privileges and immunities of the parental right is constitutionally protected

¹⁰ Ohio Civil Rule of Procedure 75(N) Allowance of spousal support, child support, and custody pendente lite.

(1) When requested in a complaint, answer, or counterclaim, or by motion served with the pleading, upon satisfactory proof by affidavit duly filed with the clerk of court, the court or referee, without oral hearing and for good cause shown, may grant spousal support pendente lite to either of the parties for the party's sustenance and expenses during the suit and may make a temporary order regarding the support, maintenance, and allocation of parental rights and responsibilities for the care of children of the marriage, whether natural or adopted, during the pendency of the action for divorce, annulment, or legal separation.

(2) Counter affidavits may be filed by the other party within fourteen days from the service of the complaint, answer, counter-claim, or motion, all affidavits to be used by the court or referee in making a temporary spousal support order, child support order, and order allocating parental rights and responsibilities for the care of children is journalized, the court shall grant the party so requesting an oral hearing within twenty-eight days to modify the temporary order. A request for oral hearing shall not suspend or delay the commencement of spousal support or other support payments previously ordered or

First, there is no hearing requirement, where in fact, the Civ.R 75(N) explicitly is written: “*without oral hearing...may make an allocation of parental rights for the care of the children of the marriage...*”.

Second, without an oral hearing, there is no ability to present a defense, introduce evidence, present witnesses or cross examine witnesses, and without such oral hearing it follows that **no evidentiary standard** has been, *or could ever have been*, met.

The *prima facie* basis in the procedural rule implicating a parental right requires “*upon good cause shown*” but fails to define exactly what “*good cause shown*” means. Then, the state court’s deprivation of the parental right to custody is determined by a particularized finding “*upon satisfactory proof by affidavit*”.

The termination of the marriage contract between the parents does not rise to a level of imminent harm to a child. Where the child is not in imminent harm, the state has no compelling reason to impermissibly intrude on behalf of the child.

And upon the filing of a divorce, where competing interests of the child and the competing interests of parents allegedly clash and are arbitrarily determined to be detrimental to the child, such unsubstantiated allegations of the child’s alleged competing interest is made without a hearing and without a constitutionally compliant evidentiary standard evidencing that imminent harm to the child **actually** exists.

On the other hand, the state makes no attempt to intervene upon intact marriages with parents who may disagree, *except* where there is the danger of imminent harm to a child. But, when the state does permissibly intervene, the implicated parent of an intact marriage is provided a hearing in juvenile court and a particularized finding by clear and

change the allocation of parental rights and responsibilities until the order is modified by journal entry after oral hearing.

convincing evidence that imminent harm to the child does *or does not* exist. See the explicit language¹¹ in R.C. 2151.35 and the definitions pursuant to R.C. 2151.03, 2151.031, 2151.04, and 2151.05 attached hereto as **EXHIBIT 4**.

Under current pattern and practice in a divorce with children, pursuant to Civ.R 75(N), the state court erroneously asserts its *parens patriae* interest in protecting the welfare of its minor citizens without an evidentiary basis upon implication of a parental right.

See the detailed and extensive authority of *Donald C. Hubin, Parental Rights and Due Process*, Journal of Law & Family Studies, University of Utah College of Law, Vol. 1, No.2, 123-150 attached hereto as **EXHIBIT 5**.

The procedural rule fails to provide a process due that is compliant with federal law.

Under current practice a parent's federal right to custody is deprived, *or enlarged to the classified "custodial" parent*, merely by the discretion of the state court, for there is no constitutionally compliant process prior to the implication of the parent's federal right.

No predeprivation hearing...*and*...no evidentiary standard of clear and convincing evidence of parental unfitness are provided in the procedural rule.

Where due process requirements *are not* explicit on the face of the rule, and therefore due process is not provided either parent under *any* set of circumstances, then the procedural rule is *flagrantly unconstitutional*.

¹¹ "If the court at the adjudicatory hearing finds from clear and convincing evidence that the child is an abused, neglected, or dependent child, the court shall proceed,...to hold a dispositional hearing and hear the evidence as to the proper disposition to be made under section..." R.C. 2151.35 (A), 3rd paragraph.

And the same exact conditions exist on appeal. The state appellate court must apply the same procedural rule. Ohio Civil Rule 75(N) is presumed to be constitutional. But this presumption fails where federally compliant requirements of due process are not facially explicit in the state procedural rule. Therefore the required due process procedures are not provided to any/either parent *under any set of circumstances*.

Where the procedural rule lacks explicit due process requirements the state appellate court can only reach the same conclusion as the trial court. Due process procedures, *i.e.* “*without oral hearing*” and “*upon proof by affidavit*”, are not constitutionally compliant and do not comport with federal requirements. Therefore, no remedy exists under any set of circumstances in any Ohio court. *Both* parents are deprived of substantive due process.¹²

The “temporary order” then becomes the default presumption in Ohio domestic courts pursuant to the final allocation of parental rights and responsibilities under R.C. 3109.04. The pattern and practice of the state domestic court is not to disrupt the child’s schedule, and in many cases temporary orders pursuant to CivR.75(N) remain in place between 6 months and several years, erroneously becoming the presumptive hurdle the previously classified “noncustodial” parent must clear at the final hearing.

Where Ohio law accepts the best interests of the child as its evidentiary standard in the determination of custody, as a pattern and practice, Ohio domestic courts do not order equal custody to parents in a contested custody divorce. The state court then uses its arbitrary discretion to *protect* the child’s best interests, *i.e.*, the competing interests of the child, asserting that conflict between the parents disrupts the continuity of the child’s

environment (which disruption exacerbates under the temporary order) and as the legal basis for protecting the child's "best interests".

Yet, the "noncustodial" parent has never been determined to be unfit by *any* evidentiary standard.

The "noncustodial" parent was denied a predeprivation hearing prior to the temporary order. The imposition of the final order is not based upon the parent's fitness as a parent, nor is the final order even based upon imminent harm to a child requiring state intervention; but the final order improperly classifies a "noncustodial" parent upon arbitrary factors *of alleged parental conflict*, which is why the parents are divorcing themselves...not their children.

The state court fails to recognize that the parents are either (1) acting in their child's best interest where they know they *cannot get along*, and are incompatible, and for the sake of the child and the parental relationship, that it would be best to part company as a married couple, or (2) the state court fails to recognize that the parents are getting a divorce because they *do not want to stay together*, and are incompatible, for that is why they sought a divorce in the first place. But in either situation, the married couple rarely files a divorce from their spouse in order to abandon their children.¹³

Ironically, the state court fails to recognize, in either situation, that the parents never requested to abandon their children in a custody divorce, and it is the desire to spend time with their children that places parents in the adversary state court arena.

¹² Of course it is highly unlikely that there will ever be a legal action filed by the "custodial" parent asserting that Ohio's statutory scheme is unconstitutional, primarily because the "custodial" parent wholly benefits from the domestic court's discretionary award enlarging their parental rights.

“The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a “better” decision could be made.”

Troxel, Id.

The State of Ohio, in its’ infinite failure to understand the importance of both parents involvement in the children’s lives, arbitrarily picks one parent to provide the care, custody, and companionship of the minor children *and at the same time* eliminates one parent’s formerly intact parental rights by reducing the now classified “noncustodial” parents’ involvement to nothing more than visitor status (seeing their children every other weekend) by further decimating the previously intact parent-child relationship that existed prior to divorce.

STATE LAW MUST BE CONSTRUED UNDER FEDERAL LAW WHERE A FEDERAL RIGHT IS IMPLICATED

In a divorce with children, the state of Ohio cannot impinge upon any parent’s underlying federal liberty right to custody of their child and the equal protection of their parental rights without meeting the explicit requirements of due process. While the state can implement law that regulates divorce, for this is an important state interest, the state is not permitted to impermissibly intrude upon the underlying federal rights of both parents. Where a substantive right inheres solely in the individual and not in the family unit, federal law under the Fourteenth Amendment protects the autonomy of each parent’s right. The state legislature recognized this in Ohio Revised Code 3109.03,¹⁴ and

¹³ If a parent is going to abandon their children, a divorce is usually not *the basis* for this type of unsettling behavior.

¹⁴ Ohio Revised Code 3109.03 Equal parental rights of father and mother.

When husband and wife are living separate and apart from each other, or are divorced, and the question as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children is brought before a court of competent jurisdiction, they shall stand on an equality as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children, so far as parenthood is involved.

entitled by mandate that each Ohio parent who is living separate and apart from each other, or are divorced, to an equality as to the parental rights and responsibilities and the legal custody of their children. But, in R.C. 3109.04, the Ohio legislature failed to provide constitutionally compliant procedures in achieving parental equality under R.C. 3109.03.

The welfare of citizens, including children, is an important state interest. The state has exclusive jurisdiction over matters pertaining to the welfare of its citizens. Yet, the state cannot impinge upon the protected and underlying federal rights of its' citizens.

State rights, *i.e.*, statutory entitlements, do not supercede substantive federal rights. The State of Ohio has reversed the pecking order of the Supremacy Clause¹⁵, {Article VI: U.S. Constitution}. The best interest standard does not supercede parental rights. Only upon successfully rebutting the presumption that a child is in imminent harm does the child's competing interest compel the state to intervene and find the least intrusive means to restrict the parent from placing the welfare of their child in jeopardy..

A cursory constitutional examination of Ohio Civil Rule 75(N) and each section of Ohio Revised Code 3109.04 demonstrate that the statutory scheme is vague and overbroad, discretion dispensing, and explicitly fails to provide constitutionally compliant due process procedures.

The state places the best interest of the child at the top of the pyramid, disregarding both parents federal right to custody, denying due process by ignoring federal law, and arbitrarily eliminating one parent's protected constitutional right by

¹⁵ Art. VI, 2nd paragraph

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the

classifying that parent as a “noncustodial” parent, while at the same time, enlarging the arbitrarily classified “custodial” parent’s right.

A significant decrease of contested divorces with children (and subsequent litigation) would occur immediately should equal/joint legal custody be the rebuttable presumption in Ohio law. Both parents would remain on equal grounds with respect to their children and the leverage so often employed by counsel, the creation of conflict, *i.e.*, competing interests, would be *de minimis* where both parents would be protected under federal law. In fact, with both parents maintaining their custodial rights, the remaining issues requiring a state domestic court would include property settlements, spousal support, journalizing decrees of divorce and dissolution, and deciding occasional parental suitability assertions.

Where custody of minor children is a federal right, the decision remains with the parent to decide if they wish to retain their autonomous right. Should one parent voluntarily choose to forgo their parental right, then this *unwilling* parent would be properly designated a noncustodial parent and be subject to the *allocation* of statutory parental rights.

“Best interests” is an arbitrary and discretionary standard *rationalized* by the domestic court judge by taking indefinable factors into consideration to determine (1) which parent should lose their liberty right and (2) which parent should retain (and enlarge) their liberty right. A federally protected right cannot be denied by arbitrary and discretionary factors.

supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

THE STATE OF OHIO'S DISINGENUOUS CLAIM THAT THE CLASSIFIED "NONCUSTODIAL" PARENT HAS NOT BEEN DEPRIVED OF THEIR PARENTAL RIGHTS

The Ohio Supreme Court in *Braatz v. Braatz* (1999), 85 Ohio St.3d 40, clearly defined custody, **legal and physical**:

"Child visitation" and "child custody" are related but distinct legal concepts: **"custody" resides in the party or parties who have the right to ultimate legal and physical control of a child**, while "visitation" resides in a noncustodial party and encompasses that party's right to visit a child."

"Although a party exercising visitation rights might gain temporary physical control over the child for that purpose, such control does not constitute "child custody" because **the legal authority to make fundamental decisions about the child's welfare remains with the custodial party...**" *Id.*

And subsequent to the deprivation of one parent's right to legal and equal physical custody pursuant to temporary orders, the domestic court is required to provide a temporary physical custody "visitation" schedule.¹⁶ There is no statute, nor any procedural rule that uniformly provides the same visitation schedule for similarly situated "noncustodial" parents in Ohio. Instead, each of Ohio's 88 counties provide a schedule pursuant to local rule that varies in the amount of time required to be set aside for the "visitor" parent, but in most case results in every other weekend (which is 96 hours per month), certain holidays on a rotating schedule, and certain summer weeks, usually 4 weeks to the "noncustodial" parent and the balance of 6-7 weeks for the "custodial" parent. The percentage of time spent with the "noncustodial" parent varies between 19% of the total time available pursuant to Champaign County's local rule to 27% of the time, for example, Franklin County's local rule. All other counties fall in-between. This is a far cry from equal physical custody {and the associate legal custodial decision-making rights

¹⁶ Only a couple of years ago SB180 was enacted eliminating the term "visitation" from the statutory language, to be replaced with the politically correct "companionship" time. No one, specifically state court

of a parent} and penalizes the “noncustodial” parent as much as 12 days from weekend to the following visitation weekend before the children at issue are permitted to spend overnights with the “noncustodial” parent. Also, this local rule schedule, intentional or not, successfully eliminates one parent from involvement with their child’s school, homework, extracurricular activities, social interaction, and relationships with relatives including half-siblings, step-siblings, and extended families.

But the deprivation of a parent’s autonomous decision-making right, *i.e.*, legal custody of their children, is implicated and suspended pursuant to Civ.R 75(N) and subsequently **terminated** pursuant to the permanent allocation of parental rights under R.C. 3109.04.

R.C. 3109.04 (K) defines the “custodial” parent as “the residential parent and legal custodian, or the custodial parent of the child”. The statute also defines the “noncustodial” parent as “a parent who is ***not*** granted custody of a child”.

The deprivation of the “noncustodial” parent’s right to legal custody is then incorporated into the final decree as the final order of the court.

And without the legal right to custody (where the right is autonomous to *each* parent)¹⁷, the right to equal physical custody does not obtain to the now classified “noncustodial” parent, for the parents are no longer similarly situated, and therefore, are not entitled to being treated similarly. The domestic court’s arbitrary classification and deprivation of one parent’s federal custody right denies both parents equal protection of the physical time each spends with their children.

officials, paid any attention and have subsequently failed to implement the less-offensive terminology which is nothing more than a smokescreen to what actually occurs...visitation.

But, where each parent-child relationship is an autonomous relationship, and of course, because a child cannot be physically split in two¹⁸, then each individual parent-child relationship, *i.e.*, time, must be equally divided.

To accomplish the protection of each parent's federal right to legal custody of their minor children in a divorce, the amount of companionship time, *i.e.*, physical custody, must be equally divided as both parents are similarly situated.¹⁹

And, where the state has no compelling reason to intervene pursuant to the competing interests of the child²⁰ because the child's welfare is not in imminent harm and where there is no finding of parental unfitness by clear and convincing evidence²¹ of a parent's federal liberty right²² to the care, custody, and companionship of their child²³ in each parent's reciprocal and autonomous parent-child relationship²⁴, each parent must be equally protected under the Fourteenth Amendment to the U.S. Constitution.²⁵

Of course the opposing argument maintains that the "noncustodial" parent can request a change of custody pursuant to R.C. 3109.04, but the *prima facie* basis and the insurmountable bar for modifying a custody decision post-decree, require that the "noncustodial" parent establish that the modification is in the child's "best interest". The threshold is judicial discretion of the arbitrary factors addressed in R.C. 3109.04 (F)(1) & (F)(2).

¹⁷ A federal liberty right inheres to the individual "since the constitutionally protected right of privacy inheres in the individual, not the married couple." *Eisenstadt v. Baird* (1972), 405 U.S. 438, syllabus @ 2(c) referring to *Griswold v. Connecticut*, (1965), 381 U.S. 501.

¹⁸ Wisdom of Solomon, where the King proved that fit parents act in the best interest of the child.

¹⁹ Equal Protection Clause, Fourteenth Amendment.

²⁰ Right of Association, First Amendment.

²¹ Due Process Clause, Fourteenth Amendment.

²² Privileges & Immunity Clause, Fourteenth Amendment.

²³ Liberty Right to Custody of Minor Children, Fourteenth Amendment.

²⁴ Privacy {in the concept of liberty} pursuant to the Ninth & Fourteenth Amendments.

²⁵ Article VI, U.S. Constitution, Supremacy Clause.

But, this hurdle to modification is further elevated where the domestic court will not disturb the child's existing environment without a basis of imminent harm to the child. And it is this conundrum that a "noncustodial" parent faces when attempting post-decree modification of their denied parental right.

To successfully modify custody, the "noncustodial" parent must establish a *prima facie* case that the "custodial" parent is unsuitable; request a hearing; and present evidence that *the previous arbitrary award of custody* should be changed by proving unfitness of the "custodial" parent...the same parent who previously achieved custodial status pursuant to the discretionary "best interests of the child" standard.

OHIO LAW IS NOT COMPLIANT WITH FEDERAL DUE PROCESS MANDATES

The Ohio legislature failed to provide constitutionally compliant and facially explicit due process procedures in Ohio Civil Rule of Procedure 75(N) and Ohio Revised Code 3109.04. The statutory scheme denies *every* parent the federal standard of *clear & convincing* evidence of parental unfitness where a parent's fundamental right to custody is implicated. As a matter of federal law, mandatory due process requirements must be explicit on the face of the rule and statute.

And where the Ohio legislature recognized pursuant to Ohio Revised Code 3109.03 that both parents stand on an equality as to the legal custody and parental rights and responsibilities of their children; Ohio Civil Rule 75(N), being a rule of procedure, must give way to the statutory presumption.

The vagueness of Ohio Revised Code 3109.04 renders the statute void under *any* set of circumstances in *any* Ohio court pursuant to the lack of specificity and the discretion-dispensing nature of the facial language.

Ohio Civil Rule of Procedure 75(N) explicitly denies an oral predeprivation hearing and then requires the evidentiary standard of “*satisfactory proof by affidavit*”. Such a standard fails to establish a *prima facie* case of parental unsuitability. And without a predeprivation hearing, such “proof by affidavit” is patently violative of minimal due process requirements. But that is exactly what occurs in every contested custody divorce in Ohio’s domestic courts.

The Ohio legislature failed to **strictly scrutinize** the explicit language in Ohio Rule of Civil Procedure 75(N) and in Ohio Revised Code 3109.04 where a federal liberty right is implicated. Where a fundamental liberty right is implicated, the statute and procedural rule must be in strict compliance with federal law, for certain substantive rights require far more than intermediate scrutiny and certainly such liberty rights decry the rational relations test that denies federal process in Ohio.

Ohio Revised Code 3109.04 is a vaguely worded statute. Where custody of a child is contested, the domestic court arbitrarily bases its decision on which parent that the court thinks by considering a list of factors that will act in the child’s “best interests”. This *subjective test* is exclusively determined by judicial discretion and without a particularized finding of parental unfitness.

The lack of an explicit evidentiary standard makes Ohio Revised Code 3109.04 flagrantly unconstitutional.²⁶ The statute is patently violative of federal due process requirements.

²⁶ Even where the requirements of due process are met concerning proper notice and a proper hearing, the fact remains that where there is no constitutionally compliant burden of proof, *i.e.*, “*clear & convincing*” evidence provided under state law, **then an individual cannot know what constitutes a violation of the law and therefore cannot conduct themselves accordingly within the law.**

The language in every applicable clause and paragraph of Ohio Revised Code 3109.04 provides for total judicial discretion, using the “best interests” standard as the determinate factor in a final allocation of parental rights.

The domestic court totally ignores the underlying federal custody right of suitable parents, but immediately supplants this autonomous right in the final hearing by awarding custody to the parent whom the court believes will provide for the “best interests” of the child under the discretionary factors in R.C. 3109.04 (F).

Where suitable parents implicitly protect a child’s welfare, the state must not intrude where the child’s welfare is not at issue. Even where conflicting opinions exist between parents, the domestic court cannot intrude on each parent’s autonomous substantive right except *to protect* the equal division of parental rights and responsibilities of similarly situated parents.

Important state interests in the welfare of children, *i.e.*, competing interests, *does not outweigh* a suitable parent’s federal liberty right to custody and care of their children.

When federal and state law are in conflict, the supremacy clause tilts the balance of power in favor of federal law.

The State of Ohio establishes a parent’s liberty right to custody in a two-step process: 1) pursuant to Ohio Civil Rule of Procedure 75(N), the procedural rule that establishes the temporary custody *pendente lite* of a child in divorce and, 2) pursuant to Ohio Revised Code 3109.04, the statute that establishes final custody and the allocation of parental rights.

The facial language of both procedural rule and statute are patently violative of federal due process requirements. Where such due process is denied *both* parties under *any* set of circumstances, the statutory scheme is facially unconstitutional.

Do Ohio Civil Rule 75(N) and Ohio Revised Code 3109.04 meet federal due process requirements?

The answer is no.

RELEVANT LAW

As a matter of law, the Sixth Circuit Court of Appeals held:

“ Parents have a liberty interest in custody of their children and, therefore, **any deprivation of that interest** by the state **must be accomplished by procedures meeting the requirements of due process.**”

Hooks v. Hooks, 771 F.2d 935 (6th Cir.1985) @ 935; Finding of Constitutional Law #1 [Emphasis added.]

As far back as *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the U.S. Supreme Court asserted, “[a] child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations”. *Id.* at 535. The Supreme Court further discussed state interference in *Prince v. Massachusetts*, 321 U.S. 158 (1944) that “it is cardinal with us that the custody, care, and nurture of the child reside first in the parents whose primary function and freedom include preparation for an obligation the state can neither supply nor hinder.” *Id.* at 166.

The Supreme Court clearly stated that a father’s, “interest in retaining custody of his children is cognizable and substantial.” *Stanley v. Illinois*, 405 U.S. 645 at 652 (1972).

Quoting *Santosky v. Kramer*, 455 U.S. at 749, 753-754 (1982) in *Franz v. United States*, 707 F.2d 582 (1983), the Court stated:

“the Court has expressly held that the interest of a parent, who has temporarily lost custody of his child; in avoiding elimination of his rights ever to visit, communicate, or regain custody of the child is important enough to entitle him to the procedural protections mandated by the Due Process Clause.”

Id. at 596. [Emphasis added.]

The *Stanley* Court asserted that parental rights could not be terminated absent a showing of unfitness and that a showing of the child’s best interest would be an insufficient basis for termination of the father’s rights.

“What is the state interest in separating children from their fathers without a hearing to determine *whether the father is unfit* in a particular disputed case? We observe that the State registers no gain when it separates children from the custody of *fit parents*. Indeed if Stanley is *a fit father*, the State spites its own articulated goals when it needlessly separates him from his family.”

Stanley, id. at 652-653 [Italics included.]

What constitutes due process in custody matters? The U.S. Supreme Court specifically answered that question where:

“The Court characterized Stanley as holding that the father’s constitutional rights were violated “absent a hearing and *a particularized finding that the father was an unfit parent.*”

Quillon v. Walcott, 434U.S. 246, 247-248 (1978), italics included.

If *Stanley’s* basis to meet due process procedural requirements was: (1) a hearing and (2) a particularized finding of parental unsuitability, then the same standards must apply to all parents.

And as the *Hooks* Court concluded, any deprivation, *i.e.*, temporary or final/permanent, requires *mandatory* procedures of due process.

Temporary Deprivation of Custody pursuant to Ohio Civil Rule 75(N)

Does the State of Ohio provide a hearing for the *temporary* deprivation of custody pursuant to Ohio Civil Rule 75(N)?

The answer is no.

Is there *any set of circumstances* that a hearing is held **before** a temporary deprivation of custody?

The answer is no. The procedural rule explicitly states that custody *pendente lite* is to be determined “without oral hearing”.

Does a post-deprivation remedy exist?

The answer is yes [see Ohio Civil Rule 75(N)(2)], but the deprivation of a liberty right requires a hearing and a finding **before** the deprivation. See *Hooks, supra*.²⁷

²⁷ In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564(1972) the U.S. Supreme Court required a prior hearing where the nature of the liberty or property deprivation falls under the Fourteenth Amendment. The hearing requirement is an integral element of federal due process requirements.

The hearing must be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In *Logan v. Zimmerman Brush Co.* 455 U.S. 422 (1982), the U. S. Supreme Court made clear that a statutorily entitled postdeprivation hearing must be held within the time specified in the statute. The constitutional entitlement mandates the timeliness of the hearing. This decision concluded that a violation of substantive due process occurs where the trial court does not adhere, *for any reason*, to the statutory time mandate. The conclusion of *Vitek v. Jones*, 445 U.S. 480 at 491 (1980) was reiterated in *Logan* that where the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement. *Logan* further distinguished constitutional entitlements from the holding in *Parratt v. Taylor*, 451 U.S. 527 (1981) in which the property loss was a random unauthorized act by a state employee, *id.* at 541; where in *Logan* the loss [property deprivation] is caused by the state system itself. *Id.* at 436.

In *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 535 (1985) the Court clarified that due process for a property deprivation required a timely postdeprivation hearing in an employment termination matter.

And even more importantly, in *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984) cited in *Casines v. Murchek*, 766 F.2d 1494, 1502 (11th Cir. 1985), *rehearing en banc denied* Sept. 5, 1985, “Where, however, the claimant is deprived of due process regardless of the state’s postdeprivation procedures, then the claimant has suffered a substantive violation of due process.” The Fifth Circuit Court explained, “rights are violated no matter what process precedes, accompanies, or follows the unconstitutional action.”

In *Goldberg v. Kelly*, 397 U.S. 254, 260 (1970), the Supreme Court held that due process required an oral predeprivation hearing prior to a property deprivation in a welfare benefits matter, holding that some property rights require immediate protection. *Goldberg* defined the constitutional requirement for an oral predeprivation hearing and the need for constitutional protection before the state can deprive a property right [welfare benefits] determined by common law to be essential.

NOW...the tie-in with the discussion of FOURTEENTH AMENDMENT PROPERTY RIGHTS:

The U.S. Supreme Court recognized long ago that liberty rights were “far more precious than... property rights” *Skinner v. Oklahoma*, 316 U.S. 535 (1941). Where a liberty right has been recognized as *far more precious* than any property right, the constitutional protection must be equivalent or exceed the holding in Goldberg. The only reasonable conclusion inferred is that a liberty right requires a predeprivation hearing where the state infringes upon that right.

Therefore, *every* parent is constitutionally entitled to an oral *predeprivation* hearing *prior* to any deprivation of custody. *Hooks, Id.*

Ohio Civil Rule 75(N)(1) explicitly states “without oral hearing” which explicit language violates federal law.

Footnote 27 addresses the specific reasons, supported by U.S. Supreme Court and Federal Appellate Court precedent decisions, where a predeprivation hearing is mandatory upon the implication of a parent’s liberty right to custody of minor children.

Are there *any set of circumstances* where a particularized finding that a parent is an unfit parent, is determined before a temporary deprivation of custody?

The answer is no. An evidentiary burden of proof, i.e. clear & convincing evidence, cannot be met because there is **no** predeprivation hearing. The explicit evidentiary standard of “*upon satisfactory proof by affidavit*” [CivR 75(N)(1)] is all that is required to deprive a parent’s custody right.

Without a predeprivation hearing there are **no set of circumstances** that a parent can be determined to be unsuitable.

No matter what good-faith efforts are made to enforce Ohio Civil Rule 75(N), the ***chilling effect*** of denying due process cannot be justified by good-faith efforts where due process is ultimately denied.

Pursuant to Ohio Civil Rule 75(N) due process cannot be achieved in any set of circumstances. The explicit denial of a hearing and therefore the inability to determine a particularized showing of parental unsuitability (where no burden of proof can be met) cannot be enforced through discretionary efforts.

Assuming *arguendo* that the implication of a fundamental liberty right would not warrant an oral predeprivation hearing; the unequivocal fact remains that a constitutional entitlement, grounded in state law, defines a substantive time predicate to achieve the mandated postdeprivation oral hearing. Ohio Civil Rule 75(N)(2) defines a specific time predicate of twenty-eight (28) days to conduct a post-deprivation oral hearing.

Once a statutory entitlement is denied or delayed *for any reason*, there is a violation of substantive due process. *Logan, supra, & Casines, supra.*

Equitable relief is required where:

“Minimum [procedural] due process requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining preconditions to adverse official action.”

Vitek v. Jones, 445 U.S. 480 at 491 (1980) [Emphasis added.]

Without due process requirements explicitly written on the face of Ohio Civil Rule 75(N) there is no opportunity for equitable relief.

Under the present procedural rule, a parent in this state is entitled to less procedural safeguards as it relates to custody and parenting determinations than if that parent resided outside Ohio.

See Ohio Revised Code 3109.23, which governs the power of a state court to issue an interstate parenting decision, requires that a hearing be held prior to the issuance of a parenting determination. [See *In re Marriage of Schmidt* (Minn. 1989), 436 N.W.2d 99, 106-107.]

And temporary orders issued under the Uniform Child Custody Jurisdiction Act are subject to the provisions of the UCCJA. [See *Roth v. Hatfield*, Dec. 28, 1983, Gallia App. Nos. 82CA-19, 82CA-20, & 82CA-21, unreported.]

While the U.S. Supreme Court has never specifically addressed the issue raised in the instant Footnote 27, the cumulative decisions of the many cases cited directly address the mandatory requirement of a predeprivation hearing. See also *Stanley v. Illinois* (1972), 405 U.S. 645 (U.S. Supreme Court holding that a hearing must be held upon implication of the parental right).

Final or Permanent Deprivation of Custody pursuant to Ohio Revised Code 3109.04²⁸

Does the State of Ohio provide a hearing for the *final* allocation of parental rights and responsibilities pursuant to Ohio Revised Code 3109.04?

The answer is yes.

Are there *any set of circumstances* where a particularized finding is made pursuant to R.C. 3109.04 that a parent is determined to be an unfit parent by clear and convincing evidence before the state permanently deprives the implicated parent's right to *legal* custody of their child?

The answer is no.

Yet the Ohio Supreme Court in *In re Hayes* (1997), 79 Ohio St.3d 46 at 48 asserts: "Permanent termination of parental rights has been described as the 'family law equivalent of the death penalty in a criminal case.'***Therefore, parents 'must be

²⁸ When both parents agree to a settlement and joint custody, then the temporary order designating one parent as "custodial" is replaced by the final decree designating both parents as legal custodians of their children. Even though the deprivation/enlargement of a substantive right occurred previously, pursuant to "temporary orders", without a predeprivation hearing and a particularized finding of parental unfitness, the settlement between the parents removes the state's compelling reason to intervene on behalf of the child's alleged competing interests, yet the only change that occurred is that the parents agreed to settle the differences between themselves.

If the State truly believed that there was prospective harm to the child, then the competing interests of the child would be at issue and the state could not accept an agreed settlement and joint custody. But, the pattern and practice in Ohio is that more than 97% of cases settle prior to a final custody hearing pursuant to R.C. 3109.04, evidencing that there is no competing interest, as alleged by the state, that rises to the level of imminent harm to a child.

CUSTODY SERVES THE WHIM OF THE STATE:

When a "custodial" parent dies in Ohio, it is presumed that the "noncustodial" parent regains custody of the children at issue. There is no hearing for determination of suitability of the former "noncustodial" parent (unless there is an issue of fitness and in some cases a custody challenge from a relative).

It is presumed that the surviving parent best serves the child's interests. But, this Court should ask, if that is so, then why was the designated "noncustodial" parent deprived of their fundamental right to custody in the first place? The default presumption that the surviving parent is now, all of a sudden, suitable to be designated the "custodial" parent is inapposite of the state's former designation of the surviving parent as the "noncustodial" parent. In simple English, the "noncustodial" parent wasn't good enough to participate in the care, custody, and companionship of the children pursuant to the arbitrary discretion of the domestic court, as defined in *Braatz, Id.*, but once the care of the children becomes an issue, the deprived parent is now *good enough* to become the "legal" decision-maker.

The "best interests" standard [the arbitrary factors defined in R.C. 3109.04(F)] is nothing more than a subjective test based on the unbridled discretion of the domestic court.

afforded every procedural and substantive protection the law allows.” (Citations omitted.)

R.C. 3109.04 provides no substantive protection.

THE U.S. SUPREME COURT HOLDING IN *SANTOSKY v. KRAMER* (1982), 455 U.S. 749 ESTABLISHED THAT **CLEAR and CONVINCING** EVIDENCE IS REQUIRED TO TERMINATE FUNDAMENTAL PARENTAL RIGHTS

The burden of (proof) “**clear & convincing**” evidence is required to make a particularized finding that a parent is an unfit parent. The evidentiary standard must be explicitly written in the statute. In Ohio Revised Code 3109.04 the burden of proof to remove parental custody is arbitrary judicial discretion, supported by several discretionary and overbroad factors listed in R.C. 3109.04(F)(2).

“The breadth of the statute infringes on the parent’s fundamental right, **specifically the statute’s best interests standard did not give any weight to a fit parent’s decision.**”

Troxel, id. [Emphasis added.]

Likewise, the breadth of R.C. 3109.04(A)(1) infringes on the Ohio parent’s fundamental right, specifically the statute’s best interests standard did not give any weight to a fit parent’s decision where:

“...the court, in a manner consistent with the best interests of the children, *shall allocate* the parental rights and responsibilities for the care of the children *primarily to one of the parents*, designate that parent as the residential parent and legal custodian of the child...” R.C. 3109.04(A)(1)

And in *every* section of the statute, including R.C. 3109.04(D)(2) which has already been declared unconstitutional in *Esch, id*, the best interest of the child standard is the explicit legal standard in Ohio determining the custody of minor children of divorce.

See also, R.C. 3109.04 (B)(1) “the court shall take into account that which would be in the best interest of the children”; “In determining the child’s best interest for purposes of making its allocation of the parental rights...”

See also, R.C. 3109.04(B)(2)(b) “If the court determines that it would be in the best interests of the children...”

See also, R.C. 3109.04(C) “it (the court) may designate...only if it determines that it is in the best interests of the child to name that parent...”

See also, R.C. 3109.04 (D)(1)(a)(i) “If the court determines that the plan is in the best interests of the children, the court shall approve it.”

See also, (D)(1)(a)(ii) and (iii).

See also, R.C. 3109.04 (D)(1)(b) “The approval of a plan under division (D)(1)(a)(ii) or (iii) is discretionary with the court...unless it determines that the plan is in the best interest of the children.”

R.C. 3109.04 (D)(2) was found unconstitutional in *Esch, id.*

See also, R.C. 3109.04 (E)(1) discussing modification of a prior decree where “the modification is necessary to serve the best interest of the child.”

See also, R.C. 3109.04 (E)(2) “If the modifications are not in the best interests of the children, the court, in its discretion, may reject the modifications or make modifications...that are in the best interest of the children.”

See also, R.C. 3109.04 (E)(2)(b) “The court may modify the terms of the plan...upon its own motion...if the court determines that the modifications are in the best interest of the children...”

See also, R.C. 3109.04 (E)(2)(c) “The court may terminate a *prior final shared parenting decree*...if it determines, upon its own motion...that shared parenting is not in the best interest of the children.”

See also, R.C. 3109.04 (F)(1) “In determining the best interest of a child pursuant to this section...”

Finally, see also, R.C. 3109.04 (F)(2) “In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors, *but not limited to*...”

And, R.C. 3109.04 fails to explicitly define the burden of proof requiring *state intervention* upon implication of the parent’s custody right, therefore a party **does not know, and cannot determine**, what level of conduct rises to a level of deprivation where that party can conduct themselves accordingly. The best interest of the child is overbroad and extremely vague. The application of the best interest standard requires total discretion of indefinable factors. And, the best interest of the child standard cannot define the level of conduct that rises to a level of parental unsuitability. The best interest standard cannot be construed under federal law.

In *Hawk v. Hawk*, 855 S.W.2d 573 @ 578-579, n.3 (Tenn. 1993) the Sixth Circuit Court, citing *Santosky, supra*, held that a “**clear & convincing**” standard of proof *is required to protect against erroneous* state intervention pursuant to the termination of parental rights.

See also the authority in *Alsager v. Dist. Court of Polk Cty., Iowa*, 406 F.Supp.10 (Iowa 9175).

R.C. 3109.04 must explicitly state that the burden of clear and convincing evidence of parental unfitness is required to deprive a parent's federal custody right.

Ohio Revised Code 3109.04 is Void for Vagueness

Ohio Revised Code 3109.04, jointly and severally, is overbroad, lacks specificity, and is discretion dispensing in nature.

Standard for Vagueness Challenge

The U.S. Supreme Court provides general standards evaluating whether a statute is unconstitutionally vague:

“It is a basic principle of due process that **an enactment is void for vagueness if its prohibitions are not clearly defined.** Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, **laws must provide explicit standards** for those who apply them.

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) cited in *Women's Medical Prof. Corp. v. Voinovich*, 130 F.3d 187 at 197 (6th Cir. 1997).

[Emphasis added.]

See also *Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10 (Iowa 1975).

It is important to note that where *Alsager* refers to a parental termination case, the Sixth Circuit's holding in *Hooks v. Hooks*, 771 F.2d 935 (6th Cir. 1985) requires that ***any deprivation_of the liberty right to custody by the state*** must be accomplished by the procedures meeting the requirements of due process.

The Sixth Circuit Court in *Hooks, id.* made the distinction that ***any*** deprivation of parental rights, not just parental termination cases, which includes the denial of a parent's

full entitlement to the care, custody, and companionship of a child requires federal protection. The implication of a parental right requires a particularized finding of parental unfitness by clear and convincing evidence where a parent is denied **full entitlement** to their right.

The U.S. Supreme Court held that a statute is void only if it is so vague where “**no standard of conduct is specified at all.**” *Coates v. City of Cincinnati*, 402 U.S. 611 at 614 (1971).[Emphasis added.]

Ohio Revised Code 3109.04 specifies no standard of conduct at all. The statute fails to explicitly state that a parent will be deprived of their parental rights by a particularized finding of parental unfitness by clear and convincing evidence.

“The initial danger present in a vague statute is the absence of fair warning.”
Alsager, id. at 18.

R.C. 3109.04 provides no warning that a fit parent can arbitrarily lose their right to custody, except by judicial discretion. So, if one construes that judicial discretion of an implicated federal right is fair warning, then the statute is not vague...*but, on the other hand*, if one construes that the statute fails to provide a constitutionally compliant warning, then the statute is patently vague. See *Alsager, id.*

R.C. 3109.04 does not provide “fair warning”.

Further, the statute specifies “in its discretion, may” where the court is determining the “*allocation* of custody and parental rights”. Where a liberty right is implicated, strict constitutional review does not permit discretion as an acceptable standard of conduct, nor does it provide for an *allocation* of a federal right.

And even explicit language regarding the *allocation* of parental rights appears in the heading of R.C. 3109.04 {Allocation of parental rights and responsibilities for care of children; shared parenting.} Discretionary language permeates all sections of the statute.

A parent either has *full entitlement* to custody of children or *no entitlement*. If the parent maintains no entitlement to custody, the parent must be deprived of that right by clear and convincing evidence of parental unfitness.

“The second danger present in a vague statute is the impermissible delegation of discretion from the state legislature to the state law enforcement body.”

Alsager, id. at 18.

A fundamental right cannot be *allocated*. The liberty right to custody is autonomous and inheres in the individual. The Ohio legislature failed to construe state law pursuant to federal law upon implication of a fundamental right.

The U.S. Supreme Court held:

“[T]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part upon the nature of the enactment.”

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 at 498 (1982).

Examination of the applicable sections of Ohio Revised Code 3109.04, “does not inform an ordinary person as to what conduct is required or must be avoided in order to prevent parental termination.” *Alsager, id.* at 18.

Where the implication of custody is a liberty right requiring due process, the importance of constitutional protections is paramount.

“Nevertheless, Due Process requires the state to clearly identify and define the evil from which the child needs protection and to specify what parental conduct so contributes to that evil that the state is justified in terminating the parent-child relationship.”

Alsager, id. at 21.

The irretrievable nature of time is irreparable. The state has no justification in terminating a fit parent’s right to legal and equal physical custody of their child where the child’s welfare is not implicated. An injury-in-fact occurs upon prospective application of unconstitutional law.

“The third danger present in a vague statute is the risk that the exercise of constitutional rights will be inhibited.”

Alsager, id. at 19.

Under no set of circumstances can any parent replace, relive, or retrieve the years of a parent-child relationship that are forever lost. The loss of time cannot be replaced, and such loss is inapposite to a property deprivation, which property can be replaced, in same or like kind. A parent’s loss of his fundamental liberty right to custody is irreparable harm.²⁹

The U.S. Supreme Court concluded,

“Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.”

Hoffman Estates, supra at 499.

Unequivocally, Civ.R 75(N) and Ohio Revised Code 3109.04 have denied multitudes of Ohio parents from exercising their protected parental rights by denying fit parents the autonomous and reciprocal parent-child relationship that is fundamental to our society.

Lack of Specificity in the Use of the Word “May”

In addition to the lack of mandatory due process requirements, all sections of R.C. 3109.04 lack specificity pursuant to the explicit use of the word “*may*” including phrases that incorporate the word “*may*” in *every applicable* clause, *i.e.*, “may grant”, “may

make”, “may cause”, “may tax as costs”, “in its discretion, may”, “it may designate”, “may approve”, “may reject”, “may order”, “may select”, and “may commit”. The lack of specificity and the discretion-dispensing nature of the statutory language fully support Plaintiff’s argument that the domestic court has total discretion where a parent’s liberty right to custody is implicated.

“The introductory phrase ...**includes the word “may”**, suggesting the Iowa juvenile court has **the full discretion** in making the termination decision once a subsection is found applicable”. “These terms may or may not withstand a vagueness challenge, but **their lack of specificity and their discretion-dispensing nature certainly support the Court’s conclusions in this case.**”

Alsager, id. at 15, footnote 2.
[Emphasis added.]

R.C. 3109.04 (F)(1) is unconstitutionally vague by definition:

“In determining the best interest of a child...the court shall consider all relevant factors, including, *but not limited to*” is unconstitutionally vague.

This section of the statute *does not define the relevant factors* of the phrase “***but not limited to***”. By expanding the breadth of the statute, such language provides open-ended, overbroad, and vague terminology permitting the application of arbitrary factors used to deny parental rights.

“The phrase “***or other conduct***” ...suggests the Iowa juvenile court is free to add to the list of reasons justifying parental termination.”

Alsager, supra at footnote 2.

What factors is the statute addressing? And exactly what relevant factors is the court not limited to? R.C. 3109.04 (F)(1) cannot be narrowly construed.

Finally, R.C. 3109.04 explicitly provides that the domestic court “***in its discretion, may***” deprive fit parents of their parental rights.

²⁹ One could compare the importance of this loss, albeit a different loss of liberty, to the lost years of wrongful incarceration. Time is irreplaceable.

Explicit discretion cannot be constitutionally scrutinized where a parental right has been intruded upon by the State? Such unbridled discretion permits the Ohio domestic courts the arbitrary and capricious ability to classify parents “custodial” and “noncustodial” without procedural protections.

Nowhere in R.C. 3109.04 does the statute explicitly indicate how the final determination (and deprivation) of custody occurs, how custody is awarded to one parent and what causes one parent to lose their custody right. The statute provides a listing of discretionary factors to consider, but the statute does not resolve the mechanical process of how a parent is designated “custodial” or “noncustodial” under federal mandates.

The truth is that the “custodial” and “noncustodial” classification has previously occurred.

The *only* custody *determination* made at any point in the divorce process occurs pursuant to Ohio Civil Rule 75(N) “upon satisfactory proof by affidavit”. Once the initial custody determination is journalized the classification becomes the *de facto* default presumption in the final hearing.

If the designated “noncustodial” parent cannot rebut the presumption of the temporary designation in the final hearing then the presumption remains *ipso jure*.

STRICT SCRUTINY OF A SUSPECT CLASSIFICATION UNDER THE EQUAL PROTECTION CLAUSE CANNOT BE IGNORED

Where both parents are similarly situated, both parents must be treated similarly.

Where a parent’s federal liberty right to custody is implicated by the state domestic court, there must be a finding by clear and convincing evidence that a parent is unsuitable or unfit in order for the state to permissibly intrude on behalf of the child’s welfare Such intrusion *first* requires a finding of parental unfitness. As discussed

previously, Ohio's Juvenile Code, R.C. 2151.35, *et al* provides the explicit process due where a parental right is implicated. The statute follows the requirements set forth in *Stanley v. Illinois* (1972), 405 U.S. 645, 92 S.Ct. 1208, requiring a hearing, and *Santosky v. Kramer* (1982), 455 U.S. 745, 102 S.Ct. 1388, requiring the burden of clear and convincing evidence of parental unfitness .

In a custody divorce hearing, Civil Rule 75(N) and R.C. 3109.04 do *not* provide the same process as a juvenile hearing, R.C. 2151.35, before denying parental rights.

Why?

The Sixth Circuit Court in *Hooks, id.* stated that *any* deprivation of a parental right requires the procedures of due process. Then it follows that the domestic procedural rule and statute must comport with the juvenile statute.

If a finding of parental unfitness is determined, only then can the State assert its “*parens patriae*” interest in protecting the minor child at issue.

But where no particularized finding is determined, then both parents are similarly situated under the law, and the state may not impermissibly intrude, nor deny, either parent's federal right to custody of their minor children.

Where both parents are fit, Ohio's statutory scheme denies equal protection of each parent's legal custody right, *i.e.*, *their decision-making right*, and each parent's physical custody right, *i.e.*, *their companionship time right*, of children in a divorce situation³⁰. Based solely upon the court's discretion and pursuant to the arbitrary and vague standard of “the best interests of the child”³¹, Ohio domestic courts, as a matter of pattern and practice, routinely deprive one parent of their right to custody by classifying

³⁰ Fourteenth Amendment, Equal Protection Clause.

³¹ See *Boyer v. Boyer* (1976), 46 Ohio St. 2d 83, 346 N.E.2d 286.

one parent as the “noncustodial” parent. A “noncustodial” parent is deprived of the decision-making authority of the care and companionship of their child, and further, the “noncustodial” parent is denied equality of companionship time.

At the same time, Ohio domestic courts, as a matter of pattern and practice routinely and unjustly, *enrich or enlarge*, the classified “custodial” parent’s right to legal and physical custody.³² The “custodial” parent is granted custody of the minor children at issue. This classified “custodial” parent *is awarded* the decision-making authority of the care and companionship of their child and is also denied equality of companionship time where their companionship time is *unjustly enlarged*.

By legal definition, “parental suitability” and “parental fitness” imply that a child’s welfare is protected, and where both parents are fit parents, “the child’s best interests” are protected.

The rebuttable presumption permitting the state to permissibly intrude occurs when a child is in imminent harm and after a particularized finding of parental unfitness is determined. That finding must be determined by **an oral hearing** {see *Stanley v. Illinois* (1972), 405 U.S. 645, 92 S.Ct. 1208} and by the constitutionally compliant evidentiary standard of **“clear and convincing” evidence**. See *Santosky v. Kramer* (1982), 455 U.S. 745, 102 S.Ct. 1388.

Where a parent’s right to custody of their minor children is substantive, and which custody of minor children is a protected liberty right under the Fourteenth Amendment of the U.S. Constitution, these procedural protections are mandatory.


³² It is highly unlikely that a classified “custodial” parent would ever assert that *their* fundamental right to custody and equal protection of that right has been violated where their “custodial” designation under Ohio’s statutory scheme implicates their *enlarged* liberty right to custody.

State law construction must incorporate the mandatory due process requirements provided under federal law. Both Ohio Civil Rule of Procedure 75(N) and Revised Code 3109.04 do not explicitly contain the minimal due process requirements where a parent's federal right to custody is implicated and therefore the procedural rule and statute are unconstitutional on their face.

RELIEF REQUESTED

Plaintiff respectfully requests that the Dayton Federal District Court declare Ohio Rule of Civil Procedure 75 (N) and Ohio Revised Code 3109.04 unconstitutional.

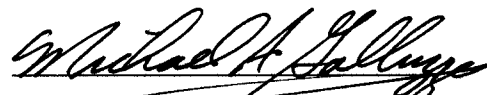
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND ACCURATE COPY OF THE FOREGOING MOTION FOR SUMMARY JUDGMENT & MERIT BRIEF WAS SERVED UPON SANFORD FLACK, ATTORNEY FOR DEFENDANT TERESA COOK, BY PERSONAL SERVICE AT 101 NORTH FOUNTAIN BLVD., SPRINGFIELD, OHIO, THE 17TH DAY OF DECEMBER 2002.



Michael A. Galluzzo, Plaintiff