

FILED

JAN 29 2004

JAMES BONINI, Clerk
DAYTON, OHIO

IN THE UNITED STATES DISTRICT COURT
IN THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION-DAYTON

MICHAEL A. GALLUZZO
PLAINTIFF,

VS.

CASE NO. C-3-01-174
Judge Thomas Rose
Magistrate Michael Merz

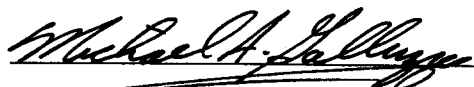
CHAMPAIGN COUNTY COURT
OF COMMON PLEAS, et al.,
DEFENDANTS.

PLAINTIFF'S OBJECTIONS to the JANUARY 23, 2004 DECISION AND ORDER
of the MAGISTRATE, and in the alternative,
MOTION FOR RECONSIDERATION PURSUANT TO PLENARY
MAGISTRATE JUDGE JURISDICTION

Plaintiff Michael A. Galluzzo timely files his objections to the Decision And Order of the Magistrate to dismiss the instant action, *and in the alternative*, Motion for Reconsideration of same. Reconsideration must present matters that the Court did not consider previously *in its decision* and reconsideration is proper wherein Plaintiff requests matters to be reviewed on said basis.

Plaintiff hereby incorporates in the attached Memorandum herein those issues that were not considered in the January 23, 2004 Decision And Order.

Respectfully submitted,



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MEMORANDUM

The following issues for reconsideration are in no particular order, but more importantly, the issues raised under objection and/or reconsideration have not been addressed by the Court in the January 24, 2004 Decision And Order.¹

1. The Decision Did Not Address Plaintiff's Request For Declaratory Relief Where R.C. 3109.04 Is In Violation Of The First Amendment Freedom Of Association Clause As Explicitly Plead In Plaintiff's Amended Complaint.

The constitutional constructionist primarily argues that unenumerated rights are outside of the protections of the United States Constitution. Apparently Magistrate Merz embraces this viewpoint, as evidenced by, and pursuant to his reliance on the dissenting opinions of Justice Scalia and Justice Stevens' in *Troxel*.² See Decision And Order @ p. 17-19, and specifically on p. 18:

“Thus the Supreme Court has neither recognized the right for which Plaintiff contends nor any other parental right which necessarily implies that right. Plaintiff of course wants this Court to recognize that right in the first instance. **In declining to do so, the Court finds support in Justice Scalia's dissent in *Troxel*.**”

{Emphasis added.}

Yet, reliance on a dissent is not precedent, and is merely the opinion of the dissenter, therefore such reliance has little or no legal weight, although Plaintiff recognizes the source of the dissent has significant stature. Regardless, the decision in *Troxel* was a plurality; the minority dissents are merely opinions. Therefore it is illogical to rely exclusively on the dissenting opinions as the legal basis for dismissal in the instant action.

¹ Pursuant to the Court's determination of whether this pleading should be construed as Objections To The Magistrate's Decision, *and in the alternative*, a Motion For Reconsideration {PURSUANT TO PLENARY MAGISTRATE JUDGE JURISIDICION}, Plaintiff both objects to the Decision and also requests reconsideration of the matters presented in the Memorandum.

² *Troxel v. Granville*, 530 U.S. 57 (2000).

Assuming *arguendo* that this Court holds itself out as fair and impartial, Justice Scalia also finds that the First Amendment's right of association is the proper legal basis to challenge infringement of parental rights. If Magistrate Merz relies primarily on **the dissent** of Justice Scalia as legal precedent, then he must reexamine the constitutionality of R.C. 3109.04 pursuant to an infringement of the autonomous parent-child relationship, *i.e.*, a violation of the reciprocal associative rights of each parent and child in a parent-child relationship.

This would be an impartial and fair reconsideration of the Magistrate's reliance on Justice Scalia's dissent.

Plaintiff Galluzzo specifically asserted that R.C. 3109.04 implicates the parental right of association in a custody divorce. See Amended Complaint @ para. 5, 26, 30, 32, & 73.

This Court did **not** address the deprivation of a parent's autonomous reciprocal parent-child right of association in its January 23, 2004 Decision and Order. Therefore, reconsideration of this issue raised in Justice Scalia's dissent is proper.

2. The Decision Did Not Address The Precedent Sixth Circuit Court Of Appeals Holding In *Hooks v. Hooks*, 771 F.2d 935 (6th Cir. 1985) And Therefore The Magistrate Cannot Overrule The Superior Court's Decision.

Plaintiff recognized long before addressing the Merit Brief that there are no Supreme Court decisions *explicitly* addressing a divorced parent's federal liberty interest in the custody of children at issue, although the long line of USSC cases clearly establishes parental rights as federal rights, *i.e.*, liberty interests under the Fourteenth Amendment... much to Justice Scalia's consternation.

And where this Magistrate found that the “Plaintiff does have sufficient constitutional standing to challenge Ohio Revised Code 3109.04” (see Decision @ p. 11), this Court determined upon certification that Plaintiff raised a proper federal challenge to facial Ohio law.

Why must this Court reconsider its’ Decision pursuant to *Hooks, id.* ?

Plaintiff found that *Hooks, id.* did explicitly address the issue of a divorced parent’s federal liberty interest in the custody of their child(ren). In fact, *Hooks* made it explicitly and painfully clear that ANY deprivation of a parent’s liberty interest without meeting the requirements of due process was a substantive denial of due process...obviously a decision that Justice Scalia would dissent as well.

The fact that the Sixth Circuit recognized ANY deprivation of a parent’s liberty interest supports Don Hubin’s bundled “set of rights and responsibilities” and supports that this Court’s “point intended by quoting Hubin is to caution against overly-expansive reading of “parental right” is not well-taken. As a matter of law the Sixth Circuit Court of Appeals implicitly supports a bundle of parental rights and responsibilities, by use of its’ terminology addressing “ANY deprivation”.³

This Court cannot ignore precedent explicitly addressed by its’ superior federal court.

See Plaintiff’s Merit Brief @ page 35.

The Sixth Circuit Court in *Hooks, id.* **made the distinction** that any deprivation of parental rights, which includes the denial of a parent’s full entitlement⁴ to the care,

³ See Decision @ p. 16 discussing Parents Rights and Due Process, 1 Journal of Law and Family Studies 123 at 125 (1999).

⁴ See Decision And Order @ p. 12 “A parent either has full entitlement to custody of children or no entitlement...A fundamental right cannot be allocated.”

custody, and companionship of a child requires federal protection. And it logically follows that any allocation of parental rights pursuant to R.C. 3109.04 *is less* than a FULL ENTITLEMENT. Therefore, the implication of a parental right requires procedures meeting the requirements of due process.

This logical conclusion, of and by itself, sufficiently addresses this Magistrate's concern that "...the Supreme Court has neither recognized the right for which Plaintiff contends nor any other right, which necessarily implies that right."

The United States Supreme Court, *i.e.*, "{c}onsistent with his (Justice Scalia's) long held reluctance to recognize substantive due process rights..." may not as of yet made the specific recognition of the parental right "Plaintiff of course wants this Court to recognize..." But, alas, the Sixth Circuit Court has already made that specific distinction.

The *Hooks* Court explicitly mandated that:

"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, id. @935. {Emphasis added.}

While this Magistrate may not wish to adhere to the finding in *Hooks, supra*, this District Court **cannot overrule** their superior court's holding that ANY DEPRIVATION of the parent's liberty interest in custody of their child(ren) **MUST BE ACCOMPLISHED BY PROCEDURES MEETING THE REQUIREMENTS OF DUE PROCESS.**

And where the Magistrate's Decision did not address the specific due process matters explicitly argued in Plaintiff's Merit Brief, reconsideration of this issue is not only proper, but of unequivocal necessity.

3. **The Magistrate Erred In Stating That Plaintiff Galluzzo Asked For State Intervention By Petitioning For Divorce Thereby Implicitly Subjecting Himself (And Other Defendants in Divorce Cases) To An Arbitrary Allocation of Parental Rights.**

Plaintiff Galluzzo in the instant matter was Defendant Galluzzo in his state court divorce. But, he had no alternative but to defend himself in an action brought by his now ex-wife (and the proper party Defendant in the instant case). For as this Court noted, there was no dispute to the relevant facts.

See Decision @ p.1.

See also, the Relevant Facts section in the Amended Complaint @ para.18.

Therefore, it is totally improper and incorrect for this Court to imply that once a parent falls under the jurisdiction of the county domestic court that the unwilling parent submits to the domestic court to allocate the decision-making authority⁵ of what were decisions previously made “jointly but in fact may allow one another autonomy over certain types of decision.” See Decision @ p. 13.

Plaintiff Galluzzo did not necessarily want the divorce, and certainly not where he would voluntarily submit his fundamental right to custody of his children to the arbitrary authority of the state.

Wherein Mr. Galluzzo did not file for divorce, an uncontested fact, he unequivocally did not “ask for state intervention” {Decision @ p. 14}, therefore **ANY DEPRIVATION** of his parental right **MUST BE ACCOMPLISHED BY PROCEDURES MEETING THE REQUIREMENTS OF DUE PROCESS.**” *Hooks, id.*

⁵ Also known as legal custody.

Ironically, this Court summarily dismissed the matter whereby Plaintiff Galluzzo and other defendant Ohio parents face no likely injury pursuant to Civil Rule of Procedure 75(N), where the utilization of this procedural rule improperly overrides the statutory requirement of R.C. 3109.03 that mandates both parents shall stand on an equality as to their parental rights and responsibilities. Where defendant parents who did not submit to the allocation of parental rights are forced to an allocation (read: any deprivation, see *Hooks, id.*) of their parental rights, the mere implication of the federal right should immediately trigger due process protection. Once the right is denied, there is no ability to undo the damage. In many cases, the deprivation of parental rights pursuant to CivR.75(N) is prolonged from 6 months to 3 years.⁶

This Court should not take this procedural rule parental custodial deprivation so readily whereby the defendant parent did not voluntarily submit to the taking of (any of) his parental rights. Without due process protections, the State has no need to adhere to federal law.⁷

The Supremacy Clause has been inverted whereby the state interest supercedes the individual federal right.

And in the instance of the defendant parent being forced to defend the divorce action, involuntarily, this Court must remember that the action was forced upon one parent...for the mere fact that the State can arbitrarily deprive parental rights without a constitutionally compliant evidentiary standard ignores strict scrutiny.

⁶ For example, the uncontested fact remains that Plaintiff was deprived for seven months before the final decree was issued.

⁷ And it does not for the State arbitrarily denies constitutional protections where no such procedures exist in R.C. 3109.04 and CivR.75(N).

Plaintiff Galluzzo requests that this Court reconsider this issue since it is clearly inapposite of the facts addressed in the January 23, 2003 Decision.⁸

4. The Court Accepted Jurisdiction Of The Federal Question And Then Declined Declaratory Judgment Finding That The State Legislature Should Remedy The Federal Question.

Plaintiff, *with all due respect*, suggests that this remedy is contra to the Magistrate’s statement at the January 2002 oral hearing wherein Plaintiff Galluzzo raised the issue that the Federal Court could order the Ohio Supreme Court to determine the merits of the federal question as it applies to Ohio’s statutory scheme. In the transcript, Magistrate Merz commandingly asserted that the proper venue to issue a ruling on Plaintiff’s federal question is in the Federal Court.

Magistrate Merz subsequently asserted that the Federal Court has a “virtually unflagging obligation to exercise the jurisdiction given [us]”. See the August 19, 2002 Substituted Report of the Magistrate *and* the January 23, 2004 Decision And Order @ p.7 citing *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976).

Magistrate Merz decided that “the place to seek a presumption in favor of shared parenting is the General Assembly, and not the federal court.” Decision @ p. 19.

Plaintiff requests, in light of the previous findings by Magistrate Merz, that the Court reconsider its suggestion that “the place to seek a presumption in favor of shared parenting is the General Assembly, and not the federal court.”

5. The Decision Implicitly Classified The Parental/Custody Rights of Divorcing Parents As Different From The Parental/Custody Rights Of Parents In Intact Families.

A fit and suitable parent is a fit and suitable parent whether the fit and suitable

⁸ Mr. Galluzzo is the named Defendant in the certified Final Decree entered into evidence pursuant to the oral hearing held before Magistrate Merz in January, 2002.

parent lives separate from the other parent, or resides unmarried with the other parent, or resides married to the other parent. Likewise, the parent whose right is implicated is at issue, not the beneficiary of the parent's loss of their right whether it be a third party, grandparents, or the other parent. The beneficiary of the deprivation is not a relevant issue, yet the Magistrate implicitly holds that a divorcing parent has less of a fundamental right to their child than a parent does in an intact (although possibly totally dysfunctional, and maybe significantly more dysfunctional than the divorcing parents) marriage. Therefore, the allocation of a fundamental right should be equally allocated to all similarly situated persons. In the intact marriage, the fundamental right remains autonomous to each parent in the marriage, for fundamental rights inhere to the individual, not the married parties.

Likewise, fundamental rights inhere to the individual whether that person is married or not. By classifying certain rights of similarly situated **individuals**, *i.e.*, parents, as having less protection, *e.g.*, where the state can allocate the bundle of rights, the uniformity and equal application of fundamental protections are severely diminished, and as a result “in Ohio and most other States the law requires the domestic relations judge to allocate the parental rights and responsibilities...”. Decision @ p.14.

How does this Federal Court condone ***an(y) allocation*** of a fundamental right?

Should society be permitted to discriminate against Black Americans on Mondays without violating certain sections of the U.S. Constitution? Would the NAACP, not to mention anyone with the brain larger than the size of a pea, accept this irrational discrimination against similarly situated U.S. citizens?

Or should we permit the practice of religion on 3 Sundays of every month, but find it against the law on the fourth Sunday? Would organized religion condone such a flagrant violation of their parishioners' freedom of religion? Not to mention the financial chaos that the lack of financial offerings would cause by restricting collections to only 3 of 4 Sundays each month.

The same scenario is applicable to custody divorce as it occurs pursuant to the allocation of parental rights. One day you are required to defend a divorce petition where you did not submit to the jurisdiction of the state court (it was forced upon one parent) while at the same time your rights are totally denied where the domestic court sets an order, without any evidence or hearing.⁹ The domestic court then forces you, without any justification that has a basis in law or constitutional protections, to abandon your time and decision-making authority under the threat of contempt and jail, but with the explicit threat that you will permanently lose your parental right if you remain in conflict with the other parent.¹⁰ This Court would have to be blind not to recognize the insanity that Ohio law provides to the defendant parent in a custody divorce who does not submit/agree to (and maybe does not want) a divorce.

Yet, the *very day before* you are served the divorce petition, your right to equal custody is **intact**. One day you have a relationship with your children, the next day that free associative parent-child relationship is terminated by state law, which of course, you did not submit to.

Now comes Magistrate Merz's Decision And Order, and *if it is permitted to stand*, will provide for the complete destruction of fundamental parental rights, associative

⁹ In fact CivR. 75(N) does not permit a hearing and the evidentiary standard is by affidavit.

¹⁰ See R.C. 3109.04 (F)(2)(a).

parent-child relationships, and the cumulative social damage that Ohio law inflicts, not only upon the bereaved parent(s), but the children that are subjected to such an illogical destruction of their associative relationship rights and who are the ultimate **legacy** of this January 23, 2004 Decision And Order.

How could this Court possibly argue that the state of Ohio is serving in the child's best interests by continuing to permit the lynching of parental rights without federally mandated due process protections explicit on the face of Ohio's statutory scheme?¹¹

All fit and suitable parents are similarly situated, regardless of their marital status.

Plaintiff requests that this Court reconsider the unjustified, and clearly implied, if not explicitly stated, condoning of classifying parents subject to a divorce (one defendant parent who has no alternative but to defend the action) into a suspect class.

6. The Decision Does Not Address The Vagueness And The Discretion-Dispensing Nature Of R.C. 3109.04.

Not only did Plaintiff raise the issue that R.C. 3109.04 was explicitly unconstitutional on its' face, but Plaintiff also asserted that the statute is overbroad, lacks specificity, and is discretion-dispensing in nature.

The January 23, 2003 Decision And Order did not address any of the aforesaid as was extensively detailed with citations in Plaintiff's Merit Brief @ p.35-40. Without reprinting the same argument, Magistrate Merz makes no mention of the Plaintiff's vagueness challenge to R.C. 3109.04.


¹¹ "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, 491 (1980).

Plaintiff Galluzzo asserts that reconsideration is proper where this Court's Decision failed to address Plaintiff's vagueness challenge, which is an independent inquiry, beyond Ohio's lack of facially explicit due process procedures in R.C. 3109.04.

WHEREFORE, the January 23, 2004 Decision And Order is not only logically flawed, but also constitutionally flawed. This Court made a decision in this case of first impression that essentially sides with Plaintiff's argument...outside of two dissenting opinions in *Troxel*. And it is a shame that what should be a logical and constitutionally compliant decision is parlayed into a "pass the buck" conclusion, *i.e.*, that the remedy of Plaintiff's properly raised federal constitutional question, lies in the state legislature, and not the federal court.

For good cause shown, Plaintiff requests that the Court withdraw its January 23, 2004 Decision And Order and issue an Order finding R.C. 3109.04 unconstitutional, vague and discretion-dispensing in nature.

Respectfully submitted,


Michael A. Galluzzo, Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND ACCURATE COPY OF THE FOREGOING WAS SERVED UPON DEFENDANT TERESA A. COOK BY U.S. MAIL, POSTAGE PREPAID, THE 29TH DAY OF JANUARY 2004.


Michael A. Galluzzo, Plaintiff