

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

FILED

FEB - 4 2004

MICHAEL A. GALLUZZO
PLAINTIFF,

JAMES BONINI, Clerk
DAYTON, OHIO

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

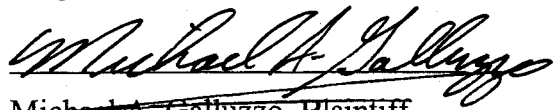
CASE NO. C-3-01-174
Magistrate Michael Merz

**MOTION OF PLAINTIFF FOR LEAVE TO FILE A SUPPLEMENT
TO THE JANUARY 29, 2004 OBJECTIONS , and in the alternative,
MOTION FOR RECONSIDERATION & AFFIDAVIT
attached *INSTANTER***

Plaintiff Michael Galluzzo, for good cause shown, respectfully requests Leave of Court that he be permitted to supplement the issues raised on reconsideration, *and in the alternative*, upon objection to the January 23, 2004 Decision And Order addressing matters that the Court did not take into consideration pursuant to the aforesaid Decision. Plaintiff attaches *instanter* this Supplement to his January 29, 2004 Motion for Reconsideration as timely filed pursuant to Federal Civil Rule 59(e) as **EXHIBIT A**.

Subsequent to the filing of the January 29, 2004 pleading Plaintiff's research has revealed supplemental supporting material of the six (6) reconsideration issues raised. And where this Magistrate has routinely requested thorough disclosure of merit arguments raised in this case, the Court would be remiss not to permit leave and accept Plaintiff's supporting material.

Respectfully submitted,



Michael A. Galluzzo, Plaintiff
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937-663-4505

SUPPLEMENT TO PLAINTIFF'S MOTION FOR RECONSIDERATION

The January 23, 2004 Decision of this Court suggests that a parent's fundamental right to the "care, custody, and nurture of the child (reside first in the parents)"¹ *changes* upon the filing of divorce or of subsequent custody proceedings between fit and suitable parents. Yet, parental rights have been repeatedly addressed by the US Supreme Court that such rights are "fundamental" rights.

In *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division*, Electronic Citation: 2002 FED App. 0009P (6th Cir.), the *en banc* Sixth Circuit Court found that child custody actions between parents still retain their "vital" and "fundamental" nature. The grounds for jurisdiction and the facts of *Popovich, id.* arose from the Americans With Disabilities Act with much discussion pursuant to the jurisdictional nature of the various sections of the Disabilities Act giving rise to federal jurisdiction.

Regardless, what is applicable to the instant matter is that the *en banc* Sixth Circuit Court applies the evidentiary standard of "clear and convincing" evidence and reasoning held in *Santosky v. Kramer*, 455 U.S. 745 (1982)² and *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981) in relation **to the nature of child custody actions between parents.**

"Here, a hearing-impaired person brought an action in federal court under Title II against a state court for allegedly failing to provide him with adequate hearing assistance in his child custody case." *Popovich, supra.*

¹ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

² "[W]hile there is still reason to believe that positive, nurturing parent-child relationships exist, the [state's] parens patriae interest favors preservation, not severance, of natural familial bonds. **The State registers no gain towards its declared goals [best interests of the child] when it separates children from custody of fit parents.**"

Santosky, id. [Emphasis added.]

Addressing *Popovich's* substantive deprivation: “**Here the plaintiff’s due process interest is significant in that the judicial proceeding will determine the amount of time, if any, he can spend with his daughter.** Failure to accommodate his hearing disability *may render him unable to participate meaningfully in that determination. If he cannot understand what is happening during the custody hearing, it will be impossible for him to refute claims made against him, or to offer evidence on his own behalf.*” *Popovich, id.* [Emphasis added.]

In another Sixth Circuit decision addressed in Plaintiff’s Merit Brief and in the Motion for Reconsideration/Objections @ p.4-5, the Court determines that due process is mandatory pursuant to parental rights **in a custody divorce between parents** for:

“...ANY deprivation [of a parent’s liberty interest in custody of their children which would include **the amount of time, if any, he can spend with his daughter, *Popovich, id.***] must be accomplished by procedures meeting the requirements of due process.”

Hooks v. Hooks, 771 F.2d 935 (6th Cir. 1985)

And the Sixth Circuit *Popovich* Court implicitly affirmed that no new right was created for parents in a custody divorce, but the *Popovich* court reiterated by holding that the special nature of parental rights, *i.e.*, natural and inherent rights, demand due process protection as was explicitly held in *Hooks, supra*.

“The Supreme Court has recognized the special nature of parental rights and has consequently imposed special due process guarantees so that states may not lightly terminate parents’ relationships with their children.”. *Popovich, id.*

To suggest that parental status consisting of a “fundamental right” can be altered, and then somehow changes, without a finding by some evidentiary standard that the parent(s) can no longer maintain the welfare of their children is ***nearly an explicit finding by this Court that the Fourteenth Amendment has been violated*** by the operation of Ohio’s statutory scheme, Ohio Civil Rule of Procedure 75(N) and R.C. 3109.04.

This Court must consider 2 issues. First, at what point in the proceedings did that fundamental right change if that same fundamental right *existed prior to the divorce proceedings?* ...And second, the Magistrate must consider, what exactly changed that fundamental right?

The question of where and how that fundamental right changed upon implication and the procedures asserted to change that fundamental right must be reviewed. The application of federal law to the facial constitutionality of Ohio's statutory scheme must be addressed in the Decision. This was not addressed in the Decision.

The essence of the federal question was *not* the creation of a new right that did not previously exist, but rather, in Ohio custody divorce actions between two fit and suitable parents, at what point does each parent's autonomous fundamental liberty right to custody become implicated³, and how the mechanics of that parental right changed to something other than a fundamental right? What express point causes a suitable Ohio parent to lose the presumption of autonomy of their fundamental parental right? What express point causes a suitable Ohio parent to lose the presumption of equality as a similarly situated parent?⁴

The parental right cannot merely *evaporate* upon the filing of a legal action.

To reiterate, this federal question does not seek the recognition or even the creation of a new right that does not already exist.⁵

This federal action is a request to strike down Ohio's statutory scheme, which legislation arbitrarily implicates, and subsequently deprives, the already established "fundamental" parental right from fit and suitable parents.

³ Under Ohio's statutory scheme, the right is implicated immediately upon the parent who filed the divorce petition and their request for temporary orders, *i.e.*, legal and physical custody, pursuant to Ohio CivR. 75(N). Plaintiff Galluzzo asserts that Ohio Civil Rule 75(N) explicitly denies due process, *i.e.*, "no oral hearing" and "upon satisfactory proof by affidavit". Inapposite of the conclusion pursuant to Ohio Civil Rule 75(N) in this Magistrate's Decision, Plaintiff Galluzzo prospectively is subject to the same procedural rule as a parent to the birth of another child in a subsequent marriage, thus he retains standing under Ohio law to challenge the facial constitutionality of the procedural rule, for he would be subject to the same Ohio statutory scheme and therefore have a case in controversy. The conclusion that Plaintiff Galluzzo no longer maintains standing ignores the prospective nature of the procedural rule's applicability.

⁴ Why does one suitable parent benefit pursuant to Ohio law and why is the other suitable parent's right impaired to the point where the right no longer exists?

⁵ See issue #5 @ p. 8 January 29, 2004 Plaintiff's Motion for Reconsideration/Objections.

Yet, this Court recognizes the crux of the issue where it explicitly addresses that “A parent either has full entitlement to custody of children or no entitlement...A fundamental right cannot be allocated.” (Plaintiff’s Merit Brief, Doc. No. 69, at 37).⁶

It would appear pursuant to the prominent position of this issue in the Magistrate’s Decision that the Court is struggling with this axiom.

Without belaboring the issue of legal philosophy...for this issue originally puzzled Plaintiff as well, the US Supreme Court has repeatedly characterized parental rights as “fundamental liberty” *and at the same time* “basic civil rights”.

These two philosophies: “fundamental liberty interests, *i.e.*, inalienable rights or natural rights” and “civil rights” are normally at opposite ends of the legal spectrum. The “fundamental liberty right”, bestowed as an inalienable (or natural) right, and the “civil right” being a state-created right. Where both of these legal rights are suggested in tandem pursuant to parental custody, the distinction is blurred in a federal challenge to state constitutionality, and especially in a case of first impression.

But, this distinction is crucial, and the necessity of proper clarification (pursuant to the reconsideration of the Court) will wholly resolve the internal struggle of this Magistrate to reach the crux of the federal question and solve the misguided sentiment that he would be creating a new “right”.

Whether by conscious deliberation or not, American jurisprudence through the US Supreme Court has carved out a distinction pursuant to the Fourteenth Amendment⁷ in the law for “superior” rights that are considered “fundamental *or* substantive” in

⁶ Decision @ p. 12.

nature.⁸ Legislation which implicate these “substantive” rights must be written with precision for the laws require strict review and an evidentiary burden of proof where such natural rights are implicated and subject to deprivation. As such these substantive natural rights are afforded specific protections when implicated, and as such the supremacy of protecting inalienable or natural rights is superior to state-created “civil” rights.⁹

Restated:

Fundamental rights, *i.e.*, inalienable rights or natural rights, by their very nature DEMAND a fixed point of reference. Such rights are not, and cannot be construed as, variable, *e.g.*, as in the case of parental custody, *apportionable*.¹⁰

The crux of the issue in Ohio’s statutory scheme is one where it only asserts a “civil” type of right, and wholly ignores the *fundamental* nature of the implicated right. “Civil” rights are *created* rights, malleable and flexible,...totally inapposite of natural/inherent “fundamental” rights. The blending of these distinctly different legal principles occurs where the state legislates laws that recognize the ability of the state to allocate, modify, and change “civil” rights, and where the legislature fails to address the conflict with “fundamental” inalienable rights and the requirements pursuant to federal law to protect the denial of these natural rights.¹¹ Where a conflict exists as to the explicit

⁷ And there are minority dissenters of significant stature in the highest court whom do not agree with the protection of substantive rights that are not enumerated in the US Constitution.

⁸ “Nothing...is unchangeable but the inherent and unalienable rights of man.” Thomas Jefferson to John Cartwright, 1824. ME 16:48.

Jus naturale est quod apud omnes homines eandem habet potentiam. 7 Co. 12 – Natural right is that which has the same force among all men.

⁹ Supremacy Clause, US Constitution, Article VI.

¹⁰ Apportionable meaning: Allocated by the arbitrary discretion of a state court judge pursuant to state law, *i.e.*, a state created “civil” right that can be *adjusted* under state law.

¹¹ **Example: Certain rights often recognized as “civil” rights, were in fact always “fundamental” or “natural” rights. If the state of Ohio at some point finds a way to regulate the procreation process (forbidden by a long line of US Supreme Court cases), then the parental right to child custody might**

language of state law in conflict with federal law, this Magistrate has an “unflagging obligation” to strike down these laws as unconstitutional.

DISMISSAL WITH PREJUDICE

It is a well-settled principle of law that “a complaint should not be dismissed merely because a plaintiff’s allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.” [*Bower v. Hardwick*, 478 US 186, 202 (1986).]

“Thus even if respondent did not advance claims on the ... Amendments, or on the Equal Protection clause, his complaint should not be dismissed if any of those provisions could entitle him to relief.” [Chief Justice Burger in *Bower v. Hardwick*, 478 US 186, 210-202 (1986). Overruled on other grounds and citing unoverturned law.]

Plaintiff Galluzzo has advanced at least six legal theories in his January 29, 2004 Motion for Reconsideration/Objections.

“Before dismissing a pro se complaint a court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively.” [Citation omitted.] **“Complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”** *Ang v. Procter & Gamble Co.*, 932 F2d 540 (6th Cir. 1991). [Emphasis added.]

The January 23, 2004 Decision & Order incorrectly found that Plaintiff Galluzzo submitted to divorce jurisdiction under Ohio law. See January 29, 2004 Motion For Reconsideration/Objections @ p. 6, Issue #3.

be deemed a proper “civil” right. Until that occurs, parental rights are fundamental natural rights

AT LEAST ONE CLAIM SURVIVES

Addressing Plaintiff's January 29, 2004 Motion for Reconsideration/Objections @ p. 11-12, Issue #6, numerous Circuit Courts of Appeal have addressed merit review of vague statutes. The Eleventh Circuit recently defined a threshold question and a two-part merit review for vague statutes¹²:

Threshold Question: **Do persons of common intelligence guess at its meaning or differ as to its application?**

The answer: Yes to the meaning of R.C. 3109.04 and CivR.75(N) *and* YES to the application of Ohio law...for Ohio's statutory scheme consists EXCLUSIVELY of arbitrary and discretionary factors.

Two-part merit review requirements:

1. The Court must determine whether the enactment reaches a substantial amount of constitutionally protected conduct, and;
2. The Court must then consider any limiting construction from the state courts.

After the two-part merit review, the Court must then render a decision as to whether or not the statute is void for vagueness.

and the Ohio statutory scheme implicating parental rights must be declared unconstitutional.

¹² *Wilson v. State Bar of GA*, Eleventh Circuit Court of Appeals, No. 96-9116 (1998):

"Whether a statute, regulation, or local ordinance is unconstitutionally vague is a question of law that we review de novo." *Dodger's Bar & Grill, Inc. v. Johnson County Bd. Of County Comm'rs*, 32 F.3d 1436, 1443 (10th Cir. 1994); see also *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1133 (3rd Cir.) ("The district court's application of the void for vagueness doctrine...is purely an issue of law subject to our plenary review."), *cert. denied*, 506 U.S. 908, 113 S.Ct. 305, 121 L.Ed.2d 228 (1992).

"Vagueness arises when a statute is so unclear as to what conduct is applicable that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Gilbert*, 130 F.3d 1458, 1462 (11th Cir. 1997) (quoting *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 s. Ct. 126, 127, 70 L.Ed. 322 (1926). When addressing a facial challenge to a law on vagueness grounds, **"a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct."** *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 494, 102 S.Ct. 1186, 1190, 71 L.Ed.2d 362 (1982). In making this determination, we must consider the *In re Thomson* court's statements concerning Standard 73. See *Village of Hoffman Estates, id.* @ 494 n.5, 102 S. Ct. @ 1191 n.5 (when evaluating the purported vagueness of a state law or

The Magistrate's instant Decision discusses several experts, commentators, and law reviews...all of whom disagree on the meaning of the "best interests of the child" as it is referenced in Ohio's statutory scheme.

"The issue, however, is not new. Academic commentators have criticized the best interest of the child standard for more than thirty years. And some law review authors have embedded that criticism in constitutional arguments which support Plaintiff's position."

Decision @ p. 13. [Emphasis added.]

The Court subsequently states in its Decision @ p. 14:

"The Court is persuaded, by its own life experience and study and by what Plaintiff has put before it, that divorce is usually not in the best interest of the children. The court also agrees that when divorce happens, it is better for children if they can maintain strong ties with both parents. Finally, the Court agrees that Plaintiff, the amici, and the commentators they cite make a strong case for a presumption of shared parenting in divorce situations."¹³

WHEREFORE, the Court should reconsider its Decision pursuant to the Motion for Reconsideration and the Instant Supplement.

Respectfully submitted,



Michael A. Galluzzo, Plaintiff
P.O. Box 710
St. Paris, Ohio 43072
937-663-4505

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 4TH DAY OF FEBRUARY 2004.



Michael A. Galluzzo, Plaintiff

regulation, "a federal court must, of course, consider any limiting construction that a state court...has proffered."). See also **Merit Brief of Plaintiff Galluzzo.**

¹³ Amicus Bill Wood, Director of Marriage Our Mission (MOM) and Preserve Our Prosperity (POP) contributed to the instant supplement.

AFFIDAVIT

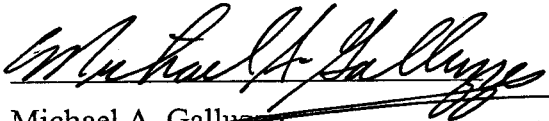
State of Ohio

County of Champaign, ss:

I, Michael A. Galluzzo, being first duly cautioned and sworn, do hereby depose and state as follows:

1. I am the Plaintiff in the above-captioned matter and of sound mind and legal age.
2. I was compelled to defend the marriage petition filed by my former spouse, Teresa (Galluzzo) Cook, the proper party Defendant in the instant matter.
3. I did not submit voluntarily to the divorce nor did I waive my parental rights pursuant to Ohio's statutory scheme, specifically CivR. 75(N) and R.C. 3109.04.
4. My parental rights were implicated upon the filing of the divorce petition.
5. *Prima facie* proof that I was compelled to defend a divorce petition exists on the certified Final Decree filed in evidence pursuant to the January 2002 oral hearing before Magistrate Merz and in the instant Amended Complaint.
6. I attest to consideration of remarriage and parenting children in the future.
7. The existence of Ohio's statutory scheme, as explicitly written, cause me great consternation and fear of exercising my fundamental, natural, and inalienable rights to marriage and the procreation of children.
8. The statutory scheme continues to exist and remains an impediment to **exercising and maintaining** my rights as a parent of future children.

Further Affiant Sayeth Naught.


Michael A. Galluzzo

Sworn to and subscribed in my presence on the 4th day of FEBRUARY 2004.



NOTARY PUBLIC

CURTIS R. BLAKE
NOTARY PUBLIC
MY COMMISSION
EXPIRES 04-10-04