

# CUSTODY & the CONSTITUTION™

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## I. State Rights and Federal Rights ...What is RIGHT?

### A. STATE RIGHTS

-Each State Maintains the Right to Regulate it's Citizens, including the Regulation of Family Matters.

However, an important Caveat Exists Where All United States Citizens Rights are Protected under the United States Constitution...and pursuant to Article VI, also known as the Supremacy Clause, State Judges must uphold Federal Law which "shall be the Supreme Law of the Land".

-Each State Protects the Welfare of It's Minor Citizens/Children in Family Matters.

-Family Matters also include the State's Right to Regulate Matters of Marriage and Divorce.

-Under State & Federal Law<sup>1</sup> Parents are Presumed to be Suitable and Fit Parents.

-Parents, Implicitly Presumed to be Suitable and Fit, Protect Their Child(ren)'s Welfare.

-Conclusion...Suitable and Fit Parents Act in Their Child(ren)'s Best Interests.

-The State Assumes an Obligation, its "*Parens Patriae*" interest,<sup>2</sup> where the Parent(s) are Unsuitable (unfit, unwilling, or unable to protect their minor child(ren)'s welfare) and where no other Suitable Individual is Available.

-The State must have a compelling legal reason to Protect the Welfare of Children where a Parent is available for the Care, Custody, and Control of their Minor Child(ren).

-The State does NOT have a right to improperly intrude on a parent-child relationship without a compelling reason.

-However, where Parent(s) are LEGALLY Presumed to Act in their Child(ren)'s Best Interests/Welfare, the State has no Compelling Reason to Intrude into the

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<sup>1</sup> *Parham v. J.R.*, 442 U.S. 584 (1979).

<sup>2</sup> Literally meaning, "parent of the country (state)".

Private Realm of the Family or into the Associational relationship between each Parent and Child.<sup>3</sup>

-Conclusion...WITHOUT a Compelling Reason for State Intervention, each autonomous Parent-Child Relationship Remains Intact.

*At this point, the State has no Legal Basis to Intervene, that is...the State has No Compelling Reason to inject itself into either Parent-Child Relationship. The Welfare/Best Interests of the Child(ren) are Protected.*<sup>4</sup>

-And it is also at this juncture that the State maintains no Legal basis to interfere with *pre-existing* Parental Rights.

-The State has no Legal basis to Implicate ANY Parental Right where the Child(ren)'s Welfare is implicitly protected.

-Therefore the Welfare of the Child(ren) has not been Proven to be in Jeopardy.

-Conclusion...Both Parents Retain their Right to Legal and Physical Custody of their Child(ren).

However, Let's Go Back to the Current Reality that Exists in Every Divorce with Children...State Authority Asserting that the Best Interests of the Child(ren) is Paramount to Parental Rights.

-The State Opines that it maintains an Obligation to Protect the Welfare of its Minor Citizens...and therefore State Intervention is Rationally Related to the Best Interests of the Child(ren).

-But, what exactly is the Legal Definition of "Best Interests"?

-What Evidentiary Standard is Applicable to Determine a Child's Best Interests?

-And who Actually Takes Control of the Child(ren)... the Parents or the State?

-State Judicial Decisions/Court Orders Evidence the TRUTH about what Actually Occurs as a Pattern and Practice in Family Courts throughout the nation.

-What Actually Happens Daily in State Family Courts certainly is NOT the Least Intrusive Means. The recurring Pattern and Practice of presumably acting in the child(ren)'s best interests occurs by Intentionally ignoring Parental Rights.

-This Pattern and Practice Inverts the Supremacy Clause (Art.VI of the US Constitution) by upholding State Law (allegedly protecting children's interests) over Federal Law, *i.e.*, compliance with U.S. Constitution, where a FEDERAL RIGHT (the fundamental liberty right to custody) is Implicated.

-The State Believes that the Least Intrusive Means, founded in the Child(ren)'s Best Interests, is to Physically Remove one legally-suitable, but arbitrarily-denied Parent from Substantive Contact with his or her Child(ren).

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<sup>3</sup> Implicating the Fourteenth, Ninth, and First Amendments.

<sup>4</sup> *Reno v. Flores*, 507 U.S. 292 (1993).

-The State expressly condones, by their OWN public record, that what is “best” for child(ren) is to effectively minimize their relationship with the now designated “non-custodial” Parent.

-Upon designation, custodial and non-custodial parents are no longer similarly situated.

-The State legislature provides a statutory entitlement for non-custodial parents to “visit” with their child...and this token stipend is the State’s Least Intrusive Method of encouraging a healthy parent-child relationship and maximizing quality familial involvement!

-On what legal basis (of intervention) is the State entitled to make these Decisions for Suitable Parents?

## B. Implication of Federal Rights by the State

-When a State Court Implicates (infringes, denies, deprives) a Parental Right (temporarily or permanently), the State Absolutely Intrudes Upon the Parent-Child Relationship by Implicating Each Parent’s Fundamental Liberty Right to Custody of their Minor Child(ren).

-Infringement of a Federal Right Occurs when the State Improperly Rationalizes that the Child’s Welfare/Best Interest is “Jeopardized” Merely through the Termination of a Marriage Contract or by Arbitrary Presumption that one parent is better suited to address the care, custody, and control of the child(ren) than the other parent.

-Conclusion...State Law Impermissibly Intrudes Upon and Implicates Fundamental Parental Rights.

The Only Way the State Can Rebut the Presumption that Fit Parents are Legally Presumed to Protect their Child(ren)’s Best Interests...is with a “**Compelling**” Reason.

-A Compelling Reason Requires the State to step-in (Intervene) where the Welfare of it’s Minor Citizens is in Jeopardy.

If the State does step-in, then it is at this point that State Rights Intersect with Federal Rights [and Federal Rights Require Mandatory Federal/Constitutional Protections]. And pursuant to Article VI of the U.S. Constitution, the Supremacy Clause requires that “the judges in every State shall be bound (by the Constitution and the Laws of the United States).”

## C. Federal Rights

-Parental rights are Fundamental Rights Protected under Federal/Constitutional Law.<sup>5</sup>

-Fundamental Rights **Inhere to the Individual**, not the Married Couple. Fundamental rights are also called substantive rights or natural rights.

### 1. Parental Rights ( & associative children's rights)

#### a. Parental Rights are a Bundle of Parental Responsibilities

-The Bundle of Parental rights and responsibilities includes the right to the care, custody, and control of a minor child.

### 2. Parental Rights are Fundamental (Substantive) Federal Rights

-The United States Supreme Court has continuously & repeatedly held that Parental Rights are Protected under the U.S. Constitution beginning in 1923 with *Meyer v. Nebraska* and most recently summarized in great detail in *Troxel v. Granville* (2000).

-Parental rights are Liberty Interests protected under the 14<sup>th</sup> Amendment.

-Liberty Interests Require Greater Protection Than Any Other Fundamental Right.

-Parents and children also maintain unenumerated privacy and autonomy interests under the 9th Amendment and the freedom to associate (an autonomous and reciprocal association between each parent and their child) pursuant to their parent-child relationship under the 1st Amendment.

-Conclusions As a Matter of Law...

PARENTAL RIGHTS ARE ABSOLUTELY PROTECTED.

THE PARENT-CHILD RELATIONSHIP IS ABSOLUTELY PROTECTED.

### 3. Custody is the Legal Basis for Care and Control of the Child

DEFINITIONS:

Legal Custody = the Decision-making Right

Physical Custody = the Companionship (relationship)

Right

-Defining the legal basis of "what a parental right consists of" is critical to successful understanding of the fundamental right itself and must be consistently and uniformly used throughout the United States.

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<sup>5</sup> The USSC plurality decision in *Troxel v. Granville*, 530 U.S. 57 (2000) evinces that all 9 justices agree that parental rights are fundamental rights, however, the Federal Magistrate Judge in the Dayton District Court refused to conclude parental rights were fundamental, and therefore constitutionally protected, resulting in the first of three issues presented for review in the pending U.S. Sixth Circuit Court of Appeals case styled, *Galluzzo v. Champaign Cty. Court of Common Pleas*.

-The improper use of current phrases and terminology is detrimental to a consensus understanding. These include *shared parenting*, which has no legal definition, and *divided* or *joint custody*, which is subject to judicial interpretation.

-Without a strict legal definition, current terminology is vague and inconclusive, but more importantly, subject to arbitrary interpretation by a state judge. Statutory (court) use of vague terminology further confuses and muddles litigation resulting in eroded family relationships.

## II. Constitutional Scrutiny<sup>6</sup>

### A. Substantive and Procedural Due Process<sup>7</sup>

-Fundamental, substantive, and/or natural rights are legally differentiated from civil rights because civil rights are rights created under law. One could clarify fundamental rights as pre-existing “inherent” rights and civil rights as government-created rights.

-Where a Federal Right is implicated, the State Must Provide the Accused a Process that is Constitutionally Compliant with the U.S. Constitution and Mandatory under Federal Law.<sup>8</sup>

-The State Must Provide an Explicit Process Due the Accused to Prove that the Child(ren) are being Harmed. This set of procedures is commonly known as Due Process.

-Due Process is a Mandatory Set of Procedures Required by the U.S. Constitution entitling Citizens whose Fundamental Rights are implicated to Consistent and Fair Treatment.

-Mandatory Fair Procedures Include:

Express Notice of the Accusation...a Pre-deprivation Hearing...the Right to Confront Witnesses...an Evidentiary Standard that is Constitutionally Compliant...and the Least Restrictive Means to Obtain a Satisfactory Solution.

-Conclusion...Where a Fundamental Right is Implicated, the State Must Provide Expressly Written Mandatory Due Process Procedures and Use the Least Restrictive Means of Intrusion to Achieve an Optimal Outcome.

### B. Both Parents Rights are Diminished Under State Law<sup>9</sup>

-Neither Parent is provided with Due Process of Law, *i.e.*, in some states there is NO pre-deprivation hearing.<sup>10</sup>

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<sup>6</sup> The United States Supreme Court mandates that constitutional (strict) scrutiny is the heightened level of scrutiny applicable to the implication of fundamental rights secured by the U.S. Constitution. Gender discrimination in state custody determinations is not at issue where a lesser standard of review (intermediate scrutiny) would be applicable.

<sup>7</sup> Substantive Due Process is defined as the procedural requirements due when a fundamental right is implicated.

<sup>8</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970) addressing the importance of certain property rights (where liberty rights are deemed far more important than property rights).

<sup>9</sup> Admission made by Ohio Attorney General Jim Petro in the State of Ohio's Second *Amicus curiae* Brief filed April 8, 2005 in the United States Court of Appeals for the Sixth Circuit in the pending federal appeal styled, *Michael A. Galluzzo v. Champaign County Court of Common Pleas*.

<sup>10</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972).

- No Statutory Scheme contains a Constitutionally Compliant Evidentiary Standard.<sup>11</sup>
- Statutes expressly written which Diminish both Parents' Fundamental rights, are NOT Constitutionally Compliant, and therefore do not meet Strict Scrutiny under Federal Law.
- Conclusion...Where BOTH Parents' Rights are diminished under State Law, there is NO Set of Circumstances that a Constitutional Outcome can ever be achieved.

### C. Substantive Equal Protection: Similarly Situated Parents Must be Treated Similarly<sup>12</sup>

- State Implication of a Fundamental Right resulting in the Arbitrary Classification of Parents into Suspect Classes (Non-custodial and Custodial) is Subject to Constitutional review.
- Whenever Government Action Seriously Burdens Fundamental Rights and Interests, Heightened Scrutiny of the Procedures is Warranted.
- Where a State Law Impinges upon a Fundamental Right secured by the U.S. Constitution it is Presumptively Unconstitutional.<sup>13</sup>
- Conclusion...Where a Statutory Classification Significantly Interferes with the Exercise of a Fundamental Right, Constitutional Scrutiny of State Procedures is Required.

## SUMMARY & CONCLUSION...

- Where Similarly Situated Parents Must be Treated Similarly, Suitable and Fit Parents Must be Treated Similarly.
- Without a finding of Parental Unsuitability (unfit, unwilling, or unable) by Clear & Convincing Evidence, BOTH Parents Must be Treated Similarly. The "Best Interests of the Child" standard of review is not a Constitutionally Compliant Evidentiary Standard when Addressing Parental Rights Between Suitable and Fit Parents.
- The "Best Interests of a Child" can be addressed only AFTER a FINDING of Parental Unsuitability by Clear & Convincing Evidence.
- However, where Both Parents are Suitable, the State has NO Legal Basis Under State or Federal Law to Even Make a Custody Determination.
- Where the State has No Legal Basis to Implicate a Fundamental Parental Right, Both Parents Maintain Their Inherent Pre-existing Right to Legal Custody of Their Child(ren).
- Because BOTH Parents Maintain Autonomy in Their Respective Parental Rights, Both Parents Must be Treated Similarly as to Physical Custody (Companionship Time).

<sup>11</sup> "Clear and Convincing" Evidence (of Parental Unsuitability) is the highest evidentiary standard in civil law that meets constitutional scrutiny pursuant to *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>12</sup> Fundamental Rights strand of Equal Protection under the Fourteenth Amendment.

<sup>13</sup> *Harris v. McRae*, 448 U.S. 297 (1980); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

- Since the Child(ren) Cannot be Cut in Half, the Constitutionally Compliant Solution and the Least Intrusive Remedy is a Presumption of Equality.
- The Presumption of Equality is Rebuttable, however this Presumptive “Starting Point” in a divorce with children Eliminates the Power Struggle for Control by Equalizing Both Parental Interests. The Presumptive “Starting Point” also takes the Wind-out-of-the- Sails of the Litigants (and their Attorneys) by Eliminating Leverage through Equalization.
- The Child(ren)’s BEST INTERESTS are Enhanced by Maintaining a Substantive Relationship with BOTH Parents...a Win-Win situation for Both Parents and Children.<sup>14</sup>

## THE BEST PARENT IS BOTH PARENTS!

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<sup>14</sup> A Presumption of Equality also enhances extended family participation with children of divorce, *i.e.*, grandparents, who have a vested emotional interest, but no legal recourse, to develop a relationship with their grandchildren. Additionally, the child(ren)’s welfare/best interests would be enhanced by increased accessibility to their extended family.