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Document Intent:

This document is a legal treatise designed as a secondary authority to be cited in child custody proceedings. It explains how a simple change in marital status, e.g. divorce, is insufficient by itself to invoke any parens patriae authority on the part of the state to make best interests determinations over the decisions of a fit parent even where two fit parents disagree based on United States Supreme Court opinions and Federal Appellate Court opinions. This document is provided as a scholarly research work only and is NOT intended to be a legal document. Its authors are not attorneys, do not practice law, and do not claim any competency as lawyers or as attorneys. Where attorneys or pro se litigants cite this document, they do so solely under their own responsibility.

The Equal Rights of Parents

Rights must be the same for the unmarried and married alike…

There are many ways that parents and children have constitutional rights that are being denied in divorce custody battles. Many of these arguments are difficult to master. This one is simple and gets directly to the point. Any average person can understand this and state this clearly and easily to any divorce court judge. It is this simple:

> Divorce between parents provides no basis, rational or compelling, for state jurisdiction over child custody because the rights of parents do not and cannot depend on marriage. For hundreds of years we had Bastardy laws that said children who were born out of wedlock were not deserving of the same rights as children born of a marriage nor were the parents entitled to the same rights to their bastard children. This is why the term bastard is such a derogatory term. In the 1970s the United States Supreme Court said that laws creating two unequal classes of children or two unequal classes of parents based on nothing more than the marital status of the parents are unconstitutional as they violate the principle of equal protection of the law.
>
> There are an additional series of parental rights cases which demonstrate that parental rights are individual rights that do not depend on marriage at all. Therefore, marriage simply is NOT the basis for parental rights or for the child's rights to the parents.
>
> By this same principle, divorce custody laws that create one set of children who get access to both parents and one set of children who do not based only on their parent's marital status are laws that improperly create two unequal classes of children.

> The same applies to parents. Divorce custody laws that create a "primary parent" class and a "visitor parent" class based on nothing more than a change in the marital status of those parents violates the principle of equal protection under the law.

The Simple Argument is this:

> My fundamental parental rights and my child's fundamental rights cannot depend on my marital status or a change in my marital status. Where divorce statutes create two unequal classes of parent or two unequal classes of child they violate the Fourteenth Amendment's Equal Protection Clause. Where the divorce court asserts child custody jurisdiction solely on the basis of a divorce between parents, the court fails the constitutional test of showing a "compelling state interest" that is "necessary" to achieve a permissible state policy.

States are simply NOT authorized under our Constitution to create two unequal classes of people in this manner particularly where the rights being deprived are fundamental rights regardless of what any state law or state divorce court judge might say to the contrary. The United States Supreme Court made clear in *Troxel v. Granville, 530 US 57 - Supreme Court 2000*, that parent's rights are fundamental:

> In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

The Court in Troxel also made clear that the Trial Court was required to produce an individualized finding supporting its jurisdiction to act and to give special weight to the determination of the fit parent:

> As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally … nor the Superior Court in this specific case required anything more. Accordingly, we hold that § 26.10.160(3), as applied in this case, is unconstitutional.

In *Griswold v. Connecticut, 381 US 479 – Supreme Court 1965*, the Court said that a state's laws MUST BE NECESSARY to achieving a permissible state policy:

> In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute

> has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," … The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy."

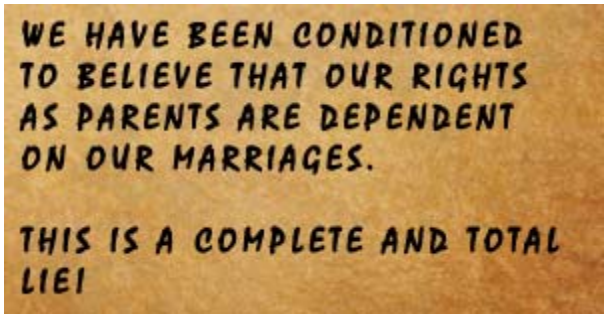
Where the rights of parent and child are not rationally related to the marriage or dependent upon the marital relationship of the parents, the dissolution of a marriage between parents cannot act as a trigger for the state to override either parent's determination of the child's best interest, because infringement of those rights is NOT NECESSARY or even rationally related to protecting the child.

All that is necessary, in the face of two fit parents seeking custody, is for the state to preside over an equal shared parenting plan where each parent gets to decide the child's best interests during their possession time with the only exceptions being where making such a decision would infringe the rights of the other parent. The only NECESSARY decisions the court must make are conflicts that can have only one outcome such as which school the child will attend or setting rules that protect the rights of both parents e.g. prohibiting unilateral decisions for things like elective invasive surgery.

The state may NOT permissibly take over all private decision making rights of parents where it is only necessary for the state to resolve a few narrowly defined decisions. The state sweeps far too broadly into the protected private decision making rights of parents where it asserts an absolute right to make best interest decisions for the child

Arguments about the welfare of the child in this scenario may have strong emotional weight, but have no legal relevance. Fit parents must, until proven otherwise, be presumed to be acting in their child's best interests. Absent proof that equal shared parenting causes harm to the child of the type and degree to which the state may intervene, the state has no more legal foundation for depriving either parent of any fundamental liberty in divorce than it does in marriage.

This argument is incredibly powerful and so amazingly simple that any parent of average intelligence can make the argument. This simple argument is really all it takes for most people to make the point that divorce courts are systematically denying the equal protection rights of children and parents.



This conditioned belief, that parental rights are dependent on marriage, drives a fundamental bias and prejudice against divorcing parents that is clearly evident in every state's family law code. All you have to do to find it is to look at the code for instances where it treats divorcing parents differently than married parents and then ask yourself, if this act would be justified against married parents. In almost every case the acts are not justifiable under equal protection.

If you are one of those people who want to understand the details and to see the proof, then this remaining section will provide many of those details and proof in the form of supporting Supreme Court opinions:

> One of the core principles of the equal protection clause is that when a classification is made based on something outside of a person's control and it bears no relation to their ability to contribute to society such as a person's race, sex, or the marital status of their parents, that classification is invidious and can-NOT stand in the face of the Equal Protection Clause.
>
> It is clear that parents and children have familial rights respective to each other. It is also clear that these rights are fundamental in nature, they are part of our First Amendment rights, and they are privacy rights. Under the equal protection clause, when a fundamental liberty is being infringed, the strictest standard of review is imposed. This standard of review forces the State or your ex to prove that what they are trying to do is constitutional. If they are trying to deprive you or your child of fundamental rights, it puts them on the defensive not you. (For a detailed explanation of these rights and legal concepts see our book: *NOT In the Child's Best Interest*, or our blog *www.FixFamilyCourts.com*)

There are numerous Supreme Court cases which establish that parental rights are INDIVIDUAL rights not dependent on marriage that deserve constitutional protection under the Equal Protection Clause. Some of those cases are:

> *Planned Parenthood of Southeastern Pa. v. Casey, 505 US 833 - Supreme Court 1992*, (It is settled now, as it was when the Court heard arguments in Roe v. Wade, that the Constitution

places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, …Our law affords constitutional protection to personal decisions relating to …family relationships, child rearing, and education... Our precedents "have respected the private realm of family life which the state cannot enter." …The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family… Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice.)

Casey is insightful as it makes clear that the constitution protects all individuals and included "married or unmarried" from government abuse of power even where they are doing so for the benefit of another family member. In this case they were saying that the state couldn't invade the woman's privacy rights even to protect the father's right. That is little different from the state saying they will invade the parents' rights in divorce for the benefit of the child. The Best Interests of the Child Doctrine essentially says that the state will violate the parents' rights if the judge believes it is for the benefit of the child. Casey would seem to say that this is impermissible.

Lehr v. Robertson, 463 US 248 - Supreme Court 1983, (The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases. … When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," …his interest in personal contact with his child acquires substantial protection under the Due Process Clause… We have held that these statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child.)

Lehr offers some significant points. It discusses "intangible fibers that connect parent and child" both "parent" and "child" are stated in the singular supporting the idea of an individual parental unit between each parent and each child. It talks of an infinite variety of connections, excluding rights only for traditional nuclear families. It discusses how "unwed" fathers can ensure that their "individual" rights to their children are affirmed or recognized in order to receive constitutional protection. (The reason the unwed father must affirm his

parenthood is that it isn't always clear who the father actually is.) Finally, Lehr clearly says that the equal protection clause prohibits discrimination between parents who are "similarly situated." The only thing that legally matters in determining similarly situated in divorce is that the parents are fit and have established a relationship with the child.

Gomez v. Perez, 409 US 535 - Supreme Court 1973, (We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.)

Gomez may be the best stated case for our purposes here. Let me explain by simply changing a few words from the quote above, "We therefore hold that once a constitutional right to parental association on behalf of children with their parents is posited there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father is not married to its mother."

Stanley v. Illinois, 405 US 645 - Supreme Court 1972, (Nor has any law refused to recognize those family relationships unlegitimized by a marriage ceremony… children cannot be denied the right of other children. … It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this court with a momentum for respect… It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.)

The important parts of this statement are a reference to cases overturning bastardy laws, "relationships unlegitimized by a marriage ceremony" and the clear statement that "children cannot be denied the right of other children" and the use of the singular form "parent" when describing the importance of parental rights and finally the statement that treating single parents differently from married parents is "inescapably contrary to the Equal Protection Clause."

Eisenstadt v. Baird, 405 US 438 - Supreme Court 1972, (We need not and do not, however, decide that important question in this case because, whatever the rights of the individual …may be, the rights must be the same for the unmarried and the married alike… If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusions)

Eisenstadt is very important because it states that privacy rights are individual in nature and cannot depend on marital status. Parental rights are often described by the United States Supreme Court as privacy rights, most notably in Planned Parenthood v. Casey, which Eisenstadt says cannot depend on marital status.

Meyer v. Nebraska, 262 US 390 - Supreme Court 1923, (Without doubt, it [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual… to marry, establish a home and bring up children… and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men…)

Meyer is very important in that it better defines the element of "liberty" that applies to the right to "establish a home and bring up children" and clearly states that this is an "individual" right. Certainly, the right to equally associate with one's children is an essential element of "the orderly pursuit of happiness by free men…"

This set of cases are the cases that finally did away with bastardy laws across the entire United States and set the standard for when illegitimacy is a legitimate classification and when it isn't.

- *New Jersey Welfare Rights Organization v. Cahill, 411 US 619 – Supreme Court 1973*
- *Weber v. Aetna Casualty & Surety Co., 406 US 164 – Supreme Court 1972*
- *Richardson v. Davis, 409 U. S. 1069 (1972)*
- *Richardson v. Griffin, 409 U. S. 1069 (1972)*
- *Levy v. Louisiana, 391 U. S. 68 (1968)*

Table of Authorities:

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4. *Lehr v. Robertson, 463 US 248 - Supreme Court 1983*
5. *Levy v. Louisiana, 391 U. S. 68 (1968)*
6. *Planned Parenthood of Southeastern Pa. v. Casey, 505 US 833 - Supreme Court 1992*
7. *Stanley v. Illinois, 405 US 645 - Supreme Court 1972*
8. *Troxel v. Granville, 530 US 57 - Supreme Court 2000*
9. *Meyer v. Nebraska, 262 US 390 - Supreme Court 1923*
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