The Equal Rights of Parents

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, however, 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.***

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

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 belonging to each parent that do not depend on marriage at all. Therefore, parental rights do not come from marriage and marriage has no part in the establishment or protection of these rights. The rights come from an established relationship based on the biological connection. The only thing that marriage can do is to make the husband the presumptive biological father.

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 only classification of parent that is legitimate in custody proceedings is fitness. The Constitution requires that parents be presumed fit just as people are presumed to be innocent in criminal law. Where two fit parents divorce there are still two fit parents who have full and equal parental rights. Nothing inherent in the divorce gives the state any legitimacy in depriving either fit parent of rights.

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, see Article VI, Federal Constitution. The United States Supreme Court made clear in ***Troxel v. Granville, 530 US 57, 66 (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, at 72 and 73, 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.

NOTE: Divorce court judges and divorce attorneys like to classify Troxel as a "grandparent's rights" case. However, nowhere in the opinion does the Court itself ever discuss the rights of grandparents. The only rights discussed are parent's rights. It is also relevant to note that the issue in Troxel was a relatively minor issue when compared to infringing the care, custody, control, and possession rights of a parent. If the Court found a mere imposition of visitation time to a grandparent to be offensive to the constitution how much more offensive must these much larger infringements be? The principles espoused in Troxel are primarily universal principles that are widely applicable in the realm of parental rights. Attempts by state court judges and attorneys to limit the scope of Troxel are motivated by the self-interest of maintaining power and maintaining the flow of easy money.

In ***Griswold v. Connecticut*, 381 US 479, 497 (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."***

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.

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. See ***Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 US 872, 909, 910 (Supreme Court 1990)**:

> ***it is important to articulate in precise terms the state interest involved. It is not the State's broad interest in fighting the critical "war on drugs" that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote... ("focus of the inquiry" concerning State's asserted interest must be "properly narrowed") ... ("Where fundamental claims of religious freedom are at stake," the Court will not accept a State's "sweeping claim" that its interest in compulsory education is compelling; despite the validity of this interest "in the generality of cases, we must searchingly examine the interests that the State seeks to promote... ("The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant") ... ("When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane . . . [or else] we may decide the question in advance in our very way of putting it").***

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, see ***Troxel***, supra at 68, 69. The Court further defines **"fit"** as simply adequately caring for one's child. So long as a parent does this, the state doesn't have a legitimate interest in injecting "**itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."** This means that divorce cannot be a trigger for the state taking over the best interest decision. The state needs more. Unless the state can demonstrate a compelling state interest, 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.

The 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. Acceptable classifications may change over time. What was once seen to be an acceptable classification can come to be seen as discrimination, see ***Cleburne v. Cleburne Living Center, Inc., 473 US 432, 466 (Supreme Court 1985)***:

> ***Courts, however, do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom... Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause.***

When the Court did away with bastardy laws and began to take increasing pains to describe parental rights in specifically individual terms, the Court shifted political and legal patterns that guide acceptable classifications of parents. State courts have been slow to grasp the implications of this evolution on their traditional exercise of power.

Another core principle of equal protection is that when a classification infringes upon a fundamental right, that classification must survive a higher level of constitutional scrutiny. In our book, ***NOT in The Child's Best Interest*** we make clear that parents and children have familial rights respective to each other. We also make clear that these rights are fundamental in nature, they are protected by First Amendment concepts of free speech and free association, our association rights and possession rights are protected by the Fourth Amendment, they are protected by the Fourteenth Amendment as liberty interests and property interests, and they are protected by concepts of privacy rights in terms of the right to make certain personal/family decisions. 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. It places the burden of proof on them, 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 at ***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, 849, 851, 898, 927, 928 (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 includes "married or unmarried" from government abuse of power even

where they are doing so for the benefit of another family member such as a child. 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. Where the Court in Casey says, **"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…"** it implies that the so called "best interest of the child" doctrine is insufficient justification for violating the fundamental rights of parents.

***Gomez v. Perez*, 409 US 535, 538 (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. For a State to do so is "illogical and unjust.")*

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. For a State to do so is 'illogical and unjust.'"**

Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child.

Troxel v. Granville, 530 US 57, 87 (Supreme Court 2000)

***Lehr v. Robertson*, 463 US 248, 256, 261, 267 (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 or only for divorced parents who agree. 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 biological 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.

***Stanley v. Illinois*, 405 US 645, 651, 658 (Supreme Court 1972)**, *(children cannot be denied the right of other children… The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. 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… Nor has any law refused to recognize those family relationships unlegitimized by a marriage ceremony… 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, 453 (Supreme Court 1972)**, *(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. It also talks about matters so fundamentally effecting a person as the choice to begat a child. If having children fundamentally effects a person then certainly having those children taken away in any measure, large or small, fundamentally effects that person. Just because states callously treat the taking away of children as a small inconsequential matter, doesn't make it so. There isn't much that is more fundamental to a person than a parental relationship with their minor children.

Meyer v. Nebraska, 262 US 390, 399 (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..."**

Children cannot be punished for the sins of their parents. It is well-established that the relationship rights of children are concomitant with the rights of the parents. When the state denies parental rights to one parent, the state infringes the rights of the child as well. It is simply impermissible to punish the child in this way no matter what society may think about the choice of two parents to divorce, See ***Trimble v. Gordon, 430 US 762,769 (Supreme Court 1977)***, *(...we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children ...)*

This following 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. Collectively, these cases establish the foundation of the statement in ***Trimble***, supra which directly relates to states punishing children because their parents divorce.

Levy v. Louisiana, 391 US 68, 72 (Supreme Court 1968), *(Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would... We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.)*

In this situation, there is no legitimate differentiation between illegitimacy and divorce. In both cases, the state is depriving the child of rights based on nothing more than the marital status of the child's parents. There is no legitimate reason why the dissolution of a marriage should be treated any differently than a marriage never happening. Nothing the child did caused the divorce and nothing the child does can stop the divorce. For better or worse, either parent can initiate a divorce suit at any time and both the child and the other parent are powerless to prevent it.

Weber v. Aetna Casualty & Surety Co., 406 US 164, 169, 171, 175, 176 (Supreme Court 1972), *(Here, as in Levy, there is impermissible discrimination. An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana law has allowed to recover... The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them... The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.)*

Here the argument is expressed in a way that is precisely the same as divorce. In fact divorce is essentially the mirror image of illegitimacy. Society has condemned divorce in every conceivable manner until just recently

in our history. Divorce has now become mainstream, impacting more than half of the married population. Many people marry and divorce multiple times. Society generally no longer condemns divorce but our laws still do. Where once the innocent married partner had some defense against an unwanted divorce, today they are powerless to stop it in most states. As with Levy, the innocent party the child and now possibly the other parent are being punished for what many would argue is the exercise of a fundamental right of the parent seeking divorce to make private decisions regarding the marriage. In this vein, even the parent seeking the divorce loses parental rights, subjecting those rights to the nearly unlimited authority of the divorce court judge.

Where society no longer despises divorce, where one parent is likely exercising a protected private choice regarding the marriage association, and where the state is seeking to limit the family association rights of a parent and child, the state simply lacks any **"legitimate state interest, compelling or otherwise."**

***Mathews v. Lucas*, *427 US 495, 505 (Supreme Court 1976)*, *(It is true, of course, that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society. The Court recognized in Weber that visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons "is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent." ... But where the law is arbitrary in such a way, we have had no difficulty in finding the discrimination impermissible on less demanding standards than those advocated here.)**

Here as in Mathews, punishing the child or even the other parent for one parent's choice to divorce is both **"illogical and unjust."** The child can bear no responsibility for the divorce but the divorce results in the child having two unequal parents, unequal time with each parent, and the child misses out on significant aspects of protected family association in the form of equal companionship with their parents. The state lacks any legitimate interest in imposing these restrictions on a child. Nothing the state does here in any way deters parents from divorcing as the act is endemic in our society. Subjecting the rights of the parents and the child to the mere opinion of a child's best interest by a state judge is an arbitrary and impermissible discrimination imposed on parents and child. Such discrimination falls under standards less demanding than the strict scrutiny required in this instance.

***Trimble v. Gordon*, *430 US 762, 769, 773, 774 (Supreme Court 1977)*, *(we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships... Here, as in Labine, the question is the constitutionality of a state intestate succession law that treats illegitimate children differently from legitimate children. Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances.)**

What possible legitimate state interest can be served by granting a state judge near absolute authority to deprive any fundamental family rights he/she chooses simply because parents change their marital status? Parental rights are individual rights that do not depend on marital status and so divorce cannot be a legitimate trigger for action. Where both parents were fit prior to the divorce, both parents must be fit following the divorce. This means that the child is safe and adequately cared for when with each parent, negating any generalized claim of harm to the child. The fundamental right to make decisions regarding marriage simply can't be punished, so punishment for that choice isn't a legitimate interest. Fundamental rights cannot be infringed even for the benefit of other family members, so there is no legitimate interest to be found in claiming that the "best interest of the child" is a legitimate interest. There simply is no legitimate state interest to be served by granting state court judges sweeping power to infringe fundamental rights as a result of a divorce suit.

***Lalli v. Lalli*, *439 US 259, 264-266 (Supreme Court 1978)*, *(We concluded that the Illinois statute discriminated against illegitimate children in a manner prohibited by the Equal Protection Clause. Although classifications based on illegitimacy are not subject to "strict scrutiny," they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests... We concluded that the Equal Protection Clause required that a statute placing exceptional burdens on illegitimate children in the furtherance of proper state objectives must be more " `carefully tuned to alternative considerations.' ")**

As expressed above, there simply are no legitimate state interests to deprive either parent or the child of fundamental rights simply because a marriage between parents dissolves. Even if the state did have **"proper state objectives"** their statutes must then be **"careful-**

ly tuned to alternative considerations." Few, if any, states have **"carefully tuned"** child custody laws in divorce.

Parham v. Hughes*, *441 US 347, 352, 358 (Supreme Court 1979), *(The Court has held on several occasions that state legislative classifications based upon illegitimacy—i. e., that differentiate between illegitimate children and legitimate children—violate the Equal Protection Clause... The basic rationale of these decisions is that it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it... The interests which the Court found controlling in Stanley were the integrity of the family against state interference and the freedom of a father to raise his own children.)*

What is interesting here is the Court's characterization of the controlling interests in Stanley. Individual parents have a right to raise their own children without state interference. The family whose integrity was protected in Stanley was a single father and his children. When a state judge imposes his/her own opinions of a child's best interests over that of either or both fit parents, the state is infringing those parents' rights to raise their own children.

Pickett v. Brown*, *462 US 1, 8, 9 (Supreme Court 1983), *(In view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny. Although we have held that classifications based on illegitimacy are not "suspect," or subject to "our most exacting scrutiny," ... the scrutiny applied to them "is not a toothless one ... we stated that "a classification based on illegitimacy is unconstitutional unless it bears `an evident and substantial relation to the particular . . . interests [the] statute is designed to serve.' " ... We stated that restrictions on support suits by illegitimate children "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." Id., at 99... We stated that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally," id., at 538, and held 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." Ibid. The Court acknowledged the "lurking problems with respect to proof of paternity," ibid. and suggested that they could not "be lightly brushed aside." Ibid. But those problems could not be used to form "an impenetrable barrier that works to shield otherwise invidious discrimination." Ibid...)*

Here the Court begins to apply enhanced scrutiny to classification of children based on the parents' marital status and that the scrutiny is **NOT** a toothless scrutiny. There must be an **"evident and substantial"** relationship to some legitimate government interest. In divorce, the state lacks even a legitimate interest in violating family rights between parent and child and there is certainly no justification for denying children of divorce the equal relationship rights that children of intact marriages are afforded. While there may be some minor lurking problems with parents living apart and how the rights will be equally exercised, none of these problems legitimizes the sweeping deprivation of family rights executed in most divorce cases under most state divorce laws. There are problems inherent in the equal exercise of parental rights that must be dealt with in divorce, but these problems cannot be used to form **"an impenetrable barrier that works to shield"** the state's actions in divorce from constitutional review.

Cleburne v. Cleburne Living Center, Inc.*, *473 US 432, 453 (Supreme Court 1985), Footnote at 453, *(The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a "tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship — other than pure prejudicial discrimination — to the stated purpose for which the classification is being made.")*

This footnote is important here as divorce has been a punishable act in our society for over a thousand years. It was acceptable in this country until the Fourteenth Amendment was passed. From that point forward, as these cases show, it has no longer been permissible to discriminate against parents or children simply because one parent makes the constitutionally protected choice to terminate a marital relationship.

In a country that recognizes the natural right of free association as a fundamental right, no state can grant any two people the right to marry nor can it give them permission to divorce. All the state may do is legally recognize the relationship the two free individuals have created for themselves. Further, where one of those parties chooses to end the marital relationship, the state is powerless to prevent this. All the state may do is to legally recognize what has already in fact occurred, the dissolution of an association.

If the state is truly interested in benefiting the child, it may proactively protect the rights of each parent

equally and protect the rights of the child.

For too much of our history, the state has made it state business what relationships people can form and how they can form them. This is impermissible under our Constitution regardless of how long states have been in the habit of doing so.

It has also been natural and permissible as a legacy of the English Religious Codes that formed the basis of our common and statutory laws for a thousand years to punish parents for divorcing. Our Constitution forbids this type of punishment and it is far past time that our divorce courts accept that the tradition of states punishing the act of divorce is constitutionally impermissible upon the passage of the Fourteenth Amendment. This is true no matter for how long states have been in the habit of abusing their authority.

***Clark v. Jeter*, 486 US 456, 461 (Supreme Court 1988)**, *(In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U. S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose... Classifications based on race or national origin, ... and classifications affecting fundamental rights, ... are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy... To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because "visiting this condemnation on the head of an infant is illogical and unjust.")*

***New Jersey Welfare Rights Organization v. Cahill*, 411 US 619, 621 (Supreme Court 1973)**, *(...for there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate.)*

Here it is also true that the fundamental constitutional rights of children of divorce to full and equal relationships with each fit parent are as indispensable to the health and well-being of those children as they are to married children.

***Gomez v. Perez*, 409 US 535, 538 (Supreme Court 1973)**, *(a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. 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. For a State to do so is "illogical and unjust." Id., at 175. We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.)*

If a child cannot be denied the statutory right to financial support, then it cannot be denied the natural fundamental constitutional right to daily intimate association with each parent equally. The value the child receives from the parent-child relationship far exceeds the value the child gets from monetary contributions. It is simply illogical and unjust for the state to deny children equal access to both fit parents where those fit parents are willing to take on this personal responsibility.

No lurking problems with application of equal possession time is sufficient to shield the state in these cases. Likewise, no lurking problems with divorced parents not getting along after divorce is sufficient to shield the state in these cases either. Where the state has in its legitimate power to enforce orders protecting each parent's fundamental rights, these problems are surmountable without undue hardship on the state.

NOTE: As of this writing, states receive financial payments from the federal government for ordering child support. This creates a financial incentive for states to deny equal rights and time to parents for the state's own financial gain. In this manner, the federal governments Title IV D mandate in the Social Security Act is harmful to children.

***Jimenez v. Weinberger*, 417 US 628 (Supreme Court 1974)**, *(the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.)*

Children of divorce and children in an intact marriage stand on equal footing with regards to their fundamental family association rights. Dividing these children into two unequal classes and denying one class the fundamental rights enjoyed by the other violates the equal protection of the laws guaranteed by the Due Process Clause of the Fourteenth Amendment.

What we see from all of these cases is that parental rights are individual rights that attach to each parent as an individual regardless of their marital status. Likewise, the rights of the child are concomitant to the rights of the parent and attach to the child. The Equal Protection Clause simply does not permit the state to create two classes of fit parent based solely on the marital status of a child's parents. Nor does it permit the state to deny fundamental rights to the child based on the marital status

of the child's parents. Therefore, divorce simply cannot be a legitimate trigger or legitimate state interest for infringing the rights of parent or child. While the state may condemn divorce if it chooses, it may **NOT** punish any of the parties involved; not the innocent child, not the innocent spouse, and not the spouse exercising their free association right to terminate a marriage.

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