No. 20-49

In The
Supreme Court of the United States

PETER N. MYMA,

Petitioner,

vs.

WENDY A. WROE,

Respondent.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

PETER N. MYMA

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QUESTIONS PRESENTED

1. Whether joint child custody is a constitutionally protected, rebuttable presumption of equal rights.

2. Whether a clear and convincing standard is required to disparage a fundamental liberty interest.

3. Whether a state custodial solution should be subject to a higher standard of scrutiny, to insure it is narrowly tailored to protect all family members' liberty interests equally.

PARTIES AND RELATED CASES

Petitioner here, father, and respondent/appellant below is Peter N. Myma, a resident of the State of Illinois.

Respondent here, mother, and petitioner/appellee below is Wendy A. Wroe, a resident of the State of Indiana.

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PETITION FOR A WRIT OF CERTIORARI

Peter Myma respectfully petitions for a writ of certiorari to review the judgment of the Indiana Supreme Court in this case.

OPINIONS BELOW

None are published and are contained in the appendix.

JURISDICTION

The liberty interest of child custody was disparaged by denying petitioner the constitutional guarantees of due process and equal protection. The jurisdiction of this court is thus invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

See Appendix 1.

STATEMENT OF THE CASE

A year after caring for his parents, father met mother. Father, an Illinois resident and mother, and Indiana resident have two children, now ages six and ten. Since childbirth, father, an educator, raised the children and rebuilt their house, while mother preferred working in retail.

Mother's contemporaneous communications express satisfaction with father's care of the children and work on their house, and show no sign of discord. Unbeknown to father, mother began cohabitating with her Indianapolis boyfriend during the many months she was frequently absent from the marital household.

After mother stopped supporting the family in June 2016, she demanded father leave Indiana with the children. After destroying father's car, in August 2016 mother and boyfriend forcibly removed and secreted[1,2] the children from father in Illinois. The children were not seen or located for six weeks. Father finally managed to talk to daughter in the principal's office in an Indiana school 70 miles away from where mother resided with boyfriend. Daughter was heard complaining of mistreatment, which included routine eight hour confinement and the inability to use the bathroom, eat or pray. Father filed for Illinois divorce the next day.

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[1] A violation under 750 ILCS 60/103(7)(v) and for which a three-week emergency order of protection under 750 ILCS 60/220(a)(1) was issued in an emergency session of Illinois Domestic Violence Court; *see Rock v. Rock*, 2015 IL App (3d) 140114-U .

[2] Secretion defined in *People v.* Manning, 778 N.E.2d 1222, 334 Ill. App.3d 882 (2002) .

Mother presented and rested her 2016 case in rural Brown County where she had the case transferred, but did not live, and father had no means of reaching without a car. Unlike mother, father was not allowed to call witnesses, present evidence and make and rest his case. Father did eventually manage to get this hearing reopened in late 2017.

Father was variously called by mother "lover boy," "ass," "idiot," "insane," "shit," "knucklehead" and a "dumbfuck," but never as "father" or "daddy" in front of the children, and "You been doin' this for two years, C'mon!" and for simply asking to speak to the children by name, "Do you realize that you're doing the same insane act every time you call. And it doesn't get you what [visitation] you want." At trial, the court stated that "there will be no excuse for somebody cursing someone on the phone in front of the kids." Mother excused this language out of frustration at father's persistence in trying to reach his children. Mother admitted after first denying that she demanded father beg for permission to speak to his own children.

All Father's calls, voicemails, texts, Skype attempts, letters and gifts to the children were blocked. Father's many motions addressing the denial of his visitation were never heard at any time.

Unable to move the trial process forward, and in light of mother's denial of father's visitation, father filed a habeas corpus petition under IC § 34-25.5-7-1 in January 2018, to justify the legal basis of the children's separation from their former sole caregiver without due process. The trial court ignored this petition, and it is still outstanding today. The Chief Administrative Officer of the

Indiana Supreme Court repeatedly refused to move the case forward under Indiana Trial Rule 53.1(E).

Later in 2018, father filed an Indiana Trial Rule 63(B)(2)(b), petition to have the judge show cause to the Indiana Supreme Court why he should not be removed from the case for refusing to perform the duties of his office[3] and have a Judge pro tempore appointed in his stead. The trial court responded by refusing to further hear, rehear, conclude or rule on the preliminary hearing, then still in progress.

A new judge set the cause for final hearing in January 2019.

Before father arrived at the courthouse, mother's first exhibit alleged "abduction". After father's objection, it was found that neither the court nor father was given any advance notice of her evidence or witnesses. Rather than excluding the evidence, the trial was immediately continued. "To prevent trial by ambush," of father, "The Court finds that the Respondent's [father's] fundamental fairness argument concerning the exhibits has merit.[4]" The court also stated that evidence previously filed need not be resubmitted.

The court ordered mother to comply with father's request for documents and witnesses, mother issuing only a generic release shortly before trial resumed, but providing no specific information, much of which in her sole possession, such as her occult diaries, and evidence under Rule 106. The court refused to compel evidence in mother's

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[3] i.e., under IC § 31-17-2-6.

[4] "Order Resetting Final Hearing," filed February 4, 2019.

possession or give father time to discover it from other sources.

Mother repeatedly requested and was granted judicial notice[5] of previous court testimony and filings while excusing her frequent repetition of issues due to her and counsels' poor memory. The court sustained many of father's objections as to mother's repetitious presentation, finding that in some instances, issues were presented four times.

The trial was highly irregular, with the court sustaining many, but not all, of father's objections to mother's misrepresentation of documents, pictures, testimony and depositions. Proffered court documents from mother were found not to be from any court, pictures were found to misrepresent locations and unsworn out-of-court statements[6] were read into the record. Mother repeatedly asked to modify or withdraw evidence that she had submitted when the evidence contradicted her sworn testimony. Father needed to engage mother in a colloquy over 25 questions and answers to get a single yes/no response, the court stating "And that if mother would just answer the questions directly, the proceeding would go a lot quicker." while denying father's numerous requests for equal trial time.

The court became stymied that father repeatedly objected to mother rendering her negative opinions of father outside of her personal knowledge. The court's need to know a fact it felt overrode the foundation that allowed a witness to testify to that fact, even though the witness' presence was denied

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[5] Under Indiana Rule of Evidence 201(C).

[6] "In all trials the testimony of witnesses shall be taken in open court..." (Indiana Trial Rule 43(A).

by court order and she did not claim personal knowledge.

Mother stipulated to going "quite far" to "lie to" obtain the children from father, while describing his "harm" to the children as making the children, in her contemporaneous words: "very active, bright, joyous, and resourceful."

Mother opined as to the lassitude of father while stipulating to have contemporaneously written that: "He's been a real one-man-repair-and-renovation force to be reckoned with!"

The court recognized father's complaints as to the time consuming nature of mother's evasive testimony as "Point taken. Point taken. Point taken." and that mother should not defer questions to her boyfriend that she herself could readily answer, because "he's never going to appear."

After several unsuccessful years compelling the appearance of this witness, without notice and by surprise on the last trial day mother called him. Father's objections to his appearance and the probity of the negative outcomes in the stipulated teenage pregnancy, suicide and imprisonment of boyfriend's children, as well as triple foreclosure and falsified bankruptcy petition[7] of boyfriend's custodial household were summarily dismissed. Mother's violations of protection orders of both children and property, and her false testimony thereto, though a statutory factor in custodial assignment, was similarly deemed insignificant.

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[7] Boyfriend claimed mother as his wife and father's two children as his own minor son and daughter.

The court found that mother's violation of an earlier protective order and her conflicting testimony thereto was not probative because domestic violence under Illinois law should not be considered by an Indiana court: "I don't know nothing about that," despite being a statutory factor under Indiana's best interest standard, IC § 31-14-13-2(7).

The court found probative, however mother's allegation of surveillance against father, which mother asserted as an opinion of what she overheard during her eavesdropping of father and neighbor.

During father's cross-examination of mother, mother stated that the February 4, 2019 court order required father to have submitted all his evidence before the first trial day on January 3, 2019, and that this rule did not apply to mother. Mother maintained that the impeaching text messages on mother's phone thus could no longer be mentioned, the court agreed, denying use of dispositive text messages that had been previously filed with the case.

Father sought to establish objective indices of mother's care. Over mother's objections, she eventually stipulated to having transferred the children to a failing school, was late one out of three days, and had missed so many school days that they had to be made up, which she failed to do. The court did not find probative that father had a perfect on-time record in the excellent schools he enrolled the children in.

Mother's case initially alleged child neglect by father. After mother testified to leaving the children unattended in the bathtub, and having the children return with stolen property from unknown locations

in the neighborhood, mother then argued that father's involvement and tutoring of the children was "not letting them be children," too overbearing, accusing father of trying to be too "perfect," his medical advocacy and emphasis on healthy habits "overwhelming," and that he was "trying to make somebody out of them." Mother sent pre-school age son, who she described as autistic, into $100 a month daycare, after quitting her job, rather than spend time with him during the day.

Mother repeatedly alleged that father's character was deficient for his legal advocacy in confronting what father saw as pervasive due process denial. At trial, the court found father's litigation history "not helpful," being collateral to the issue of child custody, "...father's filings are not unusual." Father is representing himself and is doing what he believes to be correct in his representation."

Father's role as sole caregiver of the children and the outcomes under his care were not factually traversed. Father's background as an educator, his centering of the children's lives around "learning" and the outstanding outcomes of the children under his care were also not factually traversed by mother.

Father was never shown in any recitation to have harbored any ill will to mother or boyfriend; phone calls and 140 pages of text messages display father's clinical concision when confronted with the drunken obloquy[8] of mother. Mother justified denying father visitation because he declined to

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[8] "Zolaaaaaa? Is that what you're going to do? Instead of saying Helooo, you'll be quiet? C'mon talk to me. Agin', you been doing this for two years, man. Two years. Isn't that saying somethin'?"

engage in casual conversation with her and her boyfriend.

Over father's objections to gender-defamation, mother emotively summarized her case as it is "setting a bad example" in father caring for his children, particularly for son, "Does he want Leif to grow up to be a man?" his unmanly caring for children means he "doesn't like to work" and for "being supported" solely to "sit on his butt" and "enjoy life" "all day."

Father was allotted only the last half of the last afternoon of four trial days while allowing mother to present an additional rebuttal case during his time.

Father requested joint custody and mother sought and was granted maximum exclusion of father from the children's lives.

Overriding father's objection as to absentee mother's lack of personal knowledge, the court concluded that mother's opinion would outweigh her own contemporaneous communications to the contrary, and also outweigh witness testimony with contemporaneous personal knowledge, and to deny father any custody.

The court issued a final decree. The single greatest factor it used to deny father the custody of his children was his litigation efforts. Additionally, the court stated that mother's stipulated surveillance of father could be excused because she was using it to support her opinion that she was being surveilled.

Mother was also granted custody of the children because she prevented father's contact with them, the court finding that telephonic visitation was

not visitation, and therefore mother's vulgar and abusive termination of it had no import to the instant case.

The court did not acknowledge father's sole care of the children for the first six years of their life, finding that a father staying home with the children, and rehabilitating their home was not "gainful employment."

Father would never see the children or have any substantial contact again.

Father timely filed a notice of appeal, under Indiana's constitutional absolute right to appeal under Article 7, Section 3 of the Indiana Constitution.

Father could not afford attorneys or trial transcripts, instead moving the court under Indiana Appellate Rule 31(A)[9] and its analogue, Federal Appellate Rule 10(c) to prepare a statement of evidence.

Under Indiana's version of FOIA, APRA[10], father requested recordings of every trial session. The court refused. Father was granted the recordings after an appeal to the Indianapolis Public Access Counselor. Mother never requested these recordings.

Father transcribed nearly 700 pages of every word of the final hearing and many salient portions of the preliminary hearings. The trial and appeal courts struck this as too accurate, because the trial court opined and the appellate court concurred, it

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[9] *Meisberger v. Bishop*, No. 39A01-1402-DR-76, Court of Appeals of Indiana, 15 NE 3d 653 (2014).

[10] Access to Public Records Act, IC § 5-14-3-1 et seq.

would require an inordinate time, and to which it had only limited recollection, and over three months, to review.

Father then moved the court to certify his 100-page summary statement of evidence. Mother again objected because father's summary statement too closely tracked the trial transcript and the recordings which only father had requested.

Mother provided a statement of her case, rearguing it from memory and that did not track the trial, nor did she factually traverse father's account, providing instead a list of objections to father's case, these objections not being made at trial. Maintaining now that it had an outstanding memory, the trial court immediately certified both disparate versions. Only father's statement of evidence included conduct of the court and preserved trial objections for appellate error review.

Mother's disputation of the trial record lasted through much of 2019.

Father filed a comprehensive appeal brief, replete with extensive citations to the trial record, case authority as well as Indiana and federal law. The appellate court complained of numerous formal matters such as pagination and word count certificate and rejected father's appeal without reaching the merits. A request for reconsideration on the merits was considered frivolous.

Transfer was denied to the Indiana Supreme Court, once for father attaching previous trial rulings, and for being not filed on a Federal and Illinois holiday, both of which were not recognized in Indiana.

Subsequent trial court proceedings filed by father, including a petition to modify custody, and an Indiana Trial Rule 60(B) motion for relief from judgment, were timely filed but never heard.

The factual record of the case is inadequately developed because the trial record shows father never being fully and fairly heard at any stage of the trial or appeal.

REASONS FOR GRANTING THE PETITION

I. The Case Affects Nearly Every American Today

"The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Wisconsin v. Yoder, 406 US 205 (1972).

More than a million children in America annually are involved in divorce[11]. Half of US marriages end in divorce[12]. The US leads the world in single parent households, and at a rate over three times the international average[13]. Indiana is in the top three US states for divorce[14]. "In 2016, about 4 of every 5 (80.4 percent) of the 13.6 million custodial parents were mothers, while 1 of every 5 custodial parents were fathers (19.6 percent)." [15]

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[11] *Andrew Schepard J.D.*, The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management, 22 U. ARK.LITTLEROCKL. REV. 395 (2000)

[12] U.S. Department of Health & Human Services, National Vital Statistics Reports: Births, Marriages, Divorces, and Deaths: Provisional Data for 2009 vol. 58, no. 25, 1

[13] Pew Research Center, Dec. 12, 2019, "Religion and Living Arrangements Around the World," p. 20

[14] Excluding statistically insignificant results, January 2020 data, retrieved 6/24/2020 at: https://www.census.gov/library/visualizations/interactive/marriage-divorce-rates-by-state.html

[15] *Timothy Grall, Custodial Mothers and Fathers and Their Child Support: 2015 Current Population Reports*, Issued

No father will elect to have children that he will 80% lose, doubling the number of childless women since the 1970s[16] alone.

Almost every child comes from, is integrated into or is closely associated with other children that are products of divorce.

These longstanding statistics as to gender disparity are irreconcilable with equal protection under the 14th amendment and its due process guaranty.

In no other case before this court are more rights, more deeply rooted, of greater consequence, and more profoundly affected then when state courts are either unwilling or unable to grant equal protection of the fundamental liberty interests of both parents and their children.

The notorious nature of these custodial awards is, as would be expected, widely exploited by those it favors, while being oblivious to those making the awards, all going to the wholesale destruction of the American family and the nation it is the bedrock of.

II. The Case Affects a Constitutional Liberty Interest

"The child is not the mere creature of the State." *Pierce v. Society of Sisters*, 268 US 510 (1925),

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January 2018. U.S. Department of Commerce, Economics and Statistics Administration Publication P60-262, page 3

[16] *U.S. Department of Commerce, US Census Bureau, Percent Childless*, Women Aged 30-44: 1976-2018, accessed on 6/24/2020 at: https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/fertility/figure1.pdf

and thus, "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 US 246 (1978).

This constitutional interest must be protected by the courts: "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." *Stanley v. Illinois*, 405 US 645 (1972) at page 651.

The degree of protection must be commensurate with the nature of the right being protected: "The liberty interest at issue in this case— the interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 US 57 (2000) at 65.

This liberty interest is of greater dimension than property rights and must be treated with greater, constitutional, deference: 'The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U. S. 528, 533 (1953).' *Stanley v. Illinois*, 405 US 645 (1972) at 651.

III. A Constitutional Liberty Interest Deserves Equal Protection

This Court did not say that the liberty interest resided in solely a parent, or the best parent alone, but in *both* parents equally: "It is cardinal with us

that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U. S. 158 (1944) at 166.

The liberty interest is shared by *all* members of the family: '...both "'parents *and their children* have a recognized unique and legal interest in, and a constitutionally protected right to, companionship.'" In other words, the substantive due process right to family integrity "'protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by [his or her] biological . . . parent.'" It is clear, therefore, that both parents and their children have cognizable substantive due process rights to the parent-child relationship.' *Amanda C. v. Case*, 749 N.W.2d 429, 438 (Neb. 2008).

"A study conducted in 2004 found that although the 'tender years doctrine' had been abolished many years earlier, a majority of Indiana family court judges still supported it and decided cases coming before them consistently with it. A survey of judges in Alabama, Louisiana, Mississippi and Tennessee found a clear preference among judges for maternal custody in general.[17]"

Chief Justice Burger represents the still prevalent view that "I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the

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[17] "What Judges Really Think About Fathers: Responses to Court-Commissioned Judicial Bias Surveys," 31 Transitions 4 (Nov. 2013).

mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter." *Stanley v. Illinois*, 405 US 645, Burger dissent at 665.

Mother's argument reprised Burger by nakedly alleging that a father staying at home to raise the children was "being supported" solely to "sit on his butt" and "enjoy life" "all day" and "doesn't like to work" and "set a bad example." to the children. Mother represents the former stay-at-home father as odium to son, "Does he want Leif to grow up to be a man?" The court concurred in its decree, describing a father's care and tutoring of his children as "ungainful." "This gender-biased generalization is ludicrous and an affront..." *Hanson v. Spolnik*, 685 NE 2d 71 (Ind App. Ct. 1997).

The application as well as the law applied is subject to higher scruitiny: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand..." signifying the importance of the application as of the law itself, "...so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 US 356 (1886).

'The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *Reynolds v. Sims*, 377 U. S. 533, 555 (1964).

IV. No Equal Protection Without Equal Due Process

Even when given the last half of the last afternoon of four trial days, stay at home fathers do not have a sufficient track record in the court's eyes, so the due process of hearing father was "frivolous" and a "delay:" "Procedure by presumption is always cheaper and easier than individualized determination. ..., [W]hen it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." *Stanley v. Illinois*, 405 US 645 (1972) at 657.

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' " *Santosky v. Kramer*, 455 US 745 (1982) at 758. Loss of the companionship and care of the children is one such fundamental loss of a liberty interest.

The Burger presumption (supra) "protecting" the "tender gender" is an example of "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. .... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding" (Brandeis, dissent in *Olmstead v. United States*, 277 US 438 (1928)) of equal protection.

In light of the overwhelming courts' preference in assigning custody by gender, the trial court in almost every instance accorded mother due process and rulings where father's weren't even worth

considering because "...it may be argued that ... fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry." Also, "by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment." *Stanley v. Illinois*, 405 US 645 (1972) at 649.

The court could find no time to hear father but encouraged the ever-changing legal and factual posture of mother. It is not a good use of the court's time to hear father, as being the wrong gender simply won't get custody in the Brown Circuit Court. "Indeed, one might fairly say of ... the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. *Stanley v. Illinois*, 405 US 645 (1972) at 656.

"To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is ... forbidden by the Equal Protection Clause of the Fourteenth Amendment; and ... may not lawfully be mandated solely on the basis of sex" *Reed v. Reed*, 404 US 71 (1971).

"Decisions following Reed similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." *Craig v. Boren*, 429 US 190 (1976).

No court can prejudge the outcome for reasons of efficiency because: "His right to a hearing does not depend upon the will, caprice or discretion of the trial judge who is to make a decision upon the issues. ... But harmless error analysis has no place here. The trial court's [premature] termination of the trial rendered an assessment of prejudice impossible." (*In re Marriage of Carlsson*, 163 Cal. App. 4th 281, 282, 77 Cal. Rptr. 3d 305, 305 (2008).

Father should have been given the majority of the trial time because his is the stronger de facto burden: "By requiring fathers to carry the difficult burden of affirmatively proving the unfitness of the mother, the presumption may have the effect of depriving some loving fathers of the custody of their children, while enabling some alienated mothers to arbitrarily obtain temporary custody." *Ex parte Devine*, 398 So. 2d 686 (Ala. Supreme Court 1981) at 696.

At no point was father fully and fairly heard. Even when father managed to get the preliminary hearing reopened, the court subsequently "cancelled" it without resolution. The court delayed the custody case for almost four months while mother complained of finding another lawyer, and for most of a year while the court refused to set the matter for hearing, until the Indiana Supreme court intervened. The court refused father a single day to obtain from alternate sources evidence which mother withheld.

Father was repeatedly surprised, by mother's evidence and witnesses, and as well as by the court itself. Father was denied the witnesses he gave notice of, never received the evidence he requested, nor had the time to develop more than a rudimentary case. Father detrimentally relied on the court

confirming that earlier filings already providing notice. The trial court denied father the use of earlier filed evidence and the benefit of judicial notice the court gave mother.

Troxel demonstrated that states cannot subsume federal rights to their "best interests" prerogative. This case demonstrates the outcome of the state's disregard for federal rights, and the need for more clarity to protect them in state court. More than anything else, it is the court's own conduct which should "shock this case into the protective arms of the Constitution" *Irvine v. California*, 347 US 128 (1954) at 138. That mother would repeatedly change legal and factual positions during the trial is overshadowed by the court doing the same.

The Indiana courts' approach to equality is in appearance, but presumptive in operation (*Yick Wo v. Hopkins*, 118 US 356 (1886)). The Indiana courts are under a *Burger* paternalistic obligation to "protect" the "tender gender" (*Burger*, supra) against the "unnatural" interest of a stay-at-home-father raising his own children.

The Indiana Courts believe that the seeking of due process is a ground to deny it. It construes father's desire to be fairly heard as an attack on the "tender gender" of its presumptive prerogative.

Father was at fault for mother's "abusive" denial of his calls because the court reasons that telephonic visitation[18] is not parenting time[19].

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[18] *Indiana Parenting Time Guidelines*, Section 1(A)(3).

[19] 'We disagree with mother's implication that telephone communication is not a form of parenting time. To the contrary, the Parenting Time Guidelines emphasize that "[r]egular phone

None of the above comports remotely with equal protection or due process, not the least for involving a fundamental liberty interest.

V. Parents' and Children's Liberty Interests Can Not Be Disparaged by the States

The right of the children to both of their parents, as the right of each parent to their children, is an inalienable liberty interest which States cannot deny or disparage.

"Due process of law is secured against invasion ... against state action in ... the Fourteenth [Amendment]." *Betts v. Brady*, 316 US 455, 462 (1942).

'In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the ... States is not restricted to rights specifically mentioned in the first eight amendments.' *Griswold v. Connecticut*, 381 US 479 (1965).

'The Fourteenth Amendment ... includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 US 57 (2000) at 65.

Every decision about parents' rights do not cite "a" parent in the singular, ' "As we have

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contact is an important tool in maintaining a parent/child relationship[,]" and it is a violation of the Guidelines to block these communications. Ind. Parenting Time Guideline § 1(A)(7).' *Anderson v. Youngblood* (In re V.A.), 29 N.E.3d 178 (Ind. Ct. App. 2015).

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.' *Troxel v. Granville*, 530 US 57 (2000) at 73.

In the underlying case, as in *Troxel*, the state has not only superordinated its best interest prerogative over the fundamental liberty interests of the children and their parents, but it has diminished due process and equal protection in order to do so.

'In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." ' Scalia dissent in *Troxel v. Granville*, 530 US 57 (2000) at 91.

Nowhere in the Constitution or in state laws can rights be upheld by proxy. Father's fundamental liberty interest cannot be diminished by assignment to mother. Especially when a lengthy decree opines on a range of factual matters collateral to the central issue of child custody, yet fails to find fact as to father being unfit. The decree makes non-collateral factual findings only as to mother's dishonesty and her abuse of "idiot" father and the children by denying them their visitation. "In *Bell v. Burson*, 402 U. S. 535 (1971) we found a scheme repugnant to the Due Process Clause because it deprived a driver of his license without reference to the very factor (there, fault in driving, here, fitness as a parent) that the State itself deemed fundamental to its statutory

scheme." *Stanley v. Illinois*, 405 US 645 (1972) at 653.

Nor can the harm in abrogating the children's' rights to their father be cured by spending double time with their mother.

Nor can the state constructively disparage rights by entering conclusions outside of a finding of facts thereto. The underlying decree demonstrates the court's disdain, but not any non-collateral evidence, against father(s).

The court cannot diminish father's liberty interest to child custody by the assertion of matter unrelated to custodial care, namely father's litigation posture. The trial court is estopped from doing so after having declared at trial that father was entitled to his own vigorous representation, father detrimentally relying on this proper stance, but then the trial court elevating this collateral issue to the single most important reason to deny father custody.

The court's memory, opined at trial as "outstanding," would fail, in mother's very first exhibit introducing the term "abduction," and then assigning prejudice to father, compounding the error by elevating it into a reason to deny father custody.

The court similarly cannot disparage father's liberty interest by mother's tainted stipulation to have surveilled on father in order make the allegation of same. The disingenuous character of mother's allegation is more probative than the substance of it. The fact that the court chose to elevate this collateral matter, which axiomatically cannot affect children with that which they have no knowledge of, is probative as to the unequal treatment of the parties and their liberty interests.

Moreover, the states cannot disparage father's liberty interest in visitation with the children by assigning fault to father for mother impeding access to his children. The Indiana courts have given "[T]he uncooperative custodial parent ... a perverse incentive. A parent with physical custody could obtain sole custody by usurping the other parent's ... rights..." (Pierce v Pierce, 620 N.E.2d 726, 731 (Ind. Ct. App. 1993)).

States are often at odds with the liberty interests and equality they didn't grant, but must enforce: "Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State," *Wisconsin v. Yoder*, 406 US 205 (1972).

Indiana will not respect "distant" federal rights if mother's secretive child snatching, considered domestic violence in neighboring Illinois, is categorically ignored by the trial court: "I don't know nothing about that." It is improper to preclude relevant evidence because the court does not want to spend the time or that it may go against the presumptively favored party: "Given the overwhelming relevance of the issue, it is impossible to avoid the conclusion that the consumption of time as a reason to avoid it is simply untenable. A trial judge's discretionary authority in the management of evidence does not extend to arbitrarily refusing to consider the most salient issue[s]..." *Guardianship of Simpson*, 67 Cal.App.4th 914, 936 (79 Cal.Rptr.2d 389, 1998). Nor can the trial judge diminish father's ability to be heard in more than just 1/8th of the trial time.

"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." *Griswold v. Connecticut*, 381 U. S. 479, at 497 (1965), citations omitted, Goldberg, J., concurring. Reprising outdated gender roles or picking the winner-takes-all parent would not meet any level of scrutiny as a legitimate state interest.

The state does not have a legitimate interest in awarding custody by gender, sidelining millions of parents. In the underlying case, father was given fewer rights to his children than O. J. Simpson was after the California Appeal Courts (supra) allowed evidence of Simpson's domestic violence in the murder of Nicole Brown and Ronald Goldman.

VI. Standards Narrow State Incursion on Familial Liberty Interests

Standards define equality by having visible signposts that apply to all. The farther apart these signposts are the more subjective the decision becomes. "[W]hether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause." *Bush v. Gore*, 531 US 98 (2000). This lack of ballot box standards can lead to the temptation to set higher standards to prevail for an undesired voting bloc.

The trial court capriciously applied its discretion in determining what due process is and how it could be unequally doled out between the two parties. Higher standards would diminish this temptation: "Every procedure which would offer a

possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law. *Tumey v. Ohio*, 273 U. S. 510, 273 U. S. 532." *In re Murchison*, 349 US 133 (1955).

The Indiana trial courts have awarded themselves absolute discretion in divorce, constitution and statutes to the contrary notwithstanding. The division of property is regulated under IC § 31-15-7-5 by whether it was acquired during marriage, as in most states. Yet in practice, the Indiana courts have created the notorious "one-pot" theory that overrides the statute: "It is well settled that in a dissolution action, all marital property goes into the marital pot for division, whether it was owned by either spouse before the marriage..." *Falatovics v. Falatovics*, 15 N.E.3d 108, 110 (Ind. Ct. App. 2014). The lessor interest of property is presumed equal, but the greater interest in child custody is not, as seen in the failure of Indiana Senate Bill 87 (2019), the outcome of the underlying case, and in the vast majority of similar cases.

The Indiana courts' discretion has gone so far as to deny due process by simply ignoring motions before the court, such as father's Habeas Corpus petition, relief under TR 60(B), and even an entire preliminary hearing. This denial is rubber-stamped by the Indiana Supreme Court's Office of Judicial Administration, as it has done in countless of father's TR 53.1(A) motions.

The court made no factual finding as to the fitness of father. The court arbitrarily opined on a range of collateral matters, none of which go to the fitness of father (cf *Bell v. Burson*, 402 US 535

(1971)). Thus "...that where facts necessary to sustain the issues are not found by the trial court and the findings are silent as to such facts, they are regarded as not proved." Miller v. Ortman, 235 Ind. 641, 665, 136 N.E.2d 17, 31 (1956).

The court's factual findings against mother were not collateral in nature. Material factors in assigning custody include abuse, which the decree identified as mother's vulgar denial of contact between father and the children. Mother's snatching of the children and violation of a protective order thereto is another major statutory factor of unfitness: "Child snatching is one of the most serious and damaging forms of child abuse that exists. The severity of the trauma of child snatching is one of the few points that behavioral scientists agree upon, almost without exception." *People v. Manning*, 778 N.E.2d 1222, 334 Ill. App.3d 882 (2002). The abhorrence of mother's actions is "cured" by the trial court blaming father for mother's "inflammatory" terminology.

Her theft under the guise of a court order she requested is another act of character deficiency compounding her ever-changing testimony. Character is an important issue as forward-looking conduct (*Leisure v. Wheeler*, 828 NE 2d 409 (Ind. App. Ct. 2005)) in determining the children's future.

The question in granting certiorari before this court goes to whether higher standards would have forestalled the irregularities in this case, and by extension to millions of similarly situated custodial disputes every year, another having occurred in the reading of this sentence alone.

There can be little doubt of a different outcome, if there was a strong presumption of joint custody, being rebutted only by clear and convincing evidence, and resulting in a custodial solution surviving a higher standard of scrutiny for being narrowly tailored, as would allow the equal protection of all members' rights of the former family. The right to have the case heard in front of a jury, as done in Texas, would further forestall the routine abrogation of these rights by Burger judges.

The presence of even any one of these elements would have given the trial court pause. The trial court would have been much harder pressed to justify its typical winner-takes-all custodial solution. Uniformity across the states would be a further benefit.

In assessing standards, the courts typically engage in an *Eldridge* inquiry: "The general test for determining what process is due and when was set out in ... Mathews[20] identified three factors to be balanced: first, the private interest at stake; second, the risk of erroneous deprivation and the value, if any, of additional procedural safeguards; and third, the government's countervailing interests." *Simpson v. Brown Cty.*, 860 F.3d 1001, 1006 (7th Cir. 2017)[21].

"The current court-created" low evidentiary standards combined with the expansive "sound discretion" "...allows a trial court holding to severely curtailing parental rights to stand so long as there is *some* evidence upon which to base its findings..."

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[20] *Mathews v. Eldridge*, 424 U.S. 319, at 335 (1976).

[21] Where father's litigation posture was relevant to the trial court, then Brown County Officials' routine extortion of its citizens impeaches the fairness of its court.

resulting in "a significant risk of erroneous deprivation of the most sacred of liberty interests of parents and children," *In re JRD*, 169 SW 3d 740 (Tex App Ct. 3rd Dist. 2005).

Mother's allegations, made as opinion outside of personal knowledge by an absentee mother, do not even establish a prima facie case (Celotex v. Catrett, 477 US 317 (1986)). Father's case, from the little that was heard, was based on mother's own communications and testimony, as well as documentary records, all stipulated to. The courts discretion cannot be used to blur standards of admissibility and probity to unequally favor a presumptive party.

The trial court "[E]xplicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child." *In re JRD*, 169 SW 3d 740 (Tex App Ct 3rd Dist. 2005), when it entertained 'outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas..." *De La Cruz v. Tormey*, 582 F. 2d 45 (9th Cir. 1978). In mother's and the trial courts' eyes, father raising his children while rehabilitating their home was an intolerable, indolent indulgence for a man.

"Given the weight of the private interests at stake, the social cost of even occasional error is sizable." *Santosky v. Kramer*, 455 US 745 (1982) at 764, which elevated standards would reduce. The cost to society of mass parental deprivation is not outweighed by the "benefit" of double exposure to an exclusionary parent.

'The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Addington v. Texas*, 441 US 418 (1979). There is no legitimate harm to the state in joint custody outside of its pecuniary interest in administering child support against a non-custodial parent.

There is benefit to the state in a strong presumption of joint custody, because this would reduce animus and litigation. The entire underlying 4-day trial case was devoted to mother's expression of animus to claim greater custodial rights. The need to make wild claims also diminishes the parents' future ability to work together in sharing custody.

Under stricter standards, father would not have to rebut the presumption of maternal fitness. Mother would need to show, how the outcomes of father's sole caregiving was harmful, or how her erasure of father benefitted the children. Father never requested sole custody and had always tried to engage absentee mother more in the children's lives.

"Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss." *Santosky v. Kramer*, 455 US 745 (1982) at 758. The loss of a parent's influence during formative years is an "[I]rreparable harm to the Children." *Maddux v. Maddux*, 40 N.E.3d 971 (2015).

"Therefore, I would urge that the standard of proof in the trial court be re-examined. The standard of proof instructs the fact finder on the degree of

confidence our society believes it should have in the correctness of factual conclusions for any given adjudication," *In re JRD*, 169 SW 3d 740 (Tex Ct App, 3rd Dist. 2005)[22].

The risk is diminished when "The United States Supreme Court "has mandated an intermediate standard of proof — 'clear and convincing evidence' — when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.' " *In re JRD*, 169 SW 3d 740 (Tex Ct App, 3rd Dist. 2005)[23].

"[A] stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State. As we have observed, 35 States already have adopted a higher standard by statute or court decision without apparent effect on the speed, form, or cost of their factfinding proceedings." *Santosky v. Kramer*, 455 US 745 (1982) at 767.

The standard of proof should be for this court to determine: "Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has traditionally been left to the judiciary to resolve." "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.' " " *Santosky v. Kramer*, 455 US 745 (1982) at 756.

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[22] Citing *Santosky v. Kramer*, 455 U.S. at 754-755, 102 S.Ct. 1388 (in turn citing *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)).

[23] Id. at 756, 102 S.Ct. 1388 (citing *Addington*, 441 U.S. at 424, 99 S.Ct. 1804 (1979)).

"The opinions of the plurality ... recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest... " *Troxel v. Granville*, 530 US 57 (2000) at 80, Thomas concurrence.

Loss of custody is not trivial: "Although custody and possession determinations as between parents are not as permanent or drastic as termination of parental rights, those issues can severely limit the relationship and have the potential to profoundly impair the fundamental liberty interest of parents and children in the parent-child relationship." *In re JRD*, 169 SW 3d 740 (Tex App Ct. 3rd Dist. 2005).

"Nor would an elevated standard of proof create any real administrative burdens for the State's factfinders. ... New York also demands at least clear and convincing evidence in proceedings of far less moment ... as they must have to suspend a driver's license." *Santosky v. Kramer*, 455 US 745 (1982) at 767.

The two orders higher evidentiary standard applied to the theft of a $1 candy bar teaches the factfinder to believe that a lifetime of parent-child consortium is of zero value to the state: "[F]unction of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " *Santosky v.*

Kramer, 455 US 745 (1982) at 785 (see also *In re JRD*, 169 SW 3d 740 (Tex App Ct. 3rd Dist. 2005)).

"What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case?" Clearly not a legitimate parens patriae protection of rights: "We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family." *Stanley v. Illinois*, 405 US 645 (1972) at 652.

"[T]he removal of a child from the parents is a penalty as great [as], if not greater, than a criminal penalty . . . ." *Santosky v. Kramer*, 455 US 745 (1982) at 769.

"Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved." *In re Custody of Smith*, 969 P. 2d 21 (Wash. Sup. Ct. 1998)[24].

'As we stated recently in Flores, the Fourteenth Amendment "forbids the government to infringe . . . [on] 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U. S., at 302.' *Washington v. Glucksberg*, 521 US 702 (1997).

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[24] Omitted citations: See *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *O'Hartigan v. Department of Personnel*, 118 Wash.2d 111, 117, 821 P.2d 44 (1991); *In re Welfare of Sumey*, 94 Wash.2d 757, 762, 621 P.2d 108 (1980).

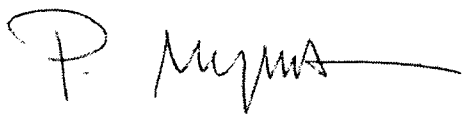
The Indiana Courts, and all similarly situated state courts, must not be allowed to disparage the familial liberty interests of children and their parents by denying the strong presumption of equality in joint custody, with anything outside of clear and convincing evidence, and by narrowly tailoring custodial orders that withstand higher scrutiny for equal protection and due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER N. MYMA



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