

No. 20-618

In the
Supreme Court of the United States

KELLY GEORGENE ROUTTEN,
Petitioner,

v.

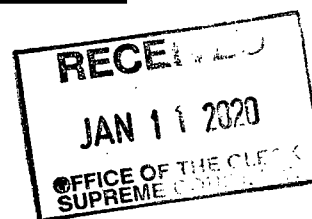
JOHN TYLER ROUTTEN,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of North Carolina

PETITION FOR REHEARING

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QUESTION PRESENTED

An additional question is to address substantial grounds not previously submitted in the original petition. The Due Process Clause forbids States from removing a minor child from a parent's custody without hearing on that parent's fitness. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972). The Due Process Clause forbids termination of parental rights without clear and convincing evidence *Santosky v. Kramer*, 455 U.S. 745, 768-769 (1982). Due Process requires an opportunity to be heard before a liberty interest is restricted. *Mathews v. Eldridge*, 424 U.S. 319, 331-334 (1976). North Carolina General Statute § 50-13.5(i) and the North Carolina Supreme Court's application of the statute creates mechanisms where a natural parent's rights can be constructively terminated without providing required constitutional protections. N.C. Gen. Stat. § 50-13.5(i); *Routten v. Routten*, 372 N.C. 571, 843 S.E.2d 154 (2020). Questions [2-3] are in addition to question [1] in the original Petition for a Writ of Certiorari:

2. Where a State denies a natural parent custody and visitation with children, does due process require the parent be provided a meaningful opportunity to be heard before denying custody and visitation?

3. Does a State violate due process where parental rights are constructively terminated while not providing the required constitutional protections?

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INTRODUCTION

This Petition for Rehearing is submitted within 25 days from December 11, 2020 and based on substantial grounds not previously submitted. Petitioner is Pro Se for this filing because Counsel of Record is pro bono and not available.

The original Petition for a Writ of Certiorari focused on conflict among the various states whether a natural parent could be denied visitation without a determination of unfitness. This Petition for a Rehearing supplements the original issue addressing due process concerns not previously submitted. The Petitioner is the victim of domestic violence and abuse but the court gave full legal and physical custody of the children to Respondent, the abusive parent, with the right to determine if Petitioner would have visitation.

A key element of domestic abuse is control, and the court gave Respondent full control of Petitioner's visitation. Petitioner hasn't had physical or visual contact with her children for almost five years, and the restrictive order effectively terminates her parental rights without affording the constitutional protections that are required for termination of parental rights. The family unit has been destroyed by the North Carolina courts. The Respondent has attempted to break the mother's bond with her daughter and son with serious heart issues.

STATEMENT OF THE CASE

The following information supplements the Statement of the Case in the original Petition for a Writ of Certiorari:

Petitioner was the victim of domestic violence and obtained a Domestic Violence Protective Order (DVPO) on 25 July 2014, beginning this case. Petitioner was thrown head-first into a glass top table, hitting the table, a chair and the floor, resulting in a concussion. She could have been killed in front of her two-year-old son. Petitioner and Respondent were married in 2002 and Respondent filed for divorce in September 2015. Petitioner had two children with Respondent, a daughter H.B. born in 2004 and a son B.C. born in 2012. B.C. was their miracle baby. Petitioner had a miscarriage in 2011. It took the doctors a while to realize it was twins and she was still pregnant with one. It was determined the baby had significant heart issues. The day after B.C. was born Duke surgeons removed his heart and rebuilt it. About two years later, during visitation, Petitioner saw indications of issues with B.C. and as a result he underwent another open-heart surgery to repair a valve in February 2015.

It's been almost 5 years since the Petitioner has even seen her children. Petitioner doesn't know what her children look like today, her daughter was 12 and her son was 3 going on 4. Her daughter is a teenager and her son, a heart baby, has spent more time away from her than with her. B.C. still needs his heart valve replaced with a mechanical one. Petitioner is an exhausted mom who's fought all the way up to the Supreme Court. God gave Petitioner the right to have children but the man who gave her a concussion took that away for almost 5 years with domestic violence because he has full custody and Petitioner none.

Based on misrepresentations of Respondent at the hearing on 13 August 2014, Petitioner waived the DVPO and entered into a custody agreement which gave Petitioner physical custody, joint legal custody, and Respondent alternate weekend visitation and a weekly dinner visitation. Respondent filed a complaint for custody and equitable distribution nine days earlier, which was not provided to Petitioner until after she waived the DVPO.

Petitioner was diagnosed with multiple sclerosis (MS) in 2001, was asymptomatic for the duration of this action. In the psychological evaluation of Petitioner in 2014, the psychologist made no diagnosis but recommended additional tests for conditions Petitioner "might" have since she had MS and recommended a neuropsychological evaluation but never spoke with Petitioner's primary care physician or neurologist. The neurologist testified at the custody trial in September 2015 he didn't consider her a candidate for a neuropsychological evaluation and preferred an MRI, but the court ordered it anyway. The additional conditions suggested by the court appointed psychologist were ruled out by an independent psychologist prior to trial.

After the trial on custody, alimony, attorney fees, child support and a contempt action against Respondent in September 2015, the court orally ordered physical custody to Respondent in October 2015. In December 2016, the court issued a temporary custody order giving physical custody during the school year to Respondent, physical custody during the summer to Petitioner, alternate weekend visitation to

Petitioner during the school year, joint legal custody with Respondent having the final say, and a rotating holiday schedule. The order required Petitioner's neuropsychological evaluation by June 2016.

Petitioner was never provided with the reason why she lost her children, other than to see a made-up diagnosis for her MS. Petitioner was accused of hiding test results by the opposing attorney. It was stated it had been completed in a motion submitted in a motion for continuance. The test came back better than anyone expected with nothing below average and several above. Petitioner had no reason to hide that test.

Petitioner had difficulty obtaining the neuropsychological evaluation since it's not medically necessary. She finally obtained the evaluation on 21 April 2016. A three-hour temporary custody hearing was to be held on 5 April 2016. Petitioner was prepared with evidence and the status of the neuropsychological evaluation, but instead the court held an in-chambers conference with just lawyers and Petitioner excluded. Due to finances, her attorney only represented her on a limited basis and hadn't talked recently before the judge went in chambers. No testimony or evidence was taken, and Petitioner had no opportunity to be heard, but the court issued a new order on 27 April 2016 with additional requirements for the neuropsychological evaluation. Petitioner fully complied with the original order but had no opportunity to provide input on the new order. Petitioner attempted a second evaluation to comply with the new order, but the provider refused based on

lack of medical necessity. The next opportunity to be heard was the 4 August hearing. Petitioner obtained the neuropsychological evaluation report on 3 August for the 4 August hearing and requested a continuance on 29 July 2016 so opposing counsel could review the report and requested a protective order. On 3 August Petitioner filed another request for continuance, for a protective order, and for return of the children since Respondent had kept them beyond visitation. At the 4 August hearing, as soon as the court found out Petitioner had the evaluation on 21 April 2016, without hearing any explanation from Petitioner, the judge threatened Petitioner with criminal contempt and refused to take the evaluation or allow it to be discussed by Petitioner or her attorney during that hearing. Opposing counsel asked questions about the process and the evaluation but was not a meaningful opportunity to be heard. The court removed custody and visitation from Petitioner. She hasn't had an opportunity to be heard on the evaluation or to submit the evaluation as evidence. The neuropsychological evaluation counters the allegations made by the court appointed psychologist and the related findings the court used to remove custody and visitation. The neuropsychological evaluation report was later sent to the court per instructions and immediately sealed by the court. A permanent custody order was issued in December 2016 and amended in March 2017. Petitioner is a good mom and doesn't know what she did wrong to lose custody.

This action has a lengthy procedural history due to Petitioner's attempts to regain custody of her children.

REASONS TO GRANT THE PETITION

In addition to the reasons set forth in the original Petition for a Writ of Certiorari, the following reasons are submitted:

I. Petitioner was Deprived of Her Liberty Interest as A Natural Parent and Denied Due Process When Her Children Were Removed from Her Custody and Visitation Without a Meaningful Opportunity to Be Heard.

A natural parent has a fundamental liberty interest in the care, custody, and nurturing of their child. *Santosky v. Kramer*, 455 U.S. 745, 758-759 (1982). A government decision depriving an individual of a liberty interest implicates procedural due process requirements of the Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Due process protects a parent's fundamental right to the care, custody, and control of their minor children. *Troxel v. Granville*, 539 U.S. 57, 66 (2000). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and manner. *Mathews*, *supra*, at 333.

At a custody hearing on 4 August 2016, the primary focus of the hearing was a neuropsychological evaluation the court required for Petitioner. Without giving Petitioner an opportunity to explain, when the court judge was told the evaluation was done on April 21, 2016, the court became angry and told the Petitioner and her attorney he wouldn't hear from them on that matter that day. The judge wouldn't take a copy of the neuropsychological evaluation at that

time. When he received it, he immediately sealed the report. The court held a condensed permanent custody hearing, during which the Petitioner and her attorney could not discuss the neuropsychological evaluation and the circumstances surrounding it. Respondent's counsel asked questions about the evaluation, but not Petitioner's counsel, so that was not a meaningful opportunity to be heard. At the hearing, the court issued a Memorandum of Judgment removing all custody and visitation from Petitioner. App. C, 65a-67a. The provisions regarding stipulation and agreement weren't on the handwritten Memorandum that day and weren't agreed to by Petitioner or her attorney. App. C, 66a-67a. A permanent custody order was issued on December 9, 2016. App. D, 68a-82a. No evidence or testimony was taken at the March 1, 2017 hearing and she had no opportunity to be heard.

Petitioner had no meaningful opportunity to be heard on the issue directly affecting custody prior to custody and visitation being removed. The Petitioner has not had that opportunity, over five years later. Due Process requires an opportunity to be heard before a liberty interest is restricted. *Mathews v. Eldridge*, 424 U.S. 319, 331-334 (1976).

Petitioner was denied due process when her custody and visitation of her children was removed with no opportunity to be heard.

The North Carolina Court of Appeals held this issue was waived and dismissed. App. B, 38a-39a. The Court of Appeals, focused the procedural due process argument on the April 5, 2016 hearing. *Id.* at 38a. The denial of the opportunity to be heard when Petitioner

lost custody and visitation was the August 4, 2016 hearing, not the April hearing. The Court of Appeals noted the constitutional issue was not raised in the Amended Rule 59 motion, the Amended Motion supplemented rather than replaced the original motion, which did address the procedural due process. *Id.* at 39a. The North Carolina Supreme Court didn't address this issue due to the Court of Appeals decision.

II. North Carolina General Statute § 50-13.5(i) and The North Carolina Supreme Court Interpretation of That Statute Create a Mechanism that Effectively Allows Constructive Termination of Parental Rights Without the Constitutional Protections Required for Termination of Parental Rights.

The North Carolina Supreme Court held that, between two natural parents, a court must apply “best interest of the child” to determine custody and visitation. *Routten v. Routten*, App. A, 12a. For termination of parental rights, the North Carolina Supreme Court applies the standard the government may only take a child from a natural parent where the parent is unfit, or the parent's conduct is inconsistent with his or her protected status. *Matter of E.B.*, 375 N.C. 310, 847 S.E.2d 666, 670-671(2020).

For denial of visitation, a court must make written findings of fact that the parent being denied is unfit or visitation is not in the best interest of the child. N.C. Gen. Stat. § 50-13.5(i), App. F, 106a. The standard of review for a court finding related to custody is whether the findings of fact are supported by competent evidence. *Romulus v. Romulus*, 215 N.C. App. 495,

498, 714 S.E. 2d 308, 311(2011). Abuse of discretion is required to overturn a child custody decision. *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). The court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary. *Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 352, 754 S.E.2d 831, 834 (2014). The standard for termination of parental rights cases is clear, cogent, and convincing evidence. *Matter of E.B.*, supra. at 672-673.

A. The Effect of North Carolina's actions has been equivalent to a constructive termination of parental rights while not providing the constitutional protections that termination proceedings require.

Under the North Carolina Statute, a parent's custody and visitation may be removed either by a showing that the parent is unfit or in the best interest of the children. N.C. Gen. Stat. § 50-13.5(i) (2019). In this case, the North Carolina Supreme Court upheld the best interest of the children standard as appropriate. *Routten v. Routten*, 372 N.C. 571, 578, 843 S.E.2d 154, 159 (2020). The permanent custody orders are extremely restrictive on Petitioner. The Petitioner's parental rights have effectively been terminated without affording Petitioner the procedural safeguards required for the termination of parental rights. Petitioner hasn't had personal, face to face, or visual contact with her two children for four years and five months. She last saw her daughter when she was twelve, now sixteen. She last saw her son when he was

almost four, now eight. Respondent has full legal and physical custody and has the right to determine visitation of Petitioner. Petitioner requests visitation frequently including birthdays, holidays, Halloween, and other occasions, which consistently is refused. The Amended Permanent Custody Order denies Petitioner the right to attend medical appointments of the children without the written permission of the Respondent which he won't grant. Petitioner's son was born with congenital heart failure. The day after he was born, surgeons removed his heart and rebuilt it and then repaired a valve in additional open-heart surgery over two and a half years later. The primary surgeon believed he would require additional surgery around age five, which hasn't occurred, and Petitioner cannot attend the appointments to provide her input or ask questions. Petitioner was her son's primary caretaker and there are no findings supporting the prohibition from doctor appointments. Another provision of the order allows law enforcement to enforce any provision of the order, so Petitioner is effectively prohibited from any situation where she may be in proximity of the children without prior permission, which won't be granted. Respondent's attorney has threatened trespass or other legal action if Petitioner leaves gifts for the children on Respondent's front steps. The order granted the Petitioner two phone calls a week to the children. She is not allowed Skype or Facetime or other video access by the Respondent. Electronic or telephonic communication is not a substitute for visitation or custody under North Carolina law. N.C. Gen. Stat. § 50-13.2(e). Petitioner's parental rights have been

constructively terminated by the North Carolina courts.

B. The constructive termination of parental rights cannot be easily countered in North Carolina based on the best interest of the children standard as applied by the North Carolina courts, in violation of the liberty interest of the 14th Amendment of the U.S. Constitution.

Creating a finding that custody or visitation is not in the best interest of the children is difficult to attack. In North Carolina, if any competent evidence supports a finding, the finding is sufficient even with substantial contrary evidence. It can only be overturned by showing abuse of discretion. It's hard to show supporting evidence is incompetent when the judge doesn't specify what evidence supports the finding. It is impossible to determine what the court used to decide Petitioner's custody was not in the best interest of the children. Under this standard, the flimsiest evidence could support a finding that custody and visitation is not in the best interest of the children without recourse to attack it due to the arbitrary abuse of discretion standard. Finding that visitation is not in the best interest of the children is the basis for the equivalent of termination of Petitioner's parental rights. Under N.C. Gen. Stat. § 50-13.5(i), this minimal finding is sufficient to deny custody and visitation, thereby circumventing the standards for termination of parental rights and violating due process rights. Because of the abuse of discretion standard, neither appellate court looked at whether

there were facts sufficient to totally deny custody and visitation even though a due process issue was raised in both courts.

CONCLUSION

The Petition for Rehearing should be granted.

Respectfully submitted,

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CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 S. Ct. R. and it is presented in good faith and not for delay.

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APPENDIX

APPENDIX J

N.C. Gen. Stat. § 50-13.2

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State; consideration of parent's military service.

(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party. An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child. Between the parents, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

(b) An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions. Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child. If

the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3). If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation. Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.

(b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

(b2) Any order for custody, including visitation, may, as a condition of such custody or visitation, require either or both parents, or any other person seeking custody or visitation, to abstain from consuming alcohol and may require submission to a continuous alcohol monitoring system, of a type approved by the Division of Adult Correction and Juvenile Justice of the Department of Public Safety, to verify compliance with

this condition of custody or visitation. Any order pursuant to this subsection shall include an order to the monitoring provider to report any violation of the order to the court and each party to the action. Failure to comply with this condition shall be grounds for civil or criminal contempt.

(c) An order for custody of a minor child may provide for such child to be taken outside of the State, but if the order contemplates the return of the child to this State, the judge may require the person, agency, organization or institution having custody out of this State to give bond or other security conditioned upon the return of the child to this State in accordance with the order of the court.

(d) If, within a reasonable time, one parent fails to consent to adoption pursuant to Chapter 48 of the General Statutes or parental rights have not been terminated, the consent of the other consenting parent shall not be effective in an action for custody of the child.

(e) An order for custody of a minor child may provide for visitation rights by electronic communication. In granting visitation by electronic communication, the court shall consider the following:

(1) Whether electronic communication is in the best interest of the minor child.

(2) Whether equipment to communicate by electronic means is available, accessible, and affordable to the parents of the minor child.

(3) Any other factor the court deems appropriate in determining whether to grant visitation by electronic communication.

The court may set guidelines for electronic communication, including the hours in which the communication may be made, the allocation of costs between the parents in implementing electronic communication with the child, and the furnishing of access information between parents necessary to facilitate electronic communication. Electronic communication with a minor child may be used to supplement visitation with the child. Electronic communication may not be used as a replacement or substitution for custody or visitation. The amount of time electronic communication is used shall not be a factor in calculating child support or be used to justify or support relocation by the custodial parent out of the immediate area or the State. Electronic communication between the minor child and the parent may be subject to supervision as ordered by the court. As used in this subsection, "electronic communication" means contact, other than face-to-face contact, facilitated by electronic means, such as by telephone, electronic mail, instant messaging, video teleconferencing, wired or wireless technologies by Internet, or other medium of communication.

(f) In a proceeding for custody of a minor child of a service member, a court may not consider a parent's past deployment or possible future deployment as the only basis in determining the best interest of the child. The court may consider any significant impact on the

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best interest of the child regarding the parent's past or possible future deployment.