

Ray R Lautenschlager

Ohio Family Rights Testimony in Opposition

Thank you for allowing me to submit testimony today, Chairman Manning, Assistant Chair Michele Reynolds, Ranking Member Paula Hicks-Hudson, and the rest of the members of the committee. We do have some questions for some of the committee members, and I would request that the Chair instruct the members to answer as soon as possible.

My name is Ray R. Lautenschlager, and I speak not only for myself but for Ohio Family Rights and its members.

I am again coming with strong opposition to SB174 and raising these issues on the recent amendments.

After reviewing the amendments, they fall extremely short of making any improvements to this bill and are nothing but “Lipstick on a Pig” as far as improvements.

It disgusts me that questions that were directed at members of this committee have yet to be answered. Or is that intention because you know that the points I raised are correct?

With all the time spent in the current General Assembly, why do the sponsors and committee members want to increase tax burdens on all the citizens of the state? The fiscal analysis is clear that there will be significant costs incurred.

- 1. Courts of common pleas will incur costs to adopt, implement, and administer rules on standard parenting time guidelines and cases involving the allocation of parenting responsibilities. The likely outcome is that courts will generally expend more time and effort to administer such cases, including possible costs associated with additional hearings, expert testimony, and guardian ad litem appointments. Some costs may be partially offset if fees are raised, which would be at the discretion of each court.**
- 2. County child support enforcement agencies (CSEAs) could incur costs to review or modify child support orders. The total cost will depend on the number of requests**

**received and the scope of review for requests.**

**These are not “could be increases”; these are guaranteed increases in the costs.**

I will address the Amendments that have been added to this bill.

Amendment No. AM\_136\_1079

While this amendment adds a finding of facts clause (should also have a conclusion of law clause), if the sponsors fail to realize that with complete discretion which has not been removed, even with all the objections to this, all a judge or magistrate needs to do is “say because I said so,” which is what is happening in Indiana now since they added that clause to their law.

1. Line 85 – Temporary orders are not appealable; only orders marked as final appealable can be challenged.
2. Line 93 – The sponsors clearly do not understand what a putative father is and what the purpose of the putative father’s registry is for, or its intended use. Punitive fathers are nothing more than a man who has had sex with a woman and may have gotten her pregnant. The purpose of

the registry is so that a father can be considered before the child is adopted by a stranger. The registry is rarely used and rarely checked. Common sense tells us that there would be no parent-child relationship when the father does not know that the child exists. Establishing a relationship is done through the juvenile court, not the putative fathers registry.

*Seeing the use of “person” tells me that LSC has not gotten the memo that DEI no longer exists in this Nation. There are other places where LSC has inserted DEI terminology that are not supported by common law principles. Common law principles have always used him or a male term to represent both males and females.*

3. Line 106 – Waiving fees will throw that cost back on every taxpayer.
4. Line 114 – While this committee claims that this bill is about the best interest of the child, this section that begins here fails to recognize that very fact. There is a reason for the procedures that are laid out in the Rules of Civil Procedure, and the timeline this creates does not do that and would not be able to be met by the courts without a significant increase in personnel.
5. Line 184 – Are we now changing how child support is calculated? The language here is reminiscent of the old child support law that considered the amount of time a parent spent with a child, instead of the current income shares.
6. Line 350 – Defining split parenting now lacks the ex post facto clauses that are required for the protection of both parents. This failure will create chaos for the parents and for CSEA. This clause also fails to recognize that child support orders in these situations are often willingly deviated to ensure that the expenses of the individual homes are not enhanced unreasonably.
7. Line 366 – These changes to Ohio’s current child support laws are best left to the Guideline Review committee that is coming up shortly. Changing this now will likely result in the being changed again during that process.
8. Line 394 – The changes here again cause me to question why this was not corrected by the sponsors before the introduction of this bill. Is it because the many years that they spent “working” on this, as Senator Gavarone claims, were nothing more than a “*horse chestnuts*” claim?
9. Line 500 – Again, another showing of sloppy workmanship by LSC and the Sponsoring senators.
10. Line 1164 – Changes to educational law are not appropriate for this legislation and must be considered through a separate bill and by a different and appropriate committee.
11. Line 1174 – Again, we are amending sections that should have been addressed before the introduction. And yet, Senator Gavarone claims that she worked on this for years before its introduction. Senator, I was not born yesterday, and neither were the parents who have raised opposition to this bill.
12. Line 1400 – The name of this department was changed before the introduction of this bill.
13. Line 1568 – Why are the sponsors not adding amendments that have nothing to do with custody between parents and pertain to child care centers? That is a conversation for different legislation and a different committee.
14. Line 1594 – Why are these amendments being made now instead of before introduction?

#### **Amendment No. am\_136\_1176**

The need for this amendment shows nothing but sloppy workmanship by LSC. Had they been doing their job correctly; this would have been handled in Amendment AM\_136\_1079 or before this bill was introduced.

## Amendment No. AM\_136\_1079

The restoration of the term parental rights is best described as nothing but lipstick on a pig.

Line 4631 – I had a conversation with a law school professor many years ago. He told me that “the first thing that a student is taught is the Constitution, it is also the first thing they forget.”

The insertion of this clause proves that statement correct.

There is no mention of parental rights in the Ohio or the US Constitution. The only vague mention of a child is the amendment that was added on abortion to the Ohio Constitution, and what that does is allow the murder of a child is certainly not in the best interest of any child.

It is clear that the sponsors do not understand the difference between a constitutional right and a fundamental right. I have addressed and explained this years ago and it would be best if you listened to that explanation. – [See it here](#)

This also raises a significant issue of what is the compelling state interest in the inference of a parent’s fundamental rights? Our portion paper is attached with our testimony.



While the bill is again before the committee, there are still questions that I raised in my testimony on October 8<sup>th</sup> that still have not been addressed and need to be addressed before that committee moves forward with this bill.

We are firmly opposed to SB174 for good reason, and you should be, too. After reading this bill, we have found language within this bill that will tumble Ohio backward to before 1978, when Ohio first started using joint custody as it standard. We have to wonder why it is the desire of the sponsors to remove shared parenting from Ohio law.

We are questioning why the sponsors have not disclosed that they will benefit from the passage of this bill.

We have to wonder why the Chairman of this Committee did not follow Ohio law and allow Judge Fuller to testify in favor of this bill? Ohio law is very clear on that procedure. (Attached is our position paper on the Judiciary testifying, and it is based on the Revised Code.)

Additionally, did the Chairman or other members of this Committee report to the Supreme Court that a judge testified on this bill? There is a judge that currently fighting a disciplinary complaint for testifying on a bill. Picking and choosing who has complaints filed against them undermines the integrity of the judiciary.

I have read through the 417 Pages of this bill and found numerous problems:

- Removes the words "*parental rights*" and replaces them with "*parental responsibilities*" throughout the code --- parents have responsibilities, NOT rights, according to the Judges. The

court must appoint a "*designated parent*" to have legal custody. The switch to the use of "*designated parent*" from the current use of residential with cause problems with taxes for school districts and a major conflict with the language other states use.

- Has the appropriate paperwork been prepared for filing to remove Ohio from the Uniform Child Custody Jurisdiction and Enforcement Act?
- Offers no guidance for courts on where to begin. i.e., a baseline.
- Gives courts "*complete discretion*" over all parenting plans -- which means total power to do what they "feel is best" no matter what. Even if parents agree!
- Within the section on courts, there are major inconsistencies between counties. In some counties, only a judge (not magistrates as currently used) will be able to hear a custody case.
- Courts aren't just "approving" plans those parents submit; they get to "issue" one of their own if they want -- again maximizing control of the family.
- Adds even more factors to consider without guidance on what to DO with those factors. So, courts must apply their personal biases and opinions to even more factors.
- Requires courts to create a plan specific to the child's age and developmental stage. All children develop at a different rate, and this would require a parenting plan that tries to take that into consideration, which is impossible.
- Courts can *deny a joint request by both parents for "equal time"* if the court thinks it's "best".
- Creates additional "best interest" factors, including a parent's "past performance" and parents' work schedules related to the child's schedule. This allows courts to give preference to a stay-at-home mom over a working dad, for instance--simply because the dad has a job.
- They have new criteria for determining if a parent is "unsuitable" to parent and explicitly state that they must only apply the preponderance of evidence (the lowest standard there is) when deciding if a parent is unsuitable. Factors include "abandonment" and "detrimental". The whole criteria for who is "unsuitable" is *subjective*, with a very low standard of evidence. This will allow abusive and neglectful parents to be based on a lower evidentiary standard than is suggested by the United States Supreme Court. (Attached is our position paper on the evidentiary standard that is used.)
- Never-married fathers cannot file for custody or visitation with their children.
- A person being "fearful of harm," under preponderance of evidence, is a specified reason to restrict a parent's responsibilities or time with their children. This is an attempt to confuse civil restraining orders with criminal restraining orders.

- At any point during the open case, the court can order a multitude of investigations and evaluations at the parents' expense. What for? To investigate a parent's "character, past conduct, family relations, etc."
- There are conflicts with FERPA (Federal Education Rights of the Parent Act) and conflicts with current law.
- Sets military rights during deployment back to before the past updates in 2012.
- Allows total strangers to file for custody of a child.
- Never-married fathers are not permitted to file for custody of their children. That section alone raises serious constitutional issues with this bill. This also raises the sincerity of the Senate and the House when they granted \$20 million to the Ohio Fatherhood Commission to get more never-married fathers involved.
- I did talk to members of the Ohio Fatherhood Commission and was told directly that this bill was never presented to the commission and that, according to Kimberley Dent, does not comment or approve legislation in this state. Assistant Chair Michele Reynolds is a member of that commission and never spoke up when a member of the BAR Association stated it.
- Why is the testimony of Judge Fuller and Senator Gavarone, and Senator Hicks-Hudson the same? Who wrote for whom, or can't the sponsors speak in their own words about this bill? Or have the sponsors not even read or understood what they introduced?
- Should this bill be passed, it will affect the ability of grandparents to see their grandchildren.
- It will allow the courts the ability to determine how a child is educated and if a parent, not both parents, to determine if a minor goes through transgender conversion. Conservatives fought hard to get that into law, and now the judges want that control.

I do have questions that members of this committee need to answer for me, and my contact information is attached.

For Chairman Manning – Is your desire to push this legislation through based on the awards you receive for the Ohio Domestic Violence Network and their claims that all men are violent? The fact is that domestic violence statistics are grouped in three ways - Man vs Woman, Man vs Man, Women vs Women. The majority of the cases are women vs women, with man vs man being the least. ODVN also fails to offer equal facilities and help for men. They also throw confusion by not separating the criminal and the simple "I am afraid of the other person claims." While everyone

should be against domestic violence, I am a survivor; using false claims to gain favor with legislators is repugnant.

Senator Gavarone and Senator Hicks-Hudson, both of you need to answer the same questions for all.

Senator Gavarone, I saw that you introduced SB277. While fundamentally a good bill, except this bill will negate that bill.

Did you verify the information and claims that there are counties with “equal custody” as their baseline? This is a false claim that is made since there are none, only ones that other multiple suggested pans with that being one of the options. That report that he referred to did not look at the standard orders from juvenile courts across the state. I have looked at and am currently updating our breakdown, which shows there to be a lack of consistency even between courts within the same county. You can see those [here](#).

There is common-sense legislation available that brings up the out-of-date law to modern societal standards; unfortunately, the Ohio Senate, in particular this committee, is refusing to recognize that at this present time. That legislation is currently in LCS for introduction in the House. If any of you wish to discuss that proposal, please feel free to contact me.

**Ray R. Lautenschlager**

Legislative Director

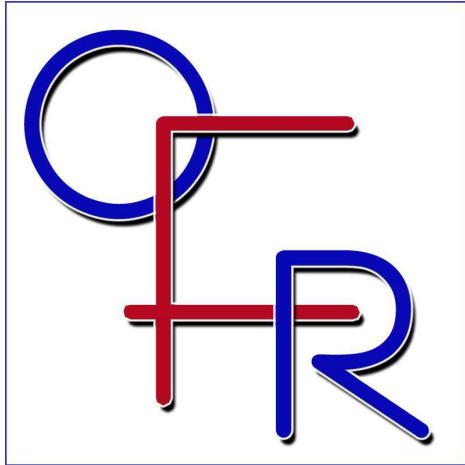
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## Has the Ohio Judiciary Overstepped Their Bounds?

### *A Look at the Judiciary and Objections to Reforms in Family Law*

It may be time for us to examine current Ohio laws and stated policies of the state, policies that were enacted by the General Assembly. What we need to look at is whether or not those policies are truly being followed or if the Ohio judiciary has

overstepped its bounds and is now usurping the authority of the General Assembly to control the policies on how the families of Ohio are treated. This report intends to analyze if the judges of the State of Ohio have in the past stepped outside of the legal authority contained in the Ohio Revised Code, Ohio and United States Constitution and their Canons of Conduct, when it comes to commenting on introduced bills that affect public policy on the families in this state.

To fully piece this together three different elements come into play that I will give general overviews of and then later show how they all piece together as the argument for telling judges to stop their objections to changes to the law that will benefit every citizen of the State of Ohio as well as the operation of the courts in the end.

### **Separation of Powers**

The intent of separation of powers in a tripartite system of government is to limit the role members of the judiciary, executive branch, and the legislative branches have in the function of the other branches. This is to assure checks and balances between the three branches of government in its constitutional structure; that no branch became so powerful that it took authority over another. That none of the three branches blatantly interfered with the operation of another branch.

**The Executive Branch** has the responsibility of running the daily operations of the government's multiple agencies. They can suggest changes to the law but cannot under normal circumstances write and pass a law or rule without the approval of the Legislature.

**The Judicial Branch** has the responsibility of operating the court system of the state and deciding issues of controversy or criminal activity that are brought before the Courts.

**The Legislative Branch** is solely responsible for writing and passing the laws which govern the state and protect its citizens.

This is a simple concept that is intended to keep the power and authority of one branch from becoming totalitarian over the citizenry or the other branches of government and prevent the monarchy type of government that the original settlers to this land left England to get away from. A simple concept that is often forgotten in times where we see and hear often about the courts making rulings on laws that they did not write nor did they pass. Too often in the media frenzy of these cases, it is forgotten that it is the individual citizen and not the Courts that have brought these cases before them for a decision based on a particular set of circumstances that have occurred. The Court cannot comment until the suit is filed and must remain silent until asked to decide if a true controversy exists.

## **Authority to Comment Under the Ohio Revised Code**

While the judges of this state are permitted to comment on newly introduced bills there are limitations on what they can comment on if they oppose and procedures that they have to follow in doing so. The following is the Ohio Revised Code that spells out the process with a couple of key phrases highlighted that have been keys to pass bills that make changes to family law.

### **105.911 Judicial impact statement. (Emphasis added)**

(A) If a bill or resolution introduced in the general assembly appears to affect the revenues or expenditures of the courts of Ohio, to ***increase or decrease<sup>i</sup> the workload or caseload of judges*** or members of their staffs, or to affect case disposition, the Ohio judicial conference may prepare a judicial impact statement of the bill or resolution on its own initiative or at the request of any member of the general assembly. The Ohio judicial conference may prepare a judicial impact statement before the bill or resolution is recommended for passage by the house of representatives or senate committee of the general assembly to which the bill was referred

and again before the bill or resolution is taken up for final consideration by either house of the general assembly. The judicial impact statement shall include ***an estimate, in dollars, of the amount by which the bill or resolution would increase or decrease revenues or expenditures*** and any other information the Ohio judicial conference considers necessary to explain the fiscal effect of the bill or resolution. The statement also shall include an ***analysis of the bill or resolution's administrative and procedural effects on the courts of this state.***

(B) The Ohio judicial conference shall distribute copies of a judicial impact statement as follows:

(1) For consideration by the senate or house of representatives rules committee, or the standing committee to which a bill is referred, two copies to the chairman together with a copy to each member of the committee;

(2) For final consideration, a copy to each member of the house that is considering the bill. If the member who introduced the bill or resolution or who requested the statement is not a member of the house or rules committee considering the bill, the Ohio judicial conference shall send the member a copy.

(C) In preparing a judicial impact statement the Ohio judicial conference may request any court, department, division, institution, board, commission, authority, bureau, or other instrumentality or officer of the state or of a county, municipal corporation, township, school district, or other governmental entity of the state to provide any of the following information:

(1) An estimate, in dollars, of the amount by which the bill or resolution would increase or decrease the revenues or expenditures received or made by the court, instrumentality, officer, or entity;

(2) Any other information the Ohio judicial conference considers necessary for it to understand or explain the fiscal, administrative, and procedural effects of the bill or resolution.

The Ohio judicial conference ***first shall contact the Ohio legislative budget office*** for information regarding the fiscal effects of the bill or resolution. If the Ohio legislative budget office does not have the fiscal information sought by the Ohio judicial conference, then the Ohio judicial conference and the Ohio legislative budget office jointly may request any of the entities described in division (C) of this section to provide the fiscal information.

A court, instrumentality, officer, or entity shall comply with a request for information as soon as reasonably possible after receiving it. The Ohio judicial conference shall specify the manner of compliance in its request and, if necessary, may specify a period of no longer than five days for

compliance. The Ohio judicial conference may consider any information provided under division (C) of this section in preparing a judicial impact statement.

(D) The failure of the Ohio judicial conference to prepare a judicial impact statement before a bill or resolution is taken up for consideration by the house of representatives or senate committee, or by either or both houses for final consideration, shall not impair the validity of any bill or resolution passed by either or both houses of the general assembly.

(E) This section does not affect the duty of the Ohio legislative budget office to prepare fiscal analyses pursuant to section [103.14](#) of the Revised Code.

(F) As used in this section:

(1) With regard to a bill or resolution, "procedural effects" includes all court-related procedures, including pretrial, trial, and post-trial proceedings.

(2) With regard to a bill or resolution, "administrative effects" includes matters pertaining to the business of the courts, including clerical processes, records management, planning and research, changes in court personnel, calendar management, facilities and equipment, workload distribution, court reorganization, and the creation or addition of judgeships.

Effective Date: 10-06-1994

**Related Legislative Provision:** See 129th General Assembly File No.39, SB 171, §4

**The Ohio Revised Code** is clear in its intent and in showing under what conditions the judges of the state are allowed to comment on proposed legislation or resolutions. They must show that a proposal will increase or decrease the workload for the courts and costs the courts money by doing so. They must also show by asking the budget office to analyze the cost of the proposal on the courts. The third element is the proof that these proposals would make changes to procedures or the administration of the courts.

What the judges are not permitted to comment on is changes to the law that affect the State's overall policies or the court's use of items such as evidentiary standards that they are to use. Those are set by the Legislative Branch of the state in the manner in which the law is written. Procedures for the handling of cases are well defined which the Rules of Civil Procedure that the Courts have the authority to define, albeit with input from the judges, attorneys, and the public of the state.

To provide a bit of a history of comments on past family law bills, the judges have always complained of a loss of discretion. Discretion or the use of preponderance standard of review is not **an administrative process**; it is a function of law that is determined by the Legislative Branch.

In past bills where they have asked for a financial analyst of these changes, the budget has come back with a showing of no additional cost. That analysis was asked for on GA 125<sup>th</sup> HB232, GA 126<sup>th</sup> HB688 but never asked for with either GA 129<sup>th</sup> SB144 or HB253 even though the judges opposed the latter two bills partially on claims of increased costs to the courts.

To expand upon and explain this claim that the courts would lose their “discretion”, we need to look at the standard of review currently in use. Currently, the courts use a preponderance of evidence standard in making determinations of custody. This allows for the use of extremely broad use of and personal interpretation of the evidence presented rather than the use of clear of convincing evidence<sup>ii</sup> that the United States Supreme Court stated within Santosky v Kramer<sup>iii</sup> was the only acceptable standard of review for the courts to show that there exists a compelling state’s interest to interfere with a parent’s legal rights. Any time that a Court decides terms under which a parent may or may not see their child there must be a clear show as to why the rights of that parent should be changed to protect the child. The mere dissolution of a personal relationship thru a divorce is not sufficient to cause to interfere with the rights of a parent. If it were, then every child of every divorcing couple would have to be taken into the care of the state for protection.

**Legal definitions of both follow:**

**preponderance of the evidence**

n. the greater weight of the evidence required in a civil (non-criminal) lawsuit for the trier of fact (jury or judge without a jury) to decide in favor of one side or the other. This preponderance is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence. Thus, one clearly knowledgeable witness may provide a preponderance of evidence over a dozen witnesses with hazy testimony, or a signed agreement with definite terms may outweigh opinions or speculation about what the parties intended. Preponderance of the evidence is required in a civil case and is contrasted with "beyond a reasonable doubt," which is the more severe test of evidence required to convict in a criminal trial. No matter what the definition stated in various legal opinions, the meaning is somewhat subjective.

### **clear and convincing evidence<sup>iv</sup>**

n. evidence that proves a matter by the "preponderance of evidence" required in civil cases and beyond the "reasonable doubt" needed to convict in a criminal case.

One needs to question why a court or its officers would not want to be held to the highest standards and quality of work when it comes to making a determination of custody. Making this claim also steps far outside of the bounds of what they are permitted to comment on as stated under the Ohio Revised Code.

## **Ohio Code of Judicial Conduct**

The third element is what the Judicial Cannons or Code of Conduct have to say in respect to how and under what circumstances a judge may comment on the law.

### **RULE 3.2 Appearances before Governmental Bodies and Consultation with Government Officials**

**A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except as follows:**

- (A) In connection with matters concerning the law, the legal system, or the administration of justice;
- (B) In connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties;
- (C) When the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity

Every time there have been bills introduced that concerns family law, or whether it changes to the way we view and award custody or alimony reforms (GA 129 HB348), the judges have asked for and been allowed meetings with representatives or senators to discuss these changes. Based on their code of conduct, these meetings are in direct violation of permissible behavior for the judiciary of Ohio. They have not appeared or been summoned to testify under the power of subpoena as would be indicated by the own Code of Conduct. I will verify that I have been at one House Public Testimony Hearing where Judge Richard Stuckey<sup>v</sup> who at that time was sitting on the bench in Stark County, testified against HB232. The judges did ask for a meeting with us to discuss the "problems" within HB232 but when told

that we were willing to meet, they never stated the time or place for that meeting to take place when we accepted their offer. The second was a stakeholder's meeting held at the request of Senator LaRose where a judge gave his opposition to SB144. I cannot verify but was told that the judges also were granted a meeting with Representative Pelanda on her alimony reform bill, HB348. I have to wonder how many other meetings have taken place contrary to what the Judicial Code of Conduct states that the judges may do.

## **The Tie Together**

To tie this all together for ease of understanding, Separation of Powers intention is to keep the branches of government from interfering with the function and authority of the coexisting other branches of government, it is in short, a checks and balances principle with the intent to keep all from having too much power over the citizens that they represent. The Ohio Revised Code places specific requirements on what, how, and what must be shown for the judges to comment on a proposed bill or resolution that is being considered by the Legislative Branch which is responsible for creating policies and laws that govern the state. The final is the restrictions and under what terms a judge comments on law outside of deciding on a "case of controversy" that is brought before the Court.

If the State of Ohio is to move forward with long-needed updates to the policies that address the families of Ohio this must stop today. These reforms have been called for twice in the past in written reports with the Task Force on Family Law in 2001<sup>vi</sup> and again with the Ohio Father Commission's report to incoming Governor Strickland in 2007<sup>vii</sup>. The introduction by the General Assembly of four previous bills speaks volumes in itself of the need for rethinking these policies now and that these laws be updated to meet the needs of current society and its problems. That will not take place until the General Assembly tells the judges of the state to return to their area and stay out of the legislative process.

As an appendix to this report, I will include the Judicial Impact statement from GA 125<sup>th</sup> HB232 and for GA 129<sup>th</sup> SB144 that clearly show that the judiciary has stepped over the limited bounds on commenting on the proposed changes to Ohio's Shared Parenting law. While in each of their comments on these bills the Judiciary has complained of what they claim is a loss of confidence in the judiciary, it is this insertion into the legislative process which is why many have lost confidence in the judiciary. Those that have gone thru the process of the family courts of Ohio have very much lost confidence in them and in the willingness of the courts to reduce the involvement of a parent for no other reason except that the

parents can't get along or have chosen to dissolve a personal relationship. Add to this the slowness and expense of what should be a relatively simple legal process taking years to complete while draining bank accounts and the college funds of children, confidence is not all that has been lost by many. For those of us that have been working on these reforms, our confidence is lost in the numerous smoke screen defenses that have been put forth in the Judicial Impact Statements that are clear misinterpretations of the bills that they have chosen to comment on. These are done to make it appear that they are doing a proper job for the State of Ohio when they have failed all. Confidence has been lost because of inconsistencies in the decision making of the judges of this state in the cases before them. Two cases with the same circumstances more than not produce differing results all because of the broad discretionary powers that exist in an area of law that lacks two major factors that the judges need to assist and guide them in their decisions.

It is time to tell the judges of the state to respect the families of the state, the legislators of the state, and the Constitution of the state, and return to what they were elected to do; decide cases of controversy, not legislate.

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<sup>i</sup> Frankly, we should be encouraging a decrease in the workloads on the Courts. Within the family court system of Ohio, several courts have taken to task for the slow movement of cases in various counties. This has been done in both the media and by the Ohio Supreme Court.

<sup>ii</sup> <http://www.ohiofamilyrights.com/Reports/White-Papers/Clear-and-Convincing-vs-Prepon/clear-and-convincing-vs-preponderance-.html>

<sup>iii</sup> [Santosky v. Kramer, 455 US 745 - Supreme Court 1982](#)

<sup>iv</sup> Clear and convincing is the civil court's equivalent of beyond a shadow of doubt.

<sup>v</sup> Now retired and currently a visiting judge and serving on divorce and custody cases

<sup>vi</sup> <http://www.ohiofamilyrights.com/Reports/Special-Reports-Page-3/Ohio-Task-Force-on-Family-Law-and-Children.pdf>

<sup>vii</sup> [http://www.ohiofamilyrights.com/Reports/Special-Reports-Page-1/2007\\_Final\\_Report\\_-\\_Ohio\\_Commission\\_on\\_Fatherhood\\_Transition\\_Committee.pdf](http://www.ohiofamilyrights.com/Reports/Special-Reports-Page-1/2007_Final_Report_-_Ohio_Commission_on_Fatherhood_Transition_Committee.pdf)



## Preponderance versa Clear and Convincing

The current evidentiary standard used by courts in determining custody awards in cases which involve divorced and never married parents is preponderance. This standard means that to be granted an advantage in having more custody of the child one need only sway the decision maker by 51% or just slightly more over the other parent.

Through the years many have called for this evidentiary standard to be changed and for good reason. Too many personal biases can enter the decision making<sup>1</sup> of the trier of fact that easily sway their final decision when making or awarding custody of a child. Decisions of this importance that determine the future participation of both parents in the life of a child must be taken and based upon the highest standards of law available, that standard is clear and convincing evidence. While the Family Court system is a civil court and operates under the terminology associated with other civil proceedings such as lawsuits, clear and convincing evidence is the civil equivalent of beyond a shadow of doubt that is used in criminal cases. It is the highest standard of review possible in a court of law.

In order to understand why this evidentiary standard needs to be changed we need to examine the case law on parental rights. Throughout the years there have been a long series of the United States Supreme Court decisions that have held that the right to be a parent is a fundamental right<sup>2</sup>, which is one that is granted by God not one protected by the Constitution

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<sup>1</sup> The American BAR Association released the results of a survey that showed that the majority of the family court judges still made their custody decisions as though "tender years doctrine" (thoughts that only a mother could raise a child) was still in effect.

[http://www.ohiofamilyrights.info/Newsletters/ohio\\_family\\_rights\\_judicial\\_survey\\_and\\_tender\\_years.htm](http://www.ohiofamilyrights.info/Newsletters/ohio_family_rights_judicial_survey_and_tender_years.htm)

<sup>2</sup> [Meyer v. State of Nebraska, 262 U.S. 390 \(1923\)](#), [Pierce v. Society of Sisters, 268 U.S. 510 \(1925\)](#), [Prince v. Commonwealth of Massachusetts, 321 U.S. 158 \(1944\)](#), [Ginsberg v. New York, 390 U.S. 629 \(1968\)](#), [Wisconsin v. Yoder, 406 U.S. 205 \(1972\)](#), [Cleveland Board of Education v. LaFleur, 414 U.S. 632 \(1974\)](#), [Moore v. East Cleveland, 431 U.S. 494 \(1977\)](#), [Smith v. Organization of Foster Families, 431 U.S. 816 \(1977\)](#), [Quilloin v. Walcott, 434 U.S. 246 \(1978\)](#), [Parham v. J. R., 442 U.S. 584 \(1979\)](#), [Santosky v. Kramer, 455 U.S. 745 \(1982\)](#), [Reno v. Flores, 507 U.S. 292 \(1993\)](#), [Washington v. Glucksburg, 521 U.S. 702 \(1997\)](#), [Troxel v. Granville, 530 U.S. 57 \(2000\)](#)

or law. While the courts and the laws are instructing judges to make their decisions based on "***the best interest of the child***"<sup>3</sup>, the laws themselves are lacking in a legal definition of the term that is peppered throughout all custody law. Without a clear definition of what is the ***best interest of the child***, decisions are often made that remove fit parents from the lives of their children every day.

In the [Troxel v. Granville, 530 U.S. 57 \(2000\)](#) decision the case of [Parham v. J. R., 442 U.S. 584 \(1979\)](#) was quoted. That quote really gives us the best guidance as to what is the best interest of the child.

"[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."<sup>4</sup>

In another US Supreme Court case, [Santosky v. Kramer, 455 U.S. 745 \(1982\)](#), the High Court found that to terminate parental rights courts must use the clear and convincing evidentiary standard. Santosky also recognized that the right to be a parent was a fundamental right and terminate or interfere with such a fund fundamental right required that the highest possible level of review be used. That level of review is clear and convincing evidence.

Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in [748\\*748](#) their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.<sup>5</sup>

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State

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<sup>3</sup> Ohio Family Rights has conducted an extensive study of family law statutes for the 50 states and has yet to find a single legal definition of best interests of the child in any of them. Yet on the converse we have found many states that recognize that parenting is a fundamental right.

<sup>4</sup> [Parham v. J. R., 442 U.S. 584 \(1979\)](#)

<sup>5</sup> [Santosky v. Kramer, 455 U.S. 745 \(1982\)](#)

moves to [754\\*754](#) destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures<sup>6</sup>

[In re Hayes](#) which came before the Ohio Supreme Court, the court made note that to terminate a parents rights was the equivalent of the death penalty of a family.

It is well recognized that the right to raise a child is an "essential" and "basic" civil right. [In re Murray \(1990\), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169, 1171](#), quoting [Stanley v. Illinois \(1972\), 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551, 558](#). Furthermore, a parent's right to the custody of his or her child has been deemed "paramount." [In re Perales \(1977\), 52 Ohio St.2d 89, 97, 6 O.O.3d 293, 297, 369 N.E.2d 1047, 1051-1052](#). Permanent termination of parental rights has been described as "the family law equivalent of the death penalty in a criminal case." [In re Smith \(1991\), 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 54](#). Therefore, parents "must be afforded every procedural and substantive protection the law allows." *Id.* With this in mind, we turn to the construction of former R.C. 2151.413(A).<sup>7</sup>

That statement alone highly suggests that the courts need the extra guidance that clear and convincing evidence provides when making determinations in regards to the custody of the child. Any limitation or restriction on the involvement of the parent In the life of their child is an encroachment upon a fundamental right. Based on all case law, for the state to take such action as to limit or restrict the involvement of a parent in the life of their child there must be a compelling interest by this state. Such compelling interest would be incidences where a parent is proven to be unfit to be involved with the child. Limitations or restrictions cannot, or should they ever be, taken lightly when done by the state. While it is the goal of every state to protect the vulnerable, these intrusions must be taken with an un-jaundiced eye. The only way for the courts to have an un-jaundiced eye is to consider all custody decisions by using the highest standard of review possible, clear and convincing evidence.

At present, the use of preponderance as an evidentiary standard has created a situation that can only be equated to walking into an unknown families home, that is one which you have no interest or no knowledge of, and telling them how, where and when every aspect of that families involvement with their own children is going to take place. Common sense tells us that as individuals we are not about to walk into an unknown neighbor's home and begin to tell them how to raise their family, nor should any court or judge ever be permitted to do the same

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<sup>6</sup> [Santosky v. Kramer, 455 U.S. 745 \(1982\)](#)

<sup>7</sup> [IN RE HAYES. 79 Ohio St.3d 46 \(1997\)](#)

without having full knowledge of that family. Again the only way to achieve that is by using the clear and convincing evidentiary standard.

Looking at the statistics, including the fact that 85% of all custodial parents are mother<sup>8</sup>, one begins to see the scope of the failure to protect future society that the use of preponderance standard has created. If we are to begin the corrections to righting the wrongs of the past that have been created by poor family policies of the states that beginning must take place and start with of the review standard that we use for determining custody between two fit parents. When the courts of this country have told us that the rights to be a parent in a fundamental rights and the termination is the equivalent of the death sentence, even the common sense of a layman says that we have looked and approached the decision making improperly for too long.

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<sup>8</sup> US Census Bureau



## Compelling State Interest

*What is it, and why is it important?*

[PDF Format](#)

May 12, 2025

Those who have seen the [handout](#) that is used and suggest be given to legislators to open a discussion about changing the way custody is approached between divorcing and never-married parents may have noticed a new question that was added this year. Two are familiar, but the second one is new, and it goes over many heads.

1. *Why do we allow the removal of fit parents from the lives of their children every day?*
2. *What is the compelling state interest in doing so?*
3. *Do parents divorce their children when they end their own personal relationship?*

#1 has gotten many heads shaking, and a What do you mean reply.

#3 is a dig at the BAR association and their thought pattern that the courts always get it right. Yes, I have heard that from an attorney representing the BAR at an interested parties meeting before.

But #2 is the new one that attorneys will miss the finer details about that question and the arguments that come with it. Often, they miss it because they ignore or skip over the first question.

To explain:

**A "compelling state interest" is a government goal so crucial and necessary that it justifies overriding a fundamental constitutional right. This term is used in legal contexts, particularly when reviewing laws that infringe on fundamental rights like freedom of speech, religion, or the right to privacy. To be deemed compelling, the interest must be essential or necessary, not just a matter of choice or preference.**



Asking what the compelling state interest is raises the question of what the goal is when you enhance the rights of one and diminish the rights of another while using preponderance as an evidentiary standard. To do that would require strict scrutiny.

**Are there times when the state does have a compelling state interest in the custody or care of a child?**

Yes, but there are limits as to where they can and how they must view the cases.

In Children's Services cases, the state has a compelling interest in protecting children from harm and abuse. To terminate a parent's rights, they have a defined process, and they must prove through clear and convincing evidence that the abuse happened and that the parent was at fault.

The passage of HB68 is a prime example of the state exercising a compelling state interest. That legislation is to prevent minors or their parents from doing irreparable harm to a vulnerable minor.

**Comments and replies**

I expect that I will hear several comments when this issue is raised before the committee on custody legislation, but I am prepared. Responding quickly will quell further comments and end oppositional arguments fast. I will also explain that this issue has not been approached correctly and needs to be changed.

***We have to do this to protect the best interests of the child.***

Define the best interest of the child.

Parham teaches us that two fit parents will always act in the best interest of the child.

“The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.”

(1979) U S Supreme Court’s Parham v. J.R. decision

Does the state declare that two parents are unfit because they ended their relationship?

If it does, then the strictest scrutiny must be applied.

Why do you think it is appropriate to walk into an unknown person’s home and tell them how to raise their family?

**To use this argument to support changes to a custody law, understand all that you can about the issue and the case law associated with it.**

This argument is based in the [fundamental right](#) to be a parent as well as [First Amendment](#) free associative rights.

First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in *Parham*:

"[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." [442 U. S., at 602](#) (alteration in original) (internal quotation marks and citations omitted).

Accordingly, so long as a parent adequately cares for his or her children (*i. e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the [69\\*69](#) best decisions concerning the rearing of that parent's children. See, *e. g.*, [Flores, 507 U. S., at 304](#).

**Justice Scalia, dissenting.**

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." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative [92\\*92](#) democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

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Additional Information below:

<https://firstamendment.mtsu.edu/article/compelling-state-interest/>

### [Troxel v. Granville, 530 US 57 - Supreme Court 2000](#)

One of the "fundamental liberty interests" recognized by the Supreme Court is the "interest of parents to make decisions concerning the care, custody, and control of their children."

- in [Hansen v. Ann Arbor Public Schools, 2003](#) and 1,989 similar citations

"A parent's interest in the care, custody, and control of his or her children is `perhaps the oldest of the fundamental liberty interests.'"Id

- in [IN RE CHANGE OF GENDER OF OJGS, 2022](#) and 1,799 similar citations

A parent retains a fundamental right to make decisions concerning her child's care, custody and control.

- in [Glueckert v. Glueckert, 2015](#) and 150 similar citations

The court then stated that, "so long as a parent adequately cares for his or her children (ie, is fit), there will normally be no reason for the State to inject 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."

- in [In re Lankford, 2016](#) and 671 similar citations

Second, as the statute had been construed by the Washington Supreme Court, it "accorded no deference" to the decision of a "fit" parent—described as a parent who "adequately cares for his or her children"—that visitation would not be in the child's best interest.

- in [In re CJC, 2020](#) and 32 similar citations

—the Supreme Court examined a Washington visitation statute which allowed any person to petition for visitation rights at any time, and allowed state courts to grant visitation rights whenever it was in the best interest of the child, without any regard to the reasonable wishes of a fit custodial parent.

- in [IN THE MATTER OF THE MARRIAGE OF RIGGS, 2006](#) and 37 similar citations

The Supreme Court in **Troxel** recognized that "there is a presumption that fit parents act in the best interests of their children."

- in [People in Interest of ST, 2015](#) and 97 similar citations

We are mindful, however, that "[p] arents have a liberty interest in directing the care, custody and control of their children," and that "[t] he Due Process Clause does not permit a state to infringe on a fit parent's fundamental right to make child rearing decisions simply because a court disagrees with the parent or believes a better decision could be made."

- in [Lubinski v. Lubinski, 2008](#) and 138 similar citations

### [Parham v. JR, 442 US 584 - Supreme Court 1979](#)

And historically the law has recognized that "natural bonds of affection lead parents to act in the best interests of their children

- in [Norman v. Norman, 2014](#) and 392 similar citations

A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment

- in [Capen v. Saginaw County, 2023](#) and 243 similar citations

Simply because the decision of a parent is not agreeable... or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state

- in [Harrison v. Harrison, 2016](#) and 160 similar citations

The Court reasoned that "the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a `neutral factfinder 'to determine whether the statutory requirements for admission are satisfied

- in [NATIVE VILLAGE OF KWINHAGAK v. DHSS, OCS, 2024](#) and 96 similar citations

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.

- in [In re KC Greenhouse Patio Apartments, LP, 2012](#) and 430 similar citations

Yet, the state "is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."

- in [New Jersey Division of Youth and Family Services v. DM, 2012](#) and 293 similar citations

"The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition."

- in [Hodgson v. Minnesota, 1990](#) and 182 similar citations

Hamdi's "private interest... affected by the official action," *ibid.*, is the most elemental of liberty interests—the interest in being free from physical detention by one's own government.

- in [Hamdi v. Rumsfeld, 2004](#) and 56 similar citations

Some of these limitations arise out of an appreciation of the state's long recognized interests as *parens patriae*.

- in [In re Ivory W., 2022](#) and 38 similar citations

Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments

- in [Rudnicki v. Bianco, 2021](#)