# Child Custody:
## 'Best Interest' or 'Unsuitability'?

Unsuitability Resurrected: The Unconstitutionality of §3109.04(D)(2)

*By Laurie B. Gibson*

In 1877, the Ohio Supreme Court held in *Clark v. Bayer* that parents who are *suitable* have a paramount right to the custody of their children unless they forfeit that right or become totally unable to care for their children. [1] This requirement of "inability" or "parental unsuitability" (i.e. that a parent must be deemed unsuitable before losing custody to a nonparent) became Ohio's standard for custody cases arising in both domestic relations and juvenile courts and was codified in 1893.[2] This standard remained for both courts until 1974 when the legislature amended domestic relations custody statute ORC §3109.04. Where this statute previously explicitly required the unsuitability of a parent before that parent could lose custody to a third party, the legislature substituted a mere "best interest" test such that even suitable parents could lose custody of their child to a nonparent if the court determined this to be in the best interest of the child. [3]

## Constitutional Implications of " Best Interest" Versus "Unsuitability"

Parents have heightened protections under the Due Process Clause of the Fourteenth Amendment to "establish a home and bring up children". [4] The United States Supreme Court has repeatedly and emphatically upheld the primacy of this right as to suitable parents. [5] As such, the Court requires a finding of unsuitability before a parent may lose custody to a nonparent as a means of ensuring due process.[6] In striking down a grandparent visitation statute over the protests of a suitable parent which allowed "forced visitation" of a child at 'any time' if it serves the "best interest of the child," the *Troxel* court held:

> "We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment." "We returned to the subject in *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. It is cardinal with us that the custody, care and nurture of the child reside first in the parents…." *Id.,* at 166."[7]

This long-held protection applies even when parents have lost temporary custody of their children. [8] Thus, these constitutional protections afforded to parents serve to keep the state from wrongfully separating the family without a prerequisite finding of parental unfitness. [9]

Similarly, in Ohio, before a court can grant custody of a child to a nonparent from a parent, there must be a demonstration by a preponderance of the evidence that the parent may be judged unsuitable. [10] Unsuitability is only met when placement of the child with the parent would be detrimental to the child.[11] This ensures that the right of the parent to raise his or her own child is balanced with the right of the state as *parens patriae* to protect the child's welfare.[12]

In contrast, the "best interest –only" test is comparative and treats the nonparent as being on equal footing with the parent. This may result in a suitable parent losing custody of his or her child simply because a judge believes a better situation exists. It is precisely this which renders the statute unconstitutional. [13]

## Ohio Custody Statutes

In Ohio, child custody proceedings are adjudicated under three primary statutes: jurisdiction is conferred on the domestic relations court pursuant to R.C. 3109.04 (A) in cases arising out of "any divorce, legal separation, or annulment proceeding and in any proceeding pertaining to the allocation of *parental* rights and responsibilities for the care of a child "in accordance with the best interests of the child." [14]

Alternatively, § 2151.23(A)(1) grants exclusive original jurisdiction to juvenile court when children are alleged to be abused, neglected, or dependent. [15] Since 2006, this adjudication also automatically implies a determination that the child's custodial and non-custodial parents are unsuitable. [16] The court then proceeds to adjudicate only the best interests of the child.

Lastly, §2151.23 (A)(2),(F)(1), vests exclusive original jurisdiction for private custody matters in the juvenile court for "any child not a ward of another court of this state." These matters are generally also to be adjudicated applying the best interest factors "in accordance with sections 3109.04, *inter alia*..."[17]

## Confused Court Responses To The 1974 Amendment

The 1974 amendment to §3109.04 seemed to dictate custody to nonparents based on best interest only, regardless of the suitability of the parents. [18] *Boyer v. Boyer*, the first Ohio Supreme Court case interpreting this amendment, affirmed the grant of custody to nonparents over suitable parents with no requirement of first finding the parents unsuitable.[19] Not only did this interpretation conflict with historical Ohio precedent, it repudiated the long-standing, constitutionally- protected primacy parents have as to the care of their children.

The Supreme Court refined *Boyer's* statutory interpretation with *In re Perales*, which revived the long-standing *Clark v. Bayer* standard, *supra*.[20] *Perales* handled the contradiction between its holding of requiring a finding of unsuitability and *Boyer's* finding that no unsuitability is required by noting that §3109.04 cases usually arise in a divorce situations between *suitable* parents, thus the court can assume parental suitability as between two parents.[21]

Additionally, *Perales* confirmed that in juvenile custody battles between parent and nonparents under §2151.23(A)(2), an *explicit* finding of unsuitability was still required. However, the *Perales* court left untouched the new §3109.04 problem caused by the 1974 amendment: the statute, itself, now explicitly allowed parent versus nonparent custody determinations to be made under the best interest-only test. [22]

The confusion came to a head with *Baker v. Baker* in 1996 when the ninth district followed *Boyer's* new finding that "3109.04 does not require an explicit finding of unsuitability." [23] *Baker* noted the confusion in Ohio custody jurisprudence and then proceeded to add to it. This decision in a father versus uncle custody battle quite painfully attempted to explain that the new best interest- only test violated neither the Ohio nor the United States constitutions' protection of fundamental parental rights by explaining that best interest includes an "*implicit* finding regarding suitability", thus, there was no need for an *explicit* finding. Yet, in the same breath, this appellate court *sua sponte* then explicitly determined that the father was unsuitable based on the trial evidence.[24]

## Final Resolution: The Necessity of Unsuitability

The Ohio Supreme Court did ultimately resolve this conundrum by 2002, giving us a trifecta of cases which upheld the requirement that courts must first make a finding of unsuitability.

In1986, the *Masitt*o court definitively upheld the *Perales* standard, citing both *Perales* and *Clark v. Bayer, supra*, by requiring a parental unsuitability finding prior to granting custody to a nonparent as a general rule in Ohio. [25] Any remaining residual confusion surrounding the unsuitability requirement after *Masitto* was emphatically addressed and patently resolved by the *Hockstock* Court in 2002. After reviewing both domestic relations and juvenile Ohio custody statues, the Court clarified the issue which *Perales* had left untouched:

> "Regardless of which court ha[s] jurisdiction, the juvenile or the domestic relations division …, this court recognized the overriding importance of a trial court's making a parental unsuitability determination on the record before awarding custody away from a natural parent to a nonparent. And, "for these reasons the position of this court in this area of child custody law ought to be clear." [26]

In total accord with the Ohio Supreme Court is the interpretation by the Ohio Legislative Service Commission, a brief prepared for members of the Ohio General Assembly laying out the current law for the legislators. This brief explains RC 3109.04(D)(2) by explicitly noting that a court is obliged to uphold the fundamental rights of parents :"without a finding of unsuitability, the allocation of parental rights and responsibilities to a nonparent infringes on the parent's fundamental right." [27]

Ultimately, the Ohio Supreme Court has come full circle to resurrect *Clark v. Bayer* via *Perales* and *Hockstock* in upholding the constitutionally- protected parental rights in parent versus nonparent custody battles. [28] Thus, in spite of, and contrary to the 1974 amendment to §3109.04, the standard in Ohio remains:

> "A court may not make an original award of custody to the nonparent "without first determining that a preponderance of the evidence shows that the parent abandoned the child; contractually relinquished custody of the child; that the parent has become totally incapable of supporting or caring for the child; or that an award of custody to the parent would be detrimental to the child."[29]

---

*Gibson is owner/attorney of the Law Office of Laurie B. Gibson in Anderson Township. She focuses on child custody matters for unwed parents in Hamilton and Clermont counties.*

1 *Clark v. Bayer,* 32 Ohio St. 299 (1877).
2 *Thrasher v. Thrasher*, 3 Ohio App.3d 210, 213, 444 N.E.2d 431 (9th Dist.1981).
3 Ohio Laws 135 v H 233 (1973-74)
4 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)
5 *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 147(2000)
6 *Stanley* v. *Illinois*, 405 U.S. 645 (1972)
7 *Troxel v. Granville*, 530 U.S. 57
8 *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 59 (1982)
9 *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990);*In re Adoption of Mays*, 30 Ohio App.3d 195, 198, 30 OBR 338, 507 N.E.2d 453.
10 *In re Perales*, 52 Ohio St.2d 89, 369 N.E.2d 1047(1977)
11 *In re Perales*, 52 Ohio St.2d 89(1977).The mere presence of character or moral weakness is not enough.
12 *Troxel* dissent at 88
13 *Troxel* at 73
14 ORC §3109.04(A) (Lexis 2015)
15 ORC§2151.(A)(1) (Lexis 2015)
16 *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191
17 ORC §2151.23(A)(2) , (F)(1) *Also* see, *In re Bonfield*, 97 Ohio St.3d 387 (2002) (Lexis 2015)
18 ORC 3109.04(D)(2); 3109.04(F)(1) (Lexis 2015)
19 *Boyer v. Boyer*, 46 Ohio St.2d 83(1976).
20 *In re Perales*, 52 Ohio St.2d 89, 369 N.E.2d 1047 (1977)
21 *In re Perales*,52 Ohio St.2d 89
22 ORC§3109.04(D)(2)
23 *Baker v. Baker*, 113 Ohio App. 3d 805( 9th dist.1996)
24 *Id.*
25 *Masitto v. Masitto*, 22 Ohio St.3d 63, 488 N.E.2d 857(1986) (R.C. 3109.04)
26 *In re Hockstock*, 98 Ohio St.3d 238 at 241, 244 (2002) ; *Scavio v. Ordway*, 2010 Ohio 984, Ohio Ct.App.,( 3rd Dist. 2010).
27 LSC Members Only brief, Vol.127, Issue 12. July 30, 2008 p.3(citing *Troxel v Granville* (2002) and *Hockstock*(2002).) *Note this brief does not have the force of law.*
28 *In re Hayes*,79 Ohio St.3d 46, 48 (1997), citing *In re Murray*, 52 Ohio St.3d 155, 157, 556 N.E.2d 1169 (1990).
29 *In re Perales*,52 Ohio St.2d 89(1977);*See also In re:James*,113 Ohio St.3d 420 ( 2007)(affirming the requirement of unsuitability as required in Hockstock);. *In re Lowe*, 7th Dist. No. 00-CO-62, 2002-Ohio-440.