

PARENTING AS A PROTECTED CONSTITUTIONAL RIGHT

Argument

Does "The Best Interest of the Child" standard exceed the limits of the Due Process and the Equal Protection Clauses of the 14th Amendment?

This brief questions if the State has abrogated the U.S. Constitution in its *parens patriae* authority by applying the best interest of the child standard in child custody determinations. Troubling, the "best interest of the child" gives no special weight to a parent's fundamental right when the court is determining the best interest of the child. Instead the "best interest of the child" lies within the discretion of the trial court, thus, the parents are at the tender mercy of the court. This legal principal, without constitutional protection derived from the Bill of Rights, we believe exceeds the bounds of the Due Process and the Equal Protection Clauses of the 14th Amendment!

The United States Supreme Court in several contexts has consistently upheld the importance of the parent-child relationship: "A state needs at least clear and convincing evidence in order to sever a parental relationship". (*Santosky v. Kramer*, 455 U.S. (1982). It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. (*Prince v. Massachusetts*, 321 U.S. 158 (1944) And it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter." (*Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) A parent's right to "the companionship, care, custody, and management of his or her children" is an interest "far more precious" than any property right. (*May v. Anderson*, 345 U.S. 528 (1952). The parent-child relationship "is an important interest that 'undeniably warrants deference and absent a powerful countervailing interest, protection.'" *Stanley v. Illinois*, 405 U.S. 645 (1972)

In *Troxel v. Granville*, 530 U.S. 57 (2000) Justice O'Connor speaking for the Court stated, "The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of the law.' "We have long recognized that the [Fourteenth] Amendment's Due Process Clause, like its Fifth Amendment counterpart, **'guarantees more than fair process.'** "The Clause also includes a **substantive component** that **'provides heightened protection against government interference with certain fundamental rights and liberty interest.'**" and "the liberty interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interest recognized by this Court."

Justice Thomas in concurring in the judgment stated, " The opinion of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply **strict scrutiny to infringements of fundamental rights.**"

The *Troxel* Court had difficulty accepting the Washington State's broad application of the child's best interest standard, "Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference" ... "Instead,places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interest, the judge's view necessarily prevails." *Id.* The Court stated this "exceeded the bounds of the Due Process Clause." Not that the Court intervened, "but failed to accord the determination of

Granville, a fit custodial parent, any material weight." Id. The Court further explained, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better decision could be made'" The Court further stated, "In light of this extensive precedent, **it cannot be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents** to make decisions concerning the care, custody, and control of their children". Id. And that a fit parent is an "important" "aspect" of the case, "for there is a presumption that fit parents act in the best interest of their children". Id.

Justice Stevens, in his dissent, raises a very important point cautioning that the best interest of the child would have limits under the Federal Constitution:

The phrase 'best interest of the child' appears in no less than 10 current Washington state statutory provisions governing determinations from guardianship to termination to adoption. . . . More broadly, a search of current state custody and visitation laws reveals fully 698 separate references to the 'best interest of the child' standard, a number that, at minimum, should give the Court some pause before it upholds a decision implying that those words, on their face, may be too boundless to pass muster under the Federal Constitution. Id at footnote #5

Similarly, in Ohio as in Washington State the child's best interest is applied in deciding child custody disputes. The CRC believes the child's best interest standard as applied in Ohio and in most states "sweeps too broadly" and exceeds the Due Process and Equal Protection Clause. The best interest of the child is not a magic wand for the State to unnecessarily restrict the parent-child relationship. As a matter of constitutional law the best interest of the child must be balanced with the parents liberty interest. If the court is unable to find a Nexus of harm or potential harm between the parent and the child than the court must place an order that maximizes participation of both parents with their children.

The CRC is convinced how the child's best interest as applied does not comply with the federal Constitution. The CRC does not reject that such a standard should be done away with, the CRC believes that parents' fundamental rights in rearing their children is subsumed within the child's best interest standard.

The other half of the equation is the state must show harm or potential harm to the child before restricting a fit parent from the "care, custody, and management of his or her children". When the parent-child relationship is restricted by a family Court Order such restrictions must be done in the least restrictive means.

The above U.S. Supreme Court cases illustrate that the parent-child relationship is protected by the equal protection and due process clauses of the Constitution and is now beyond debate. However, divorced or separated parents currently do not enjoy this heightened protection.

In 1978, the Supreme Court clearly indicated that only the relationships of those parents who from the time of conception of the child, never establish custody and who fail to support or visit their child(ren) are unprotected by the equal protection and due process clauses of the Constitution. Quilloin v. Walcott, 434 U.S. 246, 255 (1978). Divorced parents must then enjoy the same rights and obligations of their children as if still married. The state can impair a parent-child relationship through issuance of a limited visitation order, however, it must make a

determination that it has a compelling interest in doing so. Trial courts must as a matter of constitutional law, fashion orders which will maximize the time children spend with each parent.

Maximizing time with each parent is the only constitutional manner by which a parent is able to maintain a meaningful parent-child relationship after divorce. While geographic distance, school schedules and the like must be factored into the custody and visitation calculus, trial courts faced with a custody and visitation decision must accord appropriate constitutional respect to maintain a healthy parent child relationship by granting each parent as much responsibility and time as possible with the child.

The federal Due Process and Equal Protection rights extend to both parents equally, for example, in adoption proceedings. In Caban v. Mohammed, 441 U.S. 380, (1979) the Supreme Court found that a biological father who had for two years, but no longer, lived with his children and their mother was denied equal protection of the law under a New York statute which permitted the mother, but not the father, to veto an adoption. In Lehr v. Robinson (1983) 463 U.S. 248, the Supreme Court held that:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' *Caban*, [citations omitted], his interest in personal contact with his child acquires substantial protection under the Due Process Clause." (*Id.* at 261-262)

The key factor in the Due Process and Equal Protection analysis is the fitness of the parents.

The natural father's federal constitutional rights do not depend on the identity of the person attempting to infringe upon them. That is the threshold showing required to impinge upon a parent's relationship with one's children should not be less when married than when unmarried. One's rights should not be less when the biological mother seeks to attack the constitutionally protected relationship than when a potential adopter/third party seeks to attack that relationship. Simply stated, protected fundamental rights do not evaporate in a child custody/visitation proceeding.

In every circumstance under which a parental right to physical custody may be terminated in which the courts have spoken on the standard of proof to be applied, the holding has been that the proof must be by "**clear and convincing**" evidence.

In cases where joint physical custody is not ordered in a divorce setting, the parent without custody has been deprived of physical custody, just as in any other setting. The identity of the person who has custody of the child is irrelevant to the requisite proof required to deprive one parent of physical custody. Surely an action to determine whether a parental right should be retained is as fundamental to the parent child relationship as an action to terminate that relationship.

Holly Robinson has spelled out this argument in detail:

It is accepted constitutional doctrine that the due process clause of the fourteenth amendment protects interests that are recognized as constituting "life" or Property". In a number of decisions, the Supreme Court has recognized that individuals possess a fundamental liberty interest -- entitled to constitutional protection -- regarding such matters as the decisions whether to have children, decisions concerning the upbringing of children, and the retention of their

children through exercise of custody. Read together, the cases clearly establish a zone of privacy around the parent-child relationship, which only can be invaded by the state when the state possesses a sufficiently compelling reason to do so. As a result, when the marital breakdown occurs, both parents are entitled to constitutional protection of their right to continue to direct the upbringing of their children through the exercise of custody. Adequate protection of this parental right requires that parents be awarded joint custody [or expansive visitation]...unless a compelling state interest directs otherwise.

H.L. Robinson, "Joint Custody: Constitutional Imperatives", 54 Cinn. L. Rev. 27, 40-41 (1985)
See also, Ellen Cancakos: "Joint Custody as a Fundamental Right". Arizona Law Review, Vol. 23, No. 2 (Tucson, Az: University of Arizona Law College), Tuscon, 95721. *Also*, Cynthia A. McNeely: "Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court", 25 Fla. St. U.L. Rev. 335, 342+ (1998)

CONCLUSION

Custody orders must bear sufficient respect for the constitutional protections inherent in the parent-child relationship regardless of whom is attacking the parent-child relationship. Given the long history of cases by the Supreme Court it can no longer be doubted that the best interest of the child must be coupled with harm to the child before restricting a parent's fundamental liberty interest in parenting his or her child. Trial courts therefore must consider equal time with both parents and deviate from that starting point as circumstances warrant.

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