PARENTING AS A FUNDAMENTAL RIGHT

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Introduction - why both parents have a right to raise their children without government interference.

Parenting as a Constitutional Right

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The U.S. Supreme Court long ago noted that 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, 533, 97 L. Ed. 1221, 73 S.Ct. 840, 843 (1952). In Lassiter v. Department of Social Services, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 120 S.Ct. 2153, 2159-60 (1981), the Court stressed that the parent-child relationship "is an important interest that 'undeniably warrants deference and absent a powerful countervailing interest protection.'" quoting Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed 2d 551, 92 S. Ct. 1208 (1972)

In Troxel v. Granville, 527 U.S. 1069 (1999) Justice O'Conner, 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 Amendment's Due Process Clause like its Fifth Amendment counterpart, 'guarantees more than fair process.' The Clause includes a substantive component that 'provides heightened protection against governmental intereference with certain fundamental rights and liberty interest" and "the liberty interest of parents in the care , custody, and contol of their children-is perhaps the oldest of the fundamental liberty interest recognized by this Court."

Justice Thomas concurring in the majority's opinion said, "The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropreate standard of review. I would apply stict scrutiny to infringments of fundamental rights."

This is not to say that courts should blindly or automatically impose joint custody arrangements. Clearly, there are many situations where joint custody is neither appropriate nor practical. Whenever a parent-child relationship is restricted by a family court order such restrictions must be done in the least restrictive manner. The standard that most states apply in deciding child custody is "the best interest of the child". The CRC does not believe that such a standard should be done away with, however, CRC believes such a standard should be balanced with parental rights. As we find in Reno v. Flores, 507 U.S. 292, 301 (1993)

'The best interest of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion -- much less the sole constitutional criterion -- for other, less narrowly channeled judgments involving children, where their interest conflict in varying degrees with the interest of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately.

Similarly, "the best interest of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: so long as certain minimum requirements of the child is met, the interest of the child may be subordinated to the interest of other children, or indeed even to the interests of the parents or guardians themselves. "The best interest of the child" is likewise not an absolute and exclusive constitutional criterion for the government's exercise of the custodial responsiblities that it undertakes, which must be reconciled with many other responsibilites.

Narrow tailoring is required when fundamental rights are involved. Thus, the state must show adverse impact upon the child before restricting a parent from the family dynamic or physical custody. It is apparent that the parent-child relationship of a married parent is protected by the equal protection and due process clauses of the Constitution. 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). Clearly, divorced parents enjoy the same rights and obligations to their children as if still married. The state through its family law courts, 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 unless the court determines that there are compelling justifications for not maximizing time 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 time as possible with the child under the circumstances of each case.

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)

Clearly the "best interests of the child" standard is to be read in light of the requirement that the parental-child relationship remain intact. Nor should the natural father's federal constitutional rights depend upon 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 protected relationship than when a potential adopter seeks to attack that relationship. The courts have clearly held that the degree of protection afforded parental rights does not depend upon the relationship between the mother and the father. Simply, the protection afforded the parent-child relationship is not lessened because the relationship between the parents has been altered by marital dissolution. 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 those 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.

The impact these judicial decisions have on the lives of all concerned cannot be overestimated. Childhood passes rapidly and it quickly becomes too late to unring the bell. Expanded visitation or joint custody may seem unimportant, but only to those who have never experienced the hollow time of forced separation. " No human bond is of greater strength than that of parent and child" Michelle W. v. Ronald W., 39 Cal. 3d354 (1985). Seton Hall Professor 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) (footnotes omitted). 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. See 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)

This proposition that the parent-child relationship in a traditional custody and visitation dispute commands constitutional respect is admittedly lacking a long life of specific case authority approving it. This lack of specific case authority is not fatal to the proposition's vitality. At least one federal court has found that the paucity of cases recognizing the constitutional sanctity in the past. That court further held that the historical absence of a strong tradition should not result in denial of the constitutional protection for such relationships as they become increasingly prevalent. See Franz v. United States, supra.

To further underscore the need for courts to consider the constitutional protections which attach in family law matters, one need only look to recent civil rights decisions. In Smith v. City of Fontana, 818 f. 2d 1411 (9th Cir. 1987), the court of appeals held that in a civil rights action under 42 U.S.C. section 1983 where police had killed a detainee, the children had a cognizable liberty interest under the due process clause.

The analysis of the court included a finding that " a parent has a constitutionally protected liberty interest in the companionship and society of his or her child. Id. at 1418, citing Kelson v. City of Springfield, 767 F. 2d 651 (9th Cir. 1985). In Smith the court stated " We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents." Id.

A failure to accord appropriate constitutional respect to the parent-child relationship between the parties herein and the minor child by failing to award joint custody or substantial parental contact would be error. We respectfully request that this Court fashion a court order which will maximize the available time the minor will spend with each parent.

CONCLUSIONS

Given the long history of cases by the Supreme Court it can no longer be doubted that the child's best interest must be weighed with a parent's fundamental liberty interest in parenting their child without undue interference by the state. Custody orders must bear sufficient respect for the constitutional protections inherent in the parent-child relationship.

Law Journal Articles and Public Policy Documents

Daniel Lee, **"Family Law and the Collapse of Culture"**,
Free Congress Commentary, July 24, 2001.

- "Attorneys reading this may protest, "but there will be chaos if a primary custodian isn't designated!" I think not, but besides that due process requires that where fundamental rights are at stake there cannot be an automatic infringement on them. Rather the burden is on the state to prove its compelling interest (substantial harm) in each individual instance prior to considering the remedy (means has a very tight fit with the ends). If it is found the child is in substantial harm, the court must then issues orders as narrow as possible. That precludes any nationwide policy as exists today to award every other weekend visitation and two or so weeks in the summer."

- "Family law is a symptom of a sickness in the body politic. It can spread and be fatal, or can be cured. To date few persons have been aware of it, although parents in the homeschool movement seem to be taking a preemptive action to remove their children from the state's grasp. But it is probably now clear to all, the substantial harm standard is what protects these homeschooling parents too. Without it the state can dictate what they may and may not teach their children. As in other areas of family law destroy the substantial harm standard, and so too do these and other protections disappear."

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Walther,Christopher D. " **Wisconsin's Custody, Placement, and Paternity Reform Legislation** ," *Wisconsin Lawyer*, Vol. 73, No. 4, April 2000

"The changes to custody and placement law attempt to strike a delicate balance between the constitutionally protected rights of parents to raise their children without undue state interference, and the best interests of their children, who are the innocent victims of the breakup of their parents' relationship. "

"The law now is harmonized so that parents in custody disputes with each other enjoy the same rights they already enjoyed under established law governing custody disputes with third parties. In the 1984 third party (grandparent) custody case, Barstad v. Frazier,1 the Wisconsin Supreme Court held: "Under ordinary circumstances, a natural parent has a protected right under both state law and the United States Constitution to rear his or her children free from governmental intervention. Absent compelling reasons narrowly defined, it is not within the power of the court to displace a fit and able parent simply because in the court's view someone else could do a 'better job' of 'parenting.'" A parent's right to custody of his or her child originates from state law and the U.S. Constitution, and not from an award of custody by a court. A court now has limited authority to take away that right absent extraordinary circumstances."

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Hubin, Donald C., **"Parental Rights and Due Process,"** *Journal of Law and Family Studies*, vol. 1, no. 2. University of Utah, 1999. pp. 123-150.

"The U.S. Supreme Court regards parental rights as fundamental. Such a status should subject any legal procedure that directly and substantively interferes with the exercise of parental rights to strict scrutiny. On the contrary, though, despite their status as fundamental constitutional rights, parental rights are routinely suspended or revoked as a

result of procedures that fail to meet even minimal standards of procedural and substantive due process. This routine and cavalier deprivation of parental rights takes place in the context of divorce where, during the pendency of litigation, one parent is routinely deprived of significant parental rights without any demonstration that a state interest exists-much less that there is a compelling state interest that cannot be achieved in any less restrictive way. In marked contrast to our current practice, treating parental rights as fundamental rights requires a presumption of joint legal and physical custody upon divorce and during the pendency of divorce litigation. The presumption may be overcome, but only by clear and convincing evidence that such an arrangement is harmful to the children."

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McNeely, Cynthia **"Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court".** *Florida State Law Review,* September, 1998.

"A claim that fundamental rights have been violated requires the reviewing court to apply strict, rather than intermediate, scrutiny. Thus, the state would need to show a necessary and compelling interest to justify its interference with the father's fundamental right. This argument might best be raised in a situation where both parents are fit, reside in the same community, and are suitable for rotating or joint physical custody, yet the trial court awards the mother primary residential custody and the father visitation of every other weekend.[307] When an activity is constitutionally protected, as is the fundamental right to parent, a state must chose the least restrictive means possible to achieve its goal.[308] Absent good cause, it would appear that the court, in this situation, would be interfering with the father's fundamental right to parent his child; the father, then, should be entitled to a review of strict scrutiny. "

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Henry, Ronald K., **"Divorce Reform and the Fathers' Movement"** , Congressional Testimony.

"From birth and throughout the marriage, the law recognizes that the child has two parents. Both of these parents have unrestricted access and equal custodial rights with respect to the child. A custody decree is an order which restricts parents' access and custodial rights with respect to the child and like any other injunction, enjoins the parents from the exercise of their former, unrestricted rights.

> While a custody decree is an injunctive order, the courts too often fail to apply the principles that are applicable to all other injunctions. In all other situations, the guiding principle is that injunctive relief should be carefully crafted to impose only such minimum restrictions upon the parties' prior freedom as is required to resolve the present dispute. In contrast and largely because of the past swings of the pendulum (automatic father sole custody, automatic mother sole custody), the most common custody decrees issued by the courts today impose maximum rather than minimum change upon the parent-child relationship."

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Oddenino, Michael. "Joint Custody As a Child's Constitutional Right", 1994.

Robinson, Holly. "Joint Custody: Constitutional Imperatives", *University of Cincinnati Law Review,* 1985.

Canacakos, Ellen. "Joint Custody as a Fundamental Right", *Arizona Law Review,* v.23 n. 2 (1981). pp. 785-800.

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CURRENT ACTIONS

Constitutional challenges to family law are underway in many states. Below are links to relevant current cases (**Note**: these actions were not initiated by CRC, and CRC does not necessarily agree with or support all positions of these organizations. We report them here because they have a bearing on parents' constitutional rights to raise their children.)

California

The California Law Revision Commission received a formal request from Dwain S. Barefield to amend the state's family law to recognize both parents' rights to equal participation in raising their children. The commission refused to consider the action, concluding "The staff doubts that a Law Revision Commission recommendation on the matter would have much impact on the Legislature or Governor."

- **CALIFORNIA LAW REVISION COMMISSION STAFF MEMORANDUM Admin. August 28, 2001 Memorandum 2001-60**

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Colorado

Center for Children's Justice - "This is a civil rights action, under state and federal law, challenging prior and newly-enacted Colorado statutes which compel the State's judiciary to make awards of child custody and parenting time, or allocation of parental responsibilities and rights and allocation of parenting time, within the context of dissolution of marriage actions and post-decree of dissolution of marriage actions concerning children. This action is brought by the above-named individual to obtain a declaratory judgment that the challenged statute, in both its prior and present form, violates well-recognized rights, including the right to due process of law, the right to equal protection of the law, and the right to the care, custody, control, companionship and nurture of one's offspring embodied in the fundamental liberty interest in family, which rights are secured by the Fourteenth Amendment of the United States Constitution and by Art. II, Secs. 3, 6, 25 and 29 of the Colorado Constitution. "

- **http://www.childrensjustice.org/co_civrts.html**
- **Muchnick v. Colorado**
- **Stillman v. Colorado**

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Georgia

Sweat v. Sweat - Georgia's child support guidelines have been ruled unconstitutional. Some parts of this decision have a bearing on the constitutional isses related to shared parenting. In particular, equal protection considerations from the opinion:

> **Equal Protection**
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> The United States' Constitution provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Am. XIV, section 1. Ga. Const., Art. I, section I, paragraph 2 provides essentially the same protection.
>
> The egregiously different burdens and benefits placed on persons similarly situated but for the award of custody, i.e., parents with the obligation to support their child(ren) and

the same means for doing so as when they were married, has been explained at length above. This Court finds that such disparate treatment violates the guarantees of equal protection cited above. Jones v. Helms, 452 U.S. 412, 101 S. Ct. 2434 (4,5) (1981), South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 119 S. Ct. 1180 (1999), Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996) and Simpson v. State, 218 Ga. 337 at 339 (1962). The Guidelines do not result in awards based on the constitutionally sound principles of equal duty and proportional obligation (proportional to available financial resources such as each parent's income). See Smith v. Smith, 626 P 2d 342, 345-348 (Oregon, 1980); Meltzer v. Witsberger, 480 A.2d 991 (Pa. 1984); and Conway v. Dana, 318 A.2d 324 (Pa. 1985).

Full text of the opinion is here: **Judge C. Dane Perkins' opinion**

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Michigan

"Proposed amendment to the State of Michigan constitution promoting thebest interests of the child to have equal access to both parents."

- **Equal Child Parenting Amendment**

New York

Press Release - New York State Custody Laws Challenged in Federal Court; Local Family Court Judge Named as Defendant

May 12th, 2003 — On April 30th, 2003, a lawsuit was filed in Federal District Court for the Northern District of New York challenging New York State's statutory scheme for awarding custody of minor children. The current custody statutes in New York State presume that neither parent has a right to custody and that custody will be awarded based solely on the discretion of the trial court judge using the "children's best interest" standard.

Harold L. Rosenberger of Highland, New York filed the lawsuit. Mr. Rosenberger asserts that the current New York State custody statutes are unconstitutional because they fail to explicitly guarantee the parental rights of both parents, rights that have been deemed by the United States Supreme Court to be a "liberty interest" protected by the 14th Amendment of the U.S. Constitution.

The lawsuit also alleges that the Family Court Judge who presided over a custody trial exceeded her jurisdiction by placing a constraint on Mr. Rosenberger's visitation, while not applying that same constraint to the custodial parent's visitation. Ulster County Family Court Judge Marianne O. Mizel ordered that "during any of Mr. Rosenberger's periods of visitation, the children shall not be left unattended for more than fours hours."
The three children are ages 16, 16 and 10.

Mr. Rosenberger hopes that the lawsuit will proceed on its merits, and that ultimately the federal court will rule that the current New York State custody statutes are unconstitutional. He asserts that in a custody action, a fit parent may not be denied equal legal and equal physical custody of a minor child without a finding by clear and convincing evidence of parental unfitness and/or substantial harm to the child.

In August of 2001, Mr. Rosenberger was designated a non-custodial parent and ordered to pay child support. His ex-wife was given sole legal custody and sole physical custody of the children. The lawsuit names Governor George E. Pataki and Ulster Family Court Judge Marianne O. Mizel as defendants.

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Ohio

PRESS RELEASE from Michael A. Galluzzo

Federal Court Certifies Equal Custody Question in Ohio
September 27, 2002

On Sept. 24, 2002, Federal Magistrate Judge Michael Merz, United States District Court for the Southern District of Ohio, Western Division at Dayton, (*Michael A. Galluzzo vs. Champaign County Court of Common Pleas, et al., Case No. C-3-01-174*) filed an order joining the State of Ohio as a party into a case to defend the constitutionality of Ohio statues that allow courts to

deny due process in removing custody from a fit parent in divorce situations without a finding of substantial harm to the child.

On August 12, 2002, Magistrate Judge Merz withdrew his report and recommendations to dismiss the federal question action filed in April 2001 pursuant to Plaintiff Michael Galluzzo's argument that defeated the Rooker-Feldman doctrine. The Rooker-Feldman doctrine is used in a majority of federal cases to dismiss underlying state actions by asserting 'impermissible state appeals to the federal court'.

The court had given the Attorney General 30 days to file her response for intervention, for under the 11th Amendment a state has immunity from federal suit unless the state voluntarily chooses to intervene, at which time the state voluntarily waives its right to immunity from suit. The State failed to respond voluntarily and where a constitutional question was previously certified under federal law to the Attorney General, the 11th Amendment

This is the first time that a federal court has issued a certified question to rule on the merits of a presumption of equal custody in a divorce situation. This is the only case that has ever happened in a federal court that specifically addresses the federal rights of divorcing parents, fitness, the evidentiary standard requi red by federal law to prove unfitness {clear & convincing evidence- which is already part of the juvenile code in Ohio, but not the domestic code} and equal custody.

On April 27, 2001, a complaint was filed in U.S. District Court, Dayton, Ohio against Champaign County Common Pleas Court. The suit filed by Michael Galluzzo (C-3-01-174) claims the court deprived him of his constitutional right to due process in a divorce action that deprived him of custody of his children without a finding of substantial harm to the children. In June of 1993, Mr. Galluzzo was designated a non-custodial parent and ordered to pay child support and his ex-wife was given full custody of the children.

It appears as though this case will move forward on the merits. What are the "merits"? **THAT IN A DIVORCE ACTION, A FIT PARENT MAY NOT BE DENIED EQUAL LEGAL AND PHYSICAL CUSTODY OF A MINOR CHILD WITHOUT A FINDING BY CLEAR AND CONVINCING EVIDENCE OF PARENTAL UNFITNESS AND SUBSTANTIAL HARM TO THE CHILD.** (See also *Santosky v. Kramer (1982).*)

- **Merit Brief [PDF]**

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Oregon

While not a court case, a bill introduced in Oregon's 2001 legislative session recognizes the right of both parents to raise their children. Complete bill is here:
http://www.leg.state.or.us/01reg/measures
/hb3500.dir/hb3559.intro.html

Significant wording from the bill:

"(6) To acknowledge that both parents have a fundamental right to equal parenting time, parental oversight and direct care of their children, and that such rights are a fundamental liberty interest that governments may not intrude upon without first showing a compelling interest, including the interest of prevention of harm to children. "

Tennessee

Child's Best Interest has organized an attorney referral service for lawyers who pledge to raise constitutional arguments on behalf of their clients. These attorneys have agreed to the following:

- I understand parental rights derive from the 14th Amendment to the United States Constitution's liberty and privacy guarantees, as well as from similar provisions in state constitutions. And that these rights may only be limited upon the following of due process and equal protection provisions.
- I will raise constitutional protections on behalf of my clients in the appropriate time and manner.
- I have reviewed the **Constitutional Arguments**

See **ChildsBestInterest.org**

Factors that should be considered in a constitutional challenge::
http://childsbestinterest.org/
CBI_ConstitutionalArguments.doc

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Texas

"This is a lawsuit being litigated by James Loose, President of the Center for Children's Justice Texas State Chapter, for permanent injunction against the State of Texas to permanently enjoin the enforcement of T.F.C. §§§153.002, 153.133(a)(1), 153.136, and the provisions of the Texas

Family Code that provide for substantially different apportionments of times of child possession (the "Standard Possession Order" [T.F.C., Subchapter F] §153.312, et seq.) on **Fourteenth Amendment Equal Protection** and Due Process grounds."

- **Loose v. Texas**

Wisconsin

Case is already underway in the District I Court of Appeals, decision expected summer 2002. Jan Raz v Mary A. Brown

Brief is below:
http://www.wisconsinfathers.org/prbrief.pdf

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CASE LAW

GEORGIA

Sweat v. Sweat - see above

"In the interest of A.R.B., a child", Georgia Court of Appeals, Case No. A93A0698, July 2, 1993.

Although the dispute is symbolized by a 'versus' which signifies two adverse parties at opposite poles of a line, there is in fact a third party whose interests and rights make of the line a triangle. That person, the child who is not an official party to the lawsuit but whose well-being is in the eye of the controversy, has a right to shared parenting when both are equally suited to provide it.

V. A court is to consider the factors stated "supra" and then make findings of fact in the record stating the particular reasons for its decision

Notes:

1. Court rejected trial court's best interest finding and said that trial court did not define any actual harm to the children from overnight visits
2. Court noted previous decisions declaring recent trend to using same criteria in visitation and custody claims.

The Boswell case was appealed from the COSA, resulting in the following decision by the COA:

Boswell v. Boswell
COURT OF APPEALS
September Term, 1998 **[HTML] [Word Perfect] [PDF]**

This is a VERY IMPORTANT case, becase it considers what should be considered in determining "reasonable" visitation. The court makes the following statement:

"Ms. Boswell claims the "best interests of the child" standard should apply and that the Court of Special Appeals erred in applying an "actual harm" standard. Mr. Boswell contends that the Court of Special Appeals did apply the best interests of the child standard, correctly coupling this standard with the need for an evidentiary showing of actual harm in order for parental visitation to be restricted. In affirming the Court of Special Appeals' judgment, we want to clarify that the Court of Special Appeals' judgment should not be interpreted as articulating an "actual harm" standard that is separate and distinct from the best interests of the child standard. We seek to clarify that only one standard is used in determining whether to restrict parental visitation in the presence of non-marital partners, bests interests of the child, but **we also want to emphasize that when a court is engaging in a best interests analysis, reasonable maximum exposure to each parent is presumed to be in the best interests of the child."**

VIRGINIA
Supreme Court of Virginia

THOMAS O. WILLIAMS, III, ET AL. v. THOMAS O. WILLIAMS, IV, ET AL.

Record No. 971616 June 5, 1998
OPINION BY JUSTICE A. CHRISTIAN COMPTON
Full text of opinion

Excerpt: "In other words, the Court of Appeals said, "For the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation." Id. at 784-85, 485 S.E.2d at 654. **A court reaches consideration of the "best interests" standard in determining visitation only after it finds harm if visitation is not ordered. Id. at 785, 485 S.E.2d at 654.** The Court of Appeals held that the circuit court failed to make the required finding of harm if visitation were denied, reversed the circuit court, and remanded the case for reconsideration of visitation in accord with the standard it set forth. Id. We agree with the Court of Appeals' discussion holding there is no constitutional infirmity in the applicable statutes and with that court's interpretation, as we have summarized it, placed upon the statutes. "

Comment This finding is consistent with Robinson's argument that the best interest standard should be tested through a requirement of finding actual harm, i.e., the best interest is satisfied by finding the least detrimental alternative.

Beck v. Beck (New Jersey) - copy of this case needed

Stanley v. Illinois

M. L. B., PETITIONER v. S. L. J.
"Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as "of basic importance in our society," Boddie, 401 U. S., at 376, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect. See, for example, Turner v. Safley, 482 U.S. 78 (1987), Zablocki v. Redhail, 434 U.S. 374 (1978), and Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923) (raising children). M. L. B.'s case, involving the State's authority to sever permanently a parent child bond, [n.8] demands the close consideration the Court has long required when a family association so undeniably important is at stake. We approach M. L. B.'s petition mindful of the gravity of the sanction imposed on her and in light of two prior decisions most immediately in point: Lassiter v. Department of Social Servs. of Durham Cty., 452 U.S. 18 (1981), and Santosky v. Kramer, 455 U.S. 745 (1982). "

SANTOSKY ET AL. v. KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.
No. 80-5889.
SUPREME COURT OF THE UNITED STATES
455 U.S. 745; 71 L. Ed. 2d 599; 50 U.S.L.W. 4333; 102 S. Ct. 1388 Argued November 10, 1981 March 24, 1982

MICHIGAN

Travis Ballard, NCFC, brief:
Michigan case - see Section B

NEW YORK

New York case, www.kids-right.org