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The "Best Parent" is Both Parents

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The Constitutional Rights of Parents: Nearly A Century of Consistency in the U.S. Supreme Court

There are few issues on which the U.S. Supreme Court has spoken so eloquently—and so consistently—as that of parental rights. In 1923 the Court asserted that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923). On June 5, 2000, the Court declared that

[I]t cannot now 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.

Troxel v. Granville (530 U.S. 2000)

Fundamental Constitutional rights are accorded a special status in judicial review. The Fourteenth Amendment prohibits the state from depriving any person of "life, liberty, or property, without due process of law." The Court has long recognized that the Due Process Clause "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). It also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.*, at 720; see also *Reno v. Flores*, 507 U.S. 292, 301–302 (1993).

The level of scrutiny required for state actions that infringe upon fundamental rights is "strict scrutiny", which requires the state to show that the infringement serves a "compelling state interest" and that there is no Constitutionally less offensive way for the state to satisfy this compelling interest.

There are sweeping—though seldom appreciated—implications of recognizing parental rights as Constitutionally fundamental. Domestic relations courts

routinely declare one parent a "non-custodial parent" and, thereby, deprive him or her of "the fundamental right of parents to make decisions concerning the care, custody, and control" of their children. This practice has "a real and appreciable impact on, and constitutes a significant interference with," the exercise of a fundamental Constitutional right. Therefore, "it cannot now be doubted that" such a determination interferes with a fundamental constitutional right.

As a result, the practice must receive the strict scrutiny guaranteed by the Due Process Clause of the Fourteenth Amendment. This is true regardless of whether the interference with the right is permanent or temporary, *pendente lite*. The Court has held that the deprivation of fundamental liberty rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 96 S.Ct. 2673; 427 U.S. 347, (1976).

Under the strict scrutiny standard, such a deprivation of rights must occur only when there is a *compelling* state interest served by interfering with these rights and there is no more Constitutionally benign way to achieve this compelling state interest.

While it is uncontroversial that, under the *parens patriae* doctrine, the state has a compelling interest in preventing harm to children, this interest is not sufficient to Constitutionally justify the infringement in question. The state must show that there is no method of achieving this state objective that is less offensive to the Constitution than that of routinely depriving one parent of these fundamental rights. Where there is clear and convincing evidence that, in the specific case, the retention of parental rights by both parents would compromise a compelling state interest, the state may be justified in

restricting the parental rights of one, or both, parents. However, where both parents are fit, there will normally be no reason for a state to deprive one of custodial rights.

As the Court declared in *Troxel*:

[S]o 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 best decisions concerning the rearing of that parent's children.

Troxel, op. cit.

The implication of this is that, to be Constitutionally sound, state law must contain a strong legal presumption of joint legal custody of minor children upon the divorce of the parents.

[The complete history of the Court's rulings on the nature of parental rights includes also: *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J. R.*, 442 U.S. 584, 602 (1979); and *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). For more information, please visit the PACE web site at PACEgroup.org. See the "Constitutional Issues" page.]

"Parental Rights and Due Process" Available On-Line or by Mail

These arguments are more fully developed and defended in my paper, "Parental Rights and Due Process" [*Journal of Law and Family Studies*, 1(1999)123-150] available free on-line at PACEgroup.org or by regular mail. Please call 292-2505 for a copy sent by mail.

—Don Hubin, *Bulletin* editor

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