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Presumption of Custody to the Nonoffending Parent

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Key Points

- The sanctity of the family and parental rights have been affirmed by the Supreme Court since the 1920s.
- The Texas Family Code also upholds this principle with language suggesting courts must make separate findings for each parent; yet in practice, nonoffending parents' rights are often terminated along with the offending parent's rights.
- *Stanley v. Illinois* made clear that presuming the unfitness of a parent without finding is unconstitutional.
- Children who must enter substitute care, instead of the care of the noncustodial parent, face an increased likelihood of adverse, long-term outcomes.
- Terminating rights of the nonoffending parent is unconstitutional, hurts the family, and hurts our Texas children.

Introduction

The family relationship is a sacred, foundational institution upon which all societies are built. It predates and exists independently of the state. As such, state intervention in the family relationship is rightly seen as a last resort, only when necessary to protect the health and safety of the child. Supreme Court precedent dating back to the 1920s affirms this principle by almost consistently upholding parental rights as fundamental under the 14th Amendment that cannot be interfered with, absent proof of parental unfitness. In a majority of cases challenging these rights, the Court has applied strict scrutiny, the highest level of judicial oversight in our legal system.[1]

Yet this principle appears to be all but lost in child protection cases, especially in cases involving nonoffending parents. For the purposes of this article, the term "nonoffending parent" assumes that a child has been abused or neglected by one parent and the other, the "nonoffending parent," was not involved in the maltreatment and objectively had no reason to believe the child was being maltreated by the other parent. The practice of placing the parental rights of one parent in jeopardy because of the bad actions of the other parent is not only repugnant to the fundamental nature of the parent-child relationship under the Constitution, it also exposes children to additional unnecessary trauma if they are removed into foster care instead of being allowed to remain with the nonoffending parent.

A Long History of Support for Parental Rights

Several cases in the Supreme Court's long history of rulings on parental rights are particularly notable in this context. *Meyer v. Nebraska* acknowledged the right to "establish a home and bring up children" (262 U.S. 390). Robert Meyer, a schoolteacher in Nebraska, was convicted of violating the Siman Act which restricted foreign language instruction or subject matter in primary schools due to tensions following World War I. When the case was appealed to the United States Supreme Court, the majority opinion acknowledged that the Due Process Clause protected an individual's freedom "to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children," among other rights (262 U.S. 399).

Further expanding due process protections, *Pierce v. Society of Sisters* held that parents have the right to direct their child's upbringing (268 U.S. 510). A

1 See *M.L.B. v. S.L.J.*, 519 U.S. 102, 113-17 (1996); *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979); *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 503-04 (1977); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845-47 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-58 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 230-33 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 533-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401-02 (1923).

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religious private school, Society of Sisters of the Holy Name of Jesus and Mary, challenged an Oregon state amendment mandating public education, arguing that it conflicted with a parent's right to choose their child's training. The Court ruled in favor of the school stating that children are not "mere creature[s] of the state," (268 U.S. 510, 535) and that the act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children" (268 U.S. 534).

In *Prince v. Massachusetts,* Sarah Prince, a Jehovah's Witness, was convicted of violating state child labor laws by having her child assist her with street ministry (321 U.S. 158). While the Court affirmed Prince's conviction on safety grounds, it affirmed the sacred private interest of "the parent's claim to authority in her own household and in the rearing of her children" (321 U.S. 165).

Also furthering 14th Amendment protections, *M.L.B. v. S.L.J.* determined that financial means should not interfere in proceedings related to parental rights. After losing parental rights over her biological children, M.L.B. filed an appeal but could not afford the court fees. The Court ruled in favor of M.L.B., arguing the state must provide access to judicial processes even without a party's ability to pay, due to the "unique deprivation" caused by severing parental bonds (519 U.S. 106). M.L.B. built upon *Santosky v. Kramer*, a case that elevated the burden of proof for revocation of parental rights from preponderance of the evidence to clear and convincing evidence. The Court ruled that the private interest in termination proceedings is commanding (455 U.S. 758) and that "parents retain a vital interest in preventing the irretrievable destruction of their family life" (455 U.S. 753).

Troxel v. Granville gave material weight to parental decisions regarding their child (530 U.S. 57).[2] The Supreme Court struck down a Washington state law that allowed a third party to file for visitation rights despite the parent's wishes. The Troxels, the paternal grandparents, petitioned the Court for increased visitation rights against the desires of the mother, Granville. The Court held, building on years of precedent, that the state superior court infringed on Granville's right to make decisions regarding the rearing of her children and "placed on Granville the burden of *disproving* that visitation would be in her daughters' best interest and thus failed to provide any protection for her fundamental right" (530 U.S. 58).

The Rights of the Nonoffending Parent in Practice

While the Court, in the aforementioned cases and several others, has consistently recognized the superior rights of parents, child welfare practice has often disregarded these rights when faced with cases in which a child has been abused or neglected by one parent, but not the other. In such cases, the nonoffending parent is viewed through the same lens as the offending parent and is saddled with the burden of proving their own fitness as a parent and that it is in the child's best interests to be placed in their care. This practice is contrary to the principle articulated in *Parham v. J.R.* that "historically [the law] has recognized that the natural bonds of affection lead parents to act in the best interests of their children" (442 U.S. 601). The Court in *Parham* specifically noted that the exceptional cases of some parents who act contrary to the best interests of their children do not give "a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests," and "the statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to the American tradition" (422 U.S. 602-603). The Court made clear that a significant and unique connection between parent and child exists that should not be denied to either the nonoffending parent or the child.

Section 262.201 of the Texas Family Code, relating to court proceedings on the removal of the child, outlines the process of finding substitute placement for the child. Paragraph (n) details that the court "shall place a child removed from the child's custodial parent with the child's noncustodial parent or with a relative … unless placement with the noncustodial parent or a relative is not in the best interest of the child."[3] The wording of the statute suggests that the court is required to make an individualized finding on the fitness of the noncustodial parent and whether placement of the child with the noncustodial parent is in the child's best interests. In practice, however, courts can, and often do, terminate the rights of a nonoffending parent along with those of the offending parent, especially when the nonoffending parent does not get involved in the case to assert their rights (Texas Children's Commission).

When CPS files a petition seeking conservatorship over the child, it is common for both parents to be named in the petition (Texas Children's Commission). Perhaps more important than what Sec. 262.201 says is what it omits. Section 262.201 refers only to placement with the "noncustodial parent." A plain reading of the statute assumes that parents

2 *Troxel* did not apply strict scrutiny; however the decision still gives deference to parental decision-making.

3 Texas Family Code §262.201(n).

at issue are separated, one of whom having legal and physical custody of the child. It is silent regarding a presumption of custody by a custodial, nonoffending parent. In fact, it is quite common in cases in which the offending and nonoffending parents live together and share custody of the child for the nonoffending parent to be viewed as knowing about the alleged maltreatment and allowing it to occur. In both scenarios, the nonoffending parent—regardless of whether they have custodial rights to the child—is forced into the position of having to prove their own fitness as a parent under threat of permanent loss of parental rights. This practice harms both the nonoffending parent as well as the child.

The Supreme Court's decision in the landmark 1972 case *Stanley v. Illinois* speaks directly to the harm caused when the state denies custody to an individual parent without establishing the unfitness of that parent. Peter Stanley appealed an Illinois court ruling that made his three children wards of the state after their mother, whom Peter never legally married, died. The U.S. Supreme Court rejected the ruling of the Illinois Supreme Court, which presumed all unwed fathers were unfit and therefore not entitled to a hearing to seek custody of their children. The Court stated Stanley, and thus any unwed father, is "entitled to a hearing on his fitness as a parent before his children were taken from him, and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment" (405 U.S. 649). The ruling made clear that presumption of fitness, or lack thereof, without a judicial finding, is unconstitutional. The same issue arises in CPS cases when noncustodial parents are denied custody without an individualized ruling proving that the placement of a child in their custody places the child in immediate danger.

Improper application of 262.201 not only disregards Supreme Court precedent as articulated in *Stanley*, but also ignores principles upheld in the Texas Family Code that "a State agency may not adopt rules or policies or take any other action that violates the fundamental right and duty of a parent to direct the upbringing of the parent's child" (Texas Family Code Section 151.003).

Yet, more often than not, when a court finds one parent has abused or neglected their child, the state obtains temporary custody or jurisdiction of the child rather than granting custody to the nonoffending parent, regardless of no finding of detriment to the child.

Since 2010, the amount of children in relative placements has increased by roughly 50 percent (DFPS). This is important for Texas children as research shows kinship care provides stability, identity, feelings of belonging for children, and most importantly, minimizes trauma caused by intervention in the family (Annie E. Casey Foundation). By affording nonoffending parents' their right to custody, the number of children in kinship care can continue to grow with more children experiencing its benefits. As 23,773 children currently reside in non-relative placements, there is an opportunity to provide many kids with familiar homes or community ties (DFPS). Giving custody to a nonoffending biological parent who can and is willing to care for a child should be the first course of action taken by the agency in the best interest of the child.

Conclusion

These missed opportunities are not without consequence. With the status quo being the state presuming custody of a child after removal, children whose nonoffending parents are willing to assume custody are needlessly being placed into an already overburdened system and likely to experience trauma. Research suggests that putting children in out-of-home placements "has a detrimental effect on brain and neurological function," which can destroy neurons and neurological connections and cause regression in development and behaviors (Center for Improvement of Child and Family Services). Foster care placement can also lead to elevated risk of adverse long-term outcomes such as incomplete schooling, unemployment, poverty, homelessness (Szilagyi et al.). Failing to make individualized determinations regarding the fitness of each parent who would assume custody of a child in CPS cases not only wrongfully denies the nonoffending parent their fundamental rights, it increases the risk that a child will needlessly enter an already overburdened foster care system and experience lasting trauma. It is important that Texas affords nonoffending parents their constitutional rights for the good of our families, our children, and our state.

Recommendations

Recognize the due process rights of nonoffending parents by amending the language in section 262.201 in the Texas Family Code to require courts to make individualized determinations regarding the fitness of each parent who would assume custody of a child involved in a CPS case and allow for separate adjudication.

References

Center for Improvement of Child and Family Services. 2009. *Reducing the Trauma of Investigation, Removal, and Initial Out-of-Home Placement in Child Abuse Cases*. Portland State University.

DFPS (Department of Family and Protective Services). 2018. "CPS 7.2 in Substitute Care on 31 August by Placement Type and County FY08- FY17."

Meyer v. Nebraska, 262 U.S. 390, 399, 401-02 (1923).

M.L.B. v. S.L.J., 519 U.S. 102, 113-17 (1996).

Parham v. J.R., 442 U.S. 584, 602-04 (1979).

Pierce v. Society of Sisters, 268 U.S. 510, 533-35 (1925).

Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944).

Sankaran, Vivek. 2006. "But I Didn't Do Anything Wrong: Revisiting the Rights of Non-Offending Parents in Child Protection Proceedings." *University of Michigan Law School Scholarship Repository*. 83 (3): e22-e25.

Santosky v. Kramer, 455 U.S. 745, 753-54 (1982).

Stanley v. Illinois, 405 U.S. 645, 651-58 (1972).

Szilagyi, Moira A.; David S. Rosen; David Rubin; Sarah Zlotnik; the Council on Foster Care, Adoption, and Kinship Care; the Committee on Adolescence; and the Council on Early Childhood. 2015. "Health Care Issues for Children and Adolescents in Foster Care and Kinship Care." *Pediatrics* 136(4): e1142-e1166.

Texas Children's Commission, *Parent Resource Guide, Chapter 13B: Non-Offending Parents*, 2015.

The Annie E. Casey Foundation. 2012. *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families*. The Annie E. Casey Foundation.

Troxel v. Granville, 530 U.S. 57 (2000).

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