

## 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 context 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 US 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'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 [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

submission of a plan of districting by the commission. Upon receiving such plan the secretary shall publish the same forthwith, and, upon publication, such plan of districting shall have the full force of law.

Adopted November 26, 1980.

(Sec. 2 Amended in 1990. See Article XXVI of the Amendments to the Constitution of the State of Connecticut.)

#### ARTICLE XVII.

Section 8 of the article first of the constitution is amended to read as follows: In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.

Adopted November 24, 1982.

#### ARTICLE XVIII.

Article second of the constitution is amended to read as follows: The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. The legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.

Adopted November 24, 1982.

#### ARTICLE XIX.

.Section 2 of the article eleventh of the constitution is amended to read as follows: Except as provided in this section, neither the state nor any political subdivision of the state shall pay or grant to any elected official of the state or any political subdivision of the state, any compensation greater than the amount of compensation set at the beginning of such official's term of office for the office which such official holds or increase the pay or compensation of any public contractor above the amount specified in the contract. The provisions of this section shall not apply to elected officials in towns in which the legislative body is the town meeting. The compensation of an elected official of a political subdivision of the state whose term of office is four years or more may be increased once after such official has completed two years of his term by the legislative body of such political subdivision. The term "compensation" means, with respect to an elected official, such official's salary, exclusive of reimbursement for necessary expenses or any other benefit to which his office would entitle him.

Adopted November 24, 1982.

#### ARTICLE XX.

Sec. 1. Section 1 of article fifth of the constitution is amended to read as follows: The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law.

onym in an action. By including the name in the definition of personal identifying information, the rule permits a party, the person identified by name or the judicial authority on its own motion to proceed under Section 11-20B to move quickly to protect the identity of the person in accordance with the existing order of the judicial authority.

**Sec. 7-19. Issuing Subpoenas for Witnesses on Behalf of Self-Represented Litigants**

Self-represented litigants seeking to compel the attendance of necessary witnesses in connection with the hearing of any [civil] matter[, including matters scheduled on short calendar or special proceeding lists or for trial,] shall file an application to have the clerk of the court issue subpoenas for that purpose. The clerk, after verifying the scheduling of the matter [short calendar hearing, special proceeding or trial], shall present the application to the judge before whom the matter is scheduled for hearing, or the administrative judge or any judge designated by the administrative judge if the matter has not been scheduled before a specific judge, which judge shall conduct an ex parte review of the application and may direct or deny the issuance of subpoenas as such judge deems warranted under the circumstances, keeping in mind the nature of the scheduled hearing and future opportunities for examination of witnesses, as may be appropriate. If an application is denied in whole or in part, the applicant may request a hearing which shall be scheduled by the court.

COMMENTARY: The revision to this section expands the applicability of the section to any matter and comports with *State v. Nowacki*, 155 Conn. App. 758 111 A.3d 911 (2015). Also, if an application is

denied, the applicant may request a hearing which must be scheduled by the court.

## AMENDMENTS TO THE CIVIL RULES

### **Sec. 11-10. Requirement That Memorandum of Law Be Filed with Certain Motions**

(a) A memorandum of law briefly outlining the claims of law and authority pertinent thereto shall be filed and served by the movant with the following motions and requests: (1) motions regarding parties filed pursuant to Sections 9-18 through 9-22 and motions to implead a third party defendant filed pursuant to Section 10-11; (2) motions to dismiss except those filed pursuant to Section 14-3; (3) motions to strike; (4) motions to set aside judgment filed pursuant to Section 17-4; and (5) motions for summary judgment. Memoranda of law may be filed by other parties on or before the time the matter appears on the short calendar.

(b) A reply memorandum is not required and the absence of such memoranda will not prejudice any party. A reply memorandum shall be strictly confined to a discussion of matters raised by the responsive memorandum, and shall be filed within fourteen days of the filing of the responsive memorandum to which such reply memoranda is being made.

(c) Surreply memoranda cannot be filed without the permission of the judicial authority.

COMMENTARY: The revision to this section is intended to make clear that a reply memorandum by the proponent of a motion or request

**Sec. 51-14. Rules of court. Disapproval of rules by General Assembly. Hearings.** (a) The judges of the Supreme Court, the judges of the Appellate Court, and the judges of the Superior Court shall adopt and promulgate and may from time to time modify or repeal rules and forms regulating pleading, practice and procedure in judicial proceedings in courts in which they have the constitutional authority to make rules, for the purpose of simplifying proceedings in the courts and of promoting the speedy and efficient determination of litigation upon its merits. The rules of the Appellate Court shall be as consistent as feasible with the rules of the Supreme Court to promote uniformity in the procedure for the taking of appeals and may dispense, so far as justice to the parties will permit while affording a fair review, with the necessity of printing of records and briefs. Such rules shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts. Subject to the provisions of subsection (b) of this section, such rules shall become effective on such date as the judges specify but not in any event until sixty days after such promulgation.

(b) All statutes relating to pleading, practice and procedure in existence on July 1, 1957, shall be deemed to be rules of court and shall remain in effect as such only until modified, superseded or suspended by rules adopted and promulgated by the judges of the Supreme Court or the Superior Court pursuant to the provisions of this section. The Chief Justice shall report any such rules to the General Assembly for study at the beginning of each regular session. Such rules shall be referred by the speaker of the House or by the president of the Senate to the judiciary committee for its consideration and such committee shall schedule hearings thereon. Any rule or any part thereof disapproved by the General Assembly by resolution shall be void and of no effect and a copy of such resolution shall thereafter be published once in the Connecticut Law Journal.

(c) The judges or a committee of their number shall hold public hearings, of which reasonable notice shall be given in the Connecticut Law Journal and otherwise as they deem proper, upon any proposed new rule or any change in an existing rule that is to come before said judges for action, and each such proposed new rule or change in an existing rule shall be published in the Connecticut Law Journal as a part of such notice. A public hearing shall be held at least once a year, of which reasonable notice shall likewise be given, at which any member of the bar or layman may bring to the attention of the judges any new rule or change in an existing rule that he deems desirable.

(d) Upon the taking effect of such rules adopted and promulgated by the judges of the Supreme Court pursuant to the provisions of this section, all provisions of rules theretofore promulgated by the judges of the Superior Court shall be deemed to be repealed.

(1953, 1955, S. 3129d; 1955, S. 3130d; 1957, P.A. 651, S. 27; P.A. 76-436, S. 48, 681; June Sp. Sess. P.A. 83-29, S. 9, 82; P.A. 07-217, S. 186.)

History: P.A. 76-436 amended section to extend power to adopt and modify rules, etc. to superior court judges and added Subsec. (e) re rules to effectuate transfer of jurisdiction, effective July 1, 1978; June Sp. Sess. P.A. 83-29 included reference to judges of appellate court, added provision re rules of appellate court and deleted provisions of Subsec. (e) re rules necessary for transfer of jurisdiction pursuant to Sec. 51-164s; P.A. 07-217 made technical changes in Subsec. (a), effective July 12, 2007.

Rules made under former section have the force of statutes. 59 C. 45. Rules can only give effect to the real purpose of the practice act. 73 C. 6. Cited. 115 C. 101. Cited. 140 C. 643. Cited. 145 C. 222. Cited. 157 C. 157. Cited re constitutional separation of powers (Diss. Op.). 166 C. 501. Cited. 217 C. 532. Cited. 223 C. 411. Cited. 226 C. 757. Cited. 229 C. 178.

Cited. 37 CA 252; judgment reversed, see 236 C. 388. Cited. 42 CA 17.

Cited. 24 CS 25. Cited. 28 CS 34. Any change proposed in criminal court procedure should be brought before rules committee of judges. Id., 366. Cited. 38 CS 389. Cited. 43 CS 211.

Cited. 3 Conn. Cir. Ct. 8 (Diss. Op.); Id., 698, 700.

CA 768.

Subsec. (c):

Subsec. (a):

Cited. 40 CS 238.

Cited. 190 C. 657.