

IN THE SUPREME COURT OF MISSOURI
No. SC91275

BRYANT K. BLANKS,
Respondent,

v.

STEPHANIE A. FAULKNER,
Appellant.

On Appeal From the Circuit Court of Henry County, Missouri
27th Judicial Circuit
Honorable Wayne P. Strothmann
Case No. 07HE-DR00093-02

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF KANSAS & WESTERN
MISSOURI AND OF AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI IN
SUPPORT OF APPELLANT AS *AMICI CURIAE*

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STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Amicus adopts the jurisdictional statement and statement of facts as set forth in Appellant's brief filed with the Court in this case.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 600,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU of Kansas and Western Missouri is an affiliate of the ACLU based in Kansas City, Missouri, with approximately 1,500 members in Western Missouri. The ACLU of Eastern Missouri is an affiliate of the ACLU based in St. Louis with over 4,800 members in Eastern Missouri. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the First Amendment. On behalf of their members, the ACLU of Kansas and Western Missouri and the ACLU of Eastern Missouri file this brief to highlight the significant federal constitutional issues implicated by the exclusion of parents of non-marital children from the family access motion procedure.

SUMMARY OF ARGUMENT

Excluding non-marital families from the “family access motion” procedures established in Mo. Stat. Ann. § 452.400.3 has a disparate impact on suspect classifications of persons and thus violates the Equal Protection Clause of the Fourteenth Amendment. U.S. Const., amend. XIV, § 1.

ARGUMENT

I. The trial court erred in denying Appellant’s family access motion because doing so denied Appellant equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

In family law cases, Missouri courts routinely establish custody and visitation rights and schedules for parents and third parties. Public policy requires courts to craft such custody and visitation orders so that they serve the “best interests of the child.” *Williams v. Cole*, 560 S.W.2d 908, 911 (Mo. banc 1979). In marital cases, such orders are usually set out in judgments of dissolution of marriage or legal separation. In non-marital cases, such orders are normally set out in a judgment of paternity. *Courtney v. Roggy*, 302 S.W.3d 141 (Mo. App. 2009).

When a parent or third party fails to comply with a court’s custody or visitation order, the other parent or third party can always file a motion for contempt. In order to grant a motion for contempt, however, the trial court must find that the respondent willfully or intentionally denied or interfered with visitation. *Morgan v. Gaeth*, 273 S.W.3d 55, 58 (2008). In part to ameliorate this heavy burden of proving contempt, the Missouri legislature has specifically mandated a simple, *pro se* litigant-friendly procedure known as a “family access motion”:

The state courts administrator shall develop a simple form for pro se motions to the aggrieved person, which shall be provided to the person by the circuit clerk. Clerks, under the supervision of a circuit clerk, shall explain to aggrieved parties the procedures for filing the form. Notice of the fact that clerks will provide such assistance shall be conspicuously posted in the clerk's [sic] offices. The location of the office where the family access motion may be filed shall be conspicuously posted in the court building. The performance of duties described in this section shall not constitute the practice of law as defined in section 484.010. Such form for pro se motions shall not require the assistance of legal counsel to prepare and file. The cost of filing the motion shall be the standard court costs otherwise due for instituting a civil action in the circuit court.

Mo. Stat. Ann. §452.400.3.

But, according to the statute, that streamlined “family access motion” procedure is available for use in custody or visitation cases arising out of “a violation of the judgment of dissolution or legal separation.” *Id.* According to the circuit court below, the “family access motion” procedure is not available to non-marital parents whose custody and visitation rights have been established in a judgment of paternity rather than a judgment of dissolution or legal separation.

Demographic data on the incidence and distribution of children born out of wedlock suggests that the circuit court's decision adversely affects various classifications of persons, including the suspect classifications of race and national origin. Specifically, in 2000, nearly thirty-three percent of newborns were born to unmarried parents. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 Rutgers L. Rev. 73, 74 (Fall 2003). Now, a decade later, nearly forty percent of children in the United States are born to unmarried parents. Cahn & Carbone, *Red Families v. Blue Families, Legal Polarization and the Creation of Culture*, Oxford University Press, 2010, p. 118; Ludden, "Unmarried with Kids: A Shift in the Working Class," Morning Edition, National Public Radio, December 6, 2010 (available at <http://www.npr.org/2010/12/06/131675435/unmarried-with-kids-a-shift-in-the-working-class> [last visited January 17, 2010]). "Individuals in poverty and members of disadvantaged minority groups are more likely to live in non-marital families." Davis, *Male Coverture: Law and the Illegitimate Family*, 56 Rutgers L. Rev. at 108. Unmarried parents come from much more disadvantaged populations than married parents. McLanahan, "Fragile Families and the Reproduction of Poverty," 621 Annals of the Am. Acad. of Pol. & Soc. Sci. 111 (2009). Among minority populations, for instance, the percentage of children born out of marriage is considerably higher. Among African-Americans, seventy percent of children are born out of wedlock, and among Latinos fifty percent of

children are born to unwed parents. Cahn and Carbone, p. 119. Moreover, the data clearly suggest that poor people are more likely to have children out of wedlock. McLanahan & Percheski, “Family Structure and the Reproduction of Inequality,” 34 Ann. Rev. of Soc. 257 (2008).

The United States Supreme Court has adopted a three tiered analysis for lower courts to apply to equal protection issues. “In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citations omitted).

For more than four decades, beginning with *Levy v. Louisiana*, 391 U.S. 68 (1968), the Court has wrestled with equal protection issues raised by state statutes that disfavor or burden illegitimate (non-marital) children. “[A] State may not invidiously discriminate against illegitimate children by denying them substantial

benefits accorded children generally.” *Gomez v. Perez*, 409 U.S. 535, 538 (1973). The legislature’s decision to provide the “family access motion” procedure as a means of enforcing custody and visitation orders applicable to legitimate children but not to illegitimate children raises significant issues under Equal Protection Clause of the Fourteenth Amendment. In fact, because the incidence of illegitimacy is heavily skewed toward African-American and Latino families, the denial of the family access procedure to non-marital families has a disparate impact upon suspect classes.

Because of the disparate impact upon illegitimate children who belong to suspect classes, the legislature’s decision to exclude non-marital families from the benefits of the family access motion procedure must pass the most exacting scrutiny. Even if the state’s procedures did not impact upon suspect classes, however, the statutory scheme would need to pass either intermediate scrutiny (substantial relationship to an important governmental objective) or the rational basis test. But there is simply no adequate rationale for excluding non-marital families from the expedited family access procedure. Thus, the statutory process violates principles of equal protection no matter which level of scrutiny applies.

The only obvious rationale for the exclusion of non-marital families from the family access procedure is to discourage non-marital sex and childbearing. But the Supreme Court has long rejected that rationale as “illogical and unjust.” *Weber v.*

Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972). Here, as in *Weber*, “[t]he state interest in legitimate family relationships is not served by the statute[.]” *Id.*

In fact, the present statutory construct simply punishes illegitimate children.

Specifically, the exclusion of cases involving illegitimate children from the family access procedures means that, when a parent of such a child fails to comply with an established custody or visitation order, the affected child does not have the benefit of the custody or visitation schedule that the court had determined to be in his or her best interests. This state of affairs provides yet another burden for a child already shouldered with other significant burdens presented by race and poverty.

CONCLUSION

Based on the foregoing and the reasons provided in Appellant's brief, *amici* ACLU of Eastern Missouri and ACLU of Kansas & Western Missouri urge this Court to rule in Appellant's favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 1689 words, as determined using the word-count feature of Microsoft Office Word 2003. The undersigned further certifies that the accompanying disk has been scanned and was found to be virus-free.

/s/ Stephen Douglas Bonney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this brief and a copy of the brief on disk were served upon the counsel identified below by United States

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