



Post-Divorce Visitation: A Study in the Deprivation of Rights

Judith A. Fournie

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Judith A. Fournie, *Post-Divorce Visitation: A Study in the Deprivation of Rights*, 27 DePaul L. Rev. 113 (1977)

Available at: <https://via.library.depaul.edu/law-review/vol27/iss1/7>

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

POST-DIVORCE VISITATION: A STUDY IN THE DEPRIVATION OF RIGHTS

The law of visitation awards, which establishes the nature of post-divorce familial relationships, is sorely in need of clarification. Because visitation rights are actually limitations on custody, courts have borrowed a standard from the child-custody area: the "best interests of the child" must govern.¹ In applying the standard, however, the courts are missing the target and the child of divorce often constitutes the casualty on the emotional battlefield of the warring parents.² The child's needs are overlooked by courts which veil the reasons for visitation decisions behind an incantation of the phrase "best interests,"³ without relating the determination to the particular facts of the case.

Along with the abused "best interests" standard, the custody area has contributed a list of factors to be considered by courts faced with the visitation decision. Yet the courts have provided little guidance on how to apply those considerations,⁴ which include such measures as the age, sex, and preference of the child,⁵ as well as the fitness of

1. *Kilgore v. Kilgore*, 54 Ala. 336, 339, 308 So.2d 249, 251 (Civ. App. 1975). Note, however, that the "best interests" of the child may be significantly different in visitation cases than in custody cases. *Spencer v. Spencer*, 273 So.2d 605, 608 (La. Ct. App. 1973). The custodial parent must satisfy the child's needs for daily care and control, while the visiting parent exercises no such authority over the child. Rather, the non-custodial parent supplies the child with the very important psychological support of a continuing relationship. R. GARDNER, *PSYCHOTHERAPY WITH CHILDREN OF DIVORCE* 381 (1976).

2. Dr. Despert, in her study of the effect of divorce on children, noted that a man and woman who hurt each other during their marriage may continue to do so during the divorce proceeding and afterwards. Often the child is used as a pawn in the battle. "Many a harmful decision over custody, many a stubborn struggle over visitation privileges springs not from a concern for the child but from an unconscious wish of one or both parents to get the best of the other." J. DESPERT, *CHILDREN OF DIVORCE* 13 (1953).

3. See *Hildebrand v. Hildebrand*, 105 Ill. App.2d 261, 244 N.E.2d 866 (5th Dist. 1969); *Reese v. Reese*, 26 Ill. App.2d 244, 167 N.E.2d 812 (2d Dist. 1960). It is noteworthy that courts frequently publish only the abstract of divorce custody and visitation cases. The scarcity of published opinions adds to the problem of arriving at viable standards that can be employed in visitation cases.

4. Courts receive little guidance on how to apply the standards as many decisions are simply statements of results "accompanied by skeletal factual accounts with little or no attempt to support the result in reason." Taylor, *Child Custody Problems in Illinois*, 24 *DEPAUL L. REV.* 521, 522 (1975). The abstract subdivisions of the "best interests" criterion appear consistently in opinions without any description of their relationship to the particular fact pattern involved. Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 *J. FAM. L.* 21, 22 (1965). Within the existing structure, the "best interests" standard is very difficult for judges to apply. Comment, *Measuring The Child's Best Interests—A Study of Incomplete Considerations*, 44 *DEN. L.J.* 132, 134 (1967).

5. In *Interest of B.B.*, 537 S.W.2d 682 (Mo. App. 1967); *Wolff v. Wolff*, 550 P.2d 1388, 1390 (Or. App. 1976). See *Sturm, Student Symposium on the Child and the Law*, 10 *U. KAN. L. REV.* 539, 557 (1962).

the parent. Reliance upon such measures with regard to visitation questions is particularly ill-advised due to the differences between custody and visitation. In contrast to custody cases, which demand a resolution of the question of which party is to have control over, and responsibility for, the upbringing of the child, visitation cases involve only the question of the maintenance of associational ties. Therefore, if the "best interests" standard is to be used, it must enjoy more flexibility in the visitation area. Unfortunately, in many visitation cases, the child's needs are given only lip service, as they are overshadowed by various types of parental considerations.

Although commentators have risen to champion the rights of children in custody cases,⁶ the topic of visitation has received little attention from either courts or commentators.⁷ This Comment will discuss the current practices of divorce courts in making and enforcing visitation decisions. The elusive "best interests" standard will be analyzed, and the breadth of trial court discretion will be criticized. The constitutional rights of those affected by visitation, an area which virtually has been ignored, will be explored, and alternatives to the traditional method of determining visitation awards will be proposed.

VISITATION AWARDS

It is well settled that some type of continued access to the child by the non-custodial parent is generally in the "best interests" of the child.⁸ The courts are also in agreement that the welfare of the child requires liberal visitation so that he or she will not become estranged from the non-custodial parent.⁹ The extent of visitation granted in

6. See generally Forer, *Rights of Children: The Legal Vacuum*, 55 A.B.A.J. 1151 (1969); Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFFALO L. REV. 1 (1973); Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAM. L. 181 (1964); Lefco, *The Child as a Party in Interest in Custody Proceedings*, 10 GEO. ST. B.J. 577 (1974); Pokorny, *Observations by a "Friend of the Court,"* 10 L. & CONTEMP. PROB. 778 (1944); Note, *Guardianship Ad Litem in Texas Divorce and Custody Cases*, 20 BAYLOR L. REV. 433 (1968); Comment, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917 (1976); Comment, *Due Process For Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. REV. LAW & SOC. CHNG. 177 (1974).

7. See Henszey, *Visitation By a Non-Custodial Parent: What is the "Best Interests" Doctrine?* 15 J. FAM. L. 215 (1977).

8. *McManus v. McManus*, 38 Ill. App.3d 645, 647, 348 N.E.2d 507, 509 (1976); *Kay v. Kay*, 22 Ill. App.3d 530, 318 N.E.2d 9 (1974).

9. *Ellison v. Ellison*, 48 Ala. App. 80, 261 So.2d 911 (1972); *Hailey v. Hailey*, 513 P.2d 473 (Colo. App. 1973); *Escobar v. Escobar*, 300 So.2d 702 (Fla. Dist. Ct. App. 1974); *Chmelik v. Chmelik*, 25 Ill. App.2d 192, 166 N.E.2d 101 (1960); *In re Marriage of McBee*, 244 N.W.2d 327 (Iowa 1976).

the implementation of these propositions has varied. There are three possible types of visitation award: "reasonable" visitation, decretal provisions specifying visitation dates, and visitation which is left to the discretion of the custodial parent.

Perhaps the most common visitation award is that of "reasonable" visitation. If the parties are willing to cooperate with each other and to place the welfare of the child ahead of their own interests, specific dates and limits of visitation are not necessary.¹⁰ The divorced parents arrange the timing of visitation between themselves, to their mutual convenience. While the flexibility of the "reasonable" visitation award is its greatest advantage, it clearly presumes a harmonious on-going relationship between the divorced adults.

However, in cases where the divorced parents cannot cooperatively make visitation arrangements, or where the non-custodial parent is denied visitation by the former spouse, the court steps in and prescribes specific days of the week, holidays and weeks of summer vacation as visitation days.¹¹ The court takes the responsibility for arranging the visitation schedule in cases in which the parents feel animosity toward one another and in cases in which interaction between them results in confrontations causing some consequential damage to the child.¹²

The third type of possible visitation award is that which is left to the discretion of the custodial parent. While the courts have not yet adopted this approach to visitation, such authorities as Freud, Goldstein, and Solnit, in their psychological study of the child of divorce, advocate it as being in the interests of the child.¹³ Their conclusion that the non-custodial parent should have no legally enforceable right to visit the child is designed to protect the security of the on-going relationship between the child and the custodial parent.¹⁴ This proposition has been severely criticized by the commentators as encouraging spiteful behavior, blackmail, and extortion.¹⁵ Certainly the foreclosure of visitation at the whim of the custodial parent could be

10. *Ellison v. Ellison*, 48 Ala. App. 80, 261 So.2d 911 (1972).

11. *In re Marriage of Guyer*, 238 N.W.2d 794, 797 (Iowa 1976).

12. *Wood v. Wood*, 510 S.W.2d 399, 400 (Tex. Civ. App. 1974).

13. See generally GOLDSTEIN, FREUD, & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 38 (1973). The authors base their conclusion that the non-custodial parent should not necessarily have any visitation rights upon the theory that a child has difficulty maintaining a relationship with two "psychological" (nurturing) parents who are not in a positive relationship to one another.

14. *Id.* at 37, 38.

15. Foster, *A Review of Beyond the Best Interests of the Child*, 12 WILLAMETTE L. J. 545, 551 (1976).

anticipated as becoming a tool of vindictiveness and recrimination. More importantly, it ignores the child's need for a continuing relationship with the absent parent, recognizing only the value of continuity in the custodial parent's dealings with the child. Therefore, it is unlikely that the courts will adopt such an extreme position with regard to visitation.

Another possibility in the area of visitation awards, although not correctly denominated "visitation" at all, is the division of custody between the parents.¹⁶ The courts are virtually unanimous, however, in disallowing such "split custody" since the welfare of the child is believed to require custody and control under undivided authority. Frequent shifting of the child from home to home is thought to expose the child to "changes in discipline and in daily habit, creating further confusion and insecurity and inviting breach of discipline and emotional instability."¹⁷ The "best interests" of the child, therefore, generally demand that permanent custody be vested in one parent, with the visitation privileges of the non-custodial parent limited to the extent that they do not substantially affect the custodial parent's discharge of his or her responsibility.¹⁸ In the few cases where split custody has been decreed, the courts have been careful to justify the decision in terms of the unique circumstances of the case.¹⁹ In eliciting an articulation of the manner in which visitation will serve the interest of the child, the question of split custody has generated judicial attention to the needs of the child which is lacking in many of the more traditional visitation decisions.

THE DENIAL OF VISITATION

Aside from these positive awards of visitation, many courts have seen fit to severely curtail or completely deny visitation. Courts have

16. *Doherty v. Mertens*, 326 So.2d 405, 407 (La. App. 1976); *Ogden v. Ogden*, 220 So.2d 241, 244 (La. App. 1969); *Bowlin v. Bowlin*, 222 So.2d 637, 638 (Fla. App. 1969); *Holley v. Holley*, 158 So.2d 620, 622 (La. App. 1963); *McCormick v. McCormick*, 293 So.2d 454 (Miss. 1974); *Holliday v. Huffstickler*, 245 So.2d 598 (Miss. 1971); *Gardner v. Pettit*, 192 So.2d 696 (Miss. 1966); *Kennedy v. Kennedy*, 222 Miss. 469, 76 So.2d 375 (1954); *Johnson v. Johnson*, 526 S.W.2d 33, 37 (Mo. App. 1975).

17. *LeBouef v. LeBouef*, 325 So.2d 290, 292 (La. App. 1975).

18. *Id.* See also *Johnson v. Johnson*, 526 S.W.2d 33,37 (Mo. App. 1975).

19. *Kilgore v. Kilgore*, 308 So.2d 249, 252 (Ala. Civ. App. 1975). The court found that the proximity of the parties' homes and the fact that the paternal grandparents, with whom the child had spent a good deal of time, lived across the street from the father, insured that the child would enjoy security in a split custody situation. See *Terebello v. Spencer*, 273 So.2d 605, 607, 608 (La. App. 1973), in which the split custody was condemned. The short length of the visits and the fact that overnight visitation was not allowed were found to establish that the trial

created a strange dichotomy by phrasing the issue in terms of the child's "best interests," while simultaneously upholding the "rights" of the parent. One court stated that the right of visitation "should not be withheld unless the parent has forfeited the right by his conduct or unless the exercise of the right would injuriously affect the welfare of the child."²⁰ Visitation can be completely denied, then, either because the court may conclude that it is not in the "best interests" of the child or because the parent seeking visitation has somehow lost that right.²¹ Actually, the former consideration often is overshadowed by the latter.²²

While the standard professed by the courts is typically that of the "best interests" of the child, courts often base the visitation decision upon other factors,²³ such as the convenience of the custodial parent,²⁴ the morals of the parent seeking visitation,²⁵ or even the timeliness of support payments made by the non-custodial parent.²⁶ Although the child's welfare arguably may be interwoven with those parental considerations, the courts have not clearly defined the weight to be given that relationship. As a result, little guidance is available on how the "best interests" standard should be applied. Abstract factors such as the "fitness of a parent" appear in the opinions without any relationship to the particular fact pattern involved.²⁷

One idea, however, which clearly emerges from the court opinions is the recognition that visitation is a parental right,²⁸ albeit subject to

court's decree did not amount to the prohibited split custody. *See also* Baggett v. Baggett, 512 S.W.2d 292 (Tenn. App. 1973), in which the child's interest were found to be served by spending summers in the custody of the father, who lived in a rural area, and spending the school years with the mother, who lived in the city.

20. Franz v. Franz, 230 So.2d 450, 452 (La. App. 1970), *citing* Johnson v. Johnson, 214 La. 912, 39 So.2d 340 (1949).

21. In 2 NELSON, DIVORCE AND ANNULMENT 274 § 15.26 (2d ed. 1961), it is stated:

A parent whose child is placed in the custody of another person has a right of access to the child at reasonable times. The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child. A parent's right of access to his or her child will ordinarily be decreed unless the parent has forfeited the privilege by his conduct or unless the exercise of the privilege would injuriously affect the welfare of the child, for it is only in exceptional cases that this right should be denied

22. *See* notes 23-27 and accompanying text *infra*.

23. Escobar v. Escobar, 300 So.2d 702 (Fla. Dist. Ct. App. 1974).

24. Passmore v. Passmore, 144 Neb. 775, 14 N.W.2d 670 (1944); *In re Marriage of Roff*, 228 N.W.2d 98 (Iowa 1975).

25. *In re Fulwiler's Marriage*, 538 P.2d 958 (Or. App. 1975).

26. Barbour v. Barbour, 134 Mont. 317, 330 P.2d 1093 (1958).

27. Benner v. Benner, 113 Cal. App.2d 531, 248 P.2d 425 (1952); *In re Marriage of Guyer*, 238 N.W.2d 794 (Iowa 1976) (Le Grand, J., dissenting).

28. This right is thought to be a natural right, not a property right. It is interesting to note, however, that as late as 1931 the courts were still holding that parents enjoy a property right in

forfeiture by certain types of conduct. If the "best interests" standard is analyzed objectively, the courts appear to be saying that the welfare of the child is determined by the rights of the parents. Accordingly, if the parent does something to forfeit the right to see the child, then the child's "best interests" necessarily are being served by the denial of visitation. The problem with this type of judicial reasoning becomes clear in an analysis of the conditions placed upon the parental right to visitation.

First of all, the courts often base a denial or curtailment of visitation upon the moral conduct of the parent. In *Larroquette v. Larroquette*,²⁹ for example, a divorced father who was living with a woman out of wedlock was denied the right to visitation with his minor daughter in his home and the right to overnight visits. In limiting visitation the court claimed to be applying the "best interests" of the child standard,³⁰ but the language in the opinion emphasized moral judgments by the court of little convincing relevance to the welfare of the child. The court stated that the moral and emotional welfare of the child dictates that no visitation be allowed in a home where an illicit relationship is maintained on a permanent basis.³¹ In this regard the court claimed to be concerned with the prevention of the undermining of the child's respect for the family unit.³² However, even if it were conceded that the existence of a new romantic interest in a father's life is detrimental to a child of a past marriage, there is no compelling reason to believe that a child is harmed more by a permanent "illicit" relationship than by the father's remarriage. It is naive to believe that a child who has just come through the throes of his parents' divorce is not already aware of the frailties of the "family unit."

The *Larroquette* court also stated that "[t]he temporary, hypocritical removal of the concubine at visitation time does not change the fact that his apartment is a place of permanent concubinage rather than a respectable place of residence."³³ The child's "best inter-

their children, although it is not absolute. *Lippincott v. Lippincott*, 97 N.J. Eq. 517, 128 A. 254 (1925); *Kenner v. Kenner*, 139 Tenn. 700, 202 S.W. 723 (1918); *Williams v. Perry*, 40 S.W.2d 929 (Tex. Civ. App. 1931).

29. 293 So.2d 628 (La. App. 1974).

30. *Id.* at 629.

31. *Id.* Concern about the possible illegality of the non-custodial parent's relationship with a third party is unwarranted where that relationship is kept from the child. The Supreme Court established in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), that the private moral conduct of unmarried adults is protected by the Constitution.

32. *Id.*

33. *Id.*

ests," however, have no rational relationship to exclusion from the father's home at a time when his paramour is not present.³⁴ More striking is the court's illogical obsession with the punishment of an immoral parent at the expense of the child's real needs. Dr. Juliette Despert, in her classic study of the effects of divorce on children, described the needs of the child of divorced parents:

The most serious danger to children lies in depriving them of the emotional support they must have to grow on. They can be deprived of all material luxuries, even of many physical comforts, and yet thrive and grow to wholesome maturity if their emotional needs are satisfied. This is a psychological truism which applies to all children, not only in the divorce situation.³⁵

Thus, in cases in which parental conduct is not a threat to the child's welfare, limiting visitation for the purpose of punishing an immoral parent defeats the child's need for "emotional support."

Even courts which display a more liberal attitude toward the private sexual conduct of the non-custodial parent misuse the "best interests" standard. They determine the visitation question by considering whether the parent seeking visitation has actually forfeited that right. While the result may be the granting of visitation, the court's approach displays a basic flaw. It is not at all unusual for courts to state the issue in terms of the moral fitness of the parent, giving neither guidance as to the meaning of that term, nor explanation of the relationship between such fitness and the satisfaction of the child's needs.³⁶

One court recently granted extended visitation to a father who had been living with a woman and had subsequently married her.³⁷ The court's discussion, however, centered around the eventual marriage of the father and made no reference to the relationship between the moral issue and any possible effect upon the daughter. Moral considerations of parental conduct have also been discussed outside of the area of sexual activity. For example, one court granted visitation to a

34. It has been suggested that a paramour can serve as a surrogate father or mother to the child of divorce, compensating for the absence of the missing parent. R. GARDNER, *PSYCHOTHERAPY WITH CHILDREN OF DIVORCE* 388 (1976). See also *Todd v. Todd*, 311 So.2d 769, 770 (Fla. App. 1975), in which the court stated: "[I]nasmuch as the former Barbara Phillips has now married appellant, we find no justification, if there ever was one, for this provision"

35. J. DESPERT, *CHILDREN OF DIVORCE* 14 (1953).

36. *Hill v. Hill*, 423 S.W.2d 943 (Tex. Civ. App. 1968). The trial court's finding that the husband was "unfit" to visit his children was affirmed without any discussion of the basis of that finding.

37. *Todd v. Todd*, 311 So.2d 769 (Fla. App. 1975).

mother over the objection that she was materially unfit because she had deserted the family.³⁸ The mother's reasons for leaving the family were discussed and she was absolved by the court because of her youth at the time of the desertion. In this case, the court mentioned that the children might benefit from a renewed relationship with their mother. There was no indication, however, that the children's welfare in receiving their mother's attention was the deciding factor. In fact, the court emphasized the right of the mother to see her children.

In a similar case, a young mother's visitation rights were severely limited because she had not fully utilized the visitation privileges granted to her.³⁹ The court deemed her prior failure to visit to be a reflection on the intensity of her desire to see her children. The true motive of the court, however, may have been revealed in its statement regarding her new "suspicious" place of residence.⁴⁰ At any rate, the children's interest in seeing their mother was not discussed.

One form of parental moral conduct that typically has given rise to a genuine consideration of the child's interests is the homosexual activity of the parent seeking visitation. In the classic case, *In the Matter of J.S. & C.*,⁴¹ the court found that granting visitation rights to the father would serve the "best interests" of the children,⁴² enabling them to maintain their close relationship with him. The court further held that, in view of the fact that the father had involved the children in his attempts to further homosexuality, visitation should be limited. Thus, during the period of visitation the father was precluded from cohabiting with any individual other than a lawful spouse, taking the children to a named meeting place for homosexuals, involving the children in any homosexual activities or publicity, or being in the presence of his lover.⁴³ In a more recent case involving the right of a lesbian mother to visit her children, similar restrictions were imposed in the interest of the child.⁴⁴

38. *Aud v. Etienne*, 47 Ill.2d 110, 264 N.E.2d 196 (1970).

39. The mother's visitation was limited to one in each fortnight, and she was denied the privilege of taking the children to her home or overnight. *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. App. 1973).

40. The mother had moved near the residence of her paramour. *Id.*

41. 129 N.J. Super. 486, 324 A.2d 90 (1974).

42. *Id.* at 492, 324 A.2d at 94.

43. *Id.* at 498, 324 A.2d at 97.

44. *In re Jane B.*, 85 Misc.2d 515, 520, 528, 380 N.Y.S.2d 848, 854, 860-61 (1976). The custodial mother in this case admitted she and her roommate maintained a homosexual relationship, and psychiatric testimony indicated that there was a resultant emotional disturbance of the child. The court granted custody of the minor daughter to the father and limited the mother's visits. No overnight visits or visits in the presence of another homosexual were al-

The cases involving a homosexual parent display the kind of attention to the child's needs which all visitation questions should elicit. The nature of the public attitude toward homosexuality guarantees special attention to the emotional and psychological well-being of the child of a homosexual parent. It is unfortunate that the courts are unwilling to serve the child in less dramatic situations involving the moral fitness of a parent.

In the area of the denial or curtailment of visitation rights, the morality of the parent is not the only reason for defeating the child's needs. Courts also have seen fit to make visitation contingent upon the timely payment of support money. Courts base such action on the premise that the primary beneficiaries of support payments are the children. It is reasoned that "the court may balance the equities by requiring the husband to make the payments for the benefit of the children before visitation is allowed against allowing the father to visit the children regardless of whether the father cares enough to provide adequate support for his children or not."⁴⁵ The issue is phrased in terms of whether the recalcitrant parent is not being overindulged in preserving his "right" of visitation while the court is failing to use one of the better means available to encourage him to discharge his obligation of support for his child.⁴⁶

Failure of a non-custodial parent to maintain support payments is viewed as displaying a lack of interest in the child, justifying denial of visitation.⁴⁷ The complete denial of the visitation right is considered by many courts to be a most effective sanction.⁴⁸ The illogic of these two propositions, taken together, is apparent. If a parent does not care about the child, the denial of visitation will not be a serious deprivation which would encourage obedience to the decree. Moreover, considered separately, both conclusions are unfounded. A parent's failure to make timely support payments may be precipitated

lowed, the daughter could not be taken to places where known homosexuals were present, and the mother was not allowed to involve the child in homosexual activities or publicity.

45. *Reardon v. Reardon*, 3 Ariz. App. 475, 415 P.2d 571, 574 (1976). Although the non-custodial husband was found not to be in willful contempt for his failure to make support payments, the fact that he had exercised his rights to visitation only on rare occasions was considered to justify the court's decision to make visitation contingent upon the payment of support money.

46. *Id.*

47. In *Barbour v. Barbour*, 134 Mont. 317, 330 P.2d 1093 (1958), it was stated that:

[S]ubject to honest inability to pay, if a parent cares too little for the children to support them, that parent cares too little for the children to see them. However the law, the children must eat

Id. at 326, 330 P.2d at 1098.

48. *Christofferson v. Christofferson*, 363 Mich. 421, 109 N.W.2d 848 (1961).

by differences with the ex-spouse, inability to pay, or a host of other possibilities. Lack of concern for the child cannot categorically be assumed to motivate the recalcitrant parent. As to the second conclusion that a denial of visitation is the appropriate judicial instrument to enforce support decrees, it is clear that the child's interests are being sacrificed for judicial expediency. The practice of conditioning visitation upon the timely payment of child support money has been exposed as an attempt by courts to punish the recalcitrant parent through the child.⁴⁹ The proper method for dealing with a parent who willfully fails to pay child support is punishment by contempt.⁵⁰ Fortunately, the majority view recognizes the fact that the child's interests are not served by making visits with the parent contingent upon the payment of money.⁵¹ Courts have found it "unnecessary to include in the decree conditions which make visitation contingent upon payment of support . . . and any attempt to do so would have the effect of permitting a parent to bargain with the rights of the child."⁵²

Considerations of the child's welfare, other than his economic interests, have been perceived as underlying the allowance of visitation by the parent not having custody.⁵³ Furthermore, courts have recognized that "the economic, emotional and other intangible benefits to a child of timely support payments seems to outweigh the disadvantages of visitation denial."⁵⁴ Although decisions indicate that timely payments to the custodial parent purportedly will reduce the level of animosity existing between the estranged adults, creating an atmosphere of "trust and respect between the parents,"⁵⁵ no persuasive evidence has been produced on the point. It seems at least equally likely that the differences between the ex-spouses will be rooted deeply enough so that the mere prompt payment of support money will not spontaneously generate "trust and respect" between them.⁵⁶ Moreover, the child's psychological needs are more likely to

49. *West v. West*, 6 Ore. App. 128, 487 P.2d 96, 98 (1971).

50. *Griffin v. Griffin*, 472 P.2d 750, 752 (Colo. App. 1970) (stating that contempt is a "suitable" remedy).

51. *Davis v. Davis*, 145 Kan. 282, 65 P.2d 562, 566 (1937); *Feuer v. Feuer*, 50 A.D.2d 772, 376 N.Y.S.2d 546 (1975); *Gibford v. Gibford*, 55 Wash.2d 760, 350 P.2d 158 (1960).

52. *Griffin v. Griffin*, 226 Ga. 781, 784, 177 S.E.2d 696, 698 (1970). *See also* *Howard v. Howard*, 143 So.2d 502, 503 (Fla. App. 1962); *Chaffin v. Grigsby*, 293 So.2d 404 (Fla. App. 1974).

53. *Id.* at 131, 132, 487 P.2d at 98. *See also* *Hemstreet v. Hemstreet*, 228 Ore. 88, 363 P.2d 731 (1961); *Block v. Block*, 15 Wis.2d 291, 112 N.W.2d 923 (1961).

54. *Henszey*, *supra* note 7, at 216.

55. *Id.*

56. J. DESPERT, *CHILDREN OF DIVORCE* 13 (1953).

be satisfied by continued interaction with both of his parents.⁵⁷ The support, interest and continuing love of the absent parent is vital to the psychological well-being of the child.⁵⁸ Contrary to the suggestion of one court,⁵⁹ the child will not starve if payments are delinquent. The state will see to it that the child does not go hungry;⁶⁰ but the judicial sanction of the denial of visitation is cold comfort to a lonely child.

Whether visitation is denied or curtailed because of the parent's private sexual activities or orientation, general moral fitness, or failure to make timely support payments, the true basis for the limitation on association with the child should be made explicit. The veiling of judicial reasoning behind invocations of the "best interests" standard while actually basing decisions on other considerations is unjustifiable. Objection need not be made to the description of the parent's interest as a "right" of visitation, so long as the determination of whether that right should be superseded is based upon the best interests of the child, not upon a moral judgment that is unrelated to the child's welfare.

The only adequate justification for denial of visitation is parental conduct which constitutes a serious detriment to the child.⁶¹ Accordingly, some sort of visitation privilege should be granted as a matter of course;⁶² any diminution of visitation privileges should be no greater than necessary to serve the best interests of the child.⁶³

57. Since minor children, notwithstanding the divorce, are entitled to the love and companionship of both parents, and the well rounded development of a normal child depends on association with both parents, the decree, within the discretion of the court, may and, under normal circumstances, should include a provision permitting the parent deprived of their custody to visit or communicate with the children under such restrictions as the circumstances may warrant.

A divorced parent has a natural right of access to his child awarded to the other parent, and only under exceptional circumstances should the right or privilege be denied, but the welfare of the child must receive the paramount consideration in the determination of this matter. This privilege must yield to the good of the child, and may be denied to either, or both, parents, where the best interests of the child will be served thereby. Even the guilty party is usually allowed this privilege unless morally unfit to associate with the child.

27B C.J.S. Divorce § 312 at 478 (1959).

58. *Id.*

59. J. DESPERT, *supra* note 56.

60. To alleviate hunger and malnutrition in low-income households, Congress has established a Food Stamp Program. The program permits approved households to purchase a nutritionally adequate diet through normal channels of trade. 7 C.F.R. § 270-270.1 (1977).

61. 2 NELSON, DIVORCE AND ANNULMENT 273, § 15.25 (2d ed. 1961).

62. It should also be noted that a burgeoning line of cases deals with the attempts of the grandparent to secure visitation with his grandchild. Two distinct fact patterns emerge. First, there are cases in which the custodial parent is absent, having enlisted or having been drafted

CONSTITUTIONAL RIGHTS AFFECTED BY THE
VISITATION DECISION

In addition to the problem of misapplication of the "best interests" formula, visitation awards are subject to challenge because of excessive and unnecessary intrusion into constitutionally protected rights of the parents and the child. Judicial limitations on the exercise of visitation affect such rights as free association, privacy, and freedom of interstate travel. The rights of the custodial parent, the non-custodial parent, and the child to engage in normally protected activities are routinely curtailed to an astonishing extent. One court went so far as to enjoin the parents from discussing each other with the children.⁶⁴

into the armed service. *McKinney v. Cox*, 18 Ill. App.2d 609, 153 N.E.2d 98 (1958); *Lucchesi v. Lucchesi*, 330 Ill. App. 506, 71 N.E.2d 920 (1947); *Solomon v. Solomon*, 319 Ill. App. 618, 49 N.E.2d 807 (1943). In these cases the courts tend to award visitation to the grandparent on the premise that, had the non-custodial parent been home, he would have taken the child to visit at his parents' home.

Secondly, in cases in which the child has, for one reason or another, spent a considerable amount of time with the grandparents, his "best interests" are typically found to dictate a continuation of that relationship through visitation. *Warman v. Warman*, 496 S.W.2d 286, 289 (Mo. App. 1973). Here, as in the parental visitation question, the standard articulated by the courts is the "best interests" of the child. See *Gault*, *Statutory Grandparent Visitation*, 5 ST. MARY'S L.J. 474 (1973); *Gault*, *Grandparent-Grandchild Visitation*, 37 TEX. B.J. 433 (1974).

In the grandparental visitation setting, possible friction in the home between the custodial parent and the grandparents has been viewed as a potential sore spot. Note, *Visitation Rights of Grandparent Over the Objection of a Parent: The Best Interests of the Child*, 15 J. FAM. L. 51, 60 (1977). Conflict resulting from prior grandparent visits is often an influential factor in a court's determination that future visits should not be permitted. GOLDSTEIN, FREUD, & SOLNIT, *supra* note 13, at 37, 38.

The idea that friction between the grandparent and the custodial adult is more devastating to the child than that normally anticipated between divorcing spouses seems unlikely. The minority view that active friction in the child's home should not preclude visitation is better reasoned. In *Evans v. Lane*, 8 Ga. App. 826, 834, 70 S.E. 603, 607 (1911), the court allowed visitation despite the enmity existing between the father and the grandmother. The court believed that the continuing, mutual interest in the child could serve to quell the acrimony between the parties.

In any event, the child's interests should be the determining factor, and the effects of the tension in the home must be weighed against the benefits of a continued relationship with the grandparent, based upon an examination of the particular factual situation. *Gochenaour v. Gochenaour*, 45 Wis.2d 8, 172 N.W.2d 6 (1969).

The standing of such third parties to litigate visitation issues when they claim such is based on decretal rights. Where a third party has become a custodian by virtue of a court order, he is frequently placed in a position of defending the order on subsequent motions to modify. "To assert that they have no right to litigate the future status of the child would render nugatory the order granting custody." *Warman v. Warman*, 496 S.W.2d 286, 289 (Mo. App. 1973).

63. "Where it is possible to serve such interests by an order providing for less than full deprivation of visitation privileges, the court should make such an order and no more." *Devine v. Devine*, 213 Cal. App.2d 549, 553, 29 Cal. Rptr. 132, 134 (1963).

64. The appellate court noted that it was perfectly permissible for a trial court to require parties to refrain from making derogatory remarks about the other before the child, but found the order enjoining any discussion of the other party to be unreasonable and void. *Malooof v. Malooof*, 231 Ga. 811, 812, 204 S.E.2d 162, 163 (1974).

Nevertheless, constitutional issues are never raised in visitation opinions,⁶⁵ which is particularly surprising in light of the fact that the right of visitation is often conditioned upon such constitutionally suspect factors as the private sexual conduct of the parent, the timely payment of support money, and the undefined "fitness" of a parent. In other contexts, such governmental invasions of fundamental rights would demand strict judicial scrutiny,⁶⁶ with the state having the heavy burden of demonstrating a compelling interest.⁶⁷

The reason for this anomalous lack of interest in such a fertile constitutional area can be expressed in three words: trial court discretion. Although trial courts have the best opportunity to observe the conduct of the parties and their complex interrelationships which no record can preserve, visitation awards rarely articulate the facts that form the basis of the decision.⁶⁸ Instead, courts routinely veil the reasons behind the cloak of broad and unreviewable discretion.

The violation of constitutionally protected rights in visitation decisions occurs in various forms. Several of these areas will be examined, and the state's interest in the abridgment of the rights of family members will be shown to fall short of the "compelling" standard.

Right of Free Association

Courts commonly limit⁶⁹ or foreclose⁷⁰ both the parent's and the child's freedom to maintain a relationship without the showing of any significant state interest.⁷¹ So too, when a court denies visitation

65. In a 1974 case involving the rights of a homosexual father to visit his children, the New Jersey Superior Court faced the constitutional privacy issue head-on. In one of the rare cases to recognize the constitutional interests of the parent seeking visitation, the court stated: "The parental rights of a homosexual, like those of a heterosexual, are constitutionally protected." In the Matter of J. S. & C., 129 N.J. Super. 486, 489, 324 A.2d 90, 92 (1974).

66. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

67. See *Roe v. Wade*, 410 U.S. 113 (1973); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

68. See *Miezio v. Miezio*, 6 Ill.2d 469, 129 N.E.2d 20 (1955); *Rodely v. Rodely*, 28 Ill.2d 347, 192 N.E.2d 347 (1963); *Hildebrand v. Hildebrand*, 105 Ill. App.2d 261, 244 N.E.2d 866 (5th Dist. 1969); *Reese v. Reese*, 26 Ill. App.2d 244, 167 N.E.2d 812 (2d Dist. 1960); *Bliffert v. Bliffert*, 14 Wis.2d 316, 111 N.W.2d 188 (1961); *Brown v. Brown*, 9 Wis.2d 322, 101 N.W.2d 48 (1960).

69. *Application of Denberg*, 34 Misc. 2d 980, 229 N.Y.S.2d 831 (1962).

70. *Graham v. Graham*, 253 S.C. 486, 171 S.E.2d 704, 708 (1970).

71. *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969). The fact that the thrust of the criticism in this paper is directed at the judiciary does not lessen the "compelling state interest" analysis. As the Court stated in *NAACP v. Alabama*, 357 U.S. 449, 463 (1958):

It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize

based upon illegitimate considerations, the basic constitutional right to free association is improperly denied to both parent and child. Yet an individual's interest in visitation is clearly analogous to those associational rights which the Supreme Court, since the 1920's, has recognized as fundamental.⁷² The freedoms to "marry, establish a home and bring up children" have been specified as incidents to that guaranteed liberty.⁷³ Moreover, the adult's freedom to direct the destiny of his child has been preserved specifically as a "right, coupled with a high duty."⁷⁴ Obviously, the nurturing prescribed by the Court presupposes association between parent and child. The Court also has found it "beyond debate" that the freedom to engage in association for the advancement of beliefs and ideas is inseparable from the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment.⁷⁵ The right of the adult to advance his ideas to others⁷⁶ must logically extend to include association with a child.

Additionally, it can be argued that the child enjoys certain associational rights in his own behalf. Such a proposition is supported by the fact that the Supreme Court recently affirmed in dicta that a child's right to attend an educational institution which promotes certain beliefs is equal to the parents' right to send him there.⁷⁷ The Court has also characterized the principal functions of a school as including the accommodation of personal intercommunication among the stu-

72. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court found that the personal liberty guaranteed by the Fourteenth Amendment Due Process Clause denotes, among other things, the right of the individual to bring up children. This fundamental parental right was sufficient to defeat the state's interest in forbidding the teaching of foreign languages in the schools in time of peace.

73. See 262 U.S. 390, 399.

74. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). In this case the Court held that a law which compels attendance at public as opposed to private or parochial schools interfered with the liberty of parents to direct the upbringing and education of their children. The Court noted that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."

It follows from *Pierce* that parental liberty must include, as a minimum, the right to associate and communicate with the child, in order that parents may exercise their right to raise and educate their children without government direction.

75. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). The Court preserved the right of the Association to refuse to disclose its membership list to the Alabama court. The Court found that the state had failed to display a relationship between its access to the lists and its prosecution of the organization for allegedly conducting intrastate business in violation of the Alabama foreign corporation registration statute. It was held that compelled disclosure of the membership list was likely to adversely affect the ability of members to enjoy free association.

76. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

77. *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). The Court proceeded to hold that invidious private racial discrimination enjoys no affirmative constitutional protection.

dents.⁷⁸ The free association of students was found to be protected up to the point of "material disruption" with classwork, or "substantial disorder."⁷⁹ Although the child's right to associate with a non-custodial parent has not been determined specifically by the Supreme Court, it is logical to expect that such association would enjoy at least as much constitutional protection as that afforded intercommunication among minors.

The Right to Privacy

Closely related to free association and intercommunication is the right of privacy of family members, which is also infringed by certain visitation decisions. The privacy of the adult can be abridged in two spheres: the right to make certain familial decisions is denied; and private moral conduct is regulated as a condition of visitation.

Interests which are very closely related to visitation, marriage and procreation have long been recognized by the Court as fundamental rights, the abridgment of which requires strict judicial scrutiny.⁸⁰ The marital relationship has been found to lie within the zone of privacy created by the natural emanations of several fundamental constitutional guarantees.⁸¹ Moreover, the Court has proceeded to find that single persons are entitled to the same protection of privacy interests as are their married counterparts.⁸² Indeed, it is a violation of the

78. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512 (1969).

79. *Id.* at 513. In *Tinker*, the Court held that school authorities had failed to demonstrate any facts which would have justified their suspensions of students who wore black arm bands to school in protest of the Vietnam war.

80. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). It was held that mandatory sterilization of those convicted of certain crimes was a denial of equal protection. The Court noted that marriage and procreation are fundamental to the very existence and survival of the race. Similarly, in *Loving v. Virginia*, 388 U.S. 1 (1967), an anti-miscegenation statute was struck down as violative of both the Due Process and Equal Protection Clauses. The freedom to marry was considered to be a vital personal right essential to man's orderly pursuit of happiness. *Id.* at 12.

81. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). The Court found that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." The right of marital privacy was found to emanate from the specific guarantees of the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution. *Id.* at 484.

82. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). In that case, it was held that a statute which precluded the giving of advice on contraception to unmarried persons was violative of the Equal Protection Clause as there was no rational explanation of the difference in treatment between married and unmarried persons. The Court stated:

Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the

Equal Protection Clause of the Fourteenth Amendment for the state to treat them differently, absent a showing of grounds justifying such divergent treatment.⁸³ It follows that the divorced parent's privacy right is every bit as fundamental as that of a parent in an on-going marital setting.

As a fundamental right, personal privacy only can be interfered with upon the state's showing of a sufficiently compelling interest.⁸⁴ Therefore, while state regulation of decisions as personal as the choice to have an abortion is permissible, such regulation must be supported by a demonstrable compelling interest (e.g., the maintenance of health standards, or the protection of viable potential life).⁸⁵ However, in the visitation setting, constitutional rights inherent in the personal decision to maintain a relationship with a child are often infringed upon in the absence of the requisite compelling state interest. The adult's right to privacy also is denied by court orders which make visitation contingent upon the forbearance from certain activities involving private morals. Implementation of such orders entails a continuing violation of the individual's interest in avoiding disclosure of personal matters. Informational privacy, recognized by the Supreme Court as a legitimate privacy interest,⁸⁶ is the victim of such judicial action.⁸⁷

individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453.

83. *Id.* at 447.

84. In *Roe v. Wade*, 410 U.S. 113, 154 (1973), the Court observed that the state could limit a woman's choice to have an abortion in spite of the right of privacy. It was held that, at some point in pregnancy, the state's interest in maintaining health standards and protecting potential life become sufficiently compelling to sustain regulation.

85. *Id.* at 163.

86. *Whalen v. Roe*, 429 U.S. 589 (1977). In a footnote the Court cited Mr. Justice Brandeis' dissent in *Olmstead v. United States* in which "right to be let alone" was described as "the right most valued by civilized men." *Id.* at 599 n.25, quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

87. For a recent case involving informational privacy which establishes that the showing of a "vital" state interest is sufficient to justify the required disclosure of personal information concerning the use of certain prescription drugs, see *Whalen v. Roe*, 429 U.S. 589 (1977). In *Whalen*, a New York statute requiring the disclosure of certain information regarding the prescription and dispensation of dangerous legitimate drugs was upheld in view of the legislature's broad power to deal with vital state interests, such as the regulation of drug traffic, in a reasonable manner. The need to demonstrate a "vital state interest in such a case where no fundamental rights are involved appears to be a lesser standard than the "compelling" interest typically required where fundamental rights are involved. Nevertheless, the Court's history of treating family privacy as a fundamental and preferred freedom makes the visitation question easily distinguishable from that decided relative to the use of dangerous drugs. At any rate, the state can demonstrate neither "compelling" nor "vital" interests in regulating private moral con-

The child's independent interest in privacy also bears judicial attention. Although the Supreme Court has recently declared that the minor's fundamental right to privacy requires a lesser degree of scrutiny than the adult's, the state still must make a showing of a significant interest in denying privacy rights. In a case involving the regulation of the sale or distribution of contraceptives to minors, the Court observed that state restrictions inhibiting the privacy rights of minors are valid if they serve "any significant state interest . . . that is not present in the case of an adult."⁸⁸ The Court stated that the less rigorous test applicable to the privacy rights of minors is appropriate because the law has "generally regarded minors as having lesser capability for making important decisions."⁸⁹ Nevertheless, the Court found that the bare assertion of a state interest, unsupported by any evidence, was not sufficient to justify the burdening of a fundamental right.⁹⁰ It follows that a child's fundamental privacy right to decide to continue to associate with a non-custodial parent must also be preserved in the absence of a significant state interest to the contrary.

Freedom of Interstate Travel

Another fundamental constitutional right which has been infringed upon by courts in visitation decisions is the freedom of interstate travel. Courts have seen fit to stipulate that the non-custodial parent be precluded from removing the child from the state of its residence during visitation periods.⁹¹ Also, the custodial parent has been forbidden from leaving the state of the divorce proceeding with the child by courts who fear that the non-custodial parent will effectively be denied visitation.⁹²

Such restrictions run counter to the long recognized principle that the very nature of our federal union mandates that all citizens be free

duct which has not been proven harmful to a child. See footnotes 70-75 *supra* and 99-103 and accompanying text *infra*.

88. *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1977), quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

89. 431 U.S. at 693 n.15.

90. *Id.* at 696. In support of its prohibition of the distribution of contraceptives to those under sixteen years of age, the state articulated its purpose as a furtherance of the state's policy against promiscuous intercourse among the young. The Court dismissed the asserted purpose, noting that the argument that minors' sexual activity may be deterred by increasing the hazards attendant on it is unreasonable. Furthermore, the Court saw no reason to believe that limiting access to contraceptives would substantially discourage early sexual activity.

91. *Graham v. Graham*, 253 S.C. 486, 493, 171 S.E.2d 704, 708 (S.C. App. 1970).

92. *Application of Denberg*, 34 Misc.2d 980, 229 N.Y.S.2d 831 (1962).

to travel among the several states "uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."⁹³ Furthermore, freedom of travel has been found to be a "constitutional liberty closely related to the rights of free speech and association."⁹⁴ As such, it cannot be defeated by restrictions which are overly broad or which are unnecessary due to the existence of a "less drastic" alternative means.⁹⁵ Accordingly, free travel has generally enjoyed the protection of the highest level of judicial scrutiny.

Although a durational residency requirement for the filing of a divorce petition was recently approved by the Court upon the showing of mere reasonableness,⁹⁶ the fact that no "total deprivation" would result from the limitation on travel was stressed: "Appellant was not irretrievably foreclosed from obtaining some part of what she sought."⁹⁷ By contrast, the state's preclusion of all interstate travel with the child of divorce does function as an irretrievable foreclosure. The more striking difference between a legitimate state durational residency requirement and a foreclosure of interstate travel with a child of divorce, is the fact that in the latter case the fundamental, preferred freedoms of free association and privacy couple with the right to interstate travel to make the citizen's right outweigh any conceivable government interest.

Even so, in cases involving the issue of free travel, fundamental interests of the various parties can collide. In other words, if a custodial parent is granted the unlimited right to interstate travel, the non-custodial parent and the child may be effectively denied their freedom of association. The courts must balance these two fundamental constitutional rights, as well as the rights of the child, in light of

93. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). In *Shapiro*, state statutes denying welfare assistance to residents of the state or of the District of Columbia who had not resided in the jurisdiction for at least one year were held unconstitutional. The state's purpose, inhibiting an influx of needy people, was held to be impermissible. *Id.* As Mr. Justice Stewart stated for the Court in *United States v. Guest*, 383 U.S. 745 (1966), "[t]he constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized The right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *Id.* at 757, 758.

94. *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964). In *Aptheker*, the Court held that a federal statute which limited the travel of members of the Communist Party was so broad and indiscriminate as to violate the liberty guaranteed by the Fifth Amendment. *Id.* at 505.

95. *Id.* at 510, 512-13.

96. *Sosna v. Iowa*, 419 U.S. 393 (1975). An Iowa statute requiring one year's residency before an individual could file for a divorce was upheld by the Court as tailored to meet the state's legitimate interest in regulating domestic relations.

97. *Id.* at 406.

the particular facts in each case. A case-by-case analysis will best serve the interests of all of the parties to the action.

There is little conflict, however, in cases where the courts seek to limit the interstate travel of the non-custodial parent during visitation periods. The state interest in seeing that the adult returns the child to the custodial parent can be served easily by a more narrowly drawn solution. Threat of contempt proceedings or the use of a bond could guarantee the return of the child without infringing upon the fundamental right of the non-custodial parent to interstate travel.

ANALYSIS OF STATE INTEREST

The nature of the state's interest in the denial of visitation is equally devoid of substance where free association or privacy is infringed upon. The state typically cannot demonstrate even a reasonable relationship between the total preclusion of visitation and any legitimate state interest. Moreover, visitation decisions which deny parent and child the right to associate based upon such considerations as the parent's failure to make timely support payments, the private sexual activities of the adult, or his or her general "unfitness" are generally overbroad.⁹⁸

Although the state, as caretaker of a child under its authority, clearly has a significant interest in attending to its welfare, such care demands that the child's psychological needs of continued love and support of the non-custodial parent be fulfilled. In its interference with parent-child relationships the court should actually consider and articulate the interests involved and invoke the least detrimental available alternative.⁹⁹ Thus, the state's interest can be more narrowly defined as insuring visitation and protecting the child's psychological welfare where evidence of record indicates that resulting physical or mental harm to the child is likely. Where no such showing is even attempted, decisions denying visitation clearly are violative of fundamental rights. The Supreme Court recently has confirmed the minimum standard that "when a State, as here, burdens the exercise of fundamental rights, its attempt to justify that burden as a rational means for the accomplishment of some significant State

98. The unconstitutionality of overbroad statutes was explained in *NAACP v. Alabama*, 377 U.S. 288 (1958). It is now well settled that a governmental purpose to control or prevent activities constitutionally subject to state regulations "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom." *Id.* at 307.

99. Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

policy requires more than a bare assertion . . . that the burden is connected to such a policy."¹⁰⁰

Similarly, the state's interest in regulating private adult sexual or moral activity is so negligible as to justify only extremely limited intrusion into the area of fundamental constitutional freedoms.¹⁰¹ A court which is interested in safeguarding the child from exposure to immoral activities must tailor proscriptions on visitation to fit the particular fact pattern involved. The fact that an adult is living with a paramour out of wedlock, or maintains a homosexual relationship, may justify certain limitations of the activities to which the child may be exposed during his periods of visitation. However, any curtailment of the adult's privacy rights must be narrowly drawn, prohibiting no more than is necessary to protect the child from demonstrable psychological or physical harm.

Whether the fundamental constitutional interest involved in the visitation decision is viewed as free association, privacy, or free interstate travel, the limitation or foreclosure of its exercise must, in fact, be grounded in a legitimate state interest which is more than mere conjecture. The state's intrusion into the area of fundamental rights must represent the least restrictive alternative means commensurate with a legitimate state interest, even to be considered "reasonable." The lack of a compelling or significant state interest, and the use of overbroad means of facilitating a legitimate state policy, are indicative of the violation of constitutionally guaranteed liberties.

A SUGGESTION FOR THE SAFEGUARD OF CONSTITUTIONAL RIGHTS

It is unfortunate that the child's legal rights are particularly subject to judicial oversight. The child is not only denied the basic procedural due process right to counsel, but typically is not even con-

100. *Carey v. Population Services Int'l*, 431 U.S. 678, 696 (1977).

101. *Stanley v. Georgia*, 394 U.S. 557 (1969). It was held that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Countering the argument that prohibition or possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution, the Supreme Court stated:

Because that right (the individual's right to read or observe what he pleases) is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.

Id. at 568.

It must follow, therefore, that the Court would not approve a similar state rationalization in the visitation context. Because the privacy rights of the family members involved are so fundamental to individual liberty, the state's interests in denying visitation to facilitate the enforcement of support decrees, or to indirectly punish immoral parents, are clearly not compelling.

sulted as to his preference regarding visitation.¹⁰² While the child's opinion may, on occasion, be viewed as one factor to be considered, it has not been conclusive, even with a child near the age of majority.¹⁰³ This is in keeping with traditional notions of the court's special duty to protect the interests of the child as they are determined by the court, rather than to preserve his rights in an adversary setting.¹⁰⁴

In the divorce visitation proceeding, the litigant parents are represented by counsel committed to the advocacy of their interests. It is anomalous that the object of concern, the child, is consistently upstaged during the legal drama by the other litigants.¹⁰⁵ The child's interests may well not coincide with those of either parent. Counsel for either of the parents cannot be relied upon to present facts detrimental to the client to whom the duty of loyalty is owed.¹⁰⁶ The success of each attorney rests upon the dispute being resolved in favor of his client, without regard to the interests of the child.¹⁰⁷

The theory upon which courts operate in denying the child independent legal representation is the common law concept of *parens patriae*.¹⁰⁸ Procedural due process is deemed unnecessary for the

102. *McFadden v. McFadden*, 509 S.W.2d 795 (Mo. App. 1974).

103. *In re Two Minor Children*, 249 A.2d 743, 745 (Del. 1969).

104. By 1925, statutes were uniformly designed to protect the interests of the child. "The child's interest would be the dominant consideration of the courts." Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21 (1965).

105. *Yannacone & Crafton, Children or Chattels?*, 8 TRIAL L.Q. 10, 25 (1972). The guardian ad litem is advocated to assert the individual human rights retained by the child under the Ninth Amendment. It is suggested that the federal courts will provide the most effective forum for the interests of the child to be vindicated.

106. Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFF. L. REV. 1 (1973). This article extends the plea for independent counsel for the child to cases of contested adoption, delinquency and termination of parental rights proceedings.

107. Levin, *Guardian Ad Litem in a Family Court*, 34 MD. L. REV. 341, 350 (1974).

108. Originally, children were treated as having essentially the status of paternal chattel. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969). The earliest quasi-legal doctrine under which control of the child was exercised was that of *patria postestas*. A part of the Roman Private law, it gave strict recognition to the rights of a father to custody and control of his offspring. Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 55 MASS. L.Q. 229, 230 (1970). "Under this doctrine, a father controlled every aspect of his child's life. The child could be sold or condemned to death by the father who did not have to fear retribution. . . ." *Id.*

English law embraced the doctrine of *patria postestas* until the fourteenth century. As the common law developed, *parens patriae*, a diluted form of *patria postestas*, came into being. Due to the economic and political structure of medieval England, the state had a definite interest in whom land titles could vest. *Id.* Thus "[t]he law . . . was not at pains to designate any permanent guardians for children who owned no land." II F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 435 (2d ed. 1895). The King's justices saw no reason for the child who owned no land to have a guardian other than the state. Inker & Parretta, *supra*, at 231. The crown would protect all those who, having no land, had no other protector. Shepherd,

child, whose interests under the *parens patriae* doctrine are to be interpreted and protected by the court. The United States Supreme Court has recognized, however, that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹⁰⁹ In the juvenile crime area, at least, the Court has found *parens patriae* to be an ineffective substitute for due process in the preservation of constitutional rights.¹¹⁰ In reference to the denial of procedural safeguards which typically accompanies juvenile proceedings, the Court stated: "Under our Constitution, the condition of being a boy does not justify a kangaroo court."¹¹¹

Inasmuch as the child is better served by procedural constitutional safeguards than by the unlimited discretion of the trial court judges, it is suggested that the child of divorcing parents enjoy independent legal representation in proceedings affecting his rights.¹¹² It has been deemed a "mockery of the system" that the party with the greatest interest in the outcome of the litigation may be a silent witness to the proceedings.¹¹³ Even the social agency investigator, who presents objective findings, lacks the legal tools to represent the child as effectively as the attorney.¹¹⁴ The child has no one to champion his cause and to employ the legal expertise necessary to safeguard his rights.¹¹⁵

Solomon's Sword: Adjudication of Child Custody Questions, 8 U. RICH. L. REV. 151, 159 (1974).

109. *In re Gault*, 387 U.S. 1, 13 (1966).

110. In the landmark case, *In re Gault, id.*, a 15 year old boy was denied notice, the right to counsel, the privilege against self-incrimination, and the right to confront his accusers in a juvenile proceeding. He was accused of making a lewd phone call, and ordered to the State Industrial School as a juvenile delinquent until he should reach his majority. (It is ironic that the applicable code section limits the punishment of adult offenders for the same offense to not more than four months.)

111. *Id.* at 27, 28. Although *Gault* was a criminal case, the lack of logic in any civil-criminal dichotomy is considered so obvious, and the aims of a custody or visitation hearing, so closely related to those of a juvenile hearing, that "the precedent of *Gault* should soon result in mandatory provision for legal counsel in all custody cases." KATZ, *THE YOUNGEST MINORITY*, ABA FAMILY LAW SECTION 3 (1974).

112. Numerous articles have been written on the child's right to representation in custody cases. See note 6 *supra*. Since visitation is a limitation on custody, the arguments presented in these articles are equally applicable in the visitation setting.

113. Lefco, *The Child as a Party in Interest in Custody Proceedings*, 10 GA. ST. B.J. 577, 584 (1974).

114. Note, *Domestic Relations—Appointment of Counsel for the Abused Child—Statutory Schemes and the New York Approach*, 58 CORNELL L. REV. 177 (1972).

115. Lefco, *supra* note 113. In 1944 it was stated:

The modern trend towards aids of this sort for the judicial process is practical. There seems to be no good reason why the problems of divorced parents should be made greater by attempting to solve them only through orthodox legal machinery which is not particularly adapted to them. [The child's attorney] justifies its exis-

The implementation of mandatory legal representatives (guardians ad litem) for the child in divorce custody and visitation cases would enable the courts to better determine the "best interests" of the child. The court's decision in visitation cases would be rendered less complicated and the litigation rendered more expedient and directed to the actual best interests by the appointment of an attorney for the child who would both gather and evaluate information. Until the attorneys for the parents begin to recognize fully and represent the best interests of the child, only such an approach will ensure that the child would be treated as a person, with his constitutional liberties intact.¹¹⁶

CONCLUSION

The rights of family members are compromised by courts who assert the "best interests" of the child standard, without supportive discussion relative to the particular facts of each case. The considerations which, in fact, determine the allowance or disallowance of visitation are veiled behind a "best interests" incantation. It is imperative that courts dealing with such basic constitutional rights as are involved in the visitation question carefully weigh fundamental interests and articulate their findings. Then only will the "best interests" of the child, as well as of the other family members involved, be served.

Judith A. Fournie

tence by an unobtrusive but ceaseless vigilance with respect to innumerable details any one of which, in a given case, may become the turning point.

Pokorny, *Observations by a Friend of the Court*, 10 L. CONTEMP. PROB. 778, 789 (1944).

Although the cost of retaining an attorney to represent the interests of the child is an obvious disadvantage to the above-mentioned remedy, it is clear that such a financial burden is the responsibility of the family of a person who is unable to adequately care for himself. See, e.g., ILL. REV. STAT. ch. 91½, §12-12.6. See generally Note, *Guardianship Ad Litem in Texas Divorce and Custody Cases*, 20 BAYLOR L. REV. 433 (1968).

116. A suggestion designed to relieve the courts of continual relitigation of divorce and visitation matters is the use of arbitration provisions in divorce decrees. The arbitration proceeding would be less formal than a courtroom procedure, and awards could be obtained more quickly than through litigation. Since arbitration is a private proceeding, it has been advocated to avoid the embarrassment, hostility, and publicity of the "open court" situation. Holman & Noland, *Agreement and Arbitration: Relief to Over-Litigation in Domestic Relations Disputes in Washington*, 12 WILLAMETTE L.J. 527 (1976). Unfortunately, the arbitration proceeding affords no greater protection to the child of divorce than does wholesale "judicial discretion." In either setting, the child's rights can be bartered away where he remains unrepresented. Procedural safeguards and constitutional protections are likely to be the more effective guardians of the child's interest. See also Batt, *Child Custody Disputes: A Developmental-Psychological Approach to Proof and Decisionmaking*, 12 WILLAMETTE L.J. 491. It is suggested that the child's psychological needs are best interpreted by specialists in developmental psychology. The guardian ad litem should make use of such professional analysis in evaluating the child's needs.

