

ANNOTATED BIBLIOGRAPHY ON

RECENT FATHERHOOD ISSUES IN LAW JOURNALS, TEXTS AND CASES

LAW REVIEWS

Vivek Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 Temp. L. Rev. 55 (2009). This article discusses the constitutional rights of non-offending parents. It analyzes Supreme Court case law supporting non-offending parents' rights and reviews state law and policy presumptions about non-offending parents. It also proposes that juvenile courts be afforded the flexibility to assume jurisdiction over a child based on findings of maltreatment against one parent, but that courts' powers should be limited to better protect non-offending parents' rights.

Konrad Lee and Matthew Thue, *Unpacking the Package Theory: Why California's Statutory Scheme for Terminating Parental Rights in Dependent Child Proceedings Violates the Due Process Rights of Parents as Defined by the United States Supreme Court in Santosky v. Kramer*, 13 U.C. Davis. J. Juv. L. & Pol'y 143 (2009). This article argues that California's burden of proof in termination of parental rights cases is too low, using a preponderance rather than a clear and convincing standard. It also analyzes due process issues relating to non-custodial, non-offending parents, particularly problems relating to late notice at termination of parental rights hearings.

David J. Herring, *Fathers and Child Maltreatment: A Research Agenda Based on Evolutionary Theory and Behavioral Biology Research*, 31 Child. & Youth Serv. Rev. 935 (2009). This article examines risk levels of child maltreatment by fathers and father figures in various situations, focusing on factors such as how closely related the father figure and the child are or how much the child resembles the father figure. It draws on evolutionary concepts and behavioral biology research that address expected levels of male parental investment. It also discusses the importance of this research in the context of child welfare policy and services, noting that it will contribute to the development of risk assessment instruments.

Vivek Sankaran & Itzhak Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why it Matters*, Mich. Child Welf. L.J., Fall 2007, at 11. This article discusses the systemic problems with the child reunification process. It talks about how even though parents looking to reunite with their children have certain rights, such as the right to counsel, in practice, they often are not afforded these rights.

Angela Greene, *The Crab Fisherman and His Children, A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 Alaska L. Rev. 173 (2007). This article examines the constitutional rights of non-offending parents in child welfare proceedings, including a review of Supreme Court precedent. It focuses primarily on Alaska law and practice, but also outlines different state approaches.

Jeffrey Parness and Therese Clarke Arado, *Safe Haven, Adoption and Birth Record Laws: Where are the Daddies?*, 36 Cap. U. L. Rev. 207 (2007). This article discusses how safe haven laws, adoption laws, birth record laws, and familial privacy laws foreclose paternity rights when mothers abandon their children. It argues that these laws should not allow maternal privacy rights and interests to easily limit fathers' chances to participate in their children's lives when the birth of the child resulted from consensual sex between unwed partners. The article provides concrete suggestions for law reforms to better protect unwed fathers' rights.

Leslie Joan Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, 9 J.L. Fam. Stud. 281 (2007). This article discusses the lack of involvement of non-resident fathers in child welfare cases and how changing social work practice and legal developments have begun to change this. It examines the pros and cons of increased non-resident father engagement and analyzes cases that illustrate the problems that arise when non-resident fathers are notified and appear late in child welfare proceedings. It also reviews how different states respond to non-resident, non-offending father attempts to assume custody of their children when child welfare proceedings begin.

Mark Strasser, *The Often Illusory Protections of 'Biology Plus': On the Supreme Court's Parental Rights Jurisprudence*, 13 Tex. J. Civ. Lib. & Civ. Rts. 31 (2007). This article reviews Supreme Court precedent relating to unwed father's rights and argues that the lack of guidance from the high court has left state courts to develop varying and often contrasting degrees of protections for unwed fathers.

Vivek Sankaran, *But I Didn't Do Anything Wrong: Revisiting the Rights of Non-Offending Parents in Child Protection Proceedings*, 85 Mich. Bar J. 22 (2006). This article talks about the burdens placed on non-offending parents in Michigan if courts find that only one parent abused or neglected the child. It asserts that Michigan's approach to dealing with non-offending parents may violate the parents' constitutional rights.

Vivek Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 Yale L. & Pol'y Rev. 63 (2006). This article discusses the ICPC's application in cases dealing with out-of-state, non-offending parents. It argues that application of the ICPC to non-custodial parents violates the parents' constitutional and custodial rights and increases the likelihood that children will unnecessarily remain in foster care.

PRACTICE GUIDES

Claire S. Chiamulera, ed., *Advocating for Nonresident Fathers in Child Welfare Court Cases*, ABA Center on Children and the Law (2009). This book helps the legal community better engage non-resident fathers in child welfare cases. It offers strategies to attorneys and judges to help them protect fathers' constitutional rights, advocate for fathers in and out of court, and

overcome barriers to father participation, as well as respond to unique ethical issues.

Pauline Quirion & Hon. Mary Anne Sahagian, Massachusetts Continuing Legal Education, Inc., “Equity Actions to Establish Paternity by Putative Fathers who are ‘a Stranger to the Marriage,’” *Paternity and the Law of Parentage in Massachusetts*, Ch. 11 (2009). This chapter discusses Massachusetts law as it relates to putative father rights when the mother is married to someone other than the father and she and her husband have prevented the putative father from forming a substantial relationship with his child. It also analyzes Massachusetts law relating to situations where the putative father has no parent-child relationship with the child but the child will have no other father figure without him.

Jacqueline Price Schelfhauert & Hon. Martha Grace, Massachusetts Continuing Legal Education, Inc, “Paternity Issues in Juvenile Court Context,” *Paternity and the Law of Parentage in Massachusetts*, Ch. 20 (2009). This chapter discusses the rights of parents, including non-custodial parents, in abuse and neglect cases in Massachusetts.

Ann M. Haralambie, “Rights of Unmarried Parents: Constitutional Issues” and “Rights of Unmarried Parents: Natural Father’s Rights When Mother is Married,” *Handling Child Custody, Abuse and Adoption Cases* §§ 3:6 & 3:10 (2010). These articles discuss Supreme Court cases dealing with the constitutional rights of unmarried fathers and review the current state of the law in this area. They also analyze the rights of biological fathers when the mother is married to someone else at the time of birth. They review federal and state case law on whether the mother’s husband has a presumption of paternity over the child and what the natural father can do to rebut that presumption.

CASE LAW

The cases below represent a non-exhaustive sample of recent cases that are relevant to non-offending, nonresident fathers in child welfare cases. As they illustrate, the rights of fathers can vary widely depending on the law of a specific jurisdiction and the facts of a particular case.

Due Process

***In re Vincent M.*, 74 Cal. Rptr. 3d 755 (Cal. Ct. App. 2008).** Mother surrendered child at birth and father did not learn of the child’s existence until several months later. The child was deemed dependent and the case was quickly moved into the permanency planning phase. When the father learned of the child, he requested reunification services, but the court denied the request. The father appealed arguing that his constitutional rights to his child were violated when the court refused to allow him to prove he was the legal father and offer him reunification services. The higher court disagreed, holding that it was not a violation of due process to deny him reunification services after the reunification period ended, even if he did not know about the child during that period. The court reasoned that the only way a biological father can be offered reunification services outside the allotted statutory time frame is if he can offer new evidence

that it is in the child's best interest to re-open the reunification process.

***In re Sarah A.*, 874 N.Y.S.2d 653 (N.Y. App. Div. 2009).** Trial court violated father's due process rights by failing to conduct a fact-finding hearing or "inquest" before finding that father had abandoned and permanently neglected his child and terminating the father's parental rights. A new hearing was required.

***In re Charlotte D.*, 202 P.3d 1109 (Cal. 2009).** While due process rights might be violated by statute that allows termination of parental rights after a child has been in guardianship for over two years and the guardian seeks to adopt where a fit parent demonstrates a full commitment to parental responsibility, there was no constitutional violation where father showed a willful lack of support, committed violent acts toward relative caregivers, abused an animal in his daughter's presence, and violated visitation plans.

***In re Rood*, 763 N.W.2d 587 (Mich. 2009).** Father's right to due process was violated in termination of parental rights proceeding where notice of proceedings was repeatedly sent to wrong address even though the father gave correct address numerous times. While father's lack of support, involvement, and visitation may have provided some evidence of neglect, court and agency made minimal efforts to involve father in case and agency never sought to place child with him despite his willingness to assume custody if reunification with mother did not occur.

***In re H.D.F.*, 677 S.E.2d 877 (N.C. Ct. App. 2009).** In dependency case in which children were removed from mother due to her substance abuse, adjudication and disposition order required reversal as applied to father because he was not given notice or served with case documents that were served to other parties; certificates of service clearly showed the other parties were to be served and father's name was conspicuously absent.

Establishing Paternity and "Legal" Fatherhood

***In re J.L.*, 72 Cal. Rptr. 3d 27 (Cal. Ct. App. 2008).** When a mother and her boyfriend abandoned a child, the child's putative biological father sought to intervene and obtain custody of the child. The mother's boyfriend had acknowledged paternity and placed his name on the birth certificate; he opposed the putative biological father's attempt to establish paternity. The court held that the putative biological father had a due process right to challenge the boyfriend's claim to paternity, seek paternity testing and intervene in the case.

***Thurnwald v. A.E.*, 163 P.3d 623 (Utah 2007).** The Utah Supreme Court rejected a strict interpretation of a state law that prohibited a mother from putting a child up for adoption until at least 24 hours after the birth. The purpose of the law was to allow the father time to file a paternity petition before an adoption proceeding would begin (under Utah law an unwed father has no right to contest the adoption proceeding if he hasn't established paternity before the mother consents to adoption). However, the law had been narrowly construed to allow mothers to move forward with adoptions even if the child was born on a weekend or holiday where the

father would not have been able to file the required documentation in time. The court rejected this interpretation, holding that it violated the father's due process rights by preventing him from asserting any post-birth parental rights.

***In re N.W.*, 2009 WL 3743303 (Cal. Ct. App. 2009).** Father's rights were terminated and he appealed. The father argued that he should have been treated as the legal father with a right to reunification services and to request custody. He argued that he had visited the child many times, but that the mother moved numerous times and did not tell him where they went. The mother did not tell the father that the child had been placed in custody and the court had issued substitute notice to the father, but with the wrong first name. The court upheld the termination of the father's rights, reasoning that he did not make a sufficient effort to establish or maintain a relationship with the child. The court noted that he did not pay any pregnancy or birth expenses, that he did not make any affirmative efforts to stay in contact with the mother and child when he went out of town for months at a time, and that when the mother moved, the father did not make any legal efforts to find his child.

***In re Adoption of A.A.T.*, 196 P.3d 1180 (Kan. 2008).** Father sought to intervene in his child's adoption proceedings but the trial court denied his attempt. The appellate court upheld this decision finding that the father did not make sufficient effort to establish and maintain a relationship with his child. Here, the mother told the father that she had had an abortion. The father doubted this, but did not act on his suspicion. The mother told the adoption agency she did not know where the father was and gave the agency a false surname for him. The father was not notified of the adoption proceedings. He learned of them several months later and attempted to intervene. In denying his request, the court reasoned that the father did not support the mother financially or provide any support during the initial months when he knew she was pregnant. It also relied on his failure to act on his doubts about the mother's claim to have gotten an abortion. The court noted that these factors outweighed the mother's fraud.

Parental Fault and Presumptions of Fitness

***In re C.L.*, 894 N.E.2d 949 (Ill. Ct. App. 2008).** Circuit court exceeded its authority by awarding father guardianship at dispositional hearing without first making children wards of the court; mother was found to have neglected children at earlier shelter care hearing and father was granted temporary custody, but because evidence at disposition confirmed that father was fit, court should have closed case rather than issuing guardianship order.

***In re N.E.*, 919 N.E.2d 102 (Ind. 2010).** The lower court adjudicated a child neglected without finding the father at fault. The father appealed and the Indiana Supreme Court held that the decision to adjudicate a child neglected does not require a finding of fault by both parents because it is only a determination of the child's status. However, the court reversed the lower court's dispositional findings, holding that they were deficient in not assessing the father's capacity to take custody of his child.

***In re S.M.*, 985 A.2d 413 (D.C. 2009).** A lower court terminated a father's rights to his children and the father appealed. The higher court remanded the case, finding that the trial court violated the father's due process rights when it failed to assess whether the father was fit to parent before terminating his rights and freeing the children for adoption. The court stated that if the father was fit, due process requires that the court presume that it would be in the children's best interest to reside with the father rather than be adopted. The court noted that this presumption could only be rebutted by clear and convincing evidence.

***In re Elaina H.*, 2007 WL 851606 (Cal. Ct. App. 2007).** A father's rights were terminated and he appealed arguing that there was never a finding that he was unfit and the agency failed to offer him reunification services. The appellate court agreed, finding that it violated due process to terminate a father's rights without finding that he was unfit to parent. Similarly, the court held that without a finding that the father was unfit, the court's focus on maintaining the parent-child relationship should have remained its paramount concern.

***In re M.D.*, 2008 WL 3878361 (Ohio Ct. App. 2008).** Non-resident father challenged a court's award of temporary custody to his child's grandparents over him, arguing that the court must first determine that he is unfit before placing the child with a non-parent. On appeal, the higher court rejected this argument, holding that a court's determination that a child is abused or neglected implies unfitness of both the custodial and non-custodial parent. The court further stated that it was therefore not necessary to require a separate assessment of whether the non-resident parent was fit before a child is placed.

***In re F.D.J.*, 211 P.3d 289 (Or. Ct. App. 2009).** Change in permanency plan from reunification to adoption was inappropriate in case where father made sufficient progress to allow safe return of child; agency had only requested father establish paternity, which he did after several months.

Parental Preference

***In re C.B.*, 684 S.E.2d 401 (Ga. Ct. App. 2009).** Trial court did not abuse its discretion by placing child with foster parents after father surrendered his parental rights to child's aunt and uncle; father's surrender to aunt and uncle did not require placement with them since statute encourages, but does not require, relative placement and it was in child's best interests to be placed with foster family with whom he had strong bond.

Interstate Compact on the Placement of Children (ICPC)

***In re Alexis O.*, 959 A.2d 176 (N.H. 2008).** ICPC did not apply to a birth mother who was trying to cross state lines to retrieve her child after child's father, who was caring for the child, was held to have neglected the child and child was placed in the care of the agency; the regulation of the ICPC applying to birth parents is inconsistent with the text of the statute, which says that it only applies to substitutes for parental care like foster care and pre-adoptive

placements, and is thus invalid.

***C.K. v. Dep't of Children & Families*, 949 So. 2d 336 (Fla. Dist. Ct. App. 2007).** ICPC applied to an out-of-state, non-custodial biological father who was trying to get custody of child. The court held that the ICPC applies to out-of-state biological parents, but only if they are non-custodial.

Standing in Adoption Proceedings

***In re Adoption of Corbin J.*, 775 N.W.2d 404 (Neb. 2009).** A putative biological father challenged registry and adoption statutes that prevented him from participating in adoption proceedings relating to his child. Here the father failed to comply with the filing requirements of these statutes and therefore the lower court held that it was not required to seek his consent to the adoption by the child's stepfather. The higher court reversed, holding that because the putative biological father had maintained a relationship with the child, those statutes did not apply to him.

***In re I.K.*, 220 P.3d 464 (Utah 2009).** Father who resided in New Mexico found out that he had a child who was up for adoption in Utah. The father attempted to establish paternity in New Mexico and intervene in the adoption proceeding in Utah. The New Mexico court rejected his attempt citing a state law that required he establish paternity before adoption proceedings commenced. The Utah court held similarly, finding that the father did not have standing to intervene because he had not established paternity in compliance with Utah or any other state law and thus did not have a direct interest in the adoption proceedings.

***In re Adoption of K.C.J.*, 184 P.3d 1239 (Utah Ct. App. 2008).** Father who resided in Oklahoma learned that his child was being placed for adoption in Utah. The father established paternity in Oklahoma in accordance with that state's requirements, but failed to do so in Utah. The father asked to receive notice of the Utah adoption proceedings, but adoption petitioners challenged his request. On appeal, the higher court found that the father has a due process right to a hearing on whether his paternity establishment out of state gives him the right to notice in the Utah adoption proceedings.

***Adoption of E.L.*, 913 N.E.2d 1276 (Ind. Ct. App. 2009).** In adoption proceeding, dismissal of putative father's paternity petition was warranted based on putative father's failure to register with putative father registry within statutory timeframe, resulting in his waiver of notice to the adoption proceeding and implied consent to proceeding; putative father's implied consent to proceeding precluded him from establishing paternity.

Termination of Parental Rights

***In re Adoption/Guardianship of Alonza D., Jr.*, 987 A.2d 536 (Md. 2010).** The trial court terminated a father's rights and the father appealed. The children's father separated from their mother when the children were very young; mother had many problems that led to the children

being taken and placed in a foster home. Over the next eight years, the father maintained contact with the children, although they bonded more closely with the foster mother. Trial court terminated the father's parental rights, citing exceptional circumstances given the length of time the children had been with their foster mother. The state supreme court reversed, holding that this length of time and level of bonding between the foster parent and the children was not sufficient to warrant termination of the father's rights absent a showing that allowing the father to maintain a relationship with his children would be a detrimental to the best interests of the children, which the trial court did not find.

***In re Mason*, 782 N.W.2d 747 (Mich. 2010).** Trial court improperly terminated incarcerated father's parental rights and failed to properly include him in the reunification plan and court proceedings. The agency failed to facilitate the father's participation in the agency's plan to reunite the child with his parents while the father was incarcerated. The trial court did not allow the father to participate in the termination hearing via phone from prison, contrary to state law. The state supreme court held that incarceration alone is not sufficient justification to terminate parental rights and that the agency had a statutory duty to include the father in any services necessary for him to reunite with his child upon release.

***N.J. Div. of Youth & Fam. Serv. v. C.M.*, 2010 WL 2160340 (N.J. 2010).** The father had a baby out-of-wedlock while married to a different woman. The child's mother was deemed unfit, but the father initially said that he did not want custody of the child because his wife did not want the child in the house. The father later separated from his wife and tried to get custody of the child, but the trial court terminated his rights, holding that his delay endangered the health, safety, and development of the child. On appeal, the state supreme court held that the delay in accepting custody of the child was not a basis for the father's terminating parental rights on the grounds of endangerment. In addition, the court held that the fact that the child has a stronger attachment to the foster parent than the father was not enough to terminate parental rights, especially where the child's lack of attachment to the father was a result of the agency not taking reasonable efforts to provide reunification services to the father.

***In re T.H.*, 979 So.2d 1075 (Fla. Dist. Ct. App. 2008).** The trial court terminated an incarcerated fathers rights and the father appealed. The father had been the child's custodian until he was jailed. The father attempted to maintain contact with the child, visited with the child and sent letters. The father also attempted to maintain contact with the agency. The agency developed a case plan for the father, but there was no evidence that the agency helped him meet his case plan goals. The appellate court found that incarceration by itself is not a basis to terminate parental rights or the basis of an abandonment finding. The court held that the state did not have sufficient evidence to terminate the fathers' rights given his attempts to maintain a relationship with his child and the agency. The court also found that the father's due process rights were violated when his attorney withdrew and the court failed to appoint new counsel for nine months during the termination phase.

G.P. v. Houston County Dep't of Human Resources, 2009 WL 2986663 (Ala. Civ. App. 2009). Maintaining 10-year-old child in foster care to allow father to build relationship with child was not a viable alternative to terminating parental rights; child had been in care since five months of age and therapist recommended against introducing child to father based on child's trauma and father's history of alcoholism and domestic violence, as well as sexual misbehavior of father's oldest child.

B.T. v. Dep't of Children & Families, 16 So. 3d 940 (Fla. Dist. Ct. App. 2009). Trial court improperly found incarcerated father had abandoned child where father testified that mother and family members provided him photos and updates about child and his failure to support child financially was because of his incarceration; child welfare agency never asked about father's communications about child and offered no evidence to support abandonment other than fact that father was incarcerated.

In re Cody T., 979 A.2d 81 (Me. 2009). Trial court improperly terminated father's rights since evidence that father had abandoned or was unable to provide for child was lacking; lack of relationship was not due to father's actions but to mother's deliberate actions in not disclosing child's whereabouts, and father's incarceration for drug charges, without more, did not show he was a risk to child.

In re Jason J., 96 Cal. Rptr. 3d 625 (Cal. Ct. App. 2009). Father's rights were terminated despite evidence that showed a positive relationship between him and the child as it did not outweigh the child's sense of security and belonging in placement. Child separated easily from father at end of visits, father appeared more like a friendly visitor to child rather than a parent, father refused reunification services and had not progressed beyond supervised visits, and father did not recognize need to protect child from mother.

In re Jada, 874 N.Y.S.2d 113 (App. Div. 2009). Terminating father's rights to free child for adoption by her foster mother was in child's best interests even though father had made some efforts toward rehabilitating himself; child had been in foster care for six years while father struggled to overcome drug abuse, foster mother provided nurturing home and met all of child's needs for most of her life and had adopted child's half sister, and child could not be denied permanence that adoption would provide by giving father more time to show he could be a fit parent.

In re J.S.L., 763 N.W.2d 783 (N.D. 2009). Evidence showed father lacked ability to parent child and that deprivation was likely to continue to support terminating his parental rights; father rarely cooperated with social services, he did not know how to handle or care for child appropriately, he fell asleep during visits with child and skipped visits, he was hostile towards social workers, and his violent relationship with mother was relevant to determination that child would suffer harm if parental rights were not terminated.

***In re K.C.W.*, 678 S.E.2d 343 (Ga. Ct. App. 2009).** Father's mental deficiency prevented him from caring for child with special education needs and chronic medical condition, even though he had completed case plan goals, paid child support, and wanted to be part of child's life; expert testimony at termination hearing established child's deprivation was likely to continue since father's mental deficiency prevented him from caring for child on his own.

***In re Jose Luis R.H.*, 968 A.2d 875 (R.I. 2009).** Trial court's finding that father was unfit based on his imprisonment was not clearly wrong since father still had three years of a five-year sentence remaining to serve, there were no assurances of an earlier release, and keeping child in foster care until father's release would deprive him of permanency for much of his early childhood.

***T.B. v. Dep't of Children & Families*, 985 So. 2d 1210 (Fla. Dist. Ct. App. 2008).** Father's failure to see or support child for 11 months, during which he was incarcerated for seven and one-half months, did not support trial court's finding that he abandoned child where father's paternity was not established until less than a month before adjudicatory hearing in dependency proceedings, father had been denied contact with child until paternity was established, and agency caused delay in paternity determination.