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Family Fundamentals

Justices tackle a child custody case with more than parental rights at stake

BY RICHARD C. REUBEN

A groan from the student ranks is the usual response when law professors propound the notion of the law as an onion that, when peeled back layer by layer, reveals subtleties not apparent at first blush. But a rare parental rights case on the U.S. Supreme Court docket this term is a good example of how apt that comparison can be.

On the surface, *M.L.B. v. S.L.J.*, No. 95-853, hardly seems worthy of the nation's highest court, in part because our scheme of federalism generally leaves issues such as child custody to state law. But peeling back the layers of this case reveals the potential for a significant ruling on the constitutional treatment of family relationships, fundamental rights and access to courts for civil appeals.

Moreover, *M.L.B.* may signify a growing interest among the justices in exploring the reach of fundamental rights.

In addition to the underlying family issue the Court must weigh in *M.L.B.*, the justices will consider in *Vacca v. Quill*, No. 95-1858, and *Washington v. Glucksberg*, No. 96-110, whether people have a right to assisted suicide. They will also consider in *Chandler v. Miller*, No. 96-126, whether a state may compel people to undergo drug testing without having a specific suspicion.

M.L.B. and *S.L.J.* divorced in 1992, receiving joint custody of their two children, then ages 7 and 9. When the husband, *S.L.J.*, remarried, he wanted his new wife to adopt the children. He aggressively moved to terminate the parental rights of the birth mother, *M.L.B.*, contending she was unfit. The trial court granted the father's motion.

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Represented as an indigent by legal aid lawyers, *M.L.B.* appealed the decision on evidentiary grounds directly to the Mississippi Supreme Court, as provided by state law. She was able to scrape together the \$100 filing fee for the appeal but not an additional \$2,352.36 in transcription, copying and other costs

to confront the issue more directly, in part because the Court's decisions suggest that unencumbered access to the courts is limited to cases in which fundamental rights are at stake.

M.L.B.'s lawyers are arguing that since the parent-child relationship is fundamental, both due

process and equal protection require the state to permit her to proceed with a pauper's appeal of the decision to terminate her parental rights.

"By requiring over \$2,000 in advance for the appeal ... and by refusing to consider [*M.L.B.*'s] contention that she cannot pay it, the Mississippi Supreme Court has acted in disregard of these principles," solo practitioner Robert B. McDuff of Jackson, Miss., argued in his brief to the Court.

But the state warns against creating "a new and ex-

pansive constitutional right" by extending to civil matters the right to an appeal that already exists in criminal cases.

Indigents and Appeals

"Once the barrier between criminal and civil cases has been torn down, it can only be assumed that the state will be forced to bear the costs of all appeals of indigents wherein 'fundamental rights' are allegedly involved," warned Rickey T. Moore, a special assistant attorney general. Such cases "would arguably include all domestic relations matters such as divorce, paternity and child custody, and arguably might include all civil appeals."

The possibility that the Supreme Court will issue a clearer statement on the constitutional nature of parental relations and expand constitutional access to civil appellate courts suggests that *M.L.B.* may well be a sleeper case for this term—now that the legal onion has been properly peeled. ■



ACLU lawyer David Ingebretsen and Melissa Brooks (*M.L.B.*), who seeks to proceed with a pauper's appeal of a ruling terminating her parental rights.

she was required by statute to pay before her appeal could be heard.

The court summarily turned down her request to proceed in forma pauperis because Mississippi does not provide for such a step in civil appeals. The court also affirmed the termination order, setting the stage for U.S. Supreme Court arguments in October on issues that deeply touch the ethos of American law and society.

The definition of what constitutes a family remains an issue of major national concern, and an array of heart-wrenching "Baby X" surrogacy cases have made questions of child custody particularly prominent in the public mind.

But while the Supreme Court has found the traditional marital relationship to be a constitutionally "fundamental" right, in which government may interfere only after showing a compelling interest, it has been less explicit about the parent-child relationship.

M.L.B. could force the justices