

NO. A05-0310

State of Minnesota
In Supreme Court

Thomas Carroll Rubey,

Petitioner,

v.

Valerie Ann Vannett,

Respondent.

ARGUMENT BY R-KIDS OF MINNESOTA AS AMICUS CURIAE

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MAY IT PLEASE THE COURT:

1. **INTRODUCTORY REMARKS:** This argument is submitted as amicus curiae by R-KIDS of Minnesota, a non-profit corporation organized under the laws of this State, by leave granted in an order of Hon. Edward Toussaint, Chief Judge, entered on May 18, 2006. This entire submission has been prepared by the undersigned as general counsel for R-KIDS of Minnesota, and all costs of our appearance in this cause, from our motion for leave to appear to the present submission, have been born exclusively from our corporate treasury. We appear in support of the appellant. We shall not orally argue.

2. **THE PROPOSITION TO BE ADVANCED BY AMICUS:** We anticipate that counsel for the appellant will fully argue his cause, including ample discussion of all relevant particulars of record and all needful commentary on procedural issues. We shall confine attention to but one substantive proposition which should have decisive impact on this case.

This case was for dissolution of marriage, and was tried before a family court, which denied the appellant joint legal and physical custody, and granted the respondent sole legal and physical custody of their daughter, although the record shows without controversy that both the appellant as father and the respondent as mother are excellent parents, were granted joint legal and physical custody by temporary order, and over two years before the final decree split time with and co-

parented their daughter with beneficial impact on her life. Whatever else might be in dispute, amicus considers these basic facts settled under the rule of *O'Leary v. Wangensteen*, 221 N. W. 430 at 431-432 (Minn. 1928).

We contend that, under these or like circumstances, joint legal and physical custody must be presumed under subdivision 3(3) of Section 518.17 of Minnesota Statutes, properly construed, and that, accordingly, this court should reverse the judgment below and either grant joint legal and physical custody to these parties forthwith, or remand for reconsideration in light of the correct standard of law.

To avoid misunderstanding, we disavow any claim that, in proceedings for dissolution of marriage, a parent has a positive constitutional right to joint legal and physical custody of his or her child, nor do we claim that any statute is in whole or part null and void because unconstitutional. Rather, we contend that, upon constitutional principle and public policy, *a presumption in favor of joint legal and physical custody should prevail unless special circumstances in a particular case otherwise dictate*, and that such presumption can and should be read into subdivision 3(3) of Section 518.17 of Minnesota Statutes which ordains that, in determining custody, the court shall not prefer either father or mother on account of sex.

3. GENERAL RULES ON CONSTRUCTION OF STATUTES: The most important use of constitutional law is not in striking down statutes as null and

void. More significant is the rule stated as follows in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 at 30 (1937):

“The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that, as between two possible interpretations of a statute, by one of which it would be unconstitutional and the other valid, our plain duty is to adopt that which will save the act. Even to avoid serious doubt the rule is the same.”

Thus, as between alternative constructions of a statute, if one is constitutionally sound, and the other is plainly unconstitutional or even constitutionally dubious, the proper interpretation, notwithstanding all other considerations, should be that which avoids constitutional infirmities or doubts. The legislature of this State has prescribed the same rule for the reading of its own enactments, as appears in Section 645.17(3) of Minnesota Statutes.

We restate for the sake of emphasis that this principle operates to impose a construction, even if the alternative is not clearly unconstitutional. For if the alternative be even fairly questionable in light of fundamental law, the right construction removes such doubts by assigning a meaning which is constitutionally impeccable. For the cardinal rule of statutory construction is to save as much as possible by elimination of even suspected weaknesses. In applying this principle, therefore, it is not necessary to establish the unavoidable unconstitutionality of a statute beyond a reasonable doubt. It is sufficient to show the need for prudent caution in reading the statute so as avoid a risk of colliding with fundamental law.

Moreover, this principle operates, even if the constitutionally sound interpretation might otherwise not be preferred. There is, for example, a judicial rule of right reason, illustrated by *Platt v. Union Pacific Railroad*, 99 U. S. 48 at 58-59 (1878), and confirmed by Section 645.17(2) of Minnesota Statutes, that a construction avoiding redundancy should be adopted if possible, thereby giving meaning to every word, phrase, clause, or provision in a given act; yet, if any such conventional reading yields a meaning which is unconstitutional or constitutionally questionable, the constitutionally sound interpretation will prevail, idle language or other awkwardness notwithstanding. For constitutional principle is the foundation of our legal system, having been established by the sovereign power, and all else done in the name or under color of law is subordinate and must yield to superior and ultimate authority. See Alexander Hamilton, *The Federalist*, No. 78, Liberty Fund edition 2001, pp. 404-406.

4. EXAMINATION OF SECTION 518.17 OF MINNESOTA STATUTES:

The applicable statute in this case governs child custody questions in proceedings for dissolution of marriage. It provides for granting custody according to the best interests of the child, which is defined in subdivision 1 by an enumeration of factors which has been on the books and modified or augmented over many years past. Subdivision 2 goes on to stipulate, "The court shall use a rebuttable presumption that, upon request of either or both parties, joint legal custody is in the

best interests of the child,” which provision originated in Chapter 406 of Minnesota Laws of 1986. And subdivision 3(3) then says, “In determining custody, the court shall consider the best interests of each child and shall not prefer one parent over the other solely on the basis of the sex of the parent,” which provision originated in Chapter 1030 of Minnesota Laws of 1969.

It might at first seem that the legislature intended to exclude a presumption of joint physical custody, because it has provided expressly only for a presumption in favor of joint legal custody.

“Expressio unis est exclusio alterius” is, after all, a familiar maxim in the construction of positive laws, but misuse of the rule must be avoided. Thus, an enumeration of specific powers excludes powers not granted, especially any general power. But, as to enumeration of rights, or exceptions to power, the principle does not apply. Hence, a guarantee of jury trial of criminal cases limited judicial power of the United States, but did not operate to deny jury trial in suits at common law even before the Federal Bill of Rights was adopted in 1791. See Alexander Hamilton, in op. cit. *The Federalist*, No. 83, pp. 430-432. Likewise, an express presumption in favor of joint legal custody limits judicial discretion in family courts, yet does not operate to deny a presumption in favor of joint physical custody.

Hence the question whether constitutional principle, as a guide in construction of positive laws, requires us to read into subsection 3(3) of Section 518.17 of Minnesota Statutes a presumption in favor of joint physical custody, no less than joint legal custody, which, in either case, should prevail unless special circumstances in a particular case otherwise dictate.

5. THE IMPACT OF CONSTITUTIONAL PRINCIPLE UPON SECTION 518.17 OF MINNESOTA STATUTES: In order to interpret and evaluate existing case law on certain provisions of the United States Constitution, it is necessary to consider the rudiments of legal history which produced the clauses in question.

An important object of Amendment XIV of the United States Constitution was to erase doubts over the validity of the Federal Civil Rights Act of 1866, 14 U. S. Statutes at Large, p. 27 ff. While that statute was upheld under Amendment XIII a century following its enactment in *Jones v. Alfred H. Mayer & Co.*, 392 U. S. 409 (1968), it was passed over the veto of President Andrew Johnson, who thought the act was unconstitutional, and doubts expressed in his veto message lingered, for even his enemies knew that he was a great and courageous constitutional lawyer. See, e. g., *Myers v. United States*, 272 U. S. 52 at 106-177 (1926). Amendment XIV was meant to assure that, in coming years, Congress would have ample authority to intervene in behalf of freedmen who had been liberated by Amendment XIII. The equal protection clause in particular was

designed to outlaw discrimination against freedmen in former slaveholding States against any legislation which might interfere with fundamental rights of the kind protected by the Federal Civil Rights Act of 1866.

The character of these rights is fairly illustrated in the chapter on the "absolute rights of individuals" in Sir William Blackstone's *Commentaries on the Laws of England*, Christian ed. 1765, Bk. I, pp. 121-145. And such rights are expounded further in *Meyer v. Nebraska*, 261 U. S. 390 at 399-400 (1923), cited with approval in the prevailing opinions in *Griswold v. Connecticut*, 381 U. S. 479 at 481-482, 495, and 502 (1965).

But conspicuous among the rights not protected, except in a limited and indirect sense, was the right to vote, for the second section of Amendment XIV says in effect that, if a State should not grant citizens the right to vote, the representation of such State in the lower chamber of Congress would be lessened. The inference was that, if willing to pay the political price of reduced representation, a State could disenfranchise those made free by Amendment XIII.

The logic of the option left to the several States by the second section of Amendment XIV is more understandable in light of legal tradition which generally regarded the right to vote, like capacity to sit as a juror, as belonging to a higher class of privileges which were generally reserved to freeholders with estates

yielding a certain annual income, as appears in op. cit. Blackstone, Bk. I, p. 172, and Bk. III, p. 362.

Amendment XV was intended to outlaw this option of the several States to disenfranchise freedmen and more generally the black race. It generally prohibits denial of the right to vote by the Union or any of the several States on account of race or former condition of servitude.

When a right traditionally belonging to a freeholder is guaranteed, the more common rights of a freeman are by strong presumption guaranteed with it. And it has been held again and again that the right to vote is “preservative of all rights.” See, e. g., *Yick Wo v. Hopkins*, 118 U. S. 356 at 370 (1886), and *Reynolds v. Sims*, 377 U. S. 533 at 562 (1964). During confirmation hearings on his nomination as Chief Justice of the United States, John Roberts was heard to articulate this basic principle repetitiously.

The impact of Amendment XV upon the equal protection clause of Amendment XIV is to create a strong presumption that any legal discrimination based on race is unconstitutional.

We come now to Amendment XIX, which parallels Amendment XV, and guarantees that no person shall be denied the right to vote by the Union or any of the several States on account of sex. Under Amendment XIX, especially read together with the equal protection clause of Amendment XIV, any legal distinction

based on sex is, not necessarily, but by strong presumption unconstitutional. Nor can there be any doubt that the seminal cases in American jurisprudence against sex discrimination turn on the historical impact of Amendment XIX on equal protection of laws. See, e. g., *Adkins v. Children's Hospital*, 261 U. S. 525 at 552-553 (1923), and *Frontiero v. Richardson*, 411 U. S. 677 at 685 (1973).

We note here in passing that Amendment XIX speaks of discrimination on the basis of "sex," not gender, which, together with number and case, determines the inflections of various parts of speech in civilized languages. Amendment XIX refers to human beings, not parts of speech.

We do not deny the general rule that statutes are by strong presumption constitutional. But by reason of Amendments XV and XIX, that presumption is reversed in a limited field. Statutes discriminating on the basis of race and sex are by strong presumption *unconstitutional*. A unifying principle, rooted in legal tradition, creates a strong presumption against discrimination on the basis of race and on the basis of sex.

All attempts to suggest that there is an "intermediate" or weaker legal standard for sex discrimination and a "strict" or stronger legal standard for race discrimination are gravely misleading. Amendments XV and XIX have *exactly the same legal impact* on the equal protection clause of Amendment XIV. The difference between these two kinds of discrimination is *not the legal principle, but*

in the fact that race and sex are different kinds of human realities, so that what holds true for one may not also hold true for the other. And that alone explains why the legal results in specific cases on race discrimination and the legal results in specific cases on sex discrimination do not automatically translate into each other. The point may be illustrated:

In *Loving v. Virginia*, 388 U. S. 1 (1967), it was held that laws prohibiting interracial marriage are unconstitutional under the equal protection clause of Amendment XIV. The decision echoes an ancient judgment in the 12th chapter of the Book of Numbers. And yet an indelible fact of our humanity is born out in the 16th article in the Universal Declaration of Human Rights, promulgated in 1948 by the General Assembly of the United Nations. This 16th article proclaims the right without limitation as to race, nationality, or religion, to marry and found a family. Marriage is designed to give dignity to procreation, and thus has been defined from time immemorial in reference to male and female. Hence, while it is unconstitutional to prohibit marriage because of difference in race, it is constitutional to prohibit marriage because of sameness in sex, as held in *Baker v. Nelson*, 191 N. W. 2d 185 (Minn. 1971).

In light of legal history, we can reach for a settled rule from the case law on sex discrimination in the United States, deriving principally from *Adkins* as revived by *Frontiero*. For a clear development can be traced from *Taylor Louisiana*,

419 U. S. 522 (1975), to *Stanton v. Stanton*, 421 U. S. 7 (1975), to *Craig v. Boran*, 429 U. S. 190 (1976), to *Orr v. Orr*, 440 U. S. 268 (1979), and to *Mississippi University for Women v. Hogan*, 458 U. S. 718 (1982), which impartially condemn discrimination both against men or women on account of sex. And this development reached a crescendo in *United States v. Virginia*, 515 U. S. 518 at 531-534 (1996), which summarizes the whole corpus, to wit: *any law or legal practice which discriminates against men or women on account of sex is by "strong presumption" unconstitutional, and such discrimination can be rebutted only by an "extremely persuasive justification," -- i. e., a justification which is substantially related to important government objectives, is genuine and well-founded in fact, is not invented post hoc in response to litigation, does not rely on overbroad generalities concerning differences between men and women, and is not based on fixed notions about the characteristics of men and women.* There is nothing "intermediate" or less than "strict" about this standard. It is unambiguous and peremptory, nor can it be minimized.

The kind of sex discrimination allowable by fundamental law is illustrated by *Nguyen v. Immigration and Naturalization Service*, 533 U. S. 33 (2001), which conceded *United States v. Virginia*, 515 U. S. at 531-534, yet upheld distinctive requirements for proving paternity of a child born abroad and out of wedlock as a condition of American citizenship. The reason has to do with the inherent and

unavoidable differences between men and women. A mother must be present at birth, and delivery of the child is undeniable proof of maternity. But a father need not be present at birth, and even his presence at delivery is no proof of paternity, hence the legitimacy of distinct standards for proof of paternity.

The United States Supreme Court has “carefully inspected official action that closes the door or denies opportunities to women or to men.” *Virginia*, 515 U. S. at 533. And one of those opportunities is child custody. Any attempt to say otherwise on the basis of *Nguyen*, even where the child was born in wedlock and paternity and maternity are both established beyond question, is obviously misplaced.

In the wake and on the basis of *Frontiero*, it was soon recognized that the old maternal presumption in child custody cases is unconstitutional. See, e. g., *State ex rel. Watts v. Watts*, 350 N. Y. S. 2d 285 (N. Y. City Fam. Ct. 1975), which was confirmed by *Commonwealth ex rel. Spriggs v. Carlson*, 368 Atl. 2d 635 (Pa. 1977). The same point was not judicially decided in Minnesota, because the legislature abolished the old maternal presumption by statute before the judicial question became ripe.

In order to arrive at a presumption based on constitutional principle in favor of joint legal and/or physical custody, a further premise is needed. And the further premise is found in a traditional presumption, now embedded in constitutional

principle, that a fit parent will act in the best interests, and thus has a right to the custody, control, and care of his or her child. See *Troxel v. Granville*, 530 U. S. 57 at 63-73 (2000), and especially *Parham v. J. R.*, 442 U. S. 584 at 602 (1979). By operation of equal protection of the laws, as impacted by Amendment XIX, the benefit of this presumption is equally due to father and to mother in proceedings for dissolution of marriage, so long as both are deemed to be fit.

From thence it follows that there is a strong presumption, based on constitutional principle, that father and mother are entitled to joint legal and physical custody, so long as both are deemed fit, and any rebuttal must amount to an extremely persuasive justification, -- e. g., a clear showing that such an arrangement cannot be made workable even by a decree laying down rules for the parties to govern in the absence of agreement between them, or that, due to unusual circumstances, the best interests of the child would be injured by such an arrangement.

Section 518.17 of Minnesota Statutes does not deny such a preference. But, in order to eliminate constitutional doubt and render the act legally impeccable, this court can and should interpret subdivision 3(3) as raising an implied presumption of joint legal and physical custody, subject to rebuttal in appropriate situations. The idea is not on the avant-garde but represents the moderation of a growing and respectable consensus. For a bill creating an express presumption in

favor of joint legal and physical custody was prepared by a committee of lawyers involved in family practice, then introduced during the 84th legislature of Minnesota as part of House File 1191, and finally added as an amendment to House File 1321 on a heavy bi-partisan vote of 117-12 on May 20, 2005. A copy of this bill is attached as an appendix to this submission.

6. A RECENT DECISION OF THIS COURT: We are, of course, aware of *Custody of J. J. S.*, 707 N. W. 2d 706 (Minn. App. 2006), which, however, we do not believe is controlling on the proposition which we advance here, first, because it does not deal with Section 518.17 of Minnesota Statutes, or with a problem of custody of children born in wedlock of parents who are both unquestionably fit, -- second, because we ask that no enactment be declared unconstitutional, and thus null and void, -- and, third, because, in *Custody of J. J. S.*, this court misrepresented applicable decisions of the United States Supreme Court which certainly are controlling here.

This court supposed that there is an "intermediate" or relatively weak standard for sex discrimination, which is an urban myth.

The authentic standard is that a law operating to discriminate against men or women on account of sex is subject to a strong presumption of unconstitutionality, and that such presumption can be rebutted only by an extremely persuasive justification. We ask this court to reread what was so unmistakably said in *United*

States v. Virginia, 515 U. S. at 531-534, -- viz., that such a justification must not only be substantially related to an important government objective, but also be well-founded in fact, not invented post hoc in response to litigation, not reliant on overbroad generalities concerning differences between men and women, and not based on fixed notions about the characteristics of men and women.

We think that this court has a duty to abide by the law as given to us by legal tradition, and pronounced by the United States Supreme Court.

This court should construe subdivision 3(3) of Section 518.17 of Minnesota Statutes with due deference to established principles which give *both father and mother* equal benefit of the presumption that a fit parent will act in the best interests of his or her child and should enjoy custodial rights.

7. THE IMPACT OF PUBLIC POLICY ON SECTION 518.17 OF MINNESOTA STATUTES:

Joint legal custody was first authorized by Chapter 259 of Minnesota Laws of 1979. It was hoped the availability of this consolation would ease the resolution of disputes over the children arising out of dissolution of marriage. Family courts reacted with extreme prejudice against the idea, as did most matrimonial lawyers. It so happens that, after this option had been authorized, the undersigned was hauled into family court, and all efforts to negotiate a satisfactory resolution failed because the bench and bar were so hostile to joint legal custody. The problem was

resolved in *Graham v. Graham*, 386 N. W. 2d 764 (Minn. App. 1986), before the legislative presumption in favor of joint legal custody went into effect. The argument was then and there made that joint legal custody should be liberally allowed, even in the absence of an express presumption, because such reading and application of the law would promote the public policy set forth in *Wangensteen v. Northern Pacific Railway*, 16 N. W. 2d 50 at 53 (Minn. 1944), to wit: "*The law favors compromise of cases and encourages the end of litigation. Any law which has for its salutary and beneficent purpose the accomplishment of this end should not be strictly construed.*" And this court held that joint legal custody cannot be arbitrarily denied, then remanded the case, whereupon the controversy naturally evaporated.

Since then joint legal custody has been rather routine in Minnesota. The initial hostility against the idea has been reprovved by time and practice. And as family courts should then have presumed joint legal custody without legislative nudging, they should now presume joint physical custody without legislative nudging.

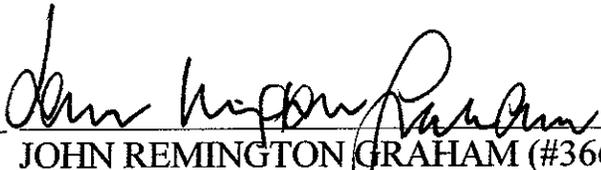
Why? Because, even laying aside constitutional principle, it is demanded by the established public policy of reading statutes to encourage the settlement of disputes.

How do we know? Because, if the family court in this case had presumed joint legal and physical custody, this cause would not be on the docket here after having already gone through two appellate courts on procedural questions even before argument on the merits. And if this court properly reads Section 518.17 of Minnesota Statutes as we have urged, this controversy will more likely than not be resolved by agreement.

8. CONCLUSION: This court should interpret subdivision 3(3) of Section 518.17 of Minnesota Statutes so as to raise a presumption in favor of joint legal and physical custody. Such a construction will accommodate constitutional principle and promote settlement of child custody disputes.

Respectfully submitted,

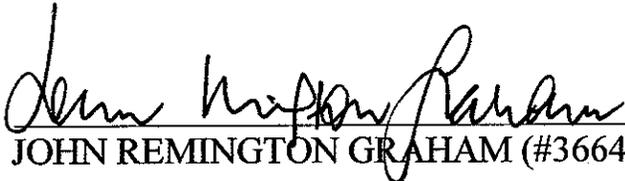
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies as an officer of the court that the foregoing submission was prepared on a Microsoft Word Program, using 14-point Times New Roman font, and that, excluding the cover, the table of contents, the table of authorities, this certificate, and the appendix, this submission consists of 4,034 words proportionally spaced, as measured by the equipment used in the preparation thereof, less than 7,000 words in any event, in compliance with Rule 132.01, Subd. 3, of the Minnesota Rules of Civil Appellate Procedure.

Dated: May 23, 2006 
JOHN REMINGTON GRAHAM (#3664X)

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).