

PRESENTED AT

**27th Annual Conference on
State and Federal Appeals**

June 1-2, 2017
Austin, Texas

Family Law Appeals

Richel Rivers
and
Mary Evelyn McNamara

RIVERS ♦ McNAMARA, PLLC

1209 West 5th St., Suite 200

Austin, Texas 78703

512-439-7000

rrivers@riversmcnamara.com

memcnamara@riversmcnamara.com

Family Law Appeals

I. INTRODUCTION

Resolution of marriage and family legal disputes is informed by the application of constitutional, statutory, and procedural principles to the uniquely personal circumstances of the litigants. Appellate review of family law cases thus presents issues uncommon to other appeals.

Here we identify three principles significant to the law's interest in personal and family life in our society and illustrate their application in cases addressed by the Texas Supreme Court: (1) personal liberties must be protected; (2) spouses owe a fiduciary duty to each other; and (3) the best interest of children predominates. Especially in an atmosphere of politically charged public discourse, unifying legal principles fostering fairness and respect are crucial to judicial resolution of family law disputes. The focus of this paper is motivated by our experience guiding people through conflicts involving exceptionally painful personal situations—the loss of relationship, disputes over care and nurture of children, challenges to choices of love, and breaches of trust. When such private matters become entangled in the morass of litigation, people experience the full measure of our government's power over their lives.

This paper is not intended to be a roadmap for handling a family law appeal. Our approach instead is to offer a broader perspective of foundational decisional principles in this difficult subject-matter area. Many helpful papers address a panoply of topics the appellate practitioner might encounter in handling a family law appeal. As an aid to the initial research a particular appellate engagement might require, we have compiled a Bibliography of recent Texas Supreme Court cases and writings in this arena.

II. PERSONAL LIBERTIES MUST BE PROTECTED

Our country's governmental system is founded on the conviction that we hold certain unalienable rights, among them being life, liberty, and the pursuit of happiness.¹ The legal system has often lent its power to the protection of such personal rights against unwarranted state action.² Judicial support of personal liberties in family relationships is reflected in cases that afford legal protections to people's private choices or that set boundaries on the state's involvement in individual and family life.³

¹ Declaration of Independence, Action of Second Continental Congress, July 4, 1776.

² *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law forbidding teaching children foreign languages violates liberties guaranteed by 14th amendment); *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating state law giving preference to men over women in application to be appointed administrator of son's estate); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (law prohibiting unmarried persons' access to contraceptives violates constitutionally protected right of privacy); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating state law criminalizing same-sex intimacy).

³ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking state law requiring parents and guardians to send children to public primary schools); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (law forbidding use of contraceptives violates married couples' constitutionally protected right of marital privacy); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating bans on interracial marriages); *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating prison regulation restricting prisoner's right to marry only when superintendent approves, and there are compelling reasons to do so); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (differentiation between same-sex & opposite-sex marriages "demeans the couple, whose moral and sexual choices the Constitution protects..."); *Obergefell v.*

Recent cultural and political debate over same-sex marriage highlights the importance of respect for the rule of law. The Texas Supreme Court has underscored this virtue in its swift recognition of the same-sex marriage ruling by the Supreme Court of the United States, in the process reminding lawyers and judges of our obligations to uphold the rule of law despite misgivings about what the law should be.⁴

Unfortunately, rancorous cultural disputes seem to induce jugglery, by lawyers and judges alike.... But it is precisely in divisive, consequential cases when by-the-book fastidiousness by courts is most vital, to blunt even the appearance of evasive corner-cutting or politicized judging.... Every Texas jurist swears allegiance to the Rule of Law, vowing to “preserve, protect and defend the Constitution and laws of the United States and of this State, so help me God.” That solemn oath comes first—always—not our ideology, not our legacy, and not our desire to be feted as on the “right side of history.”⁵

As judges and lawyers, we bear a sacred obligation to uphold the rule of law even when the law does not conform to what we believe it should be. That duty includes withstanding the temptation to bend and abuse the legal process to collect an earnestly desired result the law simply does not provide.⁶

Strongly held feelings and beliefs also infect legal battles over parenting choices and behaviors. For example, inter-family disputes over parenting capabilities raise questions of the extent to which a parent is free to choose how to raise his or her own children. A common scenario involves grandparents who can contribute significantly to the welfare of their grandchildren, perhaps better than the grandchildren’s own parents. But grandparents’ intervention into the lives of their children’s children is fundamentally constrained by the sanctity of the parent-child relationship.⁷

Tommie Granville and Brad Troxel were unmarried parents of two daughters. When they separated, Brad lived with his parents, Jenifer and Gary Troxel, and regularly brought his daughters to his parents’ home for weekend visitation. Almost two and a half years later, Brad committed suicide. The Troxels continued to see their grandchildren after Brad’s death for about five months, when Tommie told them she wished to limit their visitation with her daughters to one short visit per month. The trial court considered the mother’s and the grandparents’ proposed visitation

Hodges, 135 S. Ct. 2584 (2015) (opposite-sex and same-sex marriages are entitled to equal dignity and respect under the law).

⁴ *In re State*, 489 S.W.3d 454, 456 (Tex. 2016) (dismissing Texas Attorney General’s mandamus petition as moot following issuance of temporary restraining order allowing same-sex couple to obtain marriage license and following nonsuit of case after marriage ceremony conducted on courthouse steps).

⁵ *Id.* at 456 (Willett, J., concurring).

⁶ *Id.* at 459 (Devine, J., concurring).

⁷ *Troxel v. Granville*, 530 U.S. 57 (2000) (state law permitting any person to petition for child visitation rights at any time, with outcome based solely on trial court’s determination of child’s best interest, unconstitutionally infringes on parents’ fundamental right to rear their children).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Family Law Appeals

Also available as part of the eCourse

[Family Law Appeals](#)

First appeared as part of the conference materials for the
27th Annual Conference on State and Federal Appeals session
"Family Law Appeals"