

The United States and Washington Supreme Courts have long recognized parents 'fundamental rights to the care and custody of their children. The "rights to conceive and to raise one's children have been deemed 'essential', 'basic civil rights of man' . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' "

The rights have been recognized as protected by the due process clause of the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment and the Ninth Amendment.

See:

Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)

Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942)

Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944)).

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State interference with the parent's right to rear her or his children is subject to strict scrutiny, justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.

See Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), which also reads as follows:

Protecting a parent's right to rear her or his child has sometimes required Washington and federal courts to read special protections into custody and visitation statutes when a parent's interest conflicts with that of a nonparent.

In other cases, the need to protect the parent's right has led to such statutes being found unconstitutional, facially or as applied. In re Marriage of Allen, 28 Wn. App. 637, 626 P.2d 16 (1981) was an early case in which a custody statute was construed to require special protections for a parent resisting a nonparent's request for custody. The court reasoned that while a pure 'best interest of the child' standard" the standard according to which custody of a child was to be determined under former RCW 26.09.190 (1973) could apply in a custody dispute between parents, a more stringent standard was required where a nonparent sought to wrest custody from a parent. The court held that a nonparent could overcome the parent's rights only by showing either parental unfitness or actual detriment to the child.

In 1987, the legislature "reenact[ed] and continue[d] the law relating to third-party actions involving custody of minor children" through a separate chapter, 26.10 RCW, which Washington courts construed as incorporating Allen's parentally-protective "best interest of the child" standard. RCW 26.10.010 (expressing legislative intent); Stell, 56 Wn. App. at 365. In re Custody of R.R.B., 108 Wn. App. 602, 613, 31 P.3d 1212 (2001), review denied, 151 Wn.2d 1017 (2002), held that it is the construction of RCW 26.10.100 to require this heightened standard that saves the nonparental custody provision from constitutional challenge. In Shields, the Washington Supreme Court agreed, holding that the heightened standard for obtaining nonparental custody from a parent satisfies strict scrutiny, characterizing the standard recognized in Allen as substantial, and as one that "a nonparent will generally be able to meet . . . in only 'extraordinary circumstances.' "