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Boswell v. Boswell:**Parent's Visitation Shall Not be Restricted Solely Due to a Relationship with a Non-Marital Partner**

By Richard Dirk Selland

The Court of Appeals of Maryland held that the "correct standard to be applied in visitation determinations involving the presence of a non-marital partner is the best interest of the child, with liberal visitation being restricted only upon a showing of actual or potential adverse impact to [the] child resulting from contact with [the] non-marital partner." *Boswell v. Boswell*, 352 Md. 204, 721 A.2d 662 (1998). The court further held that requiring the father's homosexual partner to be absent during visitation was improper in the absence of specific findings of potential or actual adverse impact to the children. *Id.* The court emphasized that this decision would apply to both heterosexual and homosexual relationships outside of marriage.

Robert and Kimberly Boswell were married in May 1986. *Id.* at 210, 721 A.2d at 664. A son, Ryan, was born in 1988 and a daughter, Amanda, was born in 1991. *Id.* The parties separated in August 1994 when Mr. Boswell told his wife that he was a homosexual. *Id.* He began living with Robert Donathan in February 1995 and the two started an intimate relationship. *Id.*

After Ms. Boswell filed for a limited divorce, Judge James Cawood of the Circuit Court for Anne Arundel County ordered that visitation between Mr. Boswell and his children

take place one week night and alternating weekends. *Id.* In July 1995, Mr. Boswell filed a counterclaim for absolute divorce. *Id.* at 210, 721 A.2d at 665. Judge Lawrence Rushworth presided over a five day trial in March and April of 1996. Disputes were limited to the possession, value, and disposition of various personal property items. *Id.* The issue of custody was not contested since both parties had previously agreed that Ms. Boswell was to maintain primary custody of the children. *Id.* During trial, Mr. Boswell moved unsuccessfully for recusal of Judge Rushworth because he made statements indicating a predisposition toward restricting contact between the children and Mr. Donathan. *Id.*

Judge Rushworth ruled on the topic of visitation, a non-contested issue, by severely limiting Mr. Boswell's visitation time with his children. *Id.* The order "prohibited any overnight visitation and visitation with the children in the presence of Mr. Donathan, or 'anyone having homosexual tendencies or such persuasions, . . . or with anyone that the father may be living with in a non-marital relationship.'" *Id.* at 211, 721 A.2d at 665. However, Ms. Boswell never testified that she wanted Mr. Donathan excluded from visitation, nor that his presence was adverse to the children. *Id.*

Judge Rushworth based his order on in camera interviews with the children even though they provided no definitive response regarding their feelings about Mr. Donathan's presence. *Id.* The Court of Special Appeals of Maryland reversed the trial judge by entering a judgment in Mr. Boswell's favor and vacated the visitation prohibitions. *Id.* at 213, 721 A.2d at 666. The Court of Appeals of Maryland granted certiorari to "clarify the standard a court must apply in determining the extent of restrictions on parental visitation of children in the presence of non-marital partners." *Id.* at 214, 721 A.2d at 666.

Before the court began its legal analysis, it examined the role and testimony of the court-appointed social worker, Marcia Kabriel. *Id.* at 214, 721 A.2d at 667. Explaining any discomfort the children may be having over their Father's relationship, Ms. Kabriel testified that "the children would have been confused if it had been a man or a woman. The children routinely in the first year or two after a separation and divorce have hopes that their parents will reconcile." *Id.* at 215, 721 A.2d at 667. Dr. Kay Standley, an expert witness for Ms. Boswell, added that she was "very much in favor of both parents having a great deal of contact with the children," and that it is common for the children to

be affected by any new partner of Mr. Boswell, heterosexual or homosexual. *Id.* at 216-17, 721 A.2d at 668.

Both testimonies were useful in the court's analysis of the best interest of the child standard and how that standard applied to the case at hand. This standard, described as being "'of transcendent importance' and the 'sole question' in familial disputes; indeed it is 'therefore not considered as one of many factors, but as the objective to which virtually all other factors speak.'" *Id.* at 219, 721 A.2d at 669 (quoting *Taylor v. Taylor*, 306 Md. 290, 303, 508 A.2d 964, 970 (1986)). This standard has not only been applied to custody disputes, but also visitation determinations. *Boswell*, 352 Md. at 219, 721 A.2d at 669. A series of cases have held that visitation is to be treated like temporary custody and should thus be governed by the same standard. *Id.*

The court recognized that a parent has a fundamental right to raise a child, but that it is not *carte blanche*. *Id.* at 220, 721 A.2d at 669. The court of appeals expressed that in the course of a custody or visitation dispute, a parent's liberty interest is subordinate to what is in the best interests of the child. *Id.* The court further recognized that it is in the best interests of the child to have an "opportunity to develop a close and loving relationship with each parent." *Id.* The presumption that liberal unrestricted visitation with a non-custodial parent is in the best interests of the child may be overcome in those situations where there is evidence that the child may be harmed by such visitation. *Id.* at 221, 721 A.2d at

670. Maryland has restricted or denied visitation in cases involving physical, sexual, and/or emotional abuse by a parent by instituting a best interests standard coupled with a finding of harm. *Id.*

In applying the best interests standard, a court may consider factors derived from case law, including: "the age, sex and health of the child, the physical, spiritual, and moral well-being of the child, the environment and surroundings in which the child will be reared, [and] the influences likely to be exerted on the child . . ." *Id.* at 222, 721 A.2d at 670. Additionally, in making its findings of fact, a court is "not allowed to consider one factor, such as a parent's adultery or homosexuality, to the exclusion of all others." *Id.* at 224, 721 A.2d at 671.

The court continued its analysis by discussing a series of Maryland cases and their interpretation of the "harmful effect" or "adverse impact" requisite. *Id.* Where a change in visitation is requested on the basis of potential or actual harm to the child, courts will apply a best interests of the child standard concurrently with an adverse impact inquiry. *Id.* at 225, 721 A.2d at 672. A court will grant the change only upon a showing of actual emotional or physical harm to the child. *Id.*

The court supported this adverse impact requisite by turning its attention to other jurisdictions as well. *Id.* at 228-29, 721 A.2d at 674. The court agreed with other jurisdictions in concluding that the sexual orientation or conduct of the parent is not the primary factor in visitation

proceedings. *Id.* at 229, 721 A.2d at 674. See also, *In re the Marriage of Birdsall*, 197 Cal. App. 3d 1024 (Cal. Ct. App. 1988) (holding that the sexual orientation of a parent on its face is insufficient evidence to constitute harm); *Blew v. Verta*, 617 A.2d 31 (Pa. 1992) (holding that "courts ought not to impose restrictions which unnecessarily shield children from the true nature of their parent unless it can be shown that some detrimental impact will flow from the specific behavior of the parent."). *Boswell*, 352 Md. at 230-31, 721 A.2d at 674-75.

The court moved on to its last step of analysis which is the requirement that a court must "find a nexus between the child's emotional and/or physical harm and the contact with the non-marital partner." *Id.* at 237, 721 A.2d at 678. A restriction on visitation will not be entertained without such a nexus. *Id.* In the present case, the court was unable to find any connection between the presence of Mr. Donathan, the non-marital partner, and actual or potential harm to the children. *Id.* at 238, 721 A.2d at 678. Denying or restricting visitation merely because of a fact finder's disapproval of a non-marital relationship without making a determination of an adverse impact on the children has consistently been overturned by the Maryland courts, and this case is another example. *Id.* at 238, 721 A.2d at 679.

In *Boswell v. Boswell*, the Court of Appeals of Maryland emphasized that the only standard to apply is the best interests of the child, with "liberal visitation being restricted

only upon a showing of actual or potential adverse impact to the child resulting from the contact with the non-marital partner.” In the present case, the decision requiring Mr. Boswell to visit his children in the absence of his significant other was vacated. The decision reflects that a court will not treat a parent living in a committed relationship with someone of the same sex any differently from a parent living with someone of the opposite sex without the benefit of marriage. Sexual orientation is fundamentally irrelevant to a person’s capacity to be a good parent. Recognizing that fact, the Court of Appeals of Maryland rejected basing this decision on stereotypical assumptions. Rather, the court applied the best interests of the child standard coupled with requiring evidence of a clear connection between a parent’s actions and harm to the child before the parent’s sexual orientation assumes any relevance in the visitation proceeding.

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