98172-8

No. 79424-8-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES ALAN CLARK,

Appellant,

v.

WENDY KRISTINE CLARK,

Respondent.

PETITION FOR REVIEW

James Alan Clark, Pro Se

3493 111th Drive NE
Lake Stevens, WA 98258
(425) 609-3660

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

A. IDENTITY OF PETITIONER

James Clark, appellant below and father of the children at issue in this case, asks this Court to accept review of the Court of Appeals' decision affirming the modification petition denial. See Part B.

B. COURT OF APPEALS DECISION

Petitioner James Clark, seeks review of the Court Appeals' decision entered on January 13, 2020, affirming the trial court's order to deny appellant's modification petition to award residential credit and reverse all legal fees to appellant based on financial circumstances. A copy of the decision is attached.

C. ISSUES PRESENTED FOR REVIEW

1. Should it be considered "obvious on the record" that the basic support obligation for children with shared 50/50 residential custody schedules are incurred approximately equally between each parent's household?

2. Should it be considered "unmistakable, evident, or indisputable" that a denial of residential credit for a 50/50 residential shared custody homes plan results in the most restrictive child support order?

3. Should it be considered "unmistakable, evident, or

indisputable" that the default denial of residential credit due to RCW 26.19.075(1)(d) orders the most restrictive child support order and thus violates a parent's constitutional property and liberty rights when a least restrictive (full residential credit) or narrowly tailored (partial residential credit) child support order would provide the receiving household with enough resources?

4. Does the lack of an Attachment for Residential Schedule Adjustment for 50/50 and other significantly shared custody families represent a procedural due process constitutional violation?

5. Does the mere difference in income between parents, no matter how large, provide a sufficient reason to refuse a residential credit deviation to 50/50 families?

6. Does the vagueness doctrine apply to denying residential credit due to a "difference in incomes" or "insufficient resources"?

7. Does a denial of residential credit equally protect the children when $0 is apportioned to a 50/50 custodial parent's household?

8. Should the pro se appellant's constitutional arguments be considered even though not all RAP requirements were strictly adhered to?

D. STATEMENT OF THE CASE

James and Wendy divorced after eleven in years in 2011 with a

daughter (8) and son (6). James used a collaborative law firm and sought a 50/50 plan with residential credit. The court made Wendy the primary custodian and awarded her the family home with a $4,000 per month budget while she transitioned back into the workforce after 6 years at home. The 50/50 parenting plan was only reached after a year of expensive litigation and mediation in which the parents agreed to share equal rights as full custodial parents with a 50/50 shared residential schedule.

When spousal maintenance ended in January 2012, James sought the previously agreed to child support review of Wendy's new income and circumstances to receive an award of residential credit. The court imputed Wendy's income to be $2,333 on March 5, 2012 after a motion to reconsider in which Wendy "contends she is as employed as can be." Additionally, "The court will order a deviation for residential credit based on the economic status of both parties."

In July 2014, Wendy's average monthly income was over $4,000 per month. James sought a residential credit per a modification petition. Even though Wendy's income was more than 100% of the $4,000 per month household budget that the court had calculated in May 2010, the court refused to deviate and not because Wendy had insufficient resources but rather because of the income difference between the two MBA educated parents.

In July 2017, James presented a modification petition that would have committed him to paying a total of $3,054 in child support each month. The first $2,054 (using the court's final income calculations) would be his proportional share of the basic support obligation per the WSCSS worksheets. James' proposed child support order included an additional $1,000 per month cash payment directly into an educational savings account to fully fund the children's University of Washington (or similarly costing) undergraduate college educations. The children's best interest of a fully funded $26K annual undergraduate education without any student loans depended upon the court ordering the least restrictive child support order that included a residential credit to James. Of the $1,440 in financial savings to James between the most restrictive and least restrictive child support orders, $1,000 (70% of $1,440) would be passed directly to the children's education. The court refused, described James' attempt a cynical and transparent attempt to further his own financial interests, and reversed 100% of Wendy's legal fees onto James. The Court of Appeals affirmed the trial court's ruling in June 2018 and also reversed all of Wendy's legal fees onto James.

In July 2018, James sought a modification due to his lower salary after a layoff from Northrop Grumman in which no other job with the company was offered and he only received layoff paperwork. James's

hours and salary were cut to 20 hours per week resulting in an $85K annual salary with his new employer. James documented in his modification petition declarations that he was hired on by Northrop Grumman in 2005 on the same 20 hour per week work from home schedule earning a $78K salary. James 100% supported the family on that schedule and salary from 2005 – 2008 in what is now Wendy's home. The trial court refused to deviate, reversed all of Wendy's legal fees onto James, and found that James was engaged in vexatious litigation. The appellate court affirmed the trial court's ruling and reversed all of Wendy's legal fees onto James.

James seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The State of Washington routinely violates parents' constitutional property and liberty rights in the 51.6% majority of all custody cases statewide when courts systemically deny residential credit to 50/50 and other significantly shared custody families. There is no fair process when there is no approved method of calculation for apportioning the total amount of child support owed in shared custody arrangements. It is manifest error for the court to maintain that each parent is paying their presumptive support obligations as calculated by the WSCSS worksheets

when residential credit is denied in 50/50 and other significantly shared residential schedules.

The Washington State Child Support Schedule Workgroups have repeatedly stated "on the record" in their 2011, 2015, and 2019 reports that children's residential expenses are shared approximately equally between parents with equal residential schedules. Thus, the apportionment of all support to one household ($2,880 in this case for two children) and $0 to the other household when each household should be apportioned $1,440, creates a significant disparity in the amount of support available for the children in each household and does not equally protect the children. A denial of residential credit places more than the entire combined monthly net income calculation of child support obligation on one parent while relieving the other parent of their financial support obligation, and does not meet the legislature's intention of equitably apportioning the child support obligation between both parents, RCW 26.19.001.

Even if a receiving household has a larger net income than the court reviewed household budget, the court then relies on the ambiguous and unconstitutionally vague "difference in income" to deny residential credit and impose the most restrictive child support order.

The Supreme Court should use this case to order the Administrative Office of the Courts to create an Attachment for

Residential Schedule Adjustment to provide fair process and to ensure child support orders are least restrictive or narrowly tailored to remain in constitutional compliance with the State's Title IV-D child support plan and 45 CFR §304.10 – 304.50.

1. **It should be considered "obvious on the record" that the basic support obligation for children with shared 50/50 residential custody schedules are incurred approximately equally between each parent's household.**

The Washington Child Support Schedule Workgroups have extensively documented that expenses in 50/50 shared residential custody households are shared approximately equally between parents. The 2011 Workgroup recommended in its final report that "There should be a residential schedule credit, not just a deviation" and included a Parenting Time Credit Worksheet and Parenting Time Table to credit 50/50 homes with the 50% of duplicated expenses (Appendix XI). The 2015 Workgroup focused exclusively on one issue in their 2015 Final Report: "a residential schedule deviation based on the time that the children spend with the paying parent."

It should be obvious that when both parents are providing their children 21 plates of food weekly (averaged over a two week 3-4-4-3 residential schedule), they both have similar expenses. All the food and expenses James pays for the two children during their 50% residential time

with him relieves Wendy of those same expenses. Residential credit is how the total support obligation gets fairly divided between the two homes that actually incur those expenses in the care of the children.

2. It should be considered "unmistakable, evident, or indisputable" that a denial of residential credit for a 50/50 residential shared custody homes plan results in the most restrictive child support order?

A denial of residential credit to a 50/50 shared custody household results in the most restrictive child support order as illustrated in Appendix D of the Appellant's Brief. In this case, James is paying Wendy a total of 72% ($2,054) of the total basic support obligation as calculated by their combined monthly incomes while he incurs an additional 50% of the basic support obligation out of pocket during the children's 50% residential schedule with him. It should be clear that James pays 122% of the maximum of the RCW 26.19.020 economic support tables even though his monthly net income since July 2018 has been $5,000 monthly and would be no more than $7,000 - $9,000 depending on how much additional income the court chooses to impute. James pays all $1,440 of the children's expenses at his home out of pocket, pays all $1,440 of the children's expenses at Wendy's home, and then provides another $614 to Wendy as part of the $2,054 transfer payment. The most restrictive order has James paying $3,494 monthly towards the $2,880 CMNI basic support

obligation.

Compare that to the least restrictive order in that James pays Wendy 22% ($614) of the total basic support obligation after being credited for the 50% ($1,440) of the children's expenses incurred at his household. Residential credit results in James paying a total of $2,054 as calculated per the WSCSS worksheets with Wendy required to pay $826 monthly to be provided $1,440 for her household's 50% of expenses.

Only through a residential credit deviation is the least restrictive child support order entered in which both parents pay their proportional net income share of the basic support obligation as calculated on the WSCSS worksheets. ***It is manifest error for the court to maintain that each parent is paying their presumptive support obligations as calculated by the WSCSS worksheets when residential credit is denied in 50/50 and other significantly shared residential schedules.***

3. **It should be considered "unmistakable, evident, or indisputable" that the default denial of residential credit due to RCW 26.19.075(1)(d) orders the most restrictive child support order and thus violates a parent's constitutional property and liberty rights when a least restrictive (full residential credit) or narrowly tailored (partial residential credit) child support order would provide the receiving household with enough resources?**

Any state practice that interferes with a parent's fundamental Constitutional rights is subject to a tripartite strict scrutiny test. This

means it survives Constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest and uses the least restrictive means available to do so. *See, e.g., Washington v. Glucksberg, 521 U.S. 702 (1997)*

In this case, Wendy's approximately $4,300 monthly net income plus an additional $2,054 in child support, is over $6,350 – far over the $4,000 monthly budget the court awarded her as full support for the house in 2010 and more than every financial declaration budget she has ever submitted over the past 10 years. Even if the standard is to provide 100% of household expenses and debt payments to ensure enough resources for the household receiving support, the court has chosen since 2014 to not narrowly tailor child support awards to provide just enough resources for the household receiving support but not more.

When the courts do not order the least restrictive or a narrowly tailored child support order, they fundamentally violate the obligor parent's constitutional property rights and liberty rights. Excessive child support orders impact the obligor parent's right's to establish a home and bring up children and to control the education of their own. Excessive child support orders impact substantive due process rights including obligor's right, coupled with the high duty, to recognize and prepare his children for additional obligations. The court's denial in July 2017 of

residential credit means $0 is saved for the children's educations instead of $32,000 as of February 2020 as father proposed in the children's best interests.

4. The lack of an Attachment for Residential Schedule Adjustment is a procedural due process constitutional violation for 50/50 and other significantly shared households.

The U.S. Supreme Court observed in *Troxel v. Granville, 530 U.S. 57, 65 (2000)* that:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process."

There is no fair process when there is absolutely no process, method, or worksheet attachment to fairly apportion child support in shared residential custody households. When the total child support obligation is 100% apportioned to the lower income parent in 87.6% of all significantly shared (more than 25% with both parents) residential custody cases, which is also a 51.6% majority of all custody cases, a significant constitutional due process issue exists that impacts the majority of all family law cases involving custody in Washington state.

5. A mere difference in income between parents, no matter how large, does not provide a sufficient reason to refuse a residential credit deviation to 50/50 families?

"Mere difference in income, no matter how large, is not sufficient basis for such a deviation." *In re Marriage of Holmes, 128 Wn. App. 727, 117 P.3d 370 (2005)*. In Holmes, the primary custodial father with a $125 million in assets and $620,000 monthly net income was found to spend $636 monthly for support of his son in his household ($2,460 total support minus $1,438 for private school and $386 for health costs). The non-custodial mother had $1 million in assets, $2,051 of monthly net investment income, imputed income of another $2,051, and sought approximately $7,000 per month from the father (after subtracting private school expenses) to fund what father called "an excessively indulgent lifestyle" and "fund disruptive legislation".

In the Holmes case, the father's income was 151 times greater than the mother's and father's net assets were 125 times larger. In spite of this difference in wealth, he was not ordered to maintain a $7,000 per month child support payment that provides 11 times the resources at mother's non-custodial residence than the $636 spent at father's custodial residence.

In this case, apportioning $2,880 of support to Wendy via the most restrictive order just because James earns more is not a sufficient reason to deny a residential credit deviation, especially when Wendy's net assets are

considerably more than father's per their December 2019 financial declarations. By net worth, James is now the economically disadvantaged parent.

6. The vagueness doctrine applies to the denial of residential credit due to an unquantified difference in incomes?

The U.S. Supreme Court observed in Troxel v. Granville that:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process."

Child support should be apportioned according to the economic tables of RCW 26.19.020 in which both parents have a proportional 20+% of their income calculated as support. Yet courts are allowed to significantly deviate from that WSCSS worksheet calculations by denying the least restrictive child support order and imposing the most restrictive child support order based on the mere "difference in incomes".

In the child support statutes, there is no published standard on what constitutes a significant income difference. Looking again at the Holmes case above, the father earns $620,000 monthly and the mother $2,051 yet the court provided that the custodial father should not have to pay the non-custodial mother more because "mere difference in income, no matter how large, in not sufficient basis for such a deviation."

Compare that to a 50/50 shared residential custody case in which the economic situations are completely reversed through child support so that the mother in 2014, 2017, and 2018 ended up with a higher net income after the child support transfer payment than father did. Wendy now has a higher net worth than James even though he has consistently worked without any breaks since 2005 and she has been unemployed, underemployed, working part time, or starting her own business for eight of the past ten years.

Even when the household receiving support (Wendy) has a larger net income ($4,300 monthly) than the court awarded household budget ($4,000 monthly), the court then relies on the ambiguous and unconstitutionally vague "difference in income" to deny residential credit and impose the most restrictive and one sided child support order. Quoting from U.S. Supreme Court Justice Gorsuch, "It leaves the people to guess what the law demands - and leaves judges to make it up" and "No amount of staring at the statute's text, structure, or history will yield a clue" as to when child support will be evenly apportioned between households in the least restrictive order (residential credit) or when all support goes to one parent in the most restrictive default case for 87.6% of all shared parenting cases in Washington State.

7. A denial of residential credit does not equally protect the

children when $0 is apportioned to a 50/50 custodial parent's household?

The $0 apportionment of support to James' household has provided absolutely zero protection to his household since support payments began in June 2010. The full $2,880 apportioned to Wendy's household provides all the protection of the maximum support obligation for two children that she only has half the time. Wendy has never actually had to show how $2,880 monthly is spent on the basic support obligation for the children. Yet her $4,000 household monthly budget is supported 72% through a $2,880 of child support apportionment for two children in public school and no health issues that she has half the time.

8. **The pro se appellant's constitutional arguments should be considered even though not all RAP requirements were strictly adhered to?**

James, the pro se appellant, without assistance of counsel, unschooled in law and requesting the court to accept direction from Haines v. Kerner, 404 U.S. 519 (1972), Boag v. MacDougall, 545 US 360 (1982), Puckett v. Cox 456 F2d 233 (1972 Sixth Circuit USCA), wherein the court has directed those who are unschooled in law making pleadings shall have the court look to the substance of the pleadings rather than the form. Pro se pleadings are to be considered without regard to technicality; pro se litigants' pleadings are not to be held to the same high standards of

perfection as lawyers. Maty v. Grasselli Chemical Co., 303 U.S. 197 (1938), B. Platsky v. CIA, 953 F.2d 25, 26 28 (2nd Cir. 1991), "Court errs if court dismisses pro se litigant without instruction of how pleadings are deficient and how to repair pleadings."

F. Conclusion

While James is attempting to address the Court of Appeals ruling through this petition to reframe his arguments in terms of constitutional magnitude and manifest error, his pro se arguments are based on legitimate constitutional issues in the Washington family law courts. Approximately 12,000 Washington state families divorce every year with kids[1] and are impacted by the systemic constitutional violations. Denying a review of this case to address these violations would be an abuse of discretion.

Even if the Supreme Court cannot order the Administrative Office of the Courts to accept pro se litigant's Attachment for Residential Schedule Adjustment or to publish their own version, it can address the constitutional violations that occur when residential credit is denied and the most restrictive child support orders are entered that do not pass constitutional muster.

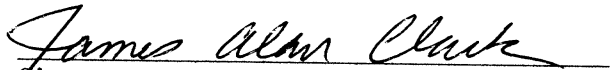
---

1 https://www.doh.wa.gov/DataandStatisticalReports/HealthStatistics/Divorce/DivorceTablesbyYear

While the Washington family courts may have the best of intentions when ordering the largest and most restrictive child support orders, the fact is these orders are unconstitutional if a least restrictive or narrowly tailored order would provide the receiving household with sufficient resources. Unconstitutional orders are ineligible to receive Title IV-D federal reimbursement funding by the state. Thus the Washington State Supreme Court has a constitutional duty to guide the courts to create constitutional orders. As the U.S. Supreme Court issued long ago, "Illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon." *Monongabela Nav. Co. v. United States, 148 U.S. 312, 325 (1893).*

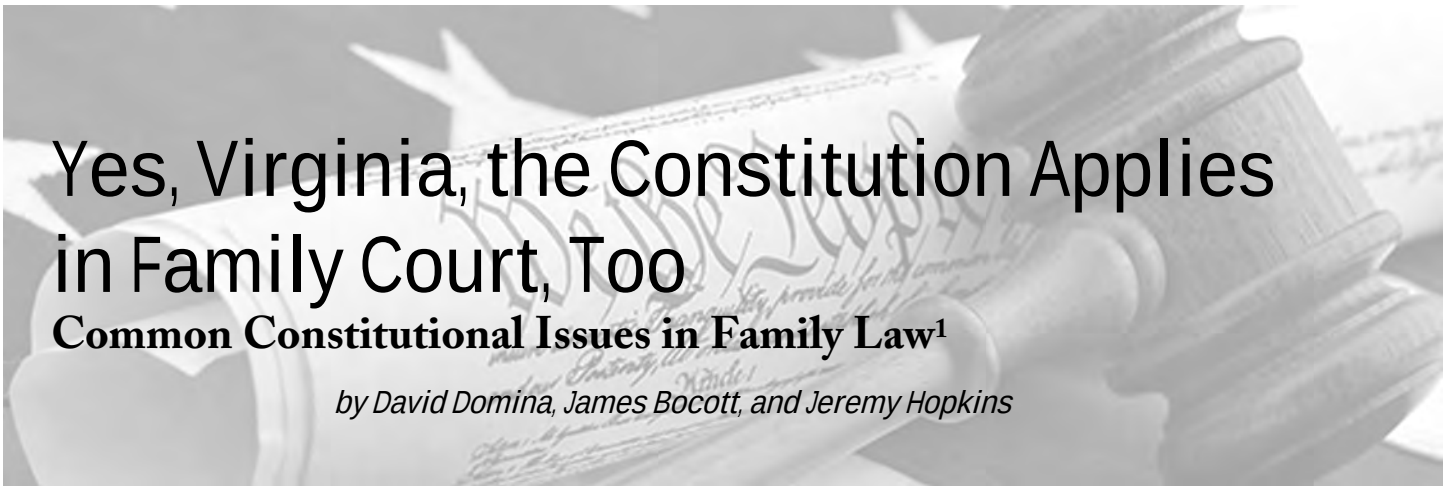
DATED this 12th day of February, 2020.

Respectfully submitted,



Signature
James Alan Clark, Pro Se

APPENDIX A – "Yes, Virginia, the Constitution Applies in Family Court, Too – Common Constitutional Issues in Family Law"



Yes, Virginia, the Constitution Applies in Family Court, Too

Common Constitutional Issues in Family Law[1]

by David Domina, James Bocott, and Jeremy Hopkins

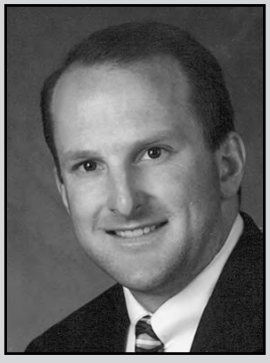
In the last few years, there has been growing awareness of the Constitutional issues that arise in family law cases. According to Yale Law Professor Douglas NeJaime:

> Many of the leading constitutional issues of our day implicate family law matters. Modern substantive due process is replete with questions of family law. *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Lawrence v. Texas* raise issues of family formation, intimate relationships, and reproductive decision making. *Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safley* address the contours of marriage. *Moore v. City of East Cleveland* protects the extended family. *Stanley v. Illinois*, *Lehr v. Robertson*, and *Michael H. v. Gerald D.* consider the rights of unmarried fathers. *Troxel v. Granville* protects a parent's childrearing decisions. Modern equal protection law, too, features a significant number of family law issues. A string of cases beginning in the late 1960s extends rights to nonmarital parent-child relationships. Leading sex equality decisions dating back to the 1970s render rights and responsibilities regarding marriage and childrearing formally gender neutral. Most recently, decisions on the rights of same

David Domina

David Domina is a trial lawyer in Omaha, whose practice includes complex trial problems, Constitutional and civil rights cases. He also has extensive experience prosecuting public integrity cases.

James Bocott



James Bocott is a trial lawyer in North Platte, whose practice focuses on bankruptcy, personal injury and family law litigation.

Jeremy Hopkins

Jeremy Hopkins is a trial lawyer in Raleigh NC, whose practice focuses on Constitutional and civil rights litigation. He has extensive experience litigating Constitutional issues in eminent domain, civil rights and family law cases.

> sex couples to marry—namely, *United States v. Windsor* and *Obergefell v. Hodges*—recognize the families formed by gays and lesbians on grounds of equal protection and due process.[2]

Oddly, judges and practitioners often overlook basic Constitutional requirements in traditional family law cases. As one commentator observed, judges regularly issue orders in these cases that would never pass Constitutional muster in other contexts:

> Under the amorphous "best interests of the child" standard, judges have ordered parents to bring their children to church, avoid criticizing ex-spouses or their religious beliefs, refrain from bringing intimate partners near the children, and even communicate feelings of love toward their ex-spouses. Although some scholarship has addressed judges' consideration of parents' religious beliefs or sexual preferences in granting custody, the constitutionality of family court orders structuring family interaction and crafting rules of parental behavior … "has largely escaped the notice of all but a few First Amendment scholars" and "survives partly because of the little attention paid to family law proceedings." Thus, family law courtrooms have the potential to become constitutional "twilight zones" in which judges adjudicating the responsibilities and obligations of the most basic unit of American society illegitimately violate parents' constitutional rights in the name of children's best interests.[3]

One of America's foremost First Amendment experts, Eugene Volokh, observed that judges regularly rely on the "best interests of the child" standard to make custody decisions based on parents' speech and beliefs, and sometimes to issue orders restricting their speech:

> The "best interests of the child" test - the normal rule applied in custody disputes between two parents - leaves family court judges ample room to consider a parent's ideology. Parents have had their rights limited or denied partly based on their advocacy of atheism, racism, homosexuality, adultery, nonmarital sex, Communism, Nazism, pacifism and disrespect for the flag, fundamentalism, polygamy, and religions that make it hard for children to "fit in the western way of life in this society."
>
> Courts have also penalized or enjoined speech that expressly or implicitly criticizes the other parent, even when the speech has a broader ideological dimension. One parent, for instance, was ordered to "make sure that there is nothing in the religious upbringing or teaching that the minor child is exposed to that can be considered homophobic," because the other parent was homosexual. Another mother was stripped of custody partly because she accurately told her 12-year-old daughter that her ex-husband, who had raised the daughter from birth, wasn't in fact the girl's biological father.
>
> Courts have also restricted a parent's religious speech when such speech was seen as inconsistent with the religious education that the custodial parent was providing. The cases generally rest on the theory (sometimes pure speculation, sometimes based on some evidence in the record) that the children will be made confused and unhappy by the contradictory teachings, and will be less likely to take their parents' authority seriously.[4]

Prof. Volokh argues these restrictions are generally unconstitutional, except when they're narrowly focused on preventing one parent from undermining the child's relationship with the other parent.[5]

Constitutional Overview

Family law cases implicate a number of Constitutional doctrines, including the First Amendment and the Establishment Clause. They also implicate substantive and procedural due process and equal protection. These are the focus of this article.[6]

Substantive Due Process

The U.S. Supreme Court observed in *Troxel v. Granville*:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."
>
> The liberty interest at issue in this case–the interest of parents in the care, custody, and control of their children–is perhaps the oldest of the fundamental liberty interests recognized by this Court.[7]

Troxel rejected a trial order granting parenting time to a child's grandparents. The court held the order "was an unconstitutional infringement on [the parent's] fundamental right to make decisions concerning the care, custody, and control

of her two daughters" because the trial court "failed to accord the determination of [the parent], a fit custodial parent, any material weight."

Any state practice that interferes with a parent's fundamental Constitutional rights is subject to a tripartite strict scrutiny test. This means it survives Constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest and uses the least restrictive means available to do so.[8]

The *Troxel* doctrine has expanded. In *Richmond v. Case*, for example, the Nebraska Supreme Court held:

> [B]oth parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship. In other words, the substantive due process right to family integrity protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by [his or her] biological parent. It is clear, therefore, that both parents and their children have cognizable substantive due process rights to the parent-child relationship.[9]

In a later case, the Nebraska court held "When an unmarried father has established familial ties with his biological child and has provided support his relationship acquires substantial constitutional protection."[10]

Nebraska is not alone in this area. In *L.F. v. Breit*, for example, the Virginia Supreme Court held that "[i]n light of this demonstrated commitment, we conclude that the Due Process Clause protects [an unmarried father's] fundamental right to make decisions concerning [the child's] care, custody and control, despite his status as an unmarried [sperm] donor."[11]

Judicial decisions that infringe on parents' care, custody and control of their children are unconstitutional unless they are narrowly tailored and apply the least restrictive means available. Under strict scrutiny analysis, appellate standards that give trial judges independent responsibility to determine custody and parenting time, even over the joint agreement of the child's parents,[12] do not pass constitutional muster.[13]

Procedural Due Process

The Due Process Clause requires that parties have fair notice of what a law requires of them. In *Linn v. Linn*, the Nebraska Supreme Court considered the constitutionality of a statute that authorized the termination of parental rights in a divorce if the court found termination was in the "best interests and welfare of the children."[14]

Linn held laws must provide "standards which the average intelligent person should be able to understand and by which he or she can regulate his or her conduct." In *Linn*, only the "best interests and welfare of the children" standard governed. This "standard" includes no provisions "sufficiently specific to apprise the parents of why the state found it necessary to terminate parental rights; there is no language conveying a warning as to prohibited conduct and no standards by which the parents could 'regulate his or her conduct.'" The *Linn* court held the law, "being vague and lacking in adequate and understandable standards of conduct to which parents should conform so as not to risk the termination of parental rights, violates the due process requirements of the Fourteenth Amendment …, and is therefore unconstitutional and void."[15]

This conclusion is in step with prevailing jurisprudence and academic thought. Many commentators over the last 50 years have observed the "best interests" standard, if it can be called a standard at all, does not provide any meaningful guidance. According to a brief that was submitted to the U.S. Supreme Court in *Troxel*:

> The best interests test has long been the subject of academic as well as judicial criticism for being indeterminate, providing little guidance on how to weigh the different needs of individual children, especially as they change over time; Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemp. Probs., 226, 257 (Summer 1975). Best interests operates as "an empty vessel into which adult perceptions and prejudices are poured." Hillary Rodham, Children Under the Law, 43 Harv. Ed. Rev. 487, 513 (1973).[4]

[4] *See also* Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 TULANE L. REV. 1365, 1181 (1986) (The "best interests" standard is "a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge. Its vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself."); Gary Crippen, Stumbling Beyond the Best Interests of the Child, 75 MINN. L. REV. 427, 499 (1990); Annette R. Appell and Bruce A. Boyer, Parental Rights v. Best Interests, 2 DUKE J. GENDER LAW & POL. 63 (1995) (analysis of cultural, class, religious, ethnic, and racial biases that pervade totally discretionary use of "best interests").[16]

The U.S. Supreme Court seems to be taking a greater interest in the vagueness doctrine. Earlier this year, Justice Gorsuch cast the deciding vote against the Trump administration in an immigration case because the statute in question was unconstitutionally vague. According to Justice Gorsuch:

> "The implacable fact is that this isn't your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute's text, structure, or history will yield a clue."[17]

It is worth noting the statute in *Dimaya* was considerably more precise than the "best interests" test so long used in child custody cases.

The vagueness of the "best interests" standard is apparent not only from the plain language of the standard itself but also from the broad range of outcomes it produces. Surveys of child custody decisions, including the *Nebraska 2002-2012 Custody Court File Research Study*, show similar facts often produce vastly different outcomes.[18] Facts that might result in joint legal custody and 50-50 parenting time in Omaha will likely result in sole legal custody and 80-20 parenting time in North Platte.[19] These surveys show case outcomes often depend more on the judge who hears the case than the law or the facts of the case.[20]

Equal Protection

With respect to equal protection, surveys of child custody cases show substantial gender disparities in case outcomes. According to the *Nebraska 2002-2012 Custody Court File Research Study*, for example, mothers were five times more likely to receive sole or primary custody of their children than fathers.[21]

Many surveys of judges show conscious gender bias in how they decide cases. "A study conducted in 2004 found that although the 'tender years doctrine' had been abolished many years earlier, a majority of Indiana family court judges still supported it and decided cases coming before them consistently with it. A survey of judges in Alabama, Louisiana, Mississippi and Tennessee found a clear preference among judges for maternal custody in general."[22]

This evidence suggests significant equal protection issues dwell within family law cases. Practitioners must be prepared to identify and argue them. Under the Equal Protection Clause, gender classifications are subject to intermediate scrutiny, which means they must serve important governmental objectives and use means that are substantially related to the achievement of those objectives.[23] As the U.S. Supreme Court held in one of its rare family law cases, gender classifications "cannot be validated on the basis of the State's preference for an allocation of family responsibilities under which the wife plays a dependent role. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[24]

Practical Results of the Best Interests Standard

The "best interests" standard has produced perverse results. It often thrusts two, fit parents into a cage fight, awarding custody -- and the financial benefits that come with it -- to the parent who best destroys the other. The system likewise incentivizes attorneys to engage in conduct that is detrimental to the relationship of the child's parents and harmful to the child.[25]

Many family courts have devolved from courts of law into arenas where attorneys too often fuel discord and encourage parents to air their subjective – and often irrelevant -- opinions about the other parent. Nothing could be further from the actual "best interests" of the child.

The "best interests" standard gives credence to a warning the U.S. Supreme Court issued long ago. "Illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[26]

Courts following the "best interests" standard are not malicious, but their well-intentioned actions are nonetheless devastating to the children impacted by their rulings. The unconstitutional acts produced by the vague but superficially laudable "best interests" standard are alarming but perhaps not surprising. As Justice Brandeis observed 90 years ago, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[27]

Implications

Several conclusions can be deduced from the law and evidence discussed thus far. First, our child custody practices are based on a standard – best interests of the child – that many lawyers and observers believe provides no real guidance. The wide variation in outcomes among similar fact patterns suggests the standard is unconstitutionally vague. The Nebraska Supreme Court has already held in a related context the best interests of the child standard is unconstitutionally vague.

Second, judges often issue parenting plans that violate substantive due process rights of parents. Under *Troxel* and *Richmond*, both parents have constitutionally protected rights

to the parent-child relationship. Judicial decisions that affect these fundamental rights are subject to strict scrutiny and must use the least restrictive means available. This means judicial decisions involving two fit parents that award sole legal custody and primary physical custody to one parent over the objections of the other parent should rarely pass Constitutional scrutiny.

Third, family law cases too often produce parenting plans that violate the Equal Protection Clause. Gender classifications "cannot be validated on the basis of the State's preference for an allocation of family responsibilities under which the wife plays a dependent role." Yet, custody data and anecdotal evidence suggest judges often use gender classifications in ways that do not comply with the Equal Protection Clause.

So where does this leave us? Despite these problems, it is possible to bring our family law practices into Constitutional compliance. With additional objective elements, the "best interests of the child" standard could survive Constitutional scrutiny. Fortunately, the additional standards necessary will likely be consistent with what mental health research shows provides the best outcomes for children.[28]

Proposed Framework

Judicial decisions regarding legal custody and parenting time implicate fundamental Constitutional rights. As a result, these decisions must be narrowly tailored and must use the least restrictive means available. This means the judge must protect each parent's Constitutional rights to the greatest extent possible, as well as the child's corollary right to a meaningful relationship with each parent.

Constitutional compliance requires trial courts to start every case from a position of joint legal custody and equal parenting time. Clear and convincing evidence must justify a departure from this equality. Decisions cannot rest on personal preferences of the judge or on gender stereotypes. Any deviations from joint legal custody and equal parenting time must be achieved by the least restrictive means available.

For example, parental conflict should not automatically preclude an award of joint legal custody. Instead, the court could use tie-breaker provisions to divide final decision making authority between the parents rather than creating a winner-take-all outcome. Not only would this comply with the Constitutional requirements (because tie-breaker provisions are less restrictive than sole decision making authority to one parent), it also incentivizes cooperative behavior and discourages gamesmanship. Research shows this produces better outcomes for children.

The essential new approach also means trial courts should maximize the parenting time of both parents.[29] In an ideal world, this would mean a 50/50 division of parenting time but life is not always so easy. In situations where the parents live sufficiently far apart that an equal division of time is unworkable, the trial court could grant the parent with whom the children do not live during the school year a disproportionate number of school holidays and summer parenting days to compensate for the unequal division of time during the school-year. The court could also order that the child live certain school years with one parent and other school years with the other, as has been successful in many cases. For example, a child could live with the mother for elementary school and the father for middle and high school. This also means the pre-separation roles played by each parent are generally not relevant to their future roles under the parenting plan.

When reviewing trial decisions, appellate courts must apply the standard of review they apply to other cases involving fundamental Constitutional rights – strict scrutiny. This means little deference to the trial judge. It also means appellate courts must ensure that, if the decision does not treat the parents equally, the trial court adopted the least restrictive means available.

Appellate courts will be required to apply progressively more scrutiny to trial decisions as they get farther away from equal time and equal decision-making. In other words, an appellate court should apply more scrutiny to a trial decision that awarded sole legal custody and 80/20 parenting time than one that awarded joint legal custody and 60/40 parenting time.

Recent Trends

Nebraska's current child custody regime presents serious Constitutional issues. Fortunately, the turn to the future may already be in progress.

In March 2018, the Nebraska Court of Appeals affirmed a trial order that modified an existing shared parenting arrangement because of a breakdown in communication between the parties. The trial court kept the shared parenting arrangement but modified it to create a week-on/week-off plan to reduce the number of exchanges and add tie-breaker provisions to the joint legal custody arrangement (two tie-breakers for each parent). The new arrangement satisfied strict scrutiny because it used the least restrictive means available despite the breakdown in communication.[30]

In November 2017, the Court of Appeals reversed a trial order and ordered a week on/week off parenting plan. The case involved a request to modify a parenting plan in which the parents previously agreed the children would live primarily with their father because the parents at that time lived too far apart to make shared parenting feasible. Since the original parenting plan was entered, however, the mother's circumstances changed so a week on/week off parenting plan was now feasible. The Court of Appeals held "modifying custody to a week on/week off parenting schedule is in the children's

best interests." This decision satisfied strict scrutiny because it treated the parents equally.[31]

In October 2017, the Court of Appeals affirmed a trial order that granted a father's request to modify an existing parenting plan to a week-on/week-off schedule. The court also affirmed the award of joint legal custody with the father being granted final decision-making authority over educational decisions. This decision satisfied strict scrutiny because it used the least restrictive means available.[32]

Conclusion

As Thomas Paine observed, "a long habit of not thinking a thing wrong, gives it a superficial appearance of being *right*."[33] Time has given the "best interests" standard the "superficial appearance of being right," but the standard's disregard for the Constitution and history of enabling harmful outcomes for children proves otherwise.

It is reasonable to expect the Nebraska Supreme Court to speak to this issue, and to the trend set by the Court of Appeals in the past eighteen months.

The future of the law often appears first in an appellate decision that does not win a majority vote. In this context, Justice David Puryear of the Texas Court of Appeals observed:

> I write separately to express my belief that the standards currently used in making and reviewing orders that have the effect of limiting a parent's access to his or her children do not reflect the legislative mandate regarding parental access, nor do they adequately respect the scope of the liberty interest enjoyed by a parent in rearing his or her own children. Because of the gravity of the constitutional rights and interests at stake in such proceedings, and because the current standard is based upon outdated notions of parenting that predate the family code and run counter to the legislature's stated policy concerning children's best interests, trial courts should justify deviation from maximum feasible time with both parents by clear and convincing evidence and make factual findings, and appellate courts should carefully review those findings. …
>
> Despite the United States Supreme Court's determination to subject infringement upon such fundamental rights to strict scrutiny and of our own legislature's mandate to preserve and foster parent-child relationships, … courts have developed a jurisprudence under which trial court decisions severely curtailing that relationship stand absent an abuse of discretion. Considering the importance of and the risk to the rights at issue and the legislature's clear mandates that courts take measures to protect this most sacred of relationships, I believe we need to carefully re-examine the standards by which decisions that limit a parent's access to or possession of a child are made and reviewed.[34]

We, the authors, agree.

Endnotes

1 © 2018 Midwest Family Law Association

2 Douglas NeJamie, "*The Family's Constitution*," 32 Constitutional Commentary 413 (2017), Yale Law School Public Law Research Paper No. 621 (footnotes omitted).

3 Kelly Kanavy, "*The State and the 'Psycho Ex-Wife': Parents' Rights, Children's Interests, and the First Amendment*," 161 U. Penn. L. Rev. 1081 (2013) (footnotes omitted).

4 Eugene Volokh, "*Parent-Child Speech and Child Custody Speech Restrictions*," 81 NYU L. Rev. 631 (2006).

5 *Id*.

6 While beyond the scope of this article, it is worth noting that family law proceedings and decisions are also subject to statutory civil rights laws, including the Americans With Disabilities Act ("ADA"). According to the U.S. Department of Health and Human Services and U.S. Department of Justice, "[p]arents who are blind or deaf also report significant discrimination in the custody process, as do parents with other physical disabilities." Moreover, the frequency of ADA complaints in this area is rising. See U.S. Department of Health and Human Services, Office for Civil Rights Administration for Children and Families and U.S. Department of Justice, Civil Rights Division, "*Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*" (August 2015), available at https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html.

7 *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (internal citations omitted). *See also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" quoting *Kovacs v. Cooper*, 336 U. S. 77, 95 (1949) (Frankfurter, J., concurring)).

8 *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997).

9 *Richmond v. Case*, 275 Neb. 757 (2008).

10 *Michael E., et al. v. State*, 286 Neb. 532 (2013).

11 *L.F. v. Breit*, 285 Va. 163 (2013).

12 *See, e.g., Zahl v. Zahl*, 273 Neb. 1043 (2007); *Becher v. Becher*, 299 Neb. 206, 217 (2018) ("a trial court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties.").

13 In addition to the substantive due process right that each parent and child has to the parent-child relationship, the First Amendment's right to association likewise protects the parent-child relationship.

14 *Linn v. Linn*, 205 Neb. 218 (1980).

15 *Id*.

16 Brief of *Amicus Curiae* National Association of Counsel for Children, submitted to the United States Supreme Court in *Troxel v. Granville*, Case No. 99-138 (Dec. 10, 1999). *See*

also, e.g., Erwin Chemerinsky, *Defining the "Best Interests"*: Constitutional Protections in Involuntary Adoptions, 18 J. Fam. L. 79 (1979) (discussing the "serious constitutional problems" in allowing adoptions based on the "vague standards and findings" contained in the best interests standard and attempting to "define 'best interests' so as to provide full protection of the parents' constitutional rights").

[17] *Sessions v. Dimaya*, 584 U.S. __ (2018) (Gorsuch, J., concurring).

[18] Nebraska State Court Administrator, "*Nebraska 2002-2012 Custody Court File Research Study*" (Dec. 31, 2013). *See also, e.g.*, Leading Women for Shared Parenting, "*Full Analysis: North Dakota Child Custody by Judge*" in "*Analysis of Child Custody Determinations: State of North Dakota*," (Oct 2017) ("significant variances in custody determinations exist between counties, judicial districts and judges"). *Available at* https://static1.squarespace.com/static/5154a075e4b08f050dc20996/t/59ef20cfb7411ccab433c3d4/1508843767027/LW4SP+North+Dakota+Child+Custody+By+Judge+10232017.pdf

[19] These disparities in judicial practices also violate the Uniformity Clause of the Nebraska Constitution, which provides, "The organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law and the force and effect of the proceedings, judgments and decrees of such courts, severally, shall be uniform." Neb. Const., Art. V-19.

[20] In addition, the vagueness of the "best interests" standard may contribute to parental alienation. Amy J.L. Baker et al, "*Best Interest of the Child and Parental Alienation: A Survey of State Statutes*," 61 J. Forensic Sciences 1011 (2016) (the best interests factors in some state statutes include "elements relevant to parental alienation but lack specificity that could contribute to tremendous variation in how these key concepts are operationalized and utilized in custody decision making. In light of the knowledge now available regarding the long-term negative consequences of parental alienation on children, it is time for a coherent judicial and legislative response to this problem.").

[21] Nebraska State Court Administrator, "*Nebraska 2002-2012 Custody Court File Research Study*" (Dec. 31, 2013).

[22] "*What Judges Really Think About Fathers: Responses to Court-Commissioned Judicial Bias Surveys*," 31 Transitions 4 (Nov. 2013) (footnotes omitted).

[23] *Orr v. Orr*, 440 U.S. 268, 269 (1979).

[24] *Id*. (holding a gender-based alimony statute unconstitutional).

[25] The "best interests" standard is also inefficient for courts and parties. It frequently causes courts and parties to focus on evidence that mental health research shows is irrelevant from a child welfare perspective and often results in multiple protracted hearings, some of which are duplicative, which wastes judicial resources and family resources that might otherwise be available to the children.

[26] *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

[27] *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (quoting *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).

[28] *See* Linda Nielsen, "*Joint Versus Sole Physical Custody: What Does the Research Tell Us About Children's Outcomes?*" Neb. Lawyer (July/Aug 2018) at 39.

See also, e.g., Linda Nielsen, "*Joint Versus Sole Physical Custody: Children's Outcomes Independent of Parent-Child Relationships, Income, and Conflict in 60 Studies*," 59 J. Div. & Remarriage 247 (2018); Richard Warshak, "*Night Shifts: Revisiting Blanket Restrictions on Children's Overnights With Separated Parents*," 59 J. Div. & Remarriage 282 (2018); Emma Fransson et al, "*What Can We Say Regarding Shared Parenting Arrangements for Swedish Children*," 59 J. Div. & Remarriage 349 (2018); William Fabricius et al, "*What Happens When There is Presumptive 50/50 Parenting Time? An Evaluation of Arizona's New Child Custody Statute*," 59 J. Div. & Remarriage 414 (2018); Sanford Braver and Ashley Votruba, "*Does Joint Physical Custody 'Cause' Children's Better Outcomes?*" 59 J. Div. & Remarriage 452 (2018); Richard Warshak, "*Social Science and Parenting Plans for Young Children: A Consensus Report*," 20 Psych. Pub. Pol. & Law 46 (2014).

[29] Mental health research shows the opportunity to have a meaningful relationship with both parents is far more important to child outcomes than living in one home. *See, e.g.*, William Fabricius, "*Latest Mental Health Research on Parenting Time and Outcomes for Children of Divorce*," invited presentation at the conference on *Latest Trends & Emerging Issues at the Intersection of Mental Health and Family Law* (Sept. 23, 2016).

[30] *Yaeger v. Fenster*, No. A-17-452 (Neb. Ct. App 2018).

[31] *Berndt v. Berndt*, 25 Neb. App. 272 (2017).

[32] *Crow v. Chelli*, No. A-16-869 (Neb. Ct. App. 2017). *See also, e.g., Schmeidler v. Schmeidler*, 25 Neb. App. 802 (2018) (reversing in part a judicially-created parenting plan and increasing the father's summer parenting time from two weeks to six weeks); *Spethman v. Spethman*, No. A-16-292 (Neb. Ct. App. 2017) (affirming a trial decision that awarded joint legal custody and a week-on/week-off parenting plan despite unfavorable behaviors by both parents); *Thompson v. Thompson*, 24 Neb. App. 349 (2016) (reversing a judicially-created parenting plan because "awarding [father] only two weekends of parenting time per month under the parenting plan was an abuse of discretion.").

[33] Thomas Paine. *Common Sense*.

[34] *In Re J.R.D. and T.C.D.*, 169 S.W. 3rd 740, 752 (Tex.App. – Austin 2005) (Puryear, J., concurring) (internal citations omitted). The Nebraska Parenting Act has a similar legislative mandate to preserve and foster parent-child relationships. " … Nebraska's Parenting Act recognizes the importance of both parents remaining active and involved in parenting in order to serve the best interests of the child." *Schmeidler v. Schmeidler*, 25 Neb. App. 802 (2018).

JAMES CLARK - FILING PRO SE

February 12, 2020 - 4:45 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	James Alan Clark, Appellant v. Wendy Kristine Clark, Respondent (794248)

The following documents have been uploaded:

- PRV_Petition_for_Review_20200212164424SC574883_9804.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 2020.02.12 - Petition for Review.pdf

A copy of the uploaded files will be sent to:

- karenm@brewelaw.com

Comments:

Sender Name: James Clark - Email: diegoslice@gmail.com
Address:
3493 111th Drive NE
Lake Stevens, WA, 98258
Phone: (425) 609-3660

Note: The Filing Id is 20200212164424SC574883