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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MICHAEL H. AND VICTORIA D., Appellants V.
GERALD D.

CASE NO: 87-746

PLACE: WASHINGTON, D.C.

DATE: October 11, 1988

PAGES: 1 thru 48

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL H. AND VICTORIA D., :
Appellants :
V. : No. 87-746
Gerald D. :
-----X

Washington, D.C.
Tuesday, October 11, 1988

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:03 o'clock a.m.

APPEARANCES:

ROBERT A.W. BORAKS, ESQ., Counsel of Record, Washington,
D.C.; on behalf of the Appellants.
LARRY M. HOFFMAN, ESQ., Counsel of Record, Los Angeles,
California; on behalf of the Appellee.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

ROBERT A.W. BORAKS, ESQ.

On behalf of the Appellants

3

LARRY M. HOFFMAN, ESQ.

On behalf of the Appellee

23

REBUTTAL ARGUMENT OF:

ROBERT A. W. BORAKS, ESQ.

45

On behalf of the Appellants

P R O C E E D I N G S

(11:03 a.m.)

1
2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 87-746, Michael H. and Victoria D. v. Gerald
5 D. Mr. Boraks, you may proceed whenever you're ready.

6 ORAL ARGUMENT OF ROBERT A.W. BORAKS

7 ON BEHALF OF THE APPELLANTS

8 MR. BORAKS: Thank you. Mr. Chief Justice,
9 may it please the Court:

10 Before the Court is the case of a natural
11 father whose claim of paternity was precluded by the
12 operation of a California state statute, which had the
13 effect of terminating an existing parent-child
14 relationship.

15 Also before the Court is the natural father's
16 daughter, who is represented by a court-appointed
17 independent guardian ad litem. Both are here
18 challenging the Constitutionality of that California
19 statute.

20 With the Court's permission I would like to
21 begin with a synopsis of the pertinent facts in this
22 case.

23 In the fall of 1980, Michael was having an
24 intimate relationship with Carole, who was married to
25 Gerald. Carole became pregnant with Michael's child.

1 Victoria, the child, was born in May of 1981. Michael,
2 Carole and Victoria subsequently had an HLA test done
3 which showed a 98.06, I believe, percent probability of
4 paternity.

5 In November of 1982, Michael filed suit in the
6 California courts to have himself declared Victoria's
7 father.

8 QUESTION: This was while the mother was
9 married to Gerald, right?

10 MR. BORAKS: I believe that all of the events
11 I'm describing, Your Honor, occurred while --

12 QUESTION: They have never been divorced?

13 MR. BORAKS: Not to my knowledge. Certainly
14 not as of the end of the record in this case.

15 In his suit Michael asked to be declared
16 Victoria's father, he asked that the court set a
17 reasonable support level for him to provide, and he
18 asked for the court to allow him visitation.

19 After the suit was filed, there came a time
20 when Carole and Victoria lived with Michael, and they
21 lived with Michael throughout most of the third year of
22 Victoria's life.

23 During that period Michael was held out by
24 Carole and by himself to the world and to Victoria as
25 Victoria's father. He cared for the child, he supported

1 the child and the mother, and in all respects he assumed
2 the role of father.

3 And as a consequence, Victoria came to know
4 him as her daddy and a parent-child relationship
5 developed between the two of them.

6 This lasted until around May of 1984 when
7 Carole broke up with Michael.

8 QUESTION: How long was that period in all?

9 MR. BORAKS: There were two separate periods,
10 the one I've just described --

11 QUESTION: When the child was living with
12 Michael.

13 MR. BORAKS: As I say, there were two separate
14 periods. The one I just described was from about August
15 of 1983 till around late April, early May of 1984.
16 Eight, nine, maybe 10 months.

17 QUESTION: August to April, eight months.
18 Nine months. Give you nine.

19 MR. BORAKS: I accept your arithmetic.

20 QUESTION: What, what was the other period?

21 MR. BORAKS: The other period was a period in,
22 for about three months in early 1982, January, February,
23 and March. I'm not sure exactly how many days or
24 whether it was a full three months or only part of that
25 quarter, but --

1 QUESTION: And that contrasts to how much of a
2 period that the child was living with Gerald?

3 MR. BORAKS: As of May of 1984? Or as, as of
4 what point in time -- as of May of 1984 --

5 QUESTION: As of the time of the decision
6 below.

7 MR. BORAKS: Oh, as of the time -- in January
8 of 1985, as of the time of the summary judgment being
9 granted to Gerald, I would say that Gerald probably had
10 the edge in terms of time. But I'm not sure by how
11 much.

12 QUESTION: Well, you know he had the edge, by
13 a good deal, no. I mean, the facts are the facts.

14 MR. BORAKS: Well, yes, they are, and I'm not
15 trying to play with them. I don't think it was by a
16 good deal, Your Honor.

17 I think maybe by three, four months. But I
18 don't have, I don't have it clearly fixed in my mind
19 what the discrepancy might have been as of that point in
20 time.

21 In any event, after Carole and Michael broke
22 up, the court below awarded Michael pendente lite
23 visitation for a period of time, and then also ordered
24 an evaluation of the situation by an independent
25 court-appointed psychologist.

1 And that evaluation did take place prior to
2 the granting of the summary judgment motion. The
3 psychologist interviewed and examined Michael, Carole,
4 Gerald and Victoria, wrote an extensive report.

5 And his bottom-line recommendation was that
6 Michael be recognized as a parent of Victoria and
7 allowed visitation. And this recommendation was based
8 solely on his assessment, that is the psychologist's
9 assessment of what was in Victoria's best interest.

10 After that report came out, Gerald filed a
11 motion for summary judgment, which was granted in
12 January of 1985. In granting the motion for summary
13 judgment, the trial court applied the conclusive
14 presumption of California Evidence Code Section 621.

15 And based on that provision he adjudicated
16 Gerald to be the father and terminated the relationship
17 between Michael and Victoria.

18 What Section 621 says is that, given certain
19 predicate facts, a child conceived by a married woman is
20 conclusively presumed to be the child of that woman's
21 husband.

22 Michael and Victoria appealed, and the summary
23 judgment decision was affirmed by the Court of Appeal.
24 In affirming the lower court's granting of summary
25 judgment, I believe that what the Court of Appeal did

1 was close a question left open by the California Supreme
2 Court in a previous case called Michelle W.

3 In that case the California Supreme Court left
4 open the question of whether Section 621 could be
5 Constitutionally applied to terminate an ongoing
6 parent-child relationship.

7 The Court of Appeal, without saying so
8 explicitly but in logic, necessarily answered that
9 question, yes. And in our view erroneously so.

10 QUESTION: Mr. Boraks, where is Victoria now?

11 MR. BORAKS: Well, I'm not entirely sure, Your
12 Honor. I believe that she's in New York. I have reason
13 to believe that she's in New York living with Carole and
14 Gerald.

15 QUESTION: Mr. Boraks --

16 MR. BORAKS: Justice O'Connor.

17 QUESTION: I guess this Court has articulated
18 the view that the biological relationship of the father
19 with the child alone is not sufficient to give him any
20 Constitutionally protected liberty interest in that
21 relationship. There has to be something more.

22 And in the Stanley against Illinois case, I
23 believe, the father had lived with the child for 18
24 years. And in the Caban case, I think, it was something
25 in the nature of four years.

1 Do you think that this off and on period of
2 seven or eight months in your situation representing the
3 father here effectively presents a substantial
4 relationship of that nature?

5 MR. BORAKS: Yes, Your Honor. I don't think
6 the analysis is quantitative, or is meant to be in those
7 cases. I believe it's qualitative.

8 I believe that it depends on the quality of
9 the relationship and the nature of the conduct of the
10 natural father. I believe --

11 QUESTION: So it could be a month or so and
12 that would be enough?

13 MR. BORAKS: If, if --

14 QUESTION: A week.

15 MR. BORAKS: If that were enough, in fact,
16 which I doubt it could be --

17 QUESTION: So it is quantitative in a sense.

18 MR. BORAKS: No, it's qualitative, but there's
19 a relationship between quantity and quality.

20 There's a relationship between the -- there's
21 a connection, a logical connection involving the amount
22 of time it takes to develop a qualitative relationship
23 that gives rise to the Constitutional rights.

24 I'm not qualified -- no pun intended -- but
25 I'm not qualified to say what that period of time is.

1 But I think that clearly that relationship did develop
2 on this record in this case.

3 QUESTION: What you're asking for on behalf of
4 the father is a recognition of a right to a hearing, to
5 establish the parental relationship. Is that correct?

6 MR. BORAKS: Yes, Your Honor.

7 QUESTION: Would there any, be anything at
8 issue in that hearing other than that parental
9 relationship? Doesn't involve custody.

10 MR. BORAKS: Well, that has never --

11 QUESTION: Or visitation.

12 MR. BORAKS: That has never -- custody has not
13 come up in this case. Certainly it would involve
14 visitation.

15 I think it involves the status, the legal
16 status of parentage, and to borrow a phrase, a bundle of
17 rights attendant to that legal status.

18 QUESTION: Let me ask you this. If this Court
19 were to determine that the father was entitled to some
20 hearing to establish the parental relationship, would
21 the child through her guardian be entitled, under
22 California law, to appear at that hearing and to be
23 represented and to be heard?

24 MR. BORAKS: I can't cite chapter and verse of
25 why I believe this is so, but I do believe that the

1 child would be entitled to --

2 QUESTION: As a matter of California law.

3 MR. BORAKS: I believe as a matter of
4 California law, and I believe as a matter of
5 Constitutional law.

6 QUESTION: Then why would we have to address
7 here any question concerning the child's
8 Constitutionally protected liberty interest? Is that
9 anything that we have to determine then here?

10 MR. BORAKS: I think that they're reciprocal
11 in nature. It's a symmetrical concept. The
12 relationship involves a symmetry.

13 QUESTION: Well, that's a pretty big
14 unanswered question. What the right of the child is,
15 apart from the parent.

16 What I'm trying to explore is why there's any
17 need to determine that, if in any event she would be
18 entitled to be heard in any hearing in California.

19 MR. BORAKS: I understand. If the Court were
20 to determine that Michael is entitled to a hearing, I
21 believe the Court could stop there, and not have to go
22 on to reach the question of whether Victoria is entitled
23 to a hearing as a matter of Constitutional analysis.

24 QUESTION: Are you going to argue here this
25 morning that she is entitled in her own right to have

1 that hearing?

2 MR. BORAKS: Well, I was certainly planning to
3 argue that the failure to hold a hearing, the failure to
4 inquire into, on the merits into the issue of where her
5 best interests lay is a Constitutional deprivation with
6 respect to her.

7 And I had not planned to abandon that
8 argument, but I do agree that what you, what you say,
9 Justice O'Connor, is correct.

10 QUESTION: Well, suppose there's been an
11 adoption proceeding, and some child has been adopted.
12 Now, does that child have a right then to go in later
13 and establish a parental relationship with a biological
14 parent?

15 MR. BORAKS: Well, with whom the child has had
16 a relationship? That's a much tougher question. I'm
17 not sure of the answer to that. But in this case I am
18 sure of the answer.

19 QUESTION: And I suppose the child in this
20 case could, if the parent, if parentage was proven,
21 could ask for support.

22 MR. BORAKS: The, the notion of a support
23 obligation was inherent in Michael H.'s complaint. He
24 understood that, he acknowledged that --

25 QUESTION: I know but, I know he understood

1 it, but whether he understood it or not --

2 MR. BORAKS: Right. Even if he didn't
3 understand it --

4 QUESTION: I suppose the child could press for
5 support if the child proved the parentage.

6 MR. BORAKS: Right. Michael could be made to
7 understand his support obligation, whether he understood
8 it or not.

9 QUESTION: So any time a wife has a child by
10 somebody other than the husband it kind of becomes a
11 menage a trois? The lover is introduced into the
12 structural relationship of the marriage.

13 MR. BORAKS: Well, not any time, Your Honor,
14 because --

15 QUESTION: Well, with one, one week, you said,
16 would be enough.

17 MR. BORAKS: No, I hope I didn't say that. I
18 didn't mean to say that. I said I didn't think it would
19 be. But I wasn't really qualified to deal with how much
20 time it takes to develop the qualitative relationship
21 necessary to --

22 QUESTION: But it would be, it would be a
23 factual determination in every case. I mean, if you
24 can't tell, if it's strictly a question of, you know,
25 how does it grab you, the state can't lay down any

1 rule. It's got to have a hearing every time this
2 happens, and the lover-father wants to get in the act.

3 MR. BORAKS: What the rule has to be, Your
4 Honor, we contend, is that any time a relationship has
5 been established between natural father and natural
6 child which qualifies for a liberty interest under this
7 Court's test, that any time that occurs there must be a
8 hearing.

9 QUESTION: Well, but that's tautological.
10 Well, what, what relationship does qualify for a liberty
11 interest?

12 MR. BORAKS: It's a relationship that has two
13 elements. Number one, biological paternity under this
14 Court's decisions, and number two, action by the natural
15 father to come forward and grasp the opportunity to
16 serve as father in fact and develop, to develop a
17 father-child relationship with his natural child.

18 QUESTION: Well, what if, what if the natural
19 father comes over to the house and says, I want to see
20 my natural father, the husband says, get out of here.

21 Now, is the natural father entitled to pursue
22 that relationship even though the husband does not want
23 him to?

24 MR. BORAKS: Well, that's harder question, and
25 not one that I have to answer for this case. But I

1 would answer it, no. That that's not required. That
2 the second element of what is necessary to establish a
3 liberty interest is absent.

4 The man may, the natural father may be
5 pursuing that element, may be trying to get that
6 element. But if he hasn't gotten it, then he does not
7 have a liberty interest under this Court's decisions.

8 And the problem with Section 621 is it makes
9 no distinction between two distinct subclasses, natural
10 parents who have developed a relationship, and natural
11 parents who have not. They're treated the same.

12 QUESTION: But as far as the child is
13 concerned it seems to me it wouldn't make any difference
14 whether there's been a father-child relationship
15 established. As far as the child is concerned the child
16 can, if you can prove parenthood, can get support. And
17 is entitled to a hearing for that.

18 MR. BORAKS: Well --

19 QUESTION: Isn't that right?

20 MR. BORAKS: I -- no, I don't think the child
21 has a Constitutional right in the absence of a
22 relationship to support.

23 I think that's a matter that could be
24 committed to state law, and that California could say
25 that a child is not entitled to support from a natural

1 father in a circumstance covered by Section 621 where
2 there has been no established relationship. I think
3 California's free to do that statutorally.

4 QUESTION: I'm somewhat surprised you conceded
5 in your answer to the Chief Justice that the father does
6 not have the right to establish the relation, because
7 under your theory of the case it's the father's natural
8 expectations, his great desire to be a father that is
9 really the propelling force of your case. It's not just
10 protecting the relation that's happened for seven
11 months.

12 So it seems to me that the logical thrust of
13 your case would require you to answer the Chief
14 Justice's question differently, that the father, if you
15 prevail, does have this right to establish a relation.

16 MR. BORAKS: Well, the reason I answered the
17 Chief Justice the way I do is because I feel compelled
18 to answer within the parameters of this Court's
19 decision.

20 QUESTION: Well, we're trying to, we're trying
21 to explore the dimensions and the articulation of the
22 theory that we would have to adopt in order to rule for
23 you in this case.

24 MR. BORAKS: Well, I don't want to discourage
25 the Court from adopting a principle that mere biological

1 paternity, that being a natural father in and of itself
2 gives rise to certain rights.

3 QUESTION: But it seemed to me by your answer
4 to the Chief Justice you foreclose that.

5 MR. BORAKS: Well, I've only not argued it. I
6 don't know that the Court is not free to re-examine the
7 limitations of Lehr v. Robertson and to say that, upon
8 further consideration, the question wasn't really
9 foreclosed in that case but it was pretty soundly dealt
10 with, that upon further consideration there aren't
11 necessarily two elements to the liberty interest, that
12 is biology and the assumption of parental
13 responsibilities, but mere biology has attendant to it
14 certain rights.

15 That was, that idea was not foreclosed by Lehr
16 v. Robertson, but the language was pretty discouraging
17 in terms of my standing and making an argument in the
18 face of that, that mere biology would suffice.

19 So perhaps I chickened out, but -- it feels, I
20 feel that the prudent way for me to proceed is based on
21 this Court's decisions.

22 QUESTION: Well, absent, absent this
23 relationship you talk about, if Gerald had, had asked to
24 adopt the girl -- Victoria, is that her name?

25 MR. BORAKS: Victoria.

1 QUESTION: Would, would he have had to give
2 notice to Michael?

3 MR. BORAKS: Absent the relationship, Justice
4 White. Not as I read this Court's previous decisions.

5 And I'm not sure what the answer is under
6 California state law. I believe the Court is going to
7 address that question in another case. But --

8 QUESTION: Mr. Boraks, do any of those prior
9 decisions involve the situation where the relationship
10 has already been terminated, where the termination is
11 not imposed by the state?

12 I mean, you know, the classic decision of ours
13 is the one in which the state says that the biological
14 parent who's been raising the child for many years is
15 simply automatically, simply by reason of having sired
16 the child out of wedlock, not a fit parent.

17 But there it is the state that is depriving
18 the person of that liberty interest by terminating the
19 relationship. Here the relationship has been
20 terminated, not by the state but by the mother and the,
21 and the marital father taking the child away.

22 Is it the state that's terminating the liberty
23 interest here?

24 MR. BORAKS: Yes, Your Honor. Because before
25 the ruling on the summary judgment motion, Michael had

1 visitation rights. The relationship between Michael and
2 Carole was not terminated by the state.

3 QUESTION: Well, I don't know what you mean by
4 visitation rights.

5 MR. BORAKS: Well, he had an -- he was awarded
6 pendente lite visitation. And had he been recognized as
7 a parent, he at least would have been entitled to be
8 heard on the question of continuing visitation.

9 QUESTION: You're asking the state to create a
10 liberty interest that he doesn't now have. As the
11 litigation begins, he has no access to the child. The
12 child is being raised by, by a husband and wife, and he
13 is not allowed to visit.

14 Now, where is the state depriving him of some,
15 something that he now has?

16 MR. BORAKS: In order to answer that question
17 I think one has to focus, has to look at a particular
18 point in time.

19 As of November of 1982, he had some
20 relationship with the child. Two and a half, three
21 months, I'm not sure exactly what point in time, in
22 early 1982.

23 QUESTION: Who terminated that? It wasn't the
24 state.

25 MR. BORAKS: No. Carole did.

1 QUESTION: And he didn't sue Carole, did he?
2 She's not a party to the case.

3 MR. BORAKS: Well, he did sue her originally.

4 QUESTION: Oh.

5 MR. BORAKS: But it was Gerald's summary
6 judgment motion that was granted. So --

7 QUESTION: But she's not a party in this Court
8 anyway.

9 MR. BORAKS: She's not a party in this Court,
10 is my understanding.

11 Your Honor, I just want to, I want to save
12 some time for rebuttal, but I want to kind of get to a
13 bottom-line position here.

14 What we're saying is that whenever one finds a
15 natural father who has developed a cognizable liberty
16 interest in a relationship with his natural child under
17 the decisions of this Court, that that relationship
18 cannot be terminated by the state absent a hearing on
19 the merits.

20 That is, where the positions of the parties
21 and the interests of the parties are examined --

22 QUESTION: Mr. Boraks, I think I interrupted
23 and you hadn't really answered Justice Scalia's
24 question. How can you say that at the time the lawsuit
25 was filed the relationship had been terminated by the

1 state?

2 MR. BORAKS: Well --

3 QUESTION: The state hadn't done anything.

4 MR. BORAKS: That's true. It was a suit
5 between private parties. But ultimately the
6 relationship got terminated by the state.

7 QUESTION: Well, it just didn't get
8 revitalized by the state.

9 MR. BORAKS: Well --

10 QUESTION: Because it was over as of the time,
11 at least as of the date the lawsuit was filed there was
12 no relationship, no ongoing relationship between your
13 client and the child.

14 MR. BORAKS: Well, it did, it did go on,
15 though, Your Honor, after the suit was filed.

16 QUESTION: It later --

17 MR. BORAKS: It later went on. I'm not saying
18 there was any Constitutional deprivation based on
19 anything the state did prior to January of 1985, when
20 the state applied Section 621 to rule that Michael had
21 no parental rights, which resulted in an effective
22 termination --

23 QUESTION: Would you have a Constitutional
24 claim if the order of the court had been, well, I think
25 the, he's the natural father, but I don't think it's in

1 the best interests of the child to give him visitation
2 rights or to enter any kind of a declaration in the
3 case, and I'll dismiss the case.

4 MR. BORAKS: After a hearing on the merits of
5 that?

6 QUESTION: I'll assume everything you've
7 alleged in your complaint is true, and granting all
8 those facts, and without regard to the statute I simply
9 will deny relief, because there's a family here that I
10 don't want to bust up.

11 MR. BORAKS: Well, without a hearing, if the
12 court is basing it on the --

13 QUESTION: Assuming everything alleged in the
14 complaint is true --

15 MR. BORAKS: Yes.

16 QUESTION: So he just said, I don't need a
17 hearing to establish facts that are not --

18 MR. BORAKS: Right. I can determine the best
19 interests of the child and base a decision on that
20 factor without a hearing, I would say, I would make the
21 same Constitutional claim. That it's not possible to
22 make that kind of a determination without a hearing
23 involving the merits of that question.

24 And in this case in particular the only
25 evidence there is in the record as to what was in

1 Victoria's best interest is the suggestion by an
2 independent psychologist that it was in her best
3 interests that a relationship continue.

4 Now a court is not bound by that, certainly.
5 But that should be enough to suggest that failing to
6 address that question was a deprivation of
7 Constitutional proportions.

8 I'd like to, if I may, save the rest of my
9 time for rebuttal.

10 QUESTION: Thank you, Mr. Boraks. We'll hear
11 now from you, Mr. Hoffman.

12 ORAL ARGUMENT OF LARRY M. HOFFMAN

13 ON BEHALF OF THE APPELLEE

14 MR. HOFFMAN: Mr. Chief Justice, and may it
15 please the Court:

16 Although I hadn't intended to do so, I think I
17 should begin with a slight reference to the facts of
18 this case, because I don't think all of the facts that
19 are relevant have been made known to you today by Mr.
20 Boraks.

21 I represent the husband, Gerald. It is Gerald
22 who was, while cohabiting with his wife, learns that his
23 wife is pregnant. He joins her in Lamaze training, he
24 participate in the birth of the child, he is living with
25 his wife and his daughter during her early months and

1 doing all that we would normally expect of a father to
2 do for his daughter.

3 On the child's first birthday he receives a
4 telephone call from Michael H., informing him for the
5 first time of Michael's claim of biological
6 responsibility.

7 Six months later, when Victoria is 18 months
8 old, Michael commences this action. At the time that
9 the action was commenced, Michael had virtually no
10 relationship whatsoever with Victoria.

11 I, in fact, was retained as counsel for Carole
12 when this case was first filed and she was first
13 served. And our immediate response was to file a motion
14 for summary judgment.

15 The record will reflect that shortly after
16 Carole responded to the complaint with her answer, she
17 filed a motion for summary judgment. At that time there
18 was no relationship that Mr. Boraks speaks of that may
19 have given Michael any Constitutionally protected
20 interest in a relationship with Victoria.

21 QUESTION: Well, he had lived with the child
22 for about three months.

23 MR. HOFFMAN: The three months that I think
24 Mr. Boraks refers to is --

25 QUESTION: January through March.

1 MR. HOFFMAN: A period of about six weeks --

2 QUESTION: Pardon me?

3 MR. HOFFMAN: It happens to span the end of
4 January to the beginning of March of 1982, which was
5 when Victoria was approximately seven months old. And
6 Carole had visited Michael at his residence in the
7 Virgin Islands. And that was during a period of
8 separation from Gerald.

9 The relationship that Mr. Boraks refers to as
10 being a significant one, and one which confers on
11 Michael the Constitutional right to interfere with the
12 relationship between Carole and her husband, my client,
13 is one that developed during the pendency of this
14 action.

15 When Carole had filed a summary judgment
16 motion, the record will reflect that on the eve of the
17 hearing there was a meeting that occurs between Michael
18 and Carole. And Carole then took her motion off
19 calendar, and then allowed access, Michael access to
20 Victoria.

21 I would also point out that that period, that
22 eight month period that Mr. Boraks refers to, was not an
23 eight consecutive month period. There were periods
24 during which Michael was not in Los Angeles, where
25 Carole and Victoria were.

1 In fact by my count, I count a total of, over
2 that eight month period, of approximately 100 days that
3 Michael spent in the house with Victoria and with
4 Carole.

5 And when Carole terminated her relationship
6 with Michael, she terminated Michael's relationship with
7 Victoria. Carole returned then to her husband, and she
8 has since been living with her husband and Victoria and
9 the sibilings of Victoria in New York.

10 You are being asked here to invalidate a
11 longstanding part of California's paternity law. This
12 is a paternity action that we're dealing with here.

13 You're being told that the statute is applied
14 blindly and mechanically to establish the fact, by
15 presumption, that a husband invariably in every case is
16 the man who is responsible for the conception of his
17 wife's child.

18 That is a misrepresentation of Section 621's
19 purpose or of its effect. What Section 621 is is a rule
20 for identifying the father of a child which does not
21 look to the facts of conception as the basis for
22 identifying the man on whom the state will confer the
23 rights and impose the obligations of paternity.

24 We simply don't think in these cases that the
25 fact of biological responsibility is as significant as,

1 for example, in the traditional paternity action, where
2 a mother is asking an unwilling man who denies
3 responsibility and will have no relationship with the
4 child to suffer the obligation, the financial
5 obligations of raising a child that he does not want and
6 who was not planned, and the man is seeking to avoid
7 that responsibility. That is not the --

8 QUESTION: Is the mother in that case acting
9 on behalf of the child?

10 MR. HOFFMAN: I think the mother's interests
11 are coincident with the child's interests in respect to
12 their desire for support.

13 QUESTION: So whether or not --

14 MR. HOFFMAN: I think the state's interest is
15 the same.

16 QUESTION: Whether or not there's been any
17 relationship between the biological father and the
18 child, the mother and the child are entitled to go after
19 him for support.

20 MR. HOFFMAN: Precisely. And we think that
21 the causal relationship between a man's act of engaging
22 in a sexual act and the result of a child being born who
23 is in need of support justifies --

24 QUESTION: So the daughter has a right to have
25 a hearing as to whether that father, that person is her

1 father.

2 MR. HOFFMAN: The biological, the person who's
3 biologically responsible, no, because in this case, in a
4 case which is governed by Section 621 where there is a
5 -- my client tells you that you don't need to establish
6 the support obligation of Michael.

7 There's no question but that Victoria is going
8 to be supported no matter what the result in this case.
9 My client too, for the child's entire minority, has been
10 very willing to support her and has supported her.

11 QUESTION: I know, I understand.

12 MR. HOFFMAN: The issue of support isn't
13 implicated in this case.

14 QUESTION: But in my example, an unwilling
15 biological father can be sued by the mother and the
16 child for support.

17 MR. HOFFMAN: Yes. There's no question about
18 that.

19 QUESTION: And they both are entitled to a
20 hearing to establish paternity.

21 MR. HOFFMAN: For the purpose of establishing
22 his support obligation.

23 QUESTION: Yes, yes.

24 MR. HOFFMAN: Yes.

25 QUESTION: And that's true even though the

1 mother was married at all times to someone else?

2 MR. HOFFMAN: No. Not in a case governed by
3 Section 621. And it isn't only the fact that the mother
4 is married at all times to someone else.

5 QUESTION: You mean that, you mean that
6 statute would also bar the mother and the daughter from
7 suing the biological father, if the mother is, was
8 married to someone else at the time of conception?

9 MR. HOFFMAN: It would stop the suit from
10 going forward, assuming that the husband is available
11 and willing to assume the parental responsibilities.

12 We presume in all cases in California that
13 each child has one and only one father, and in that man
14 we impose all responsibilities and we grant all rights
15 to belong to the father.

16 QUESTION: Well, suppose the husband has
17 become incapacitated and can't work and has no money and
18 can't support the child, and there's the biological
19 father down the street, can the mother and the child --

20 MR. HOFFMAN: No. We don't think so. I think
21 that if --

22 QUESTION: So the answer is, the California
23 statute bars their action as well?

24 MR. HOFFMAN: If the husband -- the California
25 statute provides that one man will be recognized as the

1 father of this child for all purposes.

2 If that man is the husband, then regardless of
3 his financial situation or the child's needs
4 economically, the action against the biological, the man
5 who's biologically responsible would be barred.

6 QUESTION: Well, what if, what if the father,
7 what if the husband has died? He was the husband at the
8 time of conception, but then he's died?

9 MR. HOFFMAN: Well, as a matter of fact, we
10 have a case in California called In re Lisa R. where
11 that's exactly what happened, and the California Supreme
12 Court tells us that this statute is not blindly and
13 mechanically applied in every case.

14 We look at the facts and we see if the state's
15 interest, ensuring the child a father-child
16 relationship, is being promoted. When the father is
17 dead, and in Lisa R. the mother too was dead, the answer
18 is that the statute cannot Constitutionally be applied.
19 In this case, of course, Gerald is very much alive and
20 very much a part of Victoria's life.

21 As well, we have another case, by the way, a
22 more recent case, which was cited to you in the reply
23 brief of the guardian ad litem for Victoria. I should
24 say at the outset that that case has been since
25 decertified for publication and I think is not citable

1 as authority in California.

2 But I ought to mention the case simply to
3 point out that, in this case, it was the putative father
4 who relied on Section 621.

5 The man who was biologically responsible, who
6 in that case had established a relationship with the
7 child, after the mother and the husband had divorced,
8 with the husband and mother agreeing that the husband
9 was not the father of the child, the putative father
10 assumed that responsibility informally when he then
11 separated from the mother after a period of about 17
12 months of living with the child, the putative father
13 then stopped paying for support for the child, the
14 mother brought an action against him.

15 And the putative father relied upon Section
16 621 arguing that you can't impose the responsibility on
17 me, Section 621, just read the words of the statute, it
18 says that it's the husband that's responsible and not
19 me. And the California Court of Appeals said no,
20 because Section 621 doesn't serve its intended purpose
21 here.

22 QUESTION: How many votes in the Supreme Court
23 of California does it take to decertify an opinion of
24 the Court of Appeals?

25 MR. HOFFMAN: I believe it's five, Your

1 Honor. But I really can't be certain.

2 The effect of the decertification is simply
3 that the case is not cited as precedent. The court also
4 denied a petition for --

5 QUESTION: Well, it can't even be published,
6 can it?

7 MR. HOFFMAN: It is, it's not official --
8 well, it's published in that I know about it, I've read
9 it. But it's not citable as authority.

10 QUESTION: Well, it doesn't appear in the CA
11 report.

12 MR. HOFFMAN: It will not appear in the
13 official reports. That's correct.

14 QUESTION: If I wanted to read it, what do I
15 do? How do I get it?

16 MR. HOFFMAN: I'll be happy to send you a copy
17 of it.

18 QUESTION: Please do. This business of courts
19 telling other people not to read their opinions is a
20 little bit offensive to me.

21 QUESTION: Mr. Hoffman, if we were to find
22 that Michael was entitled to a hearing on paternity,
23 would California law permit the guardian ad litem for
24 Victoria to appear at that hearing and be heard?

25 MR. HOFFMAN: If Michael were entitled to

1 establish his claim of biological responsibility, yes, I
2 believe that she would.

3 QUESTION: Well, if he would, you would think
4 that for the same reasons she would have the right to a
5 hearing.

6 MR. HOFFMAN: If he would have the right to
7 establish the responsibility, I think Mr. Boraks agrees
8 that that's a reflexive relationship there. If one has
9 the right --

10 QUESTION: But as long as, as long as the
11 husband is alive and able to support and is supporting,
12 the child may not go after the biological father.

13 MR. HOFFMAN: That's correct. And the
14 biological --

15 QUESTION: Even, even for the purpose of
16 establishing the right to inherit?

17 MR. HOFFMAN: That's correct, Your Honor. For
18 all purposes.

19 And by the way, I would point out that one of
20 the major issues in this case is that, once we determine
21 which of these two men is the father of the child, that
22 man becomes the father for all purposes, so that if
23 tomorrow Carole were to die, under California law, the
24 father would have the sole and exclusive right to
25 custody.

1 And if Carole were to die tomorrow, or the day
2 after tomorrow, but tomorrow the court were to say that
3 Michael -- excuse me -- is entitled to recognition as
4 Victoria's father, Victoria would be removed from the
5 only home that she's known since her birth, and required
6 then by the law, at Michael's request at least, to
7 reside with him.

8 So we think that the scope of this question is
9 enormous. And I think all of these matters have to be
10 taken into account, as they have been by the California
11 legislature in adopting the law, and the California
12 courts in applying and interpreting it.

13 QUESTION: Well, I take it what the biological
14 father is asking is just for the right of visitation.
15 And if we're going to create a Constitutional right and
16 define it, I suppose we could limit that way?

17 MR. HOFFMAN: Well, he is asking to be
18 recognized as Victoria's father. That's certainly the
19 complaint that he filed.

20 I would point out that we have a provision
21 under California law, I would just cite it in the
22 briefs, it's Section 4601 of the California Civil Code,
23 which authorizes the court to award visitation to any
24 person if the court determines that that would be in the
25 best interests of the child.

1 Now, Michael had the opportunity to bring that
2 action, which would have been brought, of course,
3 independent of this claim of paternity. That's not the
4 action that he brought.

5 In fact, at the hearing on the summary
6 judgment motion, Michael was, at Michael's counsel, told
7 the judge, who indicated his intention to rule in favor
8 of Gerald, that, well Your Honor, if you're going to
9 deny me my claim for visitation, for paternity, why
10 don't you then award me visitation under Section 4601?

11 And the court responded, because you haven't
12 asked for visitation under Section 4601, this is a
13 paternity action. If you think you have the right to
14 that relief, file an action and ask for it.

15 QUESTION: What is your position on whether,
16 does the presumption effect the right to that relief?

17 MR. HOFFMAN: The presumption, I think, has
18 nothing to do with the right to that relief.

19 I'm assuming that if Section 4601 allows the
20 court to award visitation to non-parents, then the
21 presumption -- of course the effect that it has is that
22 it puts Michael on a much different standard in
23 requesting visitation than he would be if he were
24 recognized as Victoria's father.

25 Because in that, under 4601, insofar as it

1 relates to non-parents, the court has the discretion to
2 grant or not grant visitation in the court's
3 discretion.

4 QUESTION: So if you were the judge and
5 Michael brings that action, and he puts on evidence, he
6 says I want to show that I'm the father, I want to
7 testify that I'm the biological father, I -- don't you
8 exclude that evidence based on the presumption?

9 MR. HOFFMAN: Correct. It's irrelevant that
10 he claims to be the biological father.

11 QUESTION: Well, so then he really can't, then
12 he, then he's standing there and he has nothing to say
13 at all.

14 MR. HOFFMAN: Well, if he's never established
15 a relationship and the court determines that this is a
16 person who does not have an interest in Victoria's
17 welfare, then that's correct. Then he would not have
18 the opportunity to establish court-ordered visitation
19 with Victoria.

20 QUESTION: Well, so then the presumption does
21 apply, does have some application in a purely visitation
22 proceeding.

23 MR. HOFFMAN: Yes, it does. As has been
24 indicated earlier, I think that there's been a
25 misstatement made in the briefs and in the argument here

1 concerning the way in which Section 621 works.

2 We've been told that 621 acts to terminate an
3 ongoing, an existing relationship, and in fact that's
4 not the case at all. It is the mother who in this case
5 terminated the relationship that existed between
6 Victoria and Michael.

7 The only purpose served by the statute in this
8 case was to preserve a relationship. And the
9 relationship that it preserved was a relationship of my
10 client with Victoria.

11 The appellants mentioned, and I heard the
12 argument during Mr. Boraks' time up here, that there was
13 a significant relationship that existed between Michael
14 and Victoria, and that has Constitutional significance.

15 But the fact of the matter is that Section 621
16 says that Michael has no opportunity to develop a
17 relationship with Victoria. It was solely by reason of
18 Carole's acquiescence that Michael even had a chance to
19 see Victoria at any time during her minority.

20 The state of California would not have
21 permitted him, had she been more resistant to his
22 efforts.

23 Because of that, I think that, while I
24 understand Mr. Boraks wants to bring this case under the
25 cases of this Court that have referred to the

1 significance of an existing relationship between father
2 and child, he can't.

3 QUESTION: If Carole had never gone back to
4 Gerald, and was living with, just living with Michael,
5 could they have together gone to court and had Michael
6 declared --

7 MR. HOFFMAN: They could well indeed, Your
8 Honor, under the statute within the child's first two
9 years --

10 QUESTION: This presumption would not have
11 applied?

12 MR. HOFFMAN: The mother joined by an
13 acknowledgment of paternity by the putative father, so
14 again the child is not being left fatherless, may file a
15 motion which, in practice what it does is it requires
16 the husband then, notwithstanding the provisions of
17 Section 621, to submit to a blood test in order to
18 establish the facts of conception.

19 QUESTION: Well now, is that -- why does, why
20 does this presumption statute permit that? By its
21 terms, or by another provision?

22 MR. HOFFMAN: Yes, expressly by its terms.

23 QUESTION: So in effect its application
24 depends to a certain extent on the position the mother
25 takes.

1 MR. HOFFMAN: That's right. The father as
2 well -- the husband as well, excuse me, has the
3 opportunity. And he, without the acknowledgment of
4 responsibility by the putative father, also within the
5 first two years.

6 I think the theory underlying those two
7 exceptions is -- well, of course, in this case we have
8 mother and husband united in a family wanting to raise
9 this child together.

10 QUESTION: And that's where the presumption
11 applies.

12 MR. HOFFMAN: That's where it applies, and it
13 excludes Michael, it excludes the guardian ad litem for
14 the child.

15 QUESTION: So, so suppose the husband takes
16 this action and he wants to prove that Michael is the
17 biological father. So he proves it, then what happens?
18 Support?

19 MR. HOFFMAN: The whole panoply of rights and
20 obligations that are available to him as the father are
21 available to him at that point.

22 QUESTION: You mean to Michael?

23 MR. HOFFMAN: Yes.

24 QUESTION: So, what, what benefit does the
25 husband get?

1 MR. HOFFMAN: If the presumption is rebutted
2 by the mother, who cooperates --

3 QUESTION: No. He's entitled to, he's
4 entitled to have, to prove that the biological father is
5 the father, isn't he?

6 MR. HOFFMAN: He would be entitled to do that
7 as well, if that were in his interest.

8 QUESTION: Yes, well, what would he get out of
9 it? Would he be going after support for the child? Or,
10 he isn't -- is he, is he intending to give up custody?

11 MR. HOFFMAN: If a husband -- maybe I'm
12 misunderstanding your question.

13 If the husband were to invoke the exception to
14 Section 621 and say, basically, I don't want to be
15 responsible for this child, this is not biologically
16 mine, he may do so, and avoid, as long as he acts within
17 the first two years so that no relationship develops
18 between the child and him, because the thought is that
19 after two years statutory --

20 QUESTION: But he could just say, well I want,
21 I want, I like the child, I want the child to live with
22 me, but I just want to collect from the biological
23 father.

24 MR. HOFFMAN: No, that he cannot do. He can't
25 have it both ways.

1 QUESTION: Yes, all right.

2 MR. HOFFMAN: I think to the extent that the
3 appellants look for a significant relationship between
4 themselves in order to come under the protection, the
5 rules that are formulated in Stanley and Caban and Lehr
6 and Quilloin, they do themselves a disservice, because
7 there really was no way for Michael to have established
8 a relationship with Victoria by coming to court. He was
9 subject to Victoria's, to Carole's whims in that
10 regard.

11 And I think that there simply is no relevance
12 to the development of any relationship between the
13 putative father and the child in cases coming under
14 Section --

15 QUESTION: Well, of course, under your view of
16 the statute, if Michael had lived with the child for
17 three years, and then the husband and the wife had
18 re-united, the presumption would go into effect, would
19 it not?

20 MR. HOFFMAN: The presumption would remain in
21 effect, if no one had actually taken steps to rebut it
22 during that period of time.

23 But of course Carole and Michael could have,
24 within those three year period, taken the action that
25 they needed to preserve the relationship --

1 QUESTION: But if they didn't, the presumption
2 goes into effect.

3 MR. HOFFMAN: That's correct. There has also
4 been discussion of whether the result in this case was
5 in Victoria's best interests.

6 We don't think that that's relevant, that in
7 this particular case it makes no difference whether it
8 would or would not have been in Victoria's best
9 interests that Michael be recognized as her father.

10 This is a paternity action. And in paternity
11 cases we don't determine the question of paternity in --
12 in those cases where we use the rule of biological
13 connection, we don't consider the question of the
14 child's best interest in that particular case in
15 deciding whether a man is or is not the father, we look
16 to the facts.

17 We look to the fact of whether there was
18 intercourse between the child and the mother which
19 resulted in the child's conception and ultimately her
20 birth.

21 QUESTION: I suppose the Court could find that
22 a particular person is the child's father and yet deny
23 that person custody, and indeed forbid that person from
24 even seeing the child. Is that possible?

25 MR. HOFFMAN: That's, that certainly is a

1 possible result, I suppose, in these cases.

2 In other words, simply a hearing to establish
3 the fact of a biological connection with, which has no
4 operative significance? I think that certainly could --

5 QUESTION: It would have, it would have
6 operative significance insofar as liability for support
7 is concerned.

8 MR. HOFFMAN: So he --

9 QUESTION: If you have a father who's violent,
10 something of that sort, I suppose a court could keep the
11 child away from that father, even though the parentage
12 would be acknowledged as his.

13 MR. HOFFMAN: That's correct. But the fact
14 that the, it would or would not be in the child's best
15 interests to visit with that particular man is not
16 relevant to the question of whether he's entitled to
17 recognition as her father.

18 QUESTION: So it isn't really getting to see
19 the child that is necessarily at issue in this lawsuit
20 at all.

21 MR. HOFFMAN: I think that to some degree it
22 is, certainly. I think Michael would say that that was
23 his prime motivation for bringing it.

24 QUESTION: But it doesn't necessarily go along
25 with acknowledgment of his parentage.

1 MR. HOFFMAN: That's correct. I mean, if it
2 would be harmful to the child that the man would have
3 contact with her, then he could be recognized as her
4 father and yet kept away from her.

5 If there are no further questions --

6 QUESTION: Yes, I have a question. Would you
7 comment on the, there's an allegation in the complaint
8 that the natural father has some kind of a genetic
9 disease that the, his descendants might also have,
10 including the child here, I suppose, and it would be in
11 the best interests of the child's medical future and all
12 to have that fact established so they can know how to
13 treat her if the problem arose. Has that any relevance
14 to this problem?

15 MR. HOFFMAN: We think not. I mean, if in
16 fact Michael were Victoria's biological father, then
17 that information has been made known to Carole, and is
18 available to her.

19 And unless we can believe that Carole and
20 Gerald are not going to do what they believe to be in
21 the best interests of the child which might involve
22 genetic counseling for the child, I think that ought not
23 to have any, any part in the decision of whether Michael
24 is or is not entitled to recognition as Victoria's
25 father.

1 But those are questions of custody and support
2 and visitation, that's what follows from the
3 determination of paternity. If there's an interesting
4 fact such as that that ought to be made known to
5 Victoria, we hope that it will be, and we have no reason
6 to believe that it won't be.

7 But certainly not to go so far as to say the
8 question of paternity, where the law identifies a
9 particular man as the one who bears that legal
10 relationship with the child, ought to be governed by
11 facts such as those.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Hoffman. Mr. Boraks, you have four minutes remaining.

14 REBUTTAL ARGUMENT OF ROBERT A.W. BORAKS
15 ON BEHALF OF THE APPELLANTS

16 MR. BORAKS: Thank you, Your Honor. I would
17 like to say something about what happens under
18 California state law absent the so-called conclusive
19 presumption, if, if in fact, let's say, Gerald and
20 Carole had not been cohabitating for the month during
21 which Victoria was conceived.

22 Both Michael as a person who took the child
23 into his home and held the child out as his own, and
24 Gerald as a person married to the child's mother, would
25 be presumed father under the California statutory

1 scheme, but they would be rebuttable presumptions.

2 And in that instance a hearing would be held,
3 the purpose of which would be to make a determination
4 based on -- which on the facts is founded under
5 weightier considerations of policy and logic. That's
6 what would happen in this case absent the conclusive
7 presumption.

8 Now, I'd like to say something about --

9 QUESTION: Does the presumption apply when the
10 husband and wife are cohabiting on the date of birth?

11 MR. BORAKS: I think the presumption is geared
12 to conception, Your Honor. Because if you look --

13 QUESTION: Do California cases say that?

14 MR. BORAKS: Well, if you look at the
15 statutory scheme, there's a whole set of these
16 rebuttable presumptions that have to do with the status
17 of marriage as of the time of the child's birth. And
18 the issue of -- and the idea of cohabitation really
19 seems to relate to conception rather than birth.

20 I would like to say something about
21 visitation. Number one, Victoria did ask for
22 visitation. And number two, visitation may not
23 necessarily go along with Michael's ability to establish
24 his paternity here. But no visitation certainly went
25 along with his inability to establish his paternity.

1 QUESTION: You say Victoria asked for
2 visitation? That's the child?

3 MR. BORAKS: Yes, Your Honor.

4 QUESTION: How old was the child when she made
5 this --

6 MR. BORAKS: Well, the guardian ad litem asked
7 for visitation.

8 QUESTION: And how does the guardian ad litem
9 get the authority -- I mean, just, well I'm a little
10 puzzled by that.

11 MR. BORAKS: Well, I think the guardian ad
12 litem has an obligation to act in what she perceived to
13 be the child's best interest under the circumstances. I
14 think the authority is based on the order of the court
15 establishing the relationship.

16 And lastly, Your Honors, it is not I alone who
17 stand here to tell you that the relationship was
18 significant or how significant or whatever.

19 I'm relying on what the California Court of
20 Appeal found and what it based its decision on, which is
21 that we appreciate that Michael H. has shown an interest
22 in Victoria D., almost since her birth, has established
23 an affectionate relationship with her, and has at times
24 even contributed to her support.

25 So the California Court of Appeal based its

1 decision on the assumption that there was a
2 relationship, but found it, the implications of that to
3 be outweighed by the state interest.

4 And our position is, the state interests are
5 legitimate and weighty, but they're insufficient to
6 justify the denial of any right to be heard on the
7 merits of the contention made by Michael or Victoria.

8 That's all I have, Your Honor.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Boraks. The case is submitted.

11 (Whereupon, at 11:57 o'clock a.m., the case in
12 the above entitled matter was submitted.)
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CERTIFICATION

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#87-746 - MICHAEL H. AND VICTORIA D., Appellants V. GERALD D.

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BY alan friedman

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