



505 5th Ave - Suite 901, Des Moines, IA 50309

<http://www.aclu-ia.org>

Parental Responsibility Ordinance Overturned in Davenport

FOR IMMEDIATE RELEASE – March 24, 2009

Contact: 515/243-3988 x 20

The ACLU of Iowa announced today that a judge has thrown out a charge against a working mother under Davenport's "Parental Responsibility Ordinance," declaring the ordinance unconstitutional because it lacked due process.

"This is a blow against the growth of the 'nanny state,'" said Ben Stone, executive director of the ACLU of Iowa. "There are a wide variety of reasons why kids do stupid or bad acts. Kids often do such things despite the best efforts of good parents. This ill-conceived ordinance represented a grossly oversimplified reaction to the complex problem of troubled kids," said Stone, who added that the juvenile court system continues to be the best place to deal with delinquent youth.

The ordinance pitted Anne Hensler, represented by the ACLU of Iowa, against the City of Davenport, which had been attempting to enforce its Parental Responsibility Ordinance against her because of the actions of her son. Davenport's ordinance saddled parents with stiff fines and other harsh consequences if a police officer merely forms a belief that a minor had violated a law or the city curfew.

"The sin of this law is that it can seriously handicap parents who are doing all the right things even though their child has engaged in some misbehavior. We ought to be supporting parents, not punishing them," said ACLU Cooperating Attorney Michael McCarthy, who is representing Hensler.

Under the law that was invalidated, a parent would receive a warning the first time that his or her child was detained by the police or referred to juvenile court. Upon a second referral, the parent would be required to pay for and complete parenting classes whether they were needed or not, and could be punished for contempt of court if the classes were not successfully finished. Subsequent incidents could result in a fine of up to \$750 each time their son or daughter got into trouble or violated curfew.

Ms. Hensler was cited for an initial violation of the ordinance when her 16 year old son was picked up for possession of a controlled substance on November 30, 2007. Three days later she received a second citation when her son was picked up for a curfew violation.

Ms. Hensler's lawsuit objected to the ordinance's automatic presumption of guilt imposed on parents based on nothing more than a police officer's word. The ACLU lawsuit argued, and Judge Mckenrick agreed, that Davenport's Parental Responsibility Ordinance violated substantive due process because:

"on its face [*it may*] subject a parent to liability even though the parent's child never committed a delinquent act, or at the least never was proved to have committed a delinquent act. Such a result lacks any rational relationship to the ordinance's stated purposes."

The Petitioner was represented locally by Davenport attorney Michael McCarthy. ACLU Foundation of Iowa Legal Director Randall C. Wilson also represented Hensler on the case. The ruling, *Anne Hensler v. City of Davenport* (#110312), was written by Iowa District Court Judge Gary D. McKenrick.

###

For More information:

Randall Wilson, Legal Director, ACLU of Iowa (515) 243-3988 x 20
Michael McCarthy, Esq., McCarthy, Lammers and Hines (563) 324-9117

IN THE IOWA DISTRICT COURT FOR SCOTT COUNTY

ANNE HENSLER,	)	FILED WITH THE CLERK OF COURT
	)	3/23/2009 2:34 PM
Plaintiff,	)	
	)	No. 110312
vs.	)	
	)	FINDINGS OF FACT, CONCLUSIONS
CITY OF DAVENPORT,	)	OF LAW AND JUDGMENT
	)	
Defendant.	)	

On February 10, 2009, this matter came before the Court for a contested trial. The plaintiff appeared personally and was represented by Michael J. McCarthy and Randall C. Wilson. The defendant was represented by Thomas Warner and Chris Jackson. The Court, having heard the evidence, having reviewed the exhibits, and being fully advised in the circumstances, finds as follows.

The Court must decide the facts from the evidence. The Court considers the evidence using its observations, common sense and experience. The Court will try to reconcile any conflicts in the evidence, but if the Court cannot, the Court accepts the evidence it finds more believable.

In determining the facts, the Court may have to decide what testimony to believe. The Court may believe all, part or none of any witness's testimony. In determining what testimony to believe, the Court considers the reasonableness and consistency of the testimony with other evidence and internally, whether a witness has made inconsistent statements, as well as the witness's appearance, conduct, age, intelligence, memory, knowledge of the facts, interest in the trial, motive, candor, bias and prejudice.

This is an action for declaratory relief and an injunction. The plaintiff claims that the parental responsibility ordinance of the city of Davenport is preempted by state law and is unconstitutional. The city contends that the parental responsibility ordinance is a valid exercise of the city's police power, both statutorily and constitutionally.

The Parental Responsibility Ordinance

Chapter 9.56 of the Davenport Municipal Code is the city's parental responsibility ordinance.

The purpose of this chapter is to preserve the peace, safety, health and welfare of the citizens of Davenport, Iowa, and the city's visitors and guests. The city council finds that there has been an increase in the number of criminal acts committed by juveniles. The city council further finds that those who bring children into the world, or those who assume a parenting role, but who fail to effectively teach, train, guide and control them, should be accountable to the community under the law. Those who need assistance and training should be aided; those who neglect their parenting duties should be encouraged to be more diligent, through civil sanctions, if necessary. This chapter should be construed to achieve these remedial objectives by addressing situations where parents or guardians have failed or neglected to act responsibly or reasonably in the supervision of their minor children.

Section 9.56.010, Davenport Municipal Code.

Pursuant to the parental responsibility ordinance, "[t]he parent of a minor shall not fail to exercise reasonable control over said minor." *Section 9.56.030, Davenport Municipal Code.* "It is the duty of the parent of a minor child or minor children to exercise sufficient control over a said minor(s) to prevent the minor(s) from committing any unlawful act in violation of federal law, state law, or city ordinance. Any occurrence is a breach of this duty." *Section 9.56.040, Davenport Municipal Code.* The ordinance further provides that a "person who violates this chapter shall be guilty of a municipal infraction violation. A separate and distinct offense shall be regarded as being

committed each day on which such person violates the provisions of this chapter.”

Section 9.56.050, Davenport Municipal Code.

“A municipal infraction is a civil offense punishable by a civil penalty of not more than \$750 for each violation or if the infraction is a repeat offense, a civil penalty not to exceed \$1,000 for each repeat offense.” *Section 364.22(1), Iowa Code (2009)*. “A city by ordinance may provide that a violation of an ordinance is a municipal infraction.”

Section 364.22(2), Iowa Code (2009). “A city shall not provide that a violation of an ordinance is a municipal infraction if the violation is a felony, an aggravated misdemeanor, or a serious misdemeanor under state law or if the violation is a simple misdemeanor under chapter 687 through 747.” *Section 364.22(3), Iowa Code (2009)*.

Jurisdiction

At the outset, the defendant argues that this Court lacks jurisdiction. The city’s argument is without merit.

A unified trial court is established. This court is the “Iowa district court”. The district court has exclusive, general, or original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate, and juvenile, except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal, or administrative body. The district court has all the power usually possessed and exercised by trial courts of general jurisdiction and is a court of record.”

Section 602.6101, Iowa Code (2009). “The jurisdiction of the Iowa district court shall be exercised by district judges, district associates judges, associate juvenile judges, associate probate judges, and magistrates.” *Section 602.6104(1), Iowa Code (2009)*. “Magistrates have jurisdiction of ... municipal infractions[.]” *Section 602.6405(1), Iowa Code (2009)*. “District judges have the full jurisdiction of the district court, including the respective jurisdictions of district associate judges and magistrates.” *Section*

602.6202, *Iowa Code* (2009). In short, this court has jurisdiction over the issues raised in this action.

Division XI of the Iowa Rules of Civil Procedure allows for declaratory judgments.

Courts of record within their respective jurisdictions shall declare rights, status, and other legal relations whether or not further relief is or could be claimed. It shall be no objection that a declaratory judgment or decree is prayed for ... The existence of another remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.

Iowa R.Civ.P. 1.1101. “The court may refuse to render a declaratory judgment or decree where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding.” *Iowa R.Civ.P. 1.1105*.

The issue of the legality or constitutionality of a municipal ordinance generally is an appropriate subject for a declaratory judgment action. *See, City of Johnston v. Christenson*, 718 N.W.2d 290, 296-97 (*Iowa* 2006); *Baker v. City of Iowa City*, 750 N.W.2d 93 (*Iowa* 2008). The fact that the plaintiff may present her claims in defense of the prosecution for a violation of the parental responsibility ordinance does not preclude raising those claims in this proceeding. *City of Johnston*, 718 N.W.2d at 296-97.

Preemption Doctrine

“The Iowa Constitution gives municipalities authority to regulate matters of local concern, subject to the superior power of the legislature[.]” *Baker*, 750 N.W.2d at 99 (*citing Iowa Const. art. III, § 38A, and §364.1, Iowa Code*). This is known as legislative home rule. *Id.* (*citing Berent v. City of Iowa City*, 738 N.W.2d 193, 196 (*Iowa* 2007)).

Under legislative home rule, the legislature retains the unfettered power to prohibit a municipality from exercising police powers, even over matters

traditionally thought to involve local affairs. Conversely, as long as an exercise of police power over local affairs is not “inconsistent with the laws of the general assembly,” municipalities may act without express legislative approval or authorization.

City of Davenport v. Seymour, 755 N.W.2d 533, 538 (Iowa 2008) (citation omitted).

The question is whether the legislature has preempted action by a municipality by enactments of its own.

“The general thrust of the preemption doctrine in the context of local affairs is that municipalities cannot act if the legislature has directed otherwise.” *Id.* Three types of preemption has been recognized: express preemption, implied conflict preemption, and implied field preemption. *Id.*, at 538-39.

Express preemption “applies where the legislature has specifically prohibited local action in a given area.” *Id.*, at 538. For example, the legislature specifically prohibited municipalities from classifying as a municipal infraction any felony, aggravated misdemeanor, or serious misdemeanor, or simple misdemeanor under Chapters 687 through 747 of the Iowa Code. *See, Section 364.22(3), Iowa Code (2009).*

Conflict preemption occurs “where an ordinance prohibits an act permitted by statute or permits an act prohibited by statute.” *City of Davenport*, 755 N.W.2d at 538. “The theory of this branch of implied preemption is that even though an ordinance may not be expressly preempted by the legislature, the ordinance cannot exist harmoniously with a state statute because the ordinance is diametrically in opposition to it.” *Id.* “[F]or implied preemption to occur based on conflict with state law, the conflict must be obvious, unavoidable, and not a matter of reasonable debate.” *Id.*, at 539.

Field “preemption occurs when the legislature has so covered a subject by statute as to demonstrate a legislative intent that regulation in the field is preempted by state law.” *Id.*

Extensive regulation of area alone is not sufficient. In order to invoke the doctrine of field preemption, there must be some clear expression of legislative intent to preempt a field from regulation by local authorities, or a statement of the legislature’s desire to have uniform regulations statewide ... there must be persuasive concrete evidence of an intent to preempt the field in the language that the legislature actually chose to employ. Field preemption is a narrow doctrine that cannot be enlarged by judicial policy preferences.

Id. (citations omitted).

The Court first must determine whether the legislature expressly has prohibited the city from legislating in the manner of the parental responsibility ordinance.

Although the plaintiff has asserted that the city’s enactment of the parental responsibility expressly is prohibited by state statute, the plaintiff cites no specific provision of the Code in which such municipal action explicitly is forbidden. This Court is unable to find any such statutory enactment. Therefore, the plaintiff has failed to prove the claim of express preemption.

The Court next considers the question of whether the doctrine of implied conflict preemption supports the plaintiff’s claim. As stated previously, conflict preemption occurs “where an ordinance prohibits an act permitted by statute or permits an act prohibited by statute.” *City of Davenport, 755 N.W.2d at 538*. “[F]or implied preemption to occur based on conflict with state law, the conflict must be obvious, unavoidable, and not a matter of reasonable debate.” *Id.*, at 539.

The plaintiff argues that Chapter 232 of the Iowa Code conflicts with the provisions of the city’s parental responsibility ordinance. A parent’s liability under the

parental responsibility ordinance is triggered by an “occurrence”, which “means a law enforcement agency has probable cause to believe a particular child engaged in a delinquent act and has filed a delinquency complaint with the court based upon such probable cause or has otherwise taken said child into custody.” *Section 9.56.020(E), Davenport Municipal Code*. The municipal code does not define a delinquent act.

Under the Iowa Code, a delinquent act is defined as “[t]he violation of any state law or local ordinance which would constitute a public offense if committed by an adult except any offense which by law is exempted from the jurisdiction of [chapter 232, or] ... [t]he violation of a federal law or a law of another state which violation constitutes a criminal offense if the case involving that act has been referred to the juvenile court.” *Section 232.2912), Iowa Code (2009)*. Delinquency proceedings under Chapter 232 of the Iowa Code involve not only the minor charged with violating a criminal statute, but also the minor’s parents, guardian or custodian. *See, e.g., Sections 232.28, 232.29, 232.37, and 232.38, Iowa Code (2009)*.

However, none of the provisions under Chapter 232 openly, obviously, or unavoidably conflict with the provisions of Davenport’s parental responsibility ordinance. The provisions of the parental responsibility ordinance are readily reconcilable with the delinquency provisions of Chapter 232 of the Iowa Code. *Cf., City of Davenport, 755 N.W.2d at 541-43 (Civil municipal infraction ordinance governing certain traffic violations not in conflict with criminal provisions of state motor vehicle code concerning same traffic violations.)*. In short, the plaintiff has failed to establish that the doctrine of implied conflict preemption applies to invalidate the city’s parental responsibility ordinance.

Next, the Court must determine whether the doctrine of implied field preemption applies to invalidate the parental responsibility ordinance. In essence, the plaintiff's claim is that the comprehensive nature of Chapter 232 occupies the field surrounding the delinquent behavior of a minor, thereby precluding the city from legislating on subjects connected to juvenile delinquency. Numerous criminal acts by minors are excluded from the jurisdiction of the juvenile court and from being adjudicated as delinquency matters. *See, Section 232.8(1)(b) & (c), Iowa Code (2009)*. The Court is unable to discern "persuasive concrete evidence of an intent to preempt the field", *City of Davenport, 755 N.W.2d at 539*, in Chapter 232 of the Code.

Based on the foregoing, the Court concludes that the plaintiff has failed to prove that the parental responsibility ordinance is preempted by any legislative enactment of the state legislature. Thus, the Court must proceed to consider whether the ordinance violates either the state or federal constitutions.

Due Process

The plaintiff contends the parental responsibility ordinance violates the due process clauses of both the Iowa and United States constitutions, on both a procedural and a substantive basis. The parties disagree regarding the appropriate standard by which the Court should assess these claims.

"[N]o person shall be deprived of life, liberty, or property without due process of law." *Article 1, Section 9, Iowa Constitution*. "No state shall . . . deprive any person of life, liberty or property, without due process of law." *Section 1, 14th Amendment to the United States Constitution*. Generally, the due process provisions of both the federal

and state constitutions are considered “to be identical in scope, import, and purpose.” *State v. Cronkhite*, 613 N.W.2d 664, 666 (Iowa 2000).

“The Due Process Clause has been interpreted to have both substantive and procedural components, with different analytic frameworks applied depending upon whether a substantive or procedural violation is alleged.” *State ex rel Miller v. Smokers Warehouse*, 737 N.W.2d 107, 111 (Iowa 2007). “[S]ubstantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that ‘shock the conscious or otherwise offend ... judicial notions of fairness ... [and that are] offensive to human dignity.’” *Rivkin v. The Dover Township Rent Leveling Board*, 143 N.J. 352, 366-67, 671 A.2d 567, 575 (1996) (citations omitted).

“There are two stages to any substantive due process inquiry.” *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). The first stage is to determine the nature of the right involved. *Id.* If a fundamental right is involved, the Court applies a strict scrutiny analysis. *Id.* “If a fundamental right is not implicated, a statute need only survive a rational basis analysis.” *Id.*

“[F]amilial relationship is a fundamental liberty interest.” *Id.* However, “an alleged infringement on a familial right is unconstitutional only when an infringement has a direct and substantial impact on the familial relationship.” *Id.*, at 663. Nothing in the parental responsibility ordinance directly or substantially impacts the parent-child relationship. At worst, prosecution of a parent under the ordinance could impact negatively that parent’s view of the child depending on how the parent handles the situation. The impact in such circumstances is indirect or consequential as opposed to a direct impact on the relationship as would be the situation if the ordinance dictated

removal of the child from parental custody or control. Therefore, in assessing whether the ordinance offends substantive due process principles, the Court applies a rational basis test to the provisions of the ordinance.

The premise of the parental responsibility ordinance is that a parent bears some responsibility for the delinquent conduct of the parent's minor child. The ordinance provides a mechanism to provide educational assistance in parenting techniques to a parent of a minor child who has committed a delinquent act. On a failure of such educational programming to prevent further delinquent activity by the child, the child's parent may be exposed to financial penalty or contempt of court. The Court is unable to conclude that the parental responsibility ordinance lacks a rational relationship to its goal of reducing juvenile delinquency.

However, an ordinance may violate substantive due process rights if the ordinance is overbroad in its application or on its face. *See, State v. Bower*, 725 N.W.2d 435, 443-44 (Iowa 2006).

[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of [fundamental] rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep" ... [E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.

City of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849, 1857, 144 L.Ed.2d 67, 77-78 (1999) (citation omitted).

A parent faces liability under the parental responsibility ordinance upon an "occurrence", which is defined to include a determination by a law enforcement agency that a particular child has engaged in a delinquent act. No independent or judicial

determination of probable cause is necessary to the application of the ordinance to the child's parent. A first occurrence may trigger notice to the parent of the potential liability of the parent under the parental responsibility ordinance. A second occurrence coupled with prior notice to the parent of the application of the parental responsibility ordinance exposes the parent to prosecution under the ordinance and creates a rebuttable presumption that the parent violated the ordinance.

As written, a parent may be presumed to have violated the parental responsibility ordinance without any independent or judicial determination that the parent's child committed a delinquent act. The city only needs to prove that one of its police officers determined that probable cause existed to believe that the parent's child had committed two delinquent acts and that the parent had been notified of the ordinance after the first probable cause determination. Under the ordinance, the burden then falls on the parent to rebut the presumption.

Thus, the parental responsibility ordinance on its face may subject a parent to liability even though the parent's child never committed a delinquent act, or at the least never was proved to have committed a delinquent act. Such a result lacks any rational relationship to the ordinance's stated purposes. Therefore, this Court concludes that the parental responsibility ordinance of the city of Davenport violates the substantive due process protections afforded by both the federal and state constitutions.

When governmental action threatens to impinge on a person's protected liberty or property interests, that person is entitled to procedural due process as well. *State v. Willard*, 756 N.W.2d 207, 214 (Iowa 2008). "Accordingly, the first step in any procedural due process inquiry is to determine whether a protected liberty or property

interest is involved. Such liberty interests ... include ... the right to ... raise children.”

Id. When a protected interest is at issue, three factors must be weighed to determine what process may be due.

“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed. 2d 18, 33 (1976).

As previously discussed in the context of the substantive due process issue, the plaintiff claims the ordinance infringes on the parent-child relationship and should be subject to strict scrutiny. The defendant claims the ordinance should be assessed on a rational basis standard. As this Court previously concluded, the parental responsibility ordinance does not directly and substantially impact the parent-child relationship. Its impacts on the parent-child relationship are indirect and a consequence of the parent’s reaction to any liability imposed by the ordinance. The parent’s property interests are directly implicated by the ordinance. Such interests do not involve fundamental rights. The Court concludes that strict scrutiny is not appropriate.

At its core, the concept of procedural due process requires notice and a meaningful opportunity to be heard and contest the allegations of violation of the ordinance. *See, Willard*, 756 N.W.2d at 214. The plaintiff advances no argument concerning the adequacy of the notice provisions of the ordinance. The procedural due process issues concern the adequacy of the hearing procedures under the ordinance.

In essence, the plaintiff's complaint is the creation of the rebuttable presumption that the ordinance has been violated which then shifts the burden of proof to the parent to establish one of six defenses to the ordinance. However, the city first must prove the facts creating the rebuttable presumption by clear, satisfactory, and convincing evidence. *Section 364.22(5)(b), Iowa Code (2009)*. The Court is unable to conclude that the parental responsibility ordinance violates procedural due process principles. *Cf., City of Davenport, 755 N.W.2d at 542-43 (Rebuttable presumption imposing vicarious liability under municipal infraction ordinance on owner of vehicle involved in a traffic violation is not inconsistent with burden of proof under Section 364.22(5)(b) of the Code)*.

Conclusion

Based on the foregoing, the Court determines that Chapter 9.56 of the Davenport Municipal Code is unconstitutionally overbroad and a denial of substantive due process rights under the federal and state constitutions. The plaintiff seeks a permanent injunction precluding the city from enforcement of the parental responsibility ordinance. The Court has no evidence before it indicating that the city would not abide by the Court's determination of the unconstitutionality of the parental responsibility ordinance. Therefore, the Court concludes that such an injunction is not warranted at this time.

The plaintiff also seeks an award of attorney fees in connection with this action. The Court determines that the present record is insufficient to make a determination of that claim. Therefore, the issue of the award of attorney fees herein shall be set for hearing before this Court.

IT IS THEREFORE ORDERED that Chapter 9.56 of the Davenport Municipal Code is unconstitutional and unenforceable as provided herein.

IT IS FURTHER ORDERED that the plaintiff's request for permanent injunction is denied, without prejudice.

IT IS FURTHER ORDERED that the plaintiff's request for attorney fees shall be heard before this Court on the 8th day of April, 2009, at 8:30 o'clock a.m. at the Scott County Courthouse, 400 West 4th Street, Davenport, Iowa.

IT IS FURTHER ORDERED that the costs of this action shall be assessed against the defendant.

Dated at Davenport, Iowa, this 23rd day of March, 2009.

Gary D. McKenrick, Judge