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Legal Issues Pertaining to Visitation – Part Two

Contents

Introduction.

In the first article in this two-part series, topics examined included the general rules from the U.S. Supreme Court and other federal courts on restrictions on visitation, and restriction of visitation on the basis of misconduct of prisoners themselves or their visitors.

This second article in the series will discuss other topics, including the duty to protect visitors on prison premises, searches and detention of visitors, contact visits and "family reunion" or conjugal visitation programs, and the barring of particular categories of persons, such as minors, former prisoners, or former correctional personnel from visitation.

Barring Particular Categories of Visitors

It has long been clear that prisoners do not have an absolute right to visitation, see Evans v. Johnson, #86-7017, 808 F.2d 1427 (11th Cir. 1987), and the first article in this series examined some of the circumstances in which visitation of a particular person or to a particular prisoner may be restricted on the basis of their conduct, such as misconduct by either the visitor or the prisoner, or both.

Some facilities, however, have established visiting rules, which may bar or restrict visitation by entire categories of persons, such as minors, former prisoners, or former correctional personnel.

The subject of visitation by minors, and restriction of their visitation, has been examined by a number of courts. Indeed, as covered in more detail in the first article in this series, the U.S. Supreme Court, in Overton v. Bazzetta, #02-94, 539 U.S. 126 (2003), upheld a set of Michigan prison rules limiting visits by children, non-family members, former prisoners, or for prisoners who commit two violations of substance abuse rules.

Sometimes, the nature of the crimes committed by the prisoner may be pointed to as a justification for restricting visitation from minors.

In Doe v. Donahue, No. 49A02-0408-CV-674, 829 N.E.2d 99 (Ind. App. 2005), for instance, a directive banning prisoners convicted of sex offenses against minors from receiving visits from minors, including their own children, was found to be rationally related to legitimate penological interests in safety and security.

Prison officials were aware of research showing that many sexual offenders repeated their offenses, that minor victims of sex offenses know the perpetrators between 80 and 90 percent of the time, and that sexual offenders who prey on children frequently "psychologically groom" them for a time before engaging in sexual activity.

Further, there was evidence of incidents of sexual molestation of children in visiting rooms, and staffing inadequacies in terms of adequately monitoring such visits. The directive, therefore, did not violate prisoners' rights and was not cruel and unusual punishment.

Additionally, the prisoners had alternative means of maintaining family relationships as they could communicate with family members by mail, telephone calls, or messages brought by persons authorized to visit.

See also Robin J. v. Superior Court of San Diego County, No. D044131, 124 Cal. App. 4th, 414, 21 Cal. Rptr. 3d 417, 2004 Cal. App. Lexis 1987 (Cal. App. 4th Dist. 2004), which held that a juvenile court had no authority to invalidate a California prison regulation preventing visitation between certain sexual offenders and all minors, including minors who were not the victims of their crimes. A California appeals court overturned an order invalidating the regulation and allowing an inmate convicted of sexual offenses involving children to receive visits from his two minor sons.

In Garber v. Pennsylvania Department of Corrections Secretary, #654 M.D. 2003, 851 A.2d 222 (Pa. Cmwlth. 2004), the court ruled that a correctional policy denying a sex-offender contact visits with minors, including family members, did

not violate his First Amendment right to freedom of association, and was rationally related to legitimate interests in promoting institutional security and the safety of children.

When minors are involved, a parent's visitation with a child may be restricted, whether or not they are incarcerated, on the basis of the best interest of the child. Illustrating this is the case of Teixeria v. Teixeria, #91-07655, 613 N.Y.S.2d 49 (A.D. 1994), holding that a New York prisoner could be denied visitation with his 7-year-old daughter based on a court's determination that it would be "inimical to the welfare of the child."

Correctional facilities may also place reasonable conditions or restrictions on visitation by minors. In Navin v. Iowa Dept. of Corrections, 92-0102, 843 F.Supp. 500 (N.D. Iowa 1994), for instance, the court found that regulations prohibiting visits by minor children of prisoners unless accompanied by certain specified responsible adults did not violate the prisoners' freedom of association or privacy rights.

In Ford v. Beister, #80-0992, 657 F.Supp. 607 (M.D. Pa. 1986), a federal trial court held that prison officials could actually prohibit all visitors under 18 years of age. Similarly, in N.E.W. v. Kennard, #94-C-148, 952 F.Supp. 714 (D. Utah 1997), the court found that a jail's policy restricting visits by children younger than eight did not violate the due process or equal protection rights of either pretrial detainees or their children.

On the other hand, sometimes once a facility has allowed such visitation, it may be subject to challenges to an end to such visitation rights. See Taylor v. Armontrout, #89-1081, 894 F.2d 961 (8th Cir. 1989), stating that an inmate could bring a civil rights action over barring of visits from his son, who was on an approved visiting list.

Such visitors, however, must comply with a facility's reasonable procedures for visitors, as illustrated by Ross v. Owens, 720 F.Supp. 490 (E.D. Pa. 1989), ruling that a prison could deny visitation by inmate's son, who was on approved visitor's list, for failure to produce required identification.

Prisons and jails, for understandable reasons, normally have rules and restrictions on the development of friendships and intimate relationships between correctional employees and prisoners, because such friendships and relationships can easily give rise to the appearance (or actuality) of favoritism, the smuggling of contraband, and violations of various security rules.

For the same reasons, courts have upheld restrictions on visitation of prisoners by present or former correctional employees, sometimes even when the correctional employee has subsequently become the prisoner's spouse.

In Samson v. Donahue, No. 3:07-CV-505, 2007 U.S. Dist. Lexis 89355 (N.D. Ind.), for instance, a former prison employee had become involved with a prisoner when she met him at the facility. She married him after she resigned while correctional officials were investigating that involvement. A federal court upheld actions denying her the right to visit the prisoner because she had violated departmental policy by becoming involved with him. This, the court found, was rationally related to legitimate security concerns.

Similarly, in Engle v. Tennessee Dept. of Corrections, #02-5970, 63 Fed. Appx. 860 (6th Cir. 2003), the court ruled that a former correctional officer at Tennessee state prison did not have a due process or equal protection right to visit inmates. A policy of the state Department of Corrections restricting former employees' visitation with inmates did not violate the due process rights of the former employee to pursue her new profession as paralegal.

The former officer could not assert inmates' rights in order to challenge department's policy of restricting former employees from visits, written communication and telephone calls with inmates on the basis that it prevented the inmates from receiving paralegal assistance from the former officer.

Also see Caraballo-Sandoval v. Honsted, #93-8004, 35 F.3d 521 (11th Cir. 1994), finding that a federal prison's decision to deny a former female employee visitation rights with a male prisoner did not violate clearly established First Amendment rights or federal prison regulations.

Courts have also upheld restrictions on visits by former inmates, as illustrated by Robles v. Pa. Dept. of Corrections, 905 C.D. 1998, 718 A.2d 882 (Pa. Cmwlth. 1998), ruling that a Pennsylvania prison official did not violate a prisoner's rights by barring visits to him by his "business associate and spiritual advisor" because the proposed visitor was a former inmate.

What about limits on visits by individuals, such as a fiancée, who may have a close relationship with a prisoner, but may not immediately qualify as a "family member." In Beasley v. Wharton, 87-142-1, 682 F.Supp. 1234 (M.D. Ga. 1988), the court upheld a policy limiting visitation privileges to family members and prior acquaintances as constitutional and held that visits by a fiancée may be barred. Similarly, in Van Poyck v. Dugger, 89-586, 779 F.Supp. 571 (M.D. Fla. 1991), the

court held that prison officials' decision to bar an inmate's fiancée from visiting him did not violate the First Amendment, but cautioned that the decision may have infringed on a liberty interest if it was retaliatory for the inmate's murder of a correctional officer rather than based on security concerns.

In Doe v. Sparks, Civ. No. 89-248J (W.D. Pa., March 14, 1990), reported in 58 U.S.L.W. 2619 (April 24, 1990), a federal trial court ruled that a prison policy barring visits of inmates' same sex lovers was unconstitutional when heterosexual inmates were allowed visits with their unmarried partners.

Search and Detention of Visitors

Just as prisons and jails have a right to conduct searches of incoming prisoners for the purposes of safeguarding institutional security and preventing the introduction of contraband, drugs, and weapons into their facilities, they must conduct reasonable searches of visitors, and may condition visitation rights on submission to such precautions. No one is compelled to visit a prisoner, and when such searches uncover contraband, drugs, weapons, or evidence of crimes, visitors should not be surprised that they may be subjected to either the termination of visitation rights, criminal prosecution in appropriate cases, or both.

Visitors who do not wish to subject themselves to such searches, however, frequently must simply be allowed to leave. Illustrating this is the case of Spear v. Sowders, 93-5528, 71 F.3d 626 (6th Cir. 1995), in which the court, while finding that prison officials had reasonable suspicion sufficient to justify a body cavity search of a female visitor, based on an informant's statements that a "young" "unrelated female" visitor to the inmate was smuggling in drugs, they could not detain the visitor for the search in the absence of probable cause, but instead had to allow her the option of departing and foregoing visit; the defendants in the visitor's lawsuit were not entitled to qualified immunity in light of factual disputes.

Some facilities have successfully utilized sophisticated technologies or canines to help protect their facility's security. In Jackson v. Dept. of Corrections, No. A-5223-98T5, 762 A.2d 255 (N.J. Super. 2000) a New Jersey court upheld the use of scanning devices and dogs to detect drugs on prison visitors. For other cases upholding similar drug detection policies, see Romo v. Champion, 93-6307, 46 F.3d 1013 (10th Cir. 1995); Ybarra v. Nevada Board of State Prison Commissioners, 80-40, 520 F. Supp. 1000 (D. Nev. 1981); Black v. Amico, #74-540, 387 F. Supp. 88 (W.D.N.Y. 1974).

Another case of interest in this area is Grigger v. Goord, 97-889, 811 N.Y.S.2d 161 (A.D. 3rd Dept. 2006), which ruled that a prisoner lacked standing to challenge the use of an ion scanner to conduct searches of visitors for drugs, and

could not proceed with his lawsuit objecting to the prison's denial of his mother's entry to the facility to visit him when the ion scanner indicated that she tested positive for contact with cocaine.

The visits of attorneys may involve special concerns. See In Re Roark, #00-9169, 8 Cal.App. 4th 1946, 1996 Cal.App. Lexis 853, holding that a criminal defense attorney did not have to remove his prosthetic leg for inspection before being allowed a contact visit with his inmate client.

Arrests of visitors have, in a few cases, resulted in civil rights lawsuits claiming false arrest. See Detoledo v. County of Suffolk, # CIV.A.03-CV-10834, 379 F. Supp. 2d 138 (D. Mass. 2005), ruling that alleged negligence by a jail supervisor in mistakenly arresting a visitor and briefly detaining her under an arrest warrant for another person was insufficient to constitute a violation of due process justifying a federal civil rights claim. The court allowed, however, a claim by a second visitor to proceed, who claimed that she was improperly arrested on a warrant which had been recalled, when the officer making the arrest had in his hands a document that indicated the recall, but allegedly was unable to read it because he did not have his prescription glasses with him.

In Phillips v. Corbin, #97-7711, 132 F.3d 867 (2nd Cir. 1997). The court ruled that the failure of a grand jury to indict a prison visitor for possessing prison contraband after correctional officers arrested her for having a letter opener on her person did not, standing alone, show an absence of probable cause for the arrest. A jury verdict for the officers in her false arrest/malicious prosecution lawsuit was upheld, and the court ruled that the officers' actions did not violate any right the paralegal had to visit prisoners.

A small number of cases have addressed strip searches of prison visitors. In Varrone v. Bilotti, 96-2368, 123 F.3d 75 (2nd Cir. 1997), the court held that correctional officers were entitled to qualified immunity for conducting a strip search of a prison visitor after a tip was received that he would be smuggling heroin into the prison. This information, combined with fact that the prisoner was incarcerated for a drug offense and that the visitor was a co-defendant in the criminal case provided reasonable suspicion for the search. See also, Wood v. Clemons, 96-1078, 89 F.3d 922 (1st Cir. 1996), ruling that a prison superintendent who ordered a strip search of minor prison visitors was entitled to qualified immunity from liability when he reasonably believed that a tip that they were smuggling in drugs was received from two unconnected confidential informants, despite the fact that the tip actually came from a single, anonymous and uncorroborated source. The federal appeals court also ruled that reasonable suspicion is an appropriate legal standard for strip searches of prison visitors.

Contact Visits and Conjugal Visitation Programs

If there is no absolute right to visitation in general, it is even clearer that prisons and jails may impose restrictions on contact visits. Some correctional facilities also have “family reunion” or conjugal visit programs, and these are a matter of privilege, not right. See Macedon v. California Department of Corrections, #02-15436, 67 Fed Appx. 407 (9th Cir. 2003), ruling that the denial of family visits to a prisoner did not violated any constitutionally protected liberty interest, and his inability to "visit with whom he wishes is an 'ordinary incident of prison life,'" and "part of the penalty that criminals pay for their offenses against society."

Having said that, however, it is also the case that facilities that allow such contact visits and/or “family reunion” programs must not discriminate against visitors or prisoners on the basis of protected categories, such as race, gender, and increasingly, in some jurisdictions, sexual orientation.

As with most visitation questions, security concerns are usually the issue when restricting or denying contact visits or conjugal visits. See Ayers v. Rone, #1:93-CV-0112, 852 F.Supp. 18 (E.D.Mo. 1994), ruling that a jail did not violate a prisoner's rights by denying him contact visits with his wife; such visits would have posed a security risk in light of prisoner's pending homicide charges and the fact that his wife was also a prisoner at the jail.

In some cases, either the nature of a prisoner’s crime or the length of their sentence has been used as a basis for denying contact visits or participation in “family reunion” programs.

In Williamson v. Nuttall, No. 500309, 825 N.Y.S.2d 802, 2006 N.Y. App. Div. Lexis 14443 (A.D. 3rd Dept.), for instance, a court ruled that a prison properly decided that prisoner serving a sentence of life without parole for beating and stabbing to death his sister-in-law (and engaging in a violent assault on her three year old daughter) was not entitled to participate in family reunion program including visits with his mother.

Because he would never return to society, given his sentence, his participation would not further the goal of strengthening family ties disrupted by imprisonment. Denial of a request for participation in such a program will be upheld if based on a rational reasons, since participation is a privilege, rather than a right.

The establishment of a family reunion program and procedures for requesting participation may require that reasons be spelled out for the denial of a request to participate.

In Bierenbaum v. Goord, #95906, 787 N.Y.S.2d 438 (A.D. 3d Dept. 2004), the court ruled that a New York prisoner incarcerated for the murder of his first wife, who married his current wife prior to his incarceration, was entitled to further proceedings on his request to participate in a "family reunion" program with his wife and daughter, when no reason or factual basis was provided for the denial of his request.

In Champion v. Artuz, #95-25120, 76 F.3d 483 (2nd Cir. 1996), the court ruled that a New York prisoner had no constitutionally protected right to participation in conjugal visits with wife; denial of such visits on basis of wife's status as an ex-offender was not a violation of equal protection of law.

Facilities may also bar certain individuals from participation in “family reunion” programs based on whether or not they actually meet the definition of family. In one such case, a California court upheld a prison regulation allowing certain prisoners overnight visitations with their "immediate family" and not with persons holding a common-law relationship. In re Cummings, #21978, 640 P.2d 1101, 180 Cal.Rptr. 826 (Cal. 1982).

Participation in “family reunion programs,” just as visitation in general, can be suspended or barred based on misconduct by either the visitor or the prisoner, or both. See Fleming v. Coughlin, #74041, 634 N.Y.S.2d 800 (A.D. 1995), finding that the permanent revocation of visiting privileges for an inmate's wife was appropriate when he tested negative for drug use prior to her visit, but tested positive for opiates directly after she visited him for two day "family reunion" visit. This proof was sufficient to support the conclusion that she smuggled contraband into prison.

See also Qazim v. Scully, #9399, 526 N.Y.S.2d 186 (A.D. 1988), in which the court found that an inmate's contact visitation privileges with his wife could be suspended when the wife possessed marijuana during her visit.

Other cases of interest in this area include:

* Larson v. Cooper, #S-10327, 90 P.3d 125 (Alaska 2004), ruling that a maximum security prison did not violate a prisoner's rights under either the U.S. Constitution or the Alaska State Constitution by ordering him not to hold his wife's hand during prayers when granted a contact visit. His right to religious freedom did not require prison to allow handholding, kissing, or embracing during

such a visit, and the rule was reasonably related to legitimate interests in keeping the prison free of contraband. Temporary suspension of contact visits after prisoner allegedly violated the rule did not violate his right to due process.

* Africa v. Vaughan, #96-649, 998 F. Supp. 552 (E.D. Pa. 1998), ruling that a prisoner did not show that his right to equal protection was violated when he was denied visitation with former prisoner who he claimed was his wife; while other prisoners were allowed visits with their spouses, even if they were former inmates, this prisoner could not show that he had ever married this woman, and had referred to her previously as his "sister" or his "friend."

*Whitmire v. State of Arizona, #00-16896, 298 F.3d 1134 (9th Cir. 2002), in which a federal appeals court overturned the dismissal of a federal civil rights claim that a prison policy prohibiting same-sex kissing and hugging during visits, except for family members, violated the right to equal protection of the homosexual partner of an inmate.

* Mitchell v. Dixon, #92-825, 862 F.Supp. 95 (E.D.N.C. 1994), in which the court held that a prison rule prohibiting a contact visit between a maximum security prisoner and his attorney did not violate prisoner's right of access to the courts; the rules adequately provided for conversation between prisoner and attorney and the prisoner's access to documents during such conversations.

* Peterson v. Shanks, #96-2190, 149 F.3d 1140 (10th Cir. 1998), in which prison officials' alleged denial of a prisoner's right to family visitation was held not to be a violation of his federally protected civil rights. Prison officials, the court commented, have broad discretion to control visitor access to prisoners, and no abuse of discretion was demonstrated.

* Isaraphanich v. Coughlin, #85 Civ. 4306, 716 F.Supp. 119 (S.D.N.Y. 1989), in which the court ruled that an alien inmate with an outstanding deportation detainer was properly denied participation in "family reunion" program.

* Bills v. Dahm, 94-1300, 32 F.3d 333 (8th Cir. 1994), hold that prison officials were entitled to qualified immunity from liability for their failure to provide a program for overnight visitation of a male inmate's infant child while allowing such visitation at women's correctional facility. The court fond that different security levels at the two institutions indicated that plaintiff and female inmates could reasonably be viewed as "not similarly situated."

* Shaddy v. Gunter, #CV87-L-323, 690 F.Supp. 860 (D. Neb. 1988), ruling that a policy prohibiting kissing, caressing or fondling during a visit, but allowing a kiss and embrace at the start and end of visit, was not unconstitutionally vague.

* Berrios- Berrios v. Thornburg, #89-282, 716 F.Supp. 987 (E.D. Ky. 1989), in which a female inmate was granted an injunction allowing her to breast feed her infant during normal visiting period, but was denied an injunction requiring storage and refrigeration of her breast milk.

* In re Stone, #22990, 182 Cal.Rptr. 79 (App. 1982), in which a California court ruled that contact visitation privileges must be restored to a prison visitors who submitted to body searches after earlier refusing to do so.

Protection of Visitors

Most courts that have addressed the subject at all appear to have greatly limited the duty of correctional facilities to provide protection for visitors against injury.

In Santana v. City of New York, #1752-TSN00, 787 N.Y.S.2d 651 (N.Y. City Civ. Ct. 2004), for instance, the City of New York and its Department of Corrections were found to have had no special duty of care to protect visitors to the city jail against the risk of assault by inmates, mandating the dismissal of visitor's personal injury lawsuit against city.

Additionally, prison visitors must take their own precautions against obvious dangers. See Hodges v. St. Clair Co., #5-93-0581, 636 N.E.2d 67 (Ill. App. 1994) in which an Illinois appeals court overturned a $20,536 award to a 75-year-old woman injured when she attempted to sit on a stool with no back while visiting her son in county jail; any danger from the design of the stool, the court stated, was "open and obvious," so the county had no duty to warn her of it.

Other cases of interest in this area include:

* Commonwealth v.Coolidge, #870052, 379 S.E.2d 338 (Va. 1989), in which the Virginia Supreme Court held that the state does not owe duty of care to a prison visitor similar to that of private landowner.

* Linn v. U.S., #96-149, 979 F.Supp. 521 (E.D. Ky. 1997), ruling that a prison visitor was a "licensee" for purposes of Kentucky state law. Accordingly an accident that injured a visitor when a canopy covering a ceiling fan came loose and fell was unforeseeable, and the U.S. government was not liable for the visitor’s injuries.

* Rhode Island Supreme Court holds state can be liable for negligence in injury to prison visitor. Nicholson v. State, #87-551, 557 A.2d 82 (R.I. 1989).

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