



## Limits on Procreation as a Condition of Probation

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Can a judge limit a probationer's right to have children?

A North Carolina judge has broad discretion to shape the conditions of a defendant's probation. Under G.S. 15A-1343(b1)(10), the judge can order the defendant to satisfy any condition deemed reasonably related to the defendant's rehabilitation. Case law has added a requirement that any special conditions imposed must also bear a relationship to the defendant's crime. *State v. Cooper*, 304 N.C. 180 (1981). But the nexus need not be all that close. In *Cooper*, for example, a condition prohibiting driving between midnight and 5:30 a.m. was deemed sufficiently closely related to the defendant's crime of stealing credit cards.

Notwithstanding the statute's flexibility, of course any special conditions a judge imposes must not violate the constitution. And when it comes to questions of a defendant's rights to procreate and keep a family together, the constitutional concerns are obvious.

But not every limit on the rights of a person convicted of a crime violates the constitution. The leading case in that regard in North Carolina is *State v. Strickland*. 169 N.C. App. 193 (2005). In *Strickland*, the court of appeals upheld the statutory special condition of probation in G.S. 15A-1343(b2)(4), which prohibits certain sex offender probationers from residing in a household with any minor child. The defendant's probation was revoked when he resided at his home with his wife and minor son.

The court rejected the defendant's argument that the condition violated his constitutional right to parent and care for his minor child without any showing that he was unfit or that the child was endangered. Given the criminal law's emphasis on protecting the public, and the fact that the probation condition did not amount to a permanent deprivation of custody, the court declined to import the procedural requirements from child custody cases. The court reached its conclusion through what appeared to be a form of rational basis review. *Strickland*, 169 N.C. App. at 196 ("The sentencing judge has broad discretion in setting probation conditions, including restricting fundamental rights. The restriction . . . is valid if (1) primarily designed to meet the ends of rehabilitation and protection of the public, and (2) reasonably related to such ends." (citations omitted)).

There are no North Carolina cases addressing related questions about limitations on child rearing or procreation as a condition of probation. But there are some instructive cases from other states.

In those cases, sometimes the condition is obviously unconstitutional and easily dispensed with. In *Thomas v. State*, for example, a woman placed on probation for theft and battery related to the theft was made subject to a condition of probation forbidding her from becoming pregnant during her term of probation unless she was married. 519 So. 2d 1113 (Fla. Dist. Ct. App. 1988). The appellate court deemed the condition "grossly erroneous on its face" as it had no relationship to her crime, related to conduct that was not itself criminal, and bore no reasonable relationship to future criminality. See also *State v. Richard*, 680 N.E.2d 667 (Ohio Ct. App. 1996) (striking a condition requiring a woman convicted of disorderly conduct and possession of drug paraphernalia to use birth control or undergo a tubal ligation).

The result is generally same when the probationer is a man. In *United States v. Smith*, 972 F.2d 960 (8th Cir. 1992),

the trial judge ordered that a defendant convicted of a drug crime “shall not cause [the] conception of another child other than to his wife, unless he can demonstrate he is fully providing support to the three children presently in existence, and the two en ventre sa mere.” The Eighth Circuit appreciated the district court judge’s concern for the defendant’s children, but deemed the condition unrelated to the defendant’s crime, invalid, and in any event unworkable. If the defendant were found to be in violation of it, the resultant children would be all the worse off on account of their father’s return to prison. *Id.* at 962.

But what if the defendant had been on probation for child abuse? Or criminal non-support? May a court limit the defendant’s right to have additional children in those circumstances?

Many law review articles have considered the question, *see, e.g.,* Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 U.C.L.A. L. Rev. 1 (1992), but relatively few cases. In *State v. Fatland*, the Court of Appeals of Iowa considered a probation condition forbidding pregnancy for a woman convicted of child endangerment resulting in bodily injury. 882 N.W.2d 123 (Iowa Ct. App. 2016). The State conceded that the condition was unreasonable, and the court concluded that it was an unconstitutional imposition on her fundamental right to procreate. The case collects a handful of cases from other jurisdictions reaching similar results.

But that is not always the outcome. Conditions imposing restrictions short of an outright ban on having additional children are sometimes upheld. For example, in *State v. Kline*, 963 P.2d 697 (Or. Ct. App. 1998), the Court of Appeals of Oregon upheld a condition requiring a man on probation for criminal mistreatment to complete drug counseling and anger management treatment before fathering any children. The appellate court rejected the defendant’s argument that the condition violated his fundamental right to procreate. The ban was not complete, but was instead explicitly designed to be lifted when the defendant completed treatment. In light of the defendant’s history of abusive behavior, the court concluded that the condition was appropriately tailored to protect future children from injury. *See also* *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001) (“[W]e find that the condition is not overly broad because it does not eliminate Oakley’s ability to exercise his constitutional right to procreate. He can satisfy the condition of probation by making efforts to support his children as required by law.”).