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The Right to Counsel in Child Dependency Proceedings: Conflict Between Florida and the Fifth Circuit

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> the issue . . . is fraught with complexity and encompasses the interests of law, both civil and criminal, medical ethics and social morality, [and] it is not one which is well suited for resolution in an adversary judicial proceeding. It is the type [of] issue which is more suitably addressed in the legislative forum, where fact finding can be less confined and the viewpoint of all interested institutions and discipline can be presented and synthesized.[41]

Although it may be correct to conclude that the issue is appropriate for legislative resolution, the supreme court itself has noted elsewhere that "in the absence of appropriate legislative action [to provide the ways and means of enforcing constitutional rights] it is the responsibility of the courts to do so."[42] Thus, in light of the failure of the Florida Legislature to enact right-to-die legislation, the supreme court could have and should have promulgated guidelines for physicians and hospitals to follow in future situations like Perlmutter's. A judicial rule, rather than a case-by-case approach, would have avoided the practical effect of *Perlmutter* which will require physicians and hospitals to seek judicial approval each time a patient refuses to continue life-saving treatment—or face potential civil and criminal liability if the decendent's estate or the state attorney later disagrees with the physician's response to his patient's request.

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The Right to Counsel in Child Dependency Proceedings: Conflict Between Florida and the Fifth Circuit

The United States Court of Appeals for the Fifth Circuit recently handed down a decision in direct conflict with a decision made by the Supreme Court of Florida only ten months earlier. In *Davis v. Page*[1] the Fifth Circuit held that indigent parents have an

41. *Id.*

42. Dade County Classroom Teachers Ass'n. v. Legislature, 269 So. 2d 684, 686 (Fla. 1972).

1. No. 78-2063 (5th Cir. Mar. 23, 1980). Davis filed a petition for a writ of habeas corpus in the Supreme Court of Florida to regain custody of her child from the State De-

absolute right to counsel in child dependency proceedings and that the court must appoint counsel for them unless they knowingly and intelligently waive the right. This decision directly conflicts with the holding of the Supreme Court of Florida in *Potvin v. Keller*,[2] a decision reaffirmed in *In re D.B. & D.S.*[3] shortly before the Fifth Circuit decided *Davis*.

Since *Potvin v. Keller*,[4] Florida courts have followed a case-by-case method for the determination of the right to counsel in child dependency proceedings, a method originally devised by the Ninth Circuit Court of Appeals in *Cleaver v. Wilcox*.[5] The *Cleaver* court had identified three critical factors a judge must examine in determining whether to appoint counsel: the length of the potential parent-child separation, the presence or absence of parental consent or of disputed facts, and the particular case's complexity as it affects parental comprehension of evidence and examination of witnesses.[6]

In *D.B. & D.S.*, the Supreme Court of Florida held that there is no fundamental right to counsel in dependency proceedings; due process requires appointed counsel only when parents risk permanently losing custody or incurring criminal charges. In all other circumstances, the right depends on a case-by-case application of the *Potvin* test.[7] Moreover, the court ordered Florida's state courts to disregard the district court's decision in *Davis*, which recognized an absolute right to counsel in such circumstances, and to follow the *D.B. & D.S.* opinion.[8]

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partment of Health and Rehabilitative Services. She had not had counsel at the dependency adjudication. After the supreme court denied her petition, Davis brought a class action in the United States District Court for the Southern District of Florida, on behalf of all indigent parents, seeking injunctive relief and a declaratory ruling that the state had to provide them with counsel. The district court entered summary judgment for Davis and held that due process requires the state to provide counsel for indigent parents. 442 F. Supp. 258 (S.D. Fla. 1977). A panel of the United States Court of Appeals for the Fifth Circuit affirmed the summary judgment and remanded for a determination of whether attorney's fees could be awarded. 618 F.2d 374 (5th Cir. 1980). On rehearing en banc, the court of appeals affirmed the summary judgment, vacated the injunction entered by the district court, and reversed the award of attorney's fees. No. 78-2063, slip op. at 5059.

2. 313 So. 2d 703 (Fla. 1975).

3. 385 So. 2d 83 (Fla. 1980).

4. The *Potvin* test derives from *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974). *See* note 7 *infra*.

5. 385 So. 2d at 87.

6. 313 So. 2d 703 (Fla. 1975).

7. 499 F.2d 940 (9th Cir. 1974). Until *Davis*, only the Ninth Circuit had addressed this question.

8. *Id.* at 945.

By subsequently affirming the district court's position in *Davis*, thereby rejecting Florida's case-by-case approach and requiring the appointment of counsel for indigents in all child dependency proceedings, the Fifth Circuit continued a conflict apparently not welcomed by the Supreme Court of Florida. The *Davis* decision heralds an extension of the constitutional right to counsel in the Fifth Circuit, a right previously confined almost exclusively to criminal and quasi-criminal cases.[9]

The Supreme Court of Florida, in *In re D.B. & D.S.*,[10] challenged the intervention of the United States District Court in *Davis*. The court reasoned that the right to counsel established by the United States Supreme Court applies solely in criminal or quasi-criminal cases. The right flows from the sixth amendment, not the fourteenth amendment guarantee of due process. This constitutional analysis is the key to the court's holding. Since "[t]he extent of procedural due process protections varies with the character of the interest and the nature of the proceeding involved,"[11] the court rejected the district court's holding in *Davis* and ruled that under the *Cleaver* test, courts should appoint counsel only when permanent termination of parental custody might result or when the proceedings might lead to criminal charges for child abuse. When "there is no threat of permanent termination of parental custody, the test should be applied on a case-by-case basis."[12]

The Supreme Court of Florida supported its case-by-case approach by drawing an analogy between the custody issues in dependency matters and in domestic relation proceedings.[13] Neither proceeding is criminal. The supreme court also distinguished dependency proceedings from delinquency proceedings. Whereas the purpose of dependency proceedings is "to protect and care for the child,"[14] the emphasis in delinquency proceedings is on punishment. The court thus rejected the district court's comparison of

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9. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel for petit offenses whenever imprisonment possible); *In re* Gault, 387 U.S. 1 (1967) (right to counsel in juvenile delinquency proceeding exists when commitment for criminal conduct is at issue); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent criminal defendant facing imprisonment for a noncapital offense has a right to counsel); Powell v. Alabama, 287 U.S. 45 (1932) (indigent criminal defendant in capital case is entitled to counsel). *See also* Comment, *The Indigent Parent's Right to Appointed Counsel in Actions to Terminate Parental Rights*, 43 U. CINN. L. REV. 635 (1979).

10. 385 So. 2d 83 (Fla. 1980).

11. *Id.* at 89 (citing Morrissey v. Brewer, 408 U.S. 471 (1972)).

12. *Id.* at 91.

13. *Id.*

14. *Id.* at 90.

the right to counsel in *In re Gault*,[15] a delinquency proceeding, with the right to counsel in dependency proceedings.

The Fifth Circuit, on the other hand, focused on the complexity of the child-dependency hearing process in determining that indigent parents have a right to counsel. The court considered the complexity of the dependency proceeding in terms of "procedural, evidentiary, and substantive law."[16] In addition, the court reasoned that the unrepresented parent would confront all of the state's resources, because the state would use social workers, psychologists, and highly experienced counsel.[17] The court determined that these factors made it highly likely that the state would erroneously deprive an unrepresented indigent parent of his child.[18]

Another factor that persuaded the Fifth Circuit that dependency proceedings require appointment of counsel was the parent's burden of proof to show that returning the child to his home is in the child's best interests.[19] The court noted that "evidence which was not legally sufficient to support a finding of dependency may nonetheless be sufficient to refuse a return of the child to its [sic] parents."[20] If a court adjudicates a child a dependent, its options range from allowing the child to remain in his own or a relative's home under supervision, to permanently committing the child to a state agency.[21] The Fifth Circuit considered that a "temporary" loss might continue until the child reaches majority.[22] If a parent may indeed lose a child for that length of time, then the loss may be "permanent" for the purpose of deciding whether the court should appoint counsel.[23]

The state had urged that the Fifth Circuit adopt the case-by-case method set forth in *Gagnon v. Scarpelli*.[24] The Court in *Gagnon* had applied a case-by-case method in probation hearings, rejecting it for criminal trials. The state's analogy to *Gagnon*, failed, however, because the Fifth Circuit reasoned that the limited due

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15. 387 U.S. 1 (1967).

16. 618 F.2d at 380. *See* No. 78-2063, slip op. at 5057.

17. 618 F.2d at 380; No. 78-2063, slip op. at 5057.

18. 618 F.2d at 381 n.6.

19. *Id.* at 380. The parent cannot relitigate the adjudication of dependency in a disposition hearing but must show that restoration of custody is in the child's best interest because of subsequent developments. *Id.*

20. *Id.* at 381 (citing Pendarvis v. State, 104 So. 2d 651 (Fla. 1st DCA 1961)).

21. *Id.* at 380. *See also* 8 FLA. ST. U.L. REV. 99, 107 (1980).

22. *Id.* at 376 (construing FLA. STAT. §§ 39.10(4) and 39.11 (1)(c) (1977). *See* 1978 Fla. Laws ch. 78-414 (revising FLA. STAT. ch. 39 (1977)).

23. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

24. 411 U.S. 778 (1973).

process rights of prisoners had colored the *Gagnon* ruling. When the rights at issue are "among the most fundamental and basic of those guaranteed by the Fourteenth Amendment,"[25] a case-by-case approach is inappropriate. According to the Fifth Circuit, an absolute right to appointed counsel exists in child dependency proceedings because of the critical nature of the rights adjudicated in such cases.

One may well conclude that the Fifth Circuit's approach to child dependency proceedings probes more deeply into the requirements of the due process clause than does the Florida analysis. But unless the Supreme Court of Florida eventually accepts the Fifth Circuit's position, or until the Supreme Court of the United States resolves the issue, the two jurisdictions remain in conflict on the question of right to counsel in dependency matters.

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Dormant Commerce Clause Revisited: *Kassel v. Consolidated Freightways Corp.*

The extent of permissible state regulation of interstate commerce under the "dormant" commerce clause has troubled the Supreme Court of the United States ever since Chief Justice Marshall interpreted the clause as a limitation on the states.[1] The Supreme Court has recognized, however, that certain state regulations may be matters of local concern, legitimately within the state's police power.[2] Because of the peculiarly local nature of highway safety regulations, for example, the Court traditionally has cloaked them with a "strong presumption of validity."[3] Despite this presumption, the Supreme Court in *Kassel v. Consolidated Freightways Corp.*,[4] held that an Iowa statute prohibiting trucks longer than fifty-five feet from traveling its roads imposed an unconstitutional

25. 618 F.2d at 384. *See* No. 78-2063, slip op. at 5058 n.8.

1. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-222 (1824). For an excellent discussion of Marshall's view of the commerce clause, see F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WHITE (1937).

2. Health and consumer protection, for example, are matters of local concern. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 351 (1977).

3. Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959).

4. 101 S. Ct. 1309 (1981).