Florida State University Law Review

Volume 8 | Issue 1 Article 6

Winter 1980

Davis v. Page, 442 F. Supp. 258 (S.D. Fla. 1977)

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Constitutional Law—JUVENILE DEPENDENCY PROCEEDINGS—CRITICAL STAGES ANALYSIS USED IN CRIMINAL PROCEEDINGS GOVERNS TIMING OF RIGHT TO COUNSEL IN CHILD DEPENDENCY PROCEEDINGS—*Davis v. Page*, 442 F. Supp. 258 (S.D. Fla. 1977).

On January 30, 1976, fourteen-month-old Carl Thor Davis sustained a broken arm as a result of a beating by his father. Hilary Davis, Carl's mother, left the family home and sought medical attention for the child, who had to be hospitalized.[1]

The following day, Hilary Davis met with representatives of the Department of Health and Rehabilitative Services (hereinafter HRS) to discuss plans for the future care of her child.[2] The interview revealed that Mrs. Davis intended to leave her husband and seek a divorce. Because Mrs. Davis was indigent, she requested temporary foster care for her son until she could become self-supporting.[3]

The Department immediately initiated dependency proceedings pursuant to Chapter 39, Florida Statutes, with the intent of placing Carl in temporary foster care.[4] As part of these proceedings, HRS alleged that Carl was a dependent child and sought temporary legal custody.[5]

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1. Davis v. Page, 442 F. Supp. 258, 260 (S.D. Fla. 1977). Note that on June 6, 1980 the Fifth Circuit affirmed the district court's holding. Davis v. Page, No. 78-2063 (5th Cir. June 6, 1980).

2. The facts surrounding Mrs. Davis' initial involvement with HRS are in dispute. The court record indicates that she sought the assistance of HRS in order to plan for the care and protection of her child and that she voluntarily requested temporary foster care placement for him. Attorneys for Mrs. Davis, however, contend that HRS initiated involvement with the family in response to a child abuse report filed with the agency by a hospital staff member. They further contend that HRS representatives decided that the child should be removed from the custody of his parents. Brief for Appellee at 6-7, Chastain v. Davis, *appeal docketed*, No. 78-2063 (5th Cir. May 18, 1978).

3. *Id.* at 8. Recent statistics obtained from HRS indicate that over 50% of the children who enter foster care each year are voluntarily placed by their parents due to family-related problems. Interview with Pamela Eby, Consultant, Family and Children's Services, Office of Social and Economic Services, Department of HRS (March 14, 1979).

4. Ch. 75-48, 1975 Fla. Laws 85 (current version at FLA. STAT. § 39.01 (1979)).

5. 442 F. Supp. at 260. The statute defined a dependent child as one who:

(a) Has been abandoned by his parents or other custodians.

(b) For any reason, is destitute or homeless.

(c) Has not proper parental support, maintenance, care, or guardianship.

(d) Because of the neglect of his parents or other custodians, is deprived of education as required by law, or of medical, psychiatric, psychological, or other care necessary for his well-being.

(e) Is living in a condition or environment such as to injure him or endanger his welfare.

(f) Is living in a home which, by reason of the neglect, cruelty, depravity, or other adverse condition of a parent or other person in whose care the child may be, is an unfit place for him.

On February 4, 1976, Mrs. Davis was advised by a representative of HRS that a detention hearing would be held later that same day.[6] She was not advised of her right to have counsel present at the hearing and she appeared without representation.[7] At the close of the detention hearing the court informed Mrs. Davis that she had a right to have counsel at the adjudicatory hearing scheduled for March 4, 1976.[8] The court did not, however, offer to appoint an attorney to represent her.

Mrs. Davis attempted to obtain counsel through Legal Services of Greater Miami, Inc. She was unsuccessful and she appeared at the adjudicatory hearing without representation. As a result of that hearing, Carl was found to be a dependent child and was committed to the temporary care and custody of HRS.[9]

After the March fourth adjudication, Mrs. Davis retained counsel and unsuccessfully attempted to obtain a writ of habeas corpus for the release of her child.[10] She then brought a class action in the United States District Court, Southern District of Florida, seeking equitable relief against William J. Page, Jr., Secretary of the Department of HRS, and the judges of the Eleventh Judicial Circuit Court, Dade County, Florida. Mrs. Davis requested that the district court declare unconstitutional all Florida dependency proceedings conducted without provision of counsel for indigent parents.[11]

(g) Is surrendered to the Division of Family Services or a licensed child-placing agency for the purpose of adoption.

(h) Has persistently run away from his parents or legal guardian.

(i) Being subject to compulsory school attendance is habitually truant from school.

Ch. 73-231, § 1, 1973 Fla. Laws 518; ch. 75-48, § 15, 1975 Fla. Laws 85 (current version at FLA. STAT. § 39.01(9) (1979)).

6. 442 F. Supp. at 260. " 'Detention hearing' means a hearing at which the court determines whether it is necessary that the child be held in detention care, shelter care, some other placement outside his own home, or in his own home under court-imposed restrictions, pending a hearing to adjudicate delinquency or dependency." Ch. 75-48, § 15, 1975 Fla. Laws 85 (current version at FLA. STAT. § 39.402(6)(a) (1979)).

7. 442 F. Supp. at 260. The court ordered that Carl be detained in the care and custody of HRS pending the outcome of an adjudicatory hearing scheduled for March 4, 1976. *Id.*

8. 442 F. Supp. at 260. " 'Adjudicatory hearing' means a hearing at which the court makes its finding of fact and enters an appropriate order dismissing the case, withholding adjudication, or adjudicating the child to be a delinquent child or a dependent child." Ch. 75-48, § 15, 1975 Fla. Laws 85 (current version at FLA. STAT. § 39.01(3) (1979)).

9. 442 F. Supp. at 261. The juvenile statute provided a right to appeal an adjudication of dependency. Ch. 73-231, § 20, 1973 Fla. Laws 518 (current version at FLA. STAT. § 39.413(1) (1979)). The record, however, does not reflect that Mrs. Davis was advised of her right to appeal if she disagreed with the court's findings. 442 F. Supp. at 261.

10. On May 11, 1976, Mrs. Davis filed a petition for writ of habeas corpus in the Supreme Court of Florida. The court denied the petition by order dated May 18, 1976. Brief for Appellants at 4, Chastain v. Davis, *appeal docketed,* No. 78-2063 (5th Cir. May 18, 1978).

11. 442 F. Supp. at 259. Mrs. Davis also sought to enjoin dependency proceedings conducted without provision of counsel for indigent parents. In a separate count, she sought a

The district court granted Mrs. Davis' motion for summary judgment, finding such dependency proceedings to be in violation of the fourteenth amendment due process and equal protection clauses of the Constitution.[12] The court held that dependency proceedings are procedurally analogous to criminal trials. Accordingly, United States Supreme Court decisions which establish that counsel must be provided for indigent defendants in criminal trials also mandate that counsel be provided for indigent parents in this type of juvenile proceeding.[13]

Davis v. Page,[14] in utilizing the critical stages analysis that governs the right to counsel in criminal proceedings, fails to consider the unique nature and character of dependency proceedings. The *Davis* court holds that a critical stage commences whenever a petition alleging dependency is filed pursuant to Florida law.[15] Therefore, under *Davis*, the criminal due process requirement of court-appointed counsel at the critical stages of arraignment, preliminary hearing, or custodial interrogation extends as well to all stages of dependency proceedings.[16] By adopting the critical stages analysis, the court rejects a case-by-case approach for determining the need for court-appointed counsel and institutes instead an absolute rule that all indigent parents who are parties to dependency proceedings must be provided with an attorney.[17]

This note will analyze the *Davis* court's application of due process, equal protection, and the fundamental interest of family integrity to support its holding that indigent parents have an absolute right to court-appointed counsel in all dependency proceedings.

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writ of habeas corpus to secure the release of her child from the custody of HRS. However, the child was returned to his mother through routine juvenile court proceedings in January, 1977 so the court did not address that issue. *Id.* at 261.

12. 442 F. Supp. at 259-65. The court determined that the fourteenth amendment due process and equal protection clauses require that parents involved in child dependency proceedings be advised of their right to assistance of counsel and, if indigent, that counsel be appointed for parents at all critical stages, unless they knowingly and intelligently waive that right. *Id.* at 263.

13. 442 F. Supp. at 262-63. The court cited Argersinger v. Hamlin, 407 U.S. 25 (1972) and Gideon v. Wainwright, 372 U.S. 335 (1963) as authority for the application of an absolute rule. *Id.* at 262. *But see* Gagnon v. Scarpelli, 411 U.S. 778 (1973), where the Court stated, "We do not, however, draw from *Gideon* and *Argersinger* the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings . . . ." *Id.* at 788.

14. 442 F. Supp. 258 (S.D. Fla. 1977).

15. *Id.* at 264-65.

16. *Id.* at 265.

17. *Id.* The Davis court cites Gideon v. Wainwright, 372 U.S. 335 (1963), as authority for the proposition that the case-by-case analysis is untenable. Touting the criminal/civil analogy, the *Davis* court refers to several cases governing due process in criminal proceedings as precedent for the application of an absolute rule in dependency proceedings. 442 F. Supp. at 265.

Analysis will show that the absolute rule imposed by *Davis* is inappropriate and that a return to a case-by-case approach is needed.

At the time of the *Davis* decision, all juvenile proceedings were governed by chapter 39, Florida Statutes.[18] Section 39.001(4), Florida Statutes expressly stated the purpose of the chapter: "[t]o provide procedures through which the provisions of the law are executed and enforced which will assure the parties fair hearings at which their rights as citizens are recognized and protected."[19] In addition, Chapter 39 stipulated that juveniles, as subjects of delinquency proceedings, must be advised of their right to counsel.[20] The chapter did not, however, require that parents named as respondents in dependency proceedings be advised of their right to court-appointed counsel.[21]

It may be argued that in making the distinction between delinquency and dependency proceedings the Florida Legislature implicitly acknowledged the quasi-criminal nature of delinquency proceedings as established by the United States Supreme Court in *In re Gault*.[22] Because of the quasi-criminal nature of delinquency proceedings, the Supreme Court has held that a child and his parents must be advised of their right to be represented by counsel, and if unable to afford counsel, to have counsel appointed.[23] Dependency proceedings, however, are strictly civil in nature. This fact prohibits the imposition of criminal sanctions upon the respondent parent.[24] In addition, by their very nature as juvenile court proceedings, dependency hearings are more informal than proceedings brought in a nonjuvenile judicial setting.[25] Therefore, parents in dependency

18. Ch. 75-48, 1975 Fla. Laws 85 (current version at FLA. STAT. § 39 (1979)).

19. Ch. 73-231, § 1, 1973 Fla. Laws 518 (current version at FLA. STAT. § 39.001(2)(d) (1979)).

20. *Id.* at § 13 (current version at FLA. STAT. § 39.071 (1979)). The current statute provides in reference to *delinquency* that "a child shall be entitled to representation by legal counsel at all stages of any proceeding under this part. If the child [is] insolvent . . . the court shall appoint counsel for him . . . ." Fla. Stat. § 39.071 (1979).

21. Since amended, however, FLA. STAT. § 39.406 (1979), pertaining to *dependency proceedings*, provides that "the child or parent shall, prior to an adjudicatory hearing, be advised by the court of his right to have counsel . . . ."

22. 387 U.S. 1 (1967).

23. *Id.* at 41. The Supreme Court has yet to decide the issue of right to counsel in dependency proceedings. The opportunity was before the Court in Kaufman v. Carter; however, certiorari was denied with Mr. Justice Black and Mr. Justice Douglas dissenting. 87 Cal. Rptr. 678 (1970), *cert. denied*, 402 U.S. 964 (1971).

24. FLA. STAT. §§ 827.04-.05 (1979) defines child abuse and neglect and provides for criminal punishment as provided in FLA. STAT. § 775.082-.089 (1979). Parents who are criminally prosecuted under the provisions of chapters 827 and 775 are afforded all the due process and equal protection rights afforded defendants in criminal prosecutions.

25. *See* FLA. STAT. § 39.001 (1979); *Cf.* FLA. R. JUV. P. (which generally provide for simplicity in procedure).

proceedings should not be automatically entitled to the same due process and equal protection rights afforded in criminal proceedings and in some juvenile court proceedings.

There is a dearth of Florida case law dealing with the issues presented in *Davis*. The landmark case in this area is *Potvin v. Keller*[26] which is factually similar to *Davis*. In *Potvin*, the parents requested that HRS take temporary custody of their child. Like Mrs. Davis, the parents later attempted to regain custody by filing a writ of habeas corpus. The Potvins maintained that, in violation of the ninth and fourteenth amendments of the Constitution, they were not informed of their right to be represented by counsel and of their right to have counsel appointed if indigent. The trial court dismissed the writ.[27]

On appeal, the Third District Court of Appeal and the Supreme Court of Florida affirmed. The supreme court determined that the standards for due process in delinquency proceedings are not the same as those mandated in all other types of juvenile proceedings.[28] Accordingly, citing the Ninth Circuit Court of Appeals case of *Cleaver v. Wilcox*,[29] the *Potvin* court held that a case-by-case approach is proper to determine the need for counsel in dependency proceedings.[30]

The approach set forth in *Cleaver* requires a determination of need based on relevant circumstances. These circumstances include: (1) the potential length of parent-child separation; (2) the degree of parental restrictions on visitation; (3) the presence or absence of parental consent; (4) the presence or absence of disputed facts; and (5) the complexity of the proceedings in terms of witnesses and documents.[31] The *Potvin* court held that such an individualized approach satisfies constitutional due process requirements and establishes a sensible set of guidelines for determining whether the absence of counsel at a particular dependency proceeding is inherently unfair.[32]

Three years after the *Potvin* decision, the Florida Supreme Court reaffirmed the adoption of the *Cleaver* case-by-case approach in *Ex*

26. 313 So. 2d 703 (Fla. 1975), *aff'g* 299 So. 2d 149 (Fla. 3d Dist. Ct. App. 1974). In *Potvin*, the parents of a three-year-old child separated. Neither parent was in a position to care for the child. The parents therefore requested that the state provide care for the child, and as a result of that request, the state initiated dependency proceedings. 299 So. 2d at 150.

27. 313 So. 2d at 705.

28. *Id.* at 705-06.

29. 499 F.2d 940 (9th Cir. 1974).

30. 313 So. 2d at 706.

31. 499 F.2d at 945.

32. 313 So. 2d at 706.

rel. Hutchins.[33] The court specifically held that the Federal Constitution does not require the presence of counsel in every dependency proceeding.[34]

The Ninth Circuit Court of Appeals' decision in *Cleaver* is one of the few federal court decisions that addresses the issue of an indigent parent's right to court-appointed counsel in dependency proceedings.[35] In utilizing the case-by-case approach, the *Cleaver* court sought to balance three essential interests: the state's interests in economy, efficiency and informality in dependency proceedings; the society's interest in preserving viable family units; and the parents' interest in not being unfairly deprived of control of his or her child.[36]

Davis rejects the *Cleaver* court's attempts to balance the interests involved and maintains that the potential for interference with the family unit is sufficient to mandate the provision of counsel in all dependency proceedings.[37] The United States Supreme Court, however, in *Mathews v. Eldridge,*[38] has held that there are three distinct factors to consider when attempting to identify the specific elements of due process required to protect fundamental interests. The factors to be considered are: the private interest affected by the official action; the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute safeguards; and the government's interest, considering the type of government function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[39] In effect, consideration of the factors set forth in *Mathews* results in a balancing of interests test similar to that employed by the *Cleaver* court. Both the *Mathews* and the *Cleaver* approach establish broad considerations of policy which must be weighed in making a determination as to the procedural

33. 345 So. 2d 703 (Fla. 1977).

34. *Id.* at 706.

35. The Fifth Circuit Court of Appeals was presented with the issue of procedural due process in *child custody* proceedings relating to divorce in Brown v. Chastain, *appeal denied,* 416 F.2d 1012 (5th Cir. 1969), *cert. denied,* 397 U.S. 951 (1970). The appellate court held that it did not have jurisdiction and, therefore, did not rule on the due process issue. In a strong dissent, Judge Rives put forth the opinion that the court did have jurisdiction due to the gravity of the issues raised. Judge Rives examined the criminal/civil distinction applied in juvenile proceedings and determined that the state's interest in the parent-child relationship removed custody matters from the class of ordinary private civil disputes. *Id.* at 1026-27. Judge Rives concluded that the state's involvement in the family relationship was sufficient to warrant the same protection afforded juveniles in delinquency proceedings. *Id.* at 1027.

36. 499 F.2d at 944-45.

37. 442 F. Supp. at 263. Further, the *Davis* court observes that more parents would be likely to retain custody of their children if represented by counsel. *Id.* at 264. This observation disregards the best interests of the child who is the subject of a dependency proceeding.

38. 424 U.S. 319 (1976).

39. *Id.* at 335.

safeguards required in dependency proceedings.[40]

Although *Davis* rejects the balance of interests test as applied in *Cleaver,* both courts acknowledge that the private interest of family integrity is involved in dependency proceedings.[41] Family integrity encompasses the various rights that the family enjoys as a unit.[42] Although not specifically mentioned in the Bill of Rights, the United States Supreme Court has determined that the right to family integrity is so basic to ordered liberty that it must be accorded the full protection reserved for enumerated rights.[43] Even though both the *Davis* and the *Cleaver* courts consider the fundamental interest of family integrity, they disagree as to the impact this interest must have on a determination of need for counsel in dependency proceedings.

According to *Davis,* procedural safeguards due will vary with the type of the state proceeding and the nature of the right at issue.[44] In determining what process is specifically due in dependency proceedings, however, the *Davis* court states that any final determination must be influenced by the extent to which an individual could be "condemned to suffer a grievous loss."[45] By focusing on the interest of family integrity and applying the "grievous loss" consideration, *Davis* holds that a parent's interest in the care and custody of a child, coupled with the grievous nature of the loss which accompanies interference with that interest, is sufficient to mandate the provision of counsel in dependency proceedings "without further inquiry."[46]

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40. The *Mathews* considerations appear to be an expression of the holding in Gagnon v. Scarpelli, 411 U.S. 788 (1973), where the court stated that the scope and nature of the proceedings in question are an essential element in determining what process is due.

41. 442 F. Supp. at 261-62; 499 F.2d at 945.

42. *See generally* Sutton, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication,* 44 BROOKLYN L. REV. 63, 70 (1977). These rights include: the parents' rights to physical custody of their children, the parents' rights to make decisions concerning their children, the mutual rights of parents and children to one another's care and companionship and to a continuing family heritage, and various and secondary inchoate rights which preserve family ties when the family members are separated from one another. *Id.*

43. This right was first recognized by the Supreme Court in Meyer v. Nebraska, 262 U.S. 390 (1923), where the Court held that "liberty" as set forth in the due process clause "denotes not merely freedom from bodily restraints but also the right . . . to marry, establish a home and *bring up children* . . . ." *Id.* at 399 (emphasis added). *See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944).

44. 442 F. Supp. at 261. *See, e.g.,* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (a military officer's denial to a civilian of access to the site of employment does not violate the due process clause of the fifth amendment).

45. 442 F. Supp. at 261. *Davis* cites the United States Supreme Court case of Goldberg v. Kelly, 397 U.S. 254 (1970), as primary support for this finding.

46. 442 F. Supp. at 263.

Davis fails to recognize that it is the "significant impairment" of a fundamental interest, not merely its "involvement," that leads courts to apply a strict standard in determining what constitutional safeguards are required in a particular situation.[47] While the fundamental interest of family integrity is involved in every dependency proceeding, it does not necessarily follow that this interest is significantly impaired in every type of dependency proceeding. The exact nature of the dependency proceeding and the role of the parties is crucial in determining whether there may be a "significant impairment" of a fundamental interest.[48] The need for counsel at dependency proceedings derives not from the invariable attributes of those hearings, but from the peculiarities of particular cases.[49]

The *Davis* court also promulgates an equal protection argument in favor of counsel at all stages of dependency proceedings.[50] As support for this argument, the *Davis* court cites the United States Supreme Court cases of *Griffin v. Illinois,*[51] *Douglas v. California,*[52] and *Mayer v. City of Chicago.*[53] These cases, however, address equal protection as it applies to an indigent *criminal* defendant's access to the appellate process. As stated by the United States Supreme Court, "*Griffin v. Illinois* and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent *prisoners* with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners."[54]

Davis fails to realize that a criminal trial is an adversary proceeding "with its own unique characteristics," a fact which was acknowledged by the United States Supreme Court in *Gagnon v. Scarpelli.*[55] Instead, the *Davis* court utilizes the criminal/civil analogy in order to support an equal protection argument applicable to dependency proceedings. The court has no justification for the use of such an analogy, however, other than the involvement of the fundamental interest of family integrity in dependency proceedings. Although equal protection is a major factor in the right to counsel in criminal proceedings, that consideration alone is insufficient to uphold a

47. *See, e.g.,* Bell v. Hongisto, 501 F.2d 346, 354 (9th Cir. 1974).

48. The *Cleaver* criteria examines the potential for significant impairment of a fundamental interest by including a consideration of (1) the potential length of parent-child separation, and (2) the degree of parental restrictions on visition. 499 F.2d at 945.

49. *Cf.* Gagon v. Scarpelli, 411 U.S. at 789 (The Court made a clear distinction between criminal trials and other types of proceedings that may come before the court).

50. 442 F. Supp. at 263-64.

51. 351 U.S. 12 (1956).

52. 372 U.S. 353 (1963).

53. 404 U.S. 189 (1971).

54. Britt v. North Carolina, 404 U.S. 226, 227 (1971) (emphasis added).

55. 411 U.S. 778, 789 (1973).

requirement of court-appointed counsel in civil dependency proceedings. This is because the scope and nature of the proceedings, as well as the potential for "significant impairment" of a fundamental interest, must be weighed in determining what constitutional safeguards are required in a particular situation.[56]

There are a variety of situations which come before the juvenile court as dependency proceedings. Upon a showing of probable cause that a child is dependent, HRS may obtain a detention order conferring authority upon the agency to maintain physical custody of the child for a period not to exceed fourteen days.[57] Also, HRS may petition the court to have a child adjudicated dependent and placed in its temporary custody.[58]

Clearly, the most critical type of dependency proceeding is the termination of parental rights.[59] This is a substantial threat to family integrity, as it involves a permanent legal severance of all familial ties between parent and child.[60] Due to the serious consequences of such a proceeding, some states maintain special procedures and require a higher standard of proof than is required in dependency proceedings in which the possible outcome is only a temporary change of custody.[61] Similarly, Florida law attempts to protect family integrity by providing that an initial proceeding to establish dependency may not result in a termination of parental rights.[62]

Even though *Davis* fails to discuss the diversity of Florida dependency proceedings, the nature and character of dependency pro-

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56. *See* Bell v. Hongisto, 501 F.2d 346 (9th Cir. 1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

57. FLA. STAT. § 39.402(6)(a), (7) (1979). A detention hearing may be held while a child is still in the physical custody of his parents, and must be held within 24 hours, excluding Sundays and legal holidays, of the time a child is taken into protective custody. *Id.* at § 39.402(6)(a).

58. FLA. STAT. § 39.409 (1979). Similar procedures were followed when Carl Davis was placed in foster care in January 1976. They are generally followed regardless of whether the parents voluntarily place the child or HRS initiates the procedures pursuant to chapter 39, Florida Statutes. In addition, FLA. STAT. § 39.01(9)(c)-(e) (1979) provides that a dependent child may also be one who "persistently run[s] away from his parents . . . ."; "is habitually truant from school . . . ."; or who "persistently disobey[s] the reasonable and lawful demands of his parents . . . and [is] beyond their control."

59. FLA. STAT. § 39.41(1)(d) (1979).

60. FLA. STAT. § 39.41(4) (1979) provides:

> A permanent order of commitment . . . shall permanently deprive the parents and legal guardian of any right to the child . . . [T]he parents . . . shall not be entitled . . . to knowledge . . . of the whereabouts of the child or of the identity or location of any person having the custody of or having adopted the child . . . .

61. *See, e.g., In re* Sego, 513 P.2d 831 (Wash. 1973). *Cf.* FLA. R. JUV. P. 8.260 (provides special procedures for permanent commitment which are different from the other rules of juvenile procedure).

62. FLA. STAT. § 39.41(3) (1979).

ceedings vary greatly. When both the parents and HRS are in accord, there is no conflict in the courtroom.[63] This casts a questionable light on the *Davis* court's summary appraisal of dependency proceedings as "traditional adversary trial(s)" that are "procedurally analogous to criminal trials."[64]

The United States Supreme Court decision in *Gagnon* is a landmark case in regard to an indigent's right to counsel when a fundamental interest is at stake. Although *Gagnon* addresses the issue of an indigent's right to counsel in a parole revocation hearing, the basic tenets of that decision are applicable to dependency proceedings. In *Gagnon,* the Court held that states are not constitutionally obligated to provide counsel in all cases, and recognized the impossibility of formulating precise guidelines to be followed in determining the need for counsel.[65] Instead, the Court presumed that counsel should be provided in cases where the individual makes claim that he has not committed the alleged violation; or where the violation is uncontested but there are substantial reasons in justification or mitigation that make revocation inappropriate.[66] Interestingly, these presumptions are similar in nature to the *Cleaver* relevant circumstances criteria which include: (1) the presence or absence of parental consent; (2) the presence or absence of disputed facts; and (3) the complexity of the proceedings in terms of witnesses and documents.[67]

Although both *Davis* and *Gagnon* focus on due process and equal protection requirements in determining the right to court-appointed counsel, they reach opposite results. The United States Supreme Court in *Gagnon* could find no justification for an absolute constitutional rule. Rather, the Court held "[t]he decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the . . . system."[68]

Following the *Cleaver* and *Gagnon* rationale, the *Davis* court should have allowed the juvenile court to exercise its discretion in

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63. FLA. STAT. § 39.404(4) (1979) provides, in part:
> When a petition for dependency has been filed and the parents . . . of the child have advised . . . that the truth of the allegations is acknowledged and that no contest is to be made of the adjudication, ... [N]either the state attorney nor an assistant state attorney shall be required to be present at the adjudicatory hearing.

64. 442 F. Supp. at 264.

65. 411 U.S. at 788, 790.

66. *Id.* at 790. The Court also recognized that in doubtful cases, consideration should be given to whether the individual appears capable of speaking effectively for himself. *Id.* at 791.

67. 499 F.2d at 945.

68. 411 U.S. at 790.

determining the need for counsel for indigents who appear before the court as parties to dependency proceedings.

The *Davis* court's application of "critical stages" and "deprivation of a fundamental interest" tests should be replaced by a case-by-case analysis of the need for counsel at the initial stage of a dependency proceeding, *i.e.* the detention hearing. At this hearing, HRS must establish probable cause for dependency in order to detain a child.[69] The facts and circumstances which must be offered in support of probable cause will generally be sufficient to allow the court to make a further finding as to the need for counsel, following an application of *Gagnon* and *Cleaver* criteria. Such a determination at this initial stage will ensure that due process and equal protection are provided at subsequent, more crucial stages of dependency proceedings.

Davis is pending on appeal in the United States Circuit Court of Appeals, Fifth Circuit.[70] The appellants, the judges of the Eleventh Circuit, submit that the court should reject the absolute rule requiring counsel and that the court should affirm the application of the case-by-case inquiry established in *Cleaver* and adopted by the Florida Supreme Court in *Potvin*.[71] If the Fifth Circuit rejects the appellant's arguments and affirms the absolute rule, then a legislative enactment will be necessary to provide the funds needed for court appointed counsel. It has been estimated that in the Eleventh Circuit alone, the cost would exceed one-half million dollars per year.[72]

Additionally, affirmation of the *Davis* rule will serve to change the very nature of dependency proceedings. Traditionally, juvenile court proceedings are more informal than other judicial proceedings, and are governed by separate rules of juvenile procedure.[73] The intent of such informality is to provide an atmosphere conducive to maintaining a workable agency-parent relationship while at the same time providing a legal forum to examine the three interests at

69. FLA. STAT. § 39.402(6)(a) (1979).

70. Brief for Appellant, Chastain v. Davis, *appeal docketed*, No. 78-2063 (5th Cir. May 18, 1978). Although named as a defendant in the original action, HRS is not a party to the present appeal.

71. *Id.* at 23-24.

72. It has been suggested that the costs of court-appointed counsel would be absorbed by the various federally funded legal service agencies that routinely provide counsel for indigents. *But see Ex rel.* Bannon, No. 77-4088D (Fla. Cir. Ct. Dade County Jan. 19, 1979), where the circuit court citing *Davis*, ordered the State to compensate court-appointed attorneys. *Id.* slip op. at 3. The court was of the opinion that if the state initiates dependency proceedings, it must bear the costs of providing constitutionally mandated counsel. Further, the court estimated that fee awards for court-appointed counsel would exceed one-half million dollars per year. *Id.* slip op. at 9-10.

73. *See generally* FLA. R. JUV. P.

stake: that of the parents, the child, and the state. The appointment of counsel at all stages of dependency proceedings will tend to turn dependency proceedings into adversarial contests, *even when the interests of parent, child, and state are not in conflict.*[74]

Undoubtedly, the appointment of counsel in dependency proceedings is vital in some instances.[75] In many situations, however, it will only serve to impede the movement of juvenile court proceedings and place a greater burden upon state finances, without affording any substantial change in the outcome of the proceedings. As noted by the Supreme Court in *Gagnon,* "due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed."[76] A consideration of the fiscal and administrative burdens that additional or substitute procedural requirements will cause is appropriate in determining what constitutes due process in a particular situation.[77] In this case, the fiscal and administrative burdens are such that an absolute rule would seem untenable. For these reasons, the case-by-case analysis, as supported by *Gagnon v. Scarpelli, Cleaver v. Wilcox* and *Potvin v. Keller,* is a more realistic and responsible approach in determining the need for court-appointed counsel for indigent parents in dependency proceedings than is the absolute rule of *Davis.*

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74. Conversely, *Davis* implies that when there is a conflict, the parents' and child's interest will be aligned against the state's interest. 442 F. Supp. at 261-64. The child's best interest, however, is not always the same as the parents' interest. A natural extension of the *Davis* requirement of counsel for parents is a requirement of counsel for children. Because of the effect a dependency adjudication may have on a child's moral, emotional, mental and physical welfare, it is imperative that the child's interests be adequately protected. In an adversarial proceeding, these interests will be most fully protected by appointment of counsel for the child.

75. *See, e.g., Ex rel.* Friez, 208 N.W.2d 259 (Neb. 1973); *In re* Chad S., 580 P.2d 983 (Okla. 1978); Mitchell v. Jamison, 444 P.2d 15 (Ore. 1968); State *ex rel.* Lemaster v. Oakley, 203 S.E.2d 140 (W. Va. 1974).

76. 411 U.S. at 788.

77. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The Supreme Court reiterates "the truism that 'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 334.

** As this issue was being prepared to go to press, the Florida Supreme Court issued an opinion which rejected the holding in *Davis v. Page,* and which substantially comports with this author's views.

On May 16, 1980, the Florida Supreme Court held that, with the exception of termination of parental rights proceedings, the constitutional right to counsel is not conclusive in dependency proceedings. *In re D. B. and D. S.*, No. 56,237 (Fla. May 16, 1980). The court reaffirmed the case-by-case approach as adopted in *Potvin v. Keller*, 313 So. 2d 703 (Fla. 1975), and expressly directed the judiciary to follow the views expressed in *In re D. B. and D. S.*, rather than the views expressed by the United States District Court in *Davis v. Page.*

The court determined that the right to counsel in dependency proceedings is governed by due process considerations, rather than by the sixth amendment right to counsel. Therefore, the extent of procedural due process protection varies with the character and nature of the proceedings involved. The court acknowledged the "distinct and special purposes" of dependency proceedings and determined that the guidelines set forth in *Potvin* adequately safeguard the due process and equal protection rights of parents in such proceedings.