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Infants - Child Neglect Proceeding

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INFANTS—CHILD NEGLECT PROCEEDING—The Court of Appeals of New York has held that an indigent parent faced with loss of a child's society, as well as the possibility of criminal charges, is entitled to assistance of counsel in child neglect proceedings and is required to be advised of such right.

In re Ella R.B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S. 2d 133 (1972).

Jeri B., indigent mother of a three-year-old baby girl, had her child taken away from her by the State of New York after a court decree found the child to be neglected.[1] The court based its decision upon the fact that the mother had left the child alone on the morning of June 21, 1969, and the child was allegedly kidnapped and raped by a friend of the mother.[2] The court did not inform the mother that if she could not afford to be represented by an attorney at the custody hearing a court appointed attorney would be provided.[3] The statute applicable to custody proceedings of this nature did not provide for assigned counsel for indigent parents.[4] The supreme court, appellate division, affirmed, and leave to appeal was granted.[5] The court of appeals reversed the decision of the two lower courts.[6]

The gravamen of the New York court's ruling that an indigent parent is entitled to assistance of counsel in the civil proceeding concerning the possible loss of a child's society, as well as a criminal neglect proceeding, appears to be rooted in a substantive due process theory. This is exemplified by the court's reference to the parent-child relationship as being too fundamental an interest and right to be relinquished to the state without the opportunity for a hearing with assigned counsel if the parent lacks the means to retain a lawyer.[7] Failure by a tribunal to do so, the court expressed, would constitute a violation of due process.[8]

In approaching the problem from a substantive due process theory, the New York court recognized two fundamental rights—the right to

1. *In re* Ella R. B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).
2. *Id.* at 352, 285 N.E.2d at 289, 334 N.Y.S.2d at 135.
3. *Id.*
4. Law of Sept. 1, 1962, ch. 686, § 343 (repealed 1970), *as amended*, N.Y. FAMILY CT. ACT § 962 (McKinney 1970).
5. 30 N.Y. 2d at 352, 285 N.E.2d at 288, 334 N.Y.S.2d at 133.
6. *Id.* at 352, 285 N.E.2d at 288, 334 N.Y.S.2d at 133-34.
7. *Id.* at 353, 285 N.E.2d at 290, 334 N.Y.S.2d at 136.
8. *Id.*

maintain the family unit, and the right to counsel. As to the fundamental right of the family unit, the New York court relied on a coterie of cases, covering many years, that considered the family unit or parent-child relationship to be a fundamental interest protected from unconstitutional state intrusion by the due process clause of the fourteenth amendment. The New York court took note of the United States Supreme Court decision, *Stanley v. Illinois*.[9] In *Stanley*, pursuant to an Illinois state statute, an unwed father's children were declared wards of the state upon the death of the mother without any hearing as to his fitness as a parent.[10] In holding the statute unconstitutional, the Court emphasized the importance of the family unit and the right to conceive and raise one's children as an essential, basic civil right of man.[11]

Even more germane to the disposition of the instant case was the long line of cases recognizing the fundamental right existing in the family or parent-child relationship that culminated in the *Stanley* decision. The New York court appears to have relied heavily on these cases for the due process approach that they adopted.[12]

The first case of significance in this precedential chain is *Meyer v. Nebraska*.[13] In *Meyer*, a teacher was convicted for teaching a pupil the German language in violation of a Nebraska statute that made teaching of any language other than English prior to the completion of eighth grade a misdemeanor.[14] In determining that the statute as so construed and applied unreasonably infringed upon the liberty guaranteed parents in raising their children, the Court held that liberty as protected under the fourteenth amendment not only protects freedom from bodily restraint, but the right to marry, to establish a home, and to bring up children.[15]

The existence of the fundamental right to a family relationship was extended in the Supreme Court decision, *Pierce v. Society of Sisters of*

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9. Stanley v. Illinois, 405 U.S. 645 (1972).
10. *Id.*
11. The Court in *Stanley* also stated:
It is cardinal with us that custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . .
Id. at 651.
12. 30 N.Y.2d at 353, 285 N.E.2d at 290, 334 N.Y.S.2d at 136.
13. Meyer v. Nebraska, 262 U.S. 390 (1923).
14. *Id.* at 397.
15. *Id.* at 399.

the Holy Names of Jesus & Mary.[16] The Court, in *Pierce*, struck down an Oregon statute that compelled all children between the ages of eight and sixteen to attend public schools.[17] The reason for holding the statute unconstitutional was that it violated the fourteenth amendment by usurping the fundamental right and duty in the parent to direct a child's destiny and prepare him for future obligations.[18] The substantive due process line of cases in this legal milieu was augmented by a series of decisions in the 1940's and 1950's.[19]

The theory that familial relationships are so fundamental that they fall under the penumbra of substantive due process rights guaranteed by the fourteenth amendment reached its apex of current acceptance in *Griswold v. Connecticut*.[20] The theory behind *Griswold* became the core of the *Stanley* case used by the New York court. The plaintiffs in *Griswold* were the executive director of the Planned Parenthood League of Connecticut and a licensed physician for the league who were convicted of violating a Connecticut statute that proscribed the dissemination of contraceptive information and materials.[21] The plaintiffs appealed their conviction on the grounds that the Connecticut law forbidding the use of contraceptives intrudes upon the right of marital privacy.[22] In holding the statute unconstitutional, the Court declared that the case concerned a relationship lying within the zone of privacy created by several fundamental constitutional guarantees, and that this relationship could not be regulated by an overly broad statute that invaded these protected freedoms.[23]

It was after the determination by the court that the issue in the case at bar involved a threat to such a fundamental interest, that the court focused on the issue of how to protect this fundamental right involved

16. 268 U.S. 510 (1925).
17. *Id.* at 530.
18. *Id.* at 535.
19. *See* Skinner v. Oklahoma, 316 U.S. 535, 540 (1942). In striking down a statute that allowed for sterilization of individuals convicted of felonies two or more times as unconstitutionally vague, the Court stated: "[w]e are dealing here with legislation that involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race . . . ." *Id.* at 541. *See also* May v. Anderson, 345 U.S. 528, 533 (1953); Prince v. Massachusetts, 312 U.S. 158 (1944).
20. Griswold v. Connecticut, 381 U.S. 479 (1965).
21. *Id.* at 480.
22. *Id.* at 479.
23. *Id.* at 485. Justice Goldberg stated,
> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.

Id. at 486.

in a civil proceeding.[24] The prophylactic against government intrusion was the finding that a constitutional right exists to have appointed counsel in a civil proceeding that could result in the loss of a child's society.[25]

The court cited *Cleaver v. Wilcox*[26] and *Boddie v. Connecticut*[27] for the proposition that it did not matter whether the proceeding is labeled civil or criminal, it is a denial of due process to remove the child of an indigent parent without the right of counsel because of the fundamental interest that exists between child and parent.[28] The *Boddie* case dealt with a class action brought on behalf of women in Connecticut receiving state welfare assistance and desiring to obtain divorces, but who were barred by their inability to pay the required court costs.[29] The statute was held to be unconstitutional for it precluded access to the courts for the purpose of dissolving the marital relationship.[30] In both cases the respective proceedings were civil.

History is not as replete with cases requiring the right to counsel in civil proceedings as it is with cases respecting the fundamental rights involved in the family unit. The few American cases dealing with the right to counsel have revolved around the constitutional interpretation of the sixth amendment's right to counsel in criminal prosecutions.

The importance of counsel in civil litigation was recognized early in English legal history.[31] Recorded pleadings from the late thirteenth and early fourteenth centuries, in which suitors informed the court that they were too poor to afford lawyers and prayed assistance, fairly demonstrate that counsel were assigned to plead the causes of people too poor to pay any fees.[32] This procedure was codified in England by a statute of Henry VII which provided for assigned attorneys to prepare and handle cases for indigent parties.[33]

The lethargic evolution of the right to counsel in civil cases in the United States is readily explicable when one contrasts the English and

24. 30 N.Y.2d at 353, 285 N.E.2d at 290, 334 N.Y.S.2d at 136.
25. *Id.*
26. 40 U.S.L.W. 2658 (D.N. Cal. Mar. 22, 1972). The *Wilcox* case involved a class action brought by the mother of a minor child who was found to be a dependent child of the court, in a civil proceeding without the benefit of counsel for the mother.
27. 401 U.S. 371 (1971).
28. 30 N.Y.2d at 353, 285 N.E.2d at 290, 334 N.Y.S.2d at 136.
29. 401 U.S. at 372.
30. *Id.* at 383.
31. Hisey, *Right to Counsel in Civil Matters*, 31 N.L.A.D.A. BRIEFCASE 302 (1972) [hereinafter cited as Hisey].
32. Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966).
33. Hisey, *supra* note 31, at 303.

American legal systems. The need for attorneys in England developed from the myriad of rigid and technical rules indigenous to English society.[34] The American legal system was characterized by a departure from the settled principles of common law, and a concentration on the equitable considerations involved.[35] Thus, the simplicity of the American legal system in the early seventeenth century obviated a need for a trained bar, and failed to provide the initial framework for a right to counsel in civil litigation.[36] Therefore, the grounds for such a right must be gleaned from the blend of the development and ramifications of the right to counsel in criminal prosecutions and the inherent rights embodied in the due process clause of the fourteenth amendment.[37]

The Supreme Court, in *Powell v. Alabama*,[38] held that the aid of counsel was encompassed within those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[39] The case concerned an illiterate, indigent Black who was not afforded the right to counsel in a capital case.[40] The importance of a right to counsel in a civil, as well as criminal proceeding, has greater significance when it is kept in mind that *Powell*, the first right to counsel case ajudicated, suggested that the right to counsel may exist in civil cases, too.

It cannot be denied that the requisites of procedural due process—notice and a fair hearing—are just as essential to civil proceedings as they are to criminal.[41] In *Hovey v. Elliot*,[42] the Court held that a civil litigant may not be deprived of an opportunity to be heard.[43] The importance of the right to be heard as a substantive right under the triumverate penumbra of life, liberty, and property was reinforced by a line of recent judicial decisions.[44]

The logical nexus between the right to be heard and the litigation process is the right to counsel. As the Court noted in the criminal case,

34. Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1328 (1966).
35. *Id.*
36. *Id.*
37. Hisey, *supra* note 31, at 303.
38. Powell v. Alabama, 287 U.S. 55 (1932).
39. *Id.* at 67. The Court continued: "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." *Id.* at 69.
40. 287 U.S. at 50.
41. Hisey, *supra* note 31, at 304.
42. 167 U.S. 409 (1897).
43. *Id.* at 414.
44. *See also* Fuentes v. Shevin, 407 U.S. 67 (1972); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); *In re* Walsh, 64 Misc. 2d 293, 315 N.Y.S.2d 59 (Family Ct. 1970).

Powell v. Alabama, the right to be heard would in many cases be of little avail if it did not comprehend the right to be heard by counsel.[45]

A further examination of the right to counsel in criminal cases indicates that courts have strenuously recognized the need for counsel not only to enable the litigant to be effectively heard, but also because of the morass of intricate and complex legal technicalities that any litigant is faced with.[46] In *Powell*, the Court noted that the plight of the untrained layman, to whom the court system would seem complex, would be unbearable without the aid of counsel.[47] The inability of the unskilled litigant to prepare his pleadings, to conduct an adequate investigation and discovery, and to blend the use of precedent and logic into a coherent attack is no less intricate in most civil litigation.[48] The Supreme Court, in *Brotherhood of Railroad Trainmen v. Virginia*,[49] declared that a layman cannot be expected to know how to protect his rights when dealing with practiced and carefully counseled adversaries.[50] The *Trainmen* case dealt with a group of railroad workers who would advise injured workers to obtain legal advice from certain recommended attorneys, and the Virginia State Bar's attempt to enjoin such practice urging that it constituted the solicitation of legal business, an unethical course of conduct.[51] While the civil litigant is not faced with the same omnipotence of his opponent as a defendant in a criminal prosecution,[52] the injuries resulting from such a proceeding can be just as devastating.[53]

Finally, an analysis of history shows that the right to appointed counsel is necessitated by the possible gravity of consequences[54]—restriction of freedom in criminal prosecutions, and loss of life, liberty, and property without due process of law in civil litigation.[55] The severity of the penalty or final judicial outcome bears a strong relationship to the scope of due process protections. The potential disadvantages accruing to the litigant in a civil proceeding demand great considera-

45. 287 U.S. at 69.
46. Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1331 (1966).
47. 287 U.S. at 69.
48. Hisey, *supra* note 31, at 304.
49. 377 U.S. 1 (1964).
50. *Id.* at 7.
51. *Id.* at 2.
52. Gideon v. Wainwright, 372 U.S. 335 (1963). The Court noted that the adversarial system is such that governments, both state and federal, properly spend vast sums of money to establish machinery to try defendants accused of crime. *Id.* at 344.
53. Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1332 (1966).
54. *Id.*
55. *Id.*

tion.[56] The resolution of civil cases concerning domestic problems,[57] divorce suits,[58] and commitment to mental institutions[59] can result in a severe invasion of the substantive rights encompassed by the due process clause of the fourteenth amendment.

The New York court, in blending the relevant precedent concerning the substantive and fundamental rights revolving around the familial unit with the right to counsel, reached a just result in the instant case and has perhaps made a significant step in the direction of guaranteeing counsel to individuals in civil proceedings no matter what right is involved. Common sense dictates the holding in this case for no one would argue that the relationship between parent and child is so trivial as to permit a state to terminate a child's society in a one-sided proceeding. But, what fundamental rights the courts will look to when an indigent defendant in a torts action demands that an attorney should be provided for him pursuant to the due process clause of the fourteenth amendment, or in an action to defend a suit brought by a creditor as a result of the complicated standard form contract that the indigent ignorantly entered into is not clear. It is hoped that the step taken by the New York court will promote the type of concern necessary to establish a constitutional right to appointed counsel in any type of civil proceeding in which such substantive rights as property interests, be it contract or tort, familial interests, such as neglect and divorce proceedings, or rights of similar grave importance are involved.

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56. *Id.*
57. *In re* Walsh, 64 Misc. 2d 293, 315 N.Y.S.2d 59 (Family Ct. 1970).
58. 401 U.S. at 371.
59. Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1332 (1966). *See also* Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).