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Right To Appointed Counsel: The Outer Limits. Davis v. Page

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Abstract

Abandoned, abused, neglected, surrendered, run-away, truant, and uncontrollably disobedient children in Florida are neatly categorized by the law as “dependent.”

KEYWORDS: appointed, counsel, limits

Right To Appointed Counsel: The Outer Limits. Davis v. Page

Abandoned, abused, neglected, surrendered, run-away, truant, and uncontrollably disobedient children in Florida are neatly categorized by the law as "dependent."[1] Dependency proceedings are diverse and complex attempts by the court to

> delicately balance a number of conflicting claims: the need to protect the health, safety and welfare of the child; the right of the parent to have custody of and to care for the child; and the state's sometimes conflicting interest in protecting both the family unit and the best interest of the child.[2]

This comment examines whether due process, under the fourteenth amendment to the United States Constitution, requires the provision of court-appointed counsel to protect the interest of indigent parents in all Florida dependency proceedings.[3]

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1. FLA. STAT. § 39.01(9) (1979) reads in full as follows:
(9) "Child who is found to be dependent" means a child who, pursuant to this chapter, is found by the court:
(a) To have been abandoned, abused, or neglected by his parents or other custodians.
(b) To have been surrendered to the department or a licensed child-placing agency for purpose of adoption.
(c) To have persistently run away from his parents or legal guardian.
(d) To be habitually truant from school while being subject to compulsory school attendance.
(e) To have persistently disobeyed the reasonable and lawful demands of his parents or other legal custodians and to be beyond their control.

2. Bell, *Dependency Law In Florida,* 53 FLA. B.J. 652 (1979).

3. The conjunctive issue of the source for payment of fees for court-appointed counsel was treated in detail by the Florida Supreme Court which determined a formula recognizing both "[t]he common law obligation of the profession to represent the poor without compensation . . [and the government's] obligation to provide legal representation when such appointment is required by the constitution . " In the Interest of D.B., 385 So. 2d 83, 92 (Fla. 1980).

Decisions of the United States courts on the right to counsel are not in accord. Recently, in a closely divided opinion, the United States Court of Appeals for the Fifth Circuit, sitting *en banc* in the case of *Davis v. Page*,[4] recognized an absolute right to counsel for indigent parents in all dependency proceedings.[5] The Ninth Circuit has, however, recognized only a qualified right to counsel, adopting a case-by-case approach.[6]

At the time the federal court decided *Davis,* the only Florida Supreme Court decision on point had applied the case-by-case approach under the rationale of the Ninth Circuit.[7] Directing the judges of Florida's Eleventh Judicial Circuit (Dade County, Florida) to follow the absolute rule, the federal district court had repudiated the reasoning of both the Ninth Circuit and the Florida Supreme Court.[8] Less than six months later came the Florida Supreme Court's reply. Expressly rejecting the federal district court's *Davis* decision, the Supreme Court of Florida explicitly instructed the judiciary of the state (with the exception of the Eleventh Circuit) to utilize the case-by-case approach.[9] A second major issue was thus raised by the Fifth Circuit's panel opinion: whether it was an abuse of the federal courts' discretion to hear the *Davis* case in the first place, since "it would have been more prudent to leave the ultimate disposition of this case to the Florida State courts."[10]

DAVIS V. PAGE: BACKGROUND

Hilary Davis spent the night of January 30, 1976 in the hospital with her fourteen-month-old son, Carl Thor Davis, who was suffering

4. No. 78-2063 (5th Cir. Mar. 23, 1981) (13-11 decision), *aff'g* 618 F.2d 374 (5th Cir. 1980), *aff'g* 422 F. Supp. 258 (S.D. Fla. 1977).

5. Other federal district court cases which have recognized an absolute right to counsel are: Smith v. Edmiston, 431 F. Supp. 941 (W.D. Tenn. 1977) and United States *ex rel.* Reed v. Tinder, No. 75-0454 (S.D. W. Va. 1975).

6. Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974).

7. Potvin v. Keller, 313 So. 2d 703 (Fla. 1975).

8. 442 F. Supp. 258 (S.D. Fla. 1977).

9. 385 So. 2d at 95. It is noted in this opinion that the Dade County judges had responded to the *Davis* district court decision by appointing counsel not only for indigent parents but for the indigent child as well, "whose interests may be adverse to the desires of his parents and the State . . . in order to protect the interest [sic] of the child." *Id.* at 88-89.

10. 618 F.2d at 387 (partially dissenting opinion).

from a broken arm. Carl's arm had been fractured as a result of a beating by his father.[11] After she turned to the state for assistance, the Florida Department of Health and Rehabilitative Services initiated a dependency proceeding to obtain custody of the child. The facts surrounding Hilary Davis' initial involvement with the State Department of Health and Rehabilitative Services, leading up to the initiation of formal dependency proceedings, are in dispute.[12]

Custody of the child was granted to the Florida Department of Health and Rehabilitative Services at a "detention hearing"[13] held in the Dade County Circuit Court, Family Division, on February 4, 1976.[14] Custody of the child had been awarded to the state on a temporary basis, pending the "adjudicatory hearing"[15] scheduled to take

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11. 442 F. Supp. at 260.

12. According to the court records, Mrs. Davis voluntarily sought foster care placement for her son to assure that he would be cared for while she relocated and obtained work. Mrs. Davis' attorneys, however, contend that a hospital staff member initiated contact with the State Department of Health and Rehabilitative Services by filing a child abuse report with that agency. Relying on this report, agency representatives decided that the child should be removed from the custody of his parents. Case Note, *Juvenile Dependency Proceedings - Critical Analysis Used In Criminal Proceedings Governs Timing Of Right To Counsel In Child Dependency Proceedings (Davis v. Page, S.D. Fla. 1977)*, 8 FLA. ST. U.L. REV. 99 (1980).

It is possible that this factual dispute may have arisen from either the social worker's misunderstanding the nature of the type of assistance Hilary Davis was requesting, or the social worker's unwillingness to accept, without further investigation, the claim that it was the child's father, rather than Hilary Davis herself, who beat and injured the infant.

13. Ch. 75-48, § 15, 1975 Fla. Laws 85 (current version at FLA. STAT. § 39.01(15) (1979)) reads in full: " '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. . . ."

14. 618 F.2d at 375.

15. Ch. 75-48, § 15, 1975 Fla. Laws 85 (current version at FLA. STAT. § 39.01(3) (1979)) reads in full: " '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."

The adjudicatory hearing is a formal court proceeding conducted by the judge without a jury. The Florida Rules of Juvenile Procedure and the rules of evidence used in civil cases are applied. FLA. STAT. § 39.09(1)(b) (1975) (current version at FLA.

place on March 4, 1976. Thus, Carl Davis was released by the hospital, not to his mother, but to the State of Florida.

Mrs. Davis appeared at the February 4, 1976 detention hearing without an attorney. It is undisputed that she was indigent at that time. The judge did not offer to appoint an attorney on that date, but he did advise her to have counsel present at the adjudicatory hearing set for March 4, 1976. Because of her lack of funds, however, Mrs. Davis was unable to hire an attorney to represent her at the adjudicatory hearing. She made some attempts to obtain a lawyer through Legal Services of Greater Miami, but appeared at the March 4, 1976 hearing without counsel. At that time, Carl was adjudicated dependent and committed to the temporary legal custody of the Florida Department of Health and Rehabilitative Services.[16] Hilary Davis was advised, at the conclusion of the hearing, to contact a lawyer. She was not advised of her right to appeal from the adjudication of dependency.[17]

Two weeks after the expiration of the thirty-day period allowed for filing an appeal to the Florida District Court of Appeal, Mrs. Davis obtained the services of Florida Rural Legal Services, Inc.[18] On May 11, 1976, she filed a Petition for Writ of Habeas Corpus in the Supreme Court of Florida, which was denied by Order on May 18, 1976, without opinion.[19]

On June 24, 1976, a petition was filed by Mrs. Davis for Writ of

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STAT. § 39.408(1)(b) (1979)).

16. When a child is adjudicated dependent, the court may place him under protective supervision in his own home, commit him to a licensed child-caring agency, commit him to the temporary legal custody of the state, or under specified circumstances, permanently commit the child to the Department of Health and Rehabilitative Services or a licensed agency to receive the child for subsequent adoption. OFFICE OF EVALUATION, FLA. DEP'T OF HEALTH AND REHABILITATIVE SERVICES, AN EVALUATION OF FLORIDA'S CHILD WELFARE SERVICES (1979).

When the child is committed to the temporary legal custody of the state, the commitment continues until terminated by the court, which may be done at any time, or until the child reaches the age of eighteen years. Ch. 75-48, § 16, 1975 Fla. Laws 104 (current version at FLA. STAT. § 39.41(4), (6) (1979)).

17. 442 F. Supp. at 261.

18. Supplemental Brief for Plaintiff-Appellee at 13, Davis v. Page, 618 F.2d 374 (5th Cir. 1980). Mrs. Davis' attorney certified therein that he was retained by Hilary Davis on April 19, 1976.

19. *Id.*

Habeas Corpus and Complaint seeking declaratory and injunctive relief in addition to class action status in the United States District Court for the Southern District of Florida.[20] On December 22, 1976, Mrs. Davis' motion for class action status was granted by the district court.[21] Subsequent to filing her petition and complaint in federal court, Mrs. Davis filed a petition in the Dade County Circuit Court seeking the return of custody of her son. Her petition was granted and the court returned custody to Mrs. Davis,[22] subject to continuing supervision of the Department of Health and Rehabilitative Services and the continuing jurisdiction of the Dade County Circuit Court.[23]

The federal district court concluded that there is an absolute right to counsel for indigent parents in dependency proceedings in Florida.[24] Defendants in the federal district court action (the Florida judges of the Eleventh Judicial Circuit) appealed the district court's decision, and on June 6, 1980, the United States Fifth Circuit Court of Appeals affirmed the decision.[25] On March 23, 1981, this decision was affirmed by the Fifth Circuit sitting *en banc*.[26]

RIGHT TO COUNSEL IN DEPENDENCY HEARINGS

Due process, as accorded by the fourteenth amendment, is the basis upon which the Fifth Circuit rested its holding. To determine whether due process requirements applied, the court looked "not to the 'weight' but to the *nature* of the interest at stake . . . to see if the interest [was] within the Fourteenth Amendment's protection of liberty and property."[27] The right to family integrity as a fundamental right is

20. Supplemental Brief for Appellants at 3, Davis v. Page, 618 F.2d 374 (5th Cir. 1980).

21. Pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, the class was defined as "all indigent persons who have been or may be defendants in dependency and neglect proceedings in the Juvenile and Family Division of Dade County Circuit Court, without being afforded the right to counsel at state expense and without being advised of their right of counsel." *Id.* at 4, citing Record on Appeal at 124-28.

22. Supplemental Brief for Appellants at 3-4, 618 F.2d 374 (5th Cir. 1980).

23. Supplemental Brief for Plaintiff-Appellee at 49, 618 F.2d 374 (5th Cir. 1980).

24. 442 F. Supp. 258 (S.D. Fla. 1977).

25. 618 F.2d 374 (5th Cir. 1980).

26. Davis v. Page, No. 78-2063 (5th Cir. Mar. 23, 1981).

27. 618 F.2d at 378 (emphasis in the original) (restated in Davis v. Page, No.

well established[28] and was not at issue in the clash between the federal judiciary and the Florida Supreme Court. Rather, at issue was the proper method to employ to adequately safeguard that fundamental right. The Florida Supreme Court, subsequent to the district court's decision in *Davis,* reaffirmed its own recognition of a "constitutionally protected interest in preserving the family unit and [in] raising one's children."[29] However, the court also indicated that "[t]he extent of procedural due process protections varies with the character of the interest and nature of the *proceeding involved.*"[30]

In examining the nature of the proceedings involved in cases in which the United States Supreme Court has established an absolute right to counsel,[31] the Florida Supreme Court concluded that this right

> applies only in criminal cases and flows principally from the sixth amendment right to counsel, applied to the states through the fourteenth amendment, rather than from the fourteenth amendment due process guarantee. Right to counsel in dependency proceedings, on the other hand, is governed by due process considerations, rather than the sixth amendment.[32]

According to the Florida Supreme Court, due process considerations flowing from the fourteenth amendment are adequately safeguarded by application of the criteria adopted by the Ninth Circuit in *Cleaver v. Wilcox,*[33] but rejected by the Fifth Circuit in *Davis v. Page.* The court

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78-2063 (5th Cir. Mar. 23, 1981)).

28. Moore v. East Cleveland, 431 U.S. 494 (1977); Cleveland Bd. of Educ. v. LeFleur, 414 U.S. 632 (1974); Wisconsin v. Yoder, 406 U.S. 205 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); May v. Anderson, 345 U.S. 528 (1953); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

29. 385 So. 2d at 90.

30. *Id.* at 89, citing Morrisey v. Brewer, 408 U.S. 471 (1972) (emphasis added).

31. Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel in a capital case); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel for serious noncapital offenses); In re Gault, 387 U.S. 1 (1967) (right to counsel for juveniles in juvenile delinquency proceedings where the issue is commitment of the juvenile for criminal conduct); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel for petit offenses whenever imprisonment could be imposed).

32. 385 So. 2d at 89.

33. 499 F.2d 940 (9th Cir. 1974).

expressly affirmed the use of these criteria on a case-by-case basis in its landmark decision of *Potvin v. Keller.*[34] It recently reaffirmed its position in *In the Interest of D.B.*, decided subsequent to the district court's decision in *Davis.* The Florida Supreme Court, however, expressed partial agreement with the *Davis* decision in *In the Interest of D.B.*, indicating that to meet due process considerations counsel is "always required in proceedings where *permanent* termination of custody might result [or] when the proceedings . . . may lead to criminal abuse charges."[35] Proper application of the *Potvin* test will always require appointment of counsel in these situations, so an absolute rule is not viewed as necessary.[36] In other dependency situations, under the *Cleaver* analysis, due process requirements may be met by the statutory provision for notice and opportunity to be heard.[37] Another Florida case on point prior to *In the Interest of D.B.* reversed an adjudication of dependency on the grounds that the indigent parent was not afforded counsel at the adjudicatory hearing.[38] This decision was reached by a Florida District Court of Appeal, utilizing the *Potvin* case-by-case approach.[39]

Examining the nature of dependency proceedings in Florida, the Fifth Circuit concluded that the case-by-case approach is "unworkable."[40] The court based this holding upon an analysis of a dependency

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34. 313 So. 2d at 706 (footnotes omitted). The criteria include:
(i) the potential length of parent-child separation,
(ii) the degree of parental restrictions on visitation,
(iii) the presence or absence of parental consent,
(iv) the presence or absence of disputed facts, and
(v) the complexity of the proceeding in terms of witnesses and documents.
The *Cleaver* criteria not only comport with constitutional due process requirements, they offer a sensible set of guidelines for determining the inherent unfairness of a custody proceeding.
The Fifth Circuit, in its *en banc* decision rejected these criteria as being, "often unknowable in advance of the proceeding." No. 78-2063, slip op. at 5058.

35. 385 So.2d at 90-91.

36. *Id.* at 90.

37. The essence of due process is the requirement that one in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it. Matthews v. Eldridge, 424 U.S. 319 (1976).

38. In the Interest of R.W.H., 375 So. 2d 321 (Fla. 2d Dist. Ct. App. 1979).

39. *Id.*

40. 618 F.2d at 383.

action as one which is procedurally comparable to a criminal court proceeding. The court started by noting that the United States Supreme Court rejected the case-by-case rule of *Betts v. Brady*[41] in its landmark decision, *Gideon v. Wainwright,*[42] which established the absolute right of indigent criminal defendants threatened with imprisonment to appointed counsel.[43] From *Gideon,* the Supreme Court found an absolute right to counsel for indigent juveniles faced with delinquency proceedings in the case of *In re Gault.*[44] The Fifth Circuit, recognizing the potentially serious consequences to the parent, held that the indigent parent involved in a dependency proceeding stands in virtually the same position as the indigent juvenile faced with a delinquency proceeding.[45] The court concluded that the parent in this situation "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[46]

Does the parent in a dependency hearing, who is not referred to as a "defendant," require a defense? "As a practical matter . . . the state through the Department of Health and Rehabilitative Services *accuses* the parent of abuse or neglect of a child."[47] However, the language from *Gault* may not be as broad as interpreted by the Fifth Circuit. *Gault* continues: "[t]he *child* 'requires the guiding hand of counsel at every step in the proceedings *against* him.' "[48] This language appears to emphasize the formal accusations lodged against the juvenile defendant. The Supreme Court in *Gault* quoted from its decision establishing an absolute right to appointed counsel for an indigent defendant in a *capital* case.[49] The *Gault* Court stressed heavily the fact that a juvenile in a delinquency hearing, like an adult in a criminal prosecution, is

41. 316 U.S. 455 (1942).
42. 372 U.S. 335 (1963).
43. 618 F.2d at 384.
44. 387 U.S. 1 (1967).
45. 618 F.2d at 381.
46. *Id.*, citing 387 U.S. at 36.
47. CONTINUING LEGAL EDUCATION COMMITTEE, THE FLA. BAR, FLORIDA JUVENILE LAW AND PRACTICE 218 (1979-80)(emphasis added). *See* note 1 *supra*, demonstrating that the parent is not always the accused in a Florida dependency action.
48. 387 U.S. at 36, citing Powell v. Alabama, 287 U.S. at 69 (emphasis added).
49. *Id.*

confronted with the "awesome prospect of incarceration."[50]

In a partially dissenting opinion, Judge John R. Brown of the Fifth Circuit pointed out that "[e]very case on which the majority . . . [relied] in support of its holding of an absolute right to counsel for parents in a child dependency proceeding, is a criminal case involving the sixth amendment, or at least involving the potential confinement of the person to whom the absolute right is granted."[51] Judge Brown reflects the position of the Florida Supreme Court that the right to counsel in a dependency hearing flows, not from the sixth, but from the fourteenth amendment, and is therefore a right of different constitutional dimensions.

A criminal defendant's right involves his protection of his own liberty; a parent's right in a dependency proceeding involves maintaining custody of his child. In the latter case, it is the child's best interest which is paramount. A dependency proceeding, unlike a delinquency proceeding, is not *against* the child. To the contrary, Samuel P. Bell, majority leader of the Florida House of Representatives, stated, "[b]roadly defined, the 'delinquent' is a child who has committed an act in violation of the law; the 'dependent' is the innocent victim of actions or conditions over which he has little or no control."[52] A dependency hearing is against neither parent nor child, rather, it is *for* the child. Bell indicates that the attorney representing a parent in a dependency action must be cautious because "[t]he natural tendency is to want to represent the adult against an agency or professionals who are questioning the adult's behavior, rather than recognizing there is a deep-seated problem with the family or the child."[53]

The Fifth Circuit in *Davis,* however, concentrates on the severe consequences which may flow to the parent after the adjudication of dependency is made. In order to regain custody of the child, the parent must petition the court to return the child through a "disposition hearing."[54] At this hearing, the parent bears the burden of proof to demon-

50. 387 U.S. at 36.

51. 618 F.2d at 388-89. Judge Brown, joined by ten of his colleagues, reiterated this position in a strong dissent in the *en banc* decision.

52. Bell, *supra* note 2, at 652.

53. *Id.* at 658.

54. Ch. 75-48, § 22, 1975 Fla. Laws 108 (current version at FLA. STAT. § 39.408(2) (1979)).

strate that, because of subsequent developments, restoration of custody is in the best interest of the child.[55] The effect of shifting the burden can be disproportionate.[56]

In a recent evaluation of Florida's child welfare services, the Florida Department of Health and Rehabilitative Services found that the mean stay in foster care for dependent children is two years and ten months.[57] Cases were documented in which children had been in foster care for over seventeen years.[58] In over thirty-six percent of the cases examined, children had remained in foster care for more than five years.[59] The effect of an adjudication of dependency can be a commitment of the child to the temporary custody of the state, which continues until terminated by the court, following a disposition hearing, or until the child reaches the age of eighteen years.[60] Since temporary custody may encompass the entire period prior to a child's reaching legal adulthood, *Davis* raises the question of whether a temporary commitment might *always* carry the potential of permanently terminating a parental custody. Viewed in this light, temporary commitment proceedings would always come under the Florida Supreme Court's post-*Davis* rule, requiring appointment of counsel to indigent parents whenever permanent termination of parental rights is threatened.[61]

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55. 618 F.2d at 380.

56. Evidence inadequate to support a finding of dependency may nevertheless be "adequate to support [a] . . . refusal to restore custody," even when the parents demonstrate their fitness, ability, and willingness to properly rear their child. Pendarvis v. State, 104 So. 2d 651, 652 (Fla. 1st Dist. Ct. App. 1958).

57. OFFICE OF EVALUATION, FLA. DEP'T OF HEALTH AND REHABILITATIVE SERVICES, AN EVALUATION OF FLORIDA'S CHILD WELFARE SERVICES (1979).

58. *Id.* at 30-31.

59. *Id.* at 71-73.

60. *See* discussion at note 16 *supra.*

61. 385 So. 2d at 90-91. Thirty-one states now provide an absolute right to court-appointed counsel for indigent parents in juvenile dependency hearings. They are as follows: ALA. CODE § 15-63(b) (1977); ARIZ. REV. STAT. ANN. § 8-225 (1974); CAL. CIV. CODE § 237-.5 (West 1971); GA. CODE ANN. §§ 24A-1701(d), 24A-2001(a) (1976); HAWAII REV. STAT. § 802-1 (1976); IDAHO CODE §§ 16-1606(c), 16-1608 (1979); ILL. REV. STAT. ch. 37, § 701-20(1) (1975); IND. CODE § 34-1-1-3 (1973); IOWA CODE § 232.28 (1969); ME. REV. STAT. ANN. tit. 22, § 3792 (1980); MD. CTS. & JUD. PROC. CODE § 3-821 (1980); MASS. GEN. LAWS ANN. ch. 119, § 29 (West 1969); MINN. STAT. ANN. § 260.155(2) (1971); NEB. REV. STAT. § 43.205.06 (1978); N.H. REV. STAT. ANN. § 604A-1 (1974); N.J. STAT. ANN. § 9:6-8.43 (West 1976);

THE JURISDICTION QUESTION: SHOULD THE ISSUE BE RESOLVED BY FLORIDA COURTS OR BY FEDERAL COURTS?

Hilary Davis was not advised by the Dade County Circuit Court of her right to appeal the adjudication of her child's dependency under Florida law.[62] She did not obtain the services of an attorney until the expiration date for filing a state appeal had passed.[63] Her petition for habeas corpus to the Florida Supreme Court was denied.[64] At that point, she had exhausted her state remedies and consequently, sought federal habeas corpus relief.

Whether the federal district court abused its discretion in adjudicating Mrs. Davis' claim is an issue raised by Judge John R. Brown of the Fifth Circuit in his partially dissenting opinion.[65] The Dade County judges in their supplemental brief for the rehearing en banc, argued that although no particular petition was before the state court at the time Mrs. Davis filed her federal action, the jurisdiction of the state circuit court had been invoked and was continuing.[66] Therefore, arguably, she had not exhausted state remedies. In fact, acting upon a petition subsequently filed by Mrs. Davis, the state circuit court returned custody of her child to her,[67] exercising its continuing jurisdiction.[68] In contrast, Mrs. Davis argued that she was properly before the district

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N.M. STAT. ANN. § 32-1-27 (1978); N.Y. FAM. CT. ACT § 1043(a) (McKinney 1975); N.D. CENT. CODE § 27-20-26 (1975); OHIO REV. CODE ANN. § 2151.352 (Page 1976); OKLA. STAT. ANN. tit. 10, § 1109(b) (1966); OR. REV. STAT. § 419-498 (1979); PA. STAT. ANN. tit. 42, § 6337 (Purdon Supp. 1980); R.I. GEN. LAWS § 14-1-31 (1970); S.D. COMP. LAWS ANN. § 26-8-22.2 (1976); UTAH CODE ANN. § 78-3a-35 (1978); VA. CODE § 16.1-266(c)(2) (Supp. 1980); WIS. STAT. ANN. § 48.25(6) (West Supp. 1978); Smith v. Edminston, 431 F. Supp. 941 (W.D. Tenn. 1977); In re Myricks, 85 Wash. 252, 533 P.2d 841 (1975); State *ex rel.* Lemaster v. Oakley, 157 W. Va. 590, 203 S.E. 2d 140 (1974).

62. 442 F. Supp. at 261.

63. *See* Supplemental Brief for Plaintiff-Appellee at 13, Davis v. Page, 618 F.2d 374 (5th Cir. 1980). Mrs. Davis' attorney certified therein that he was retained by Hilary Davis on April 19, 1976.

64. *Id.*

65. 618 F.2d at 387-89.

66. Supplemental Brief for Appellants at 39, 618 F.2d 374 (5th Cir. 1980).

67. *Id.* at 3-4.

68. *See* Supplemental Brief for Plaintiff-Appellee at 49, 618 F.2d 374 (5th Cir. 1980).

court, having satisfied the requirements of *Younger v. Harris*[69] and *Moore v. Sims*,[70] since there were adjudicatory proceedings pending.

The jurisdiction question was dealt with by the Fifth Circuit Court of Appeals in its rehearing of the case en banc. A bare majority acknowledged the propriety of federal habeas corpus jurisdiction in the case.[71]

CONCLUSION

The Florida Supreme Court's rule (based on the Ninth Circuit's case-by-case approach) has now been declared unconstitutional by the Fifth Circuit Court of Appeals. Judicial fireworks may yet be anticipated in view of the split which now exists between the Ninth Circuit, which maintains the case-by-case approach, and the Fifth Circuit's absolute rule.

As noted in the beginning of this comment, Florida law classifies a great many different types of children as "dependent." This complicates the question of whether the indigent parents of a child involved in dependency proceedings should always, or only under certain circumstances, be granted the right to court-appointed counsel. For example, a child may have been abandoned by the parents, or may find himself presented to the court by his parents, who charge that he is "ungovernable" in that he persistently disobeys their reasonable and lawful demands.[72] In these situations, should the state pay for the parent's attorney? Certainly there are dependency situations in which the child needs legal counsel at least as much as the parent, such as the case of alleged parental abuse. In dependency proceedings, there are always three interests: the child, the parent, and the state. These interests may align and realign in various permutations, particularly according to the category of dependency involved. To achieve fairness of all parties, a rule should be adopted with sufficient flexibility to adequately protect each interest within the context of each dependency situation. How-

69. 401 U.S. 37 (1971).

70. 442 U.S. 415 (1979), extending the *Younger* doctrine to matters involving child custody.

71. No. 78-2063 (5th Cir. Mar. 23, 1981).

72. FLA. STAT. §39.01(9)(e) (1979). Regardless of the category involved, an adjudication of dependency can result in loss of parental custody. *See* note 16 *supra*.

ever, in the adoption of such a rule, the protection of the child's best interests must not be sacrificed out of concern for the rights of his parents.

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