

INDIANA NEGLECT PROCEEDINGS: THE NEGLECTED RIGHT TO COUNSEL

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Following a divorce, a father was awarded custody of his child with visitation rights to the mother. During the time the child was visiting the mother, the child was found to be neglected. At the subsequent dispositional hearing, the father promised to care for the child and not leave the child alone with the mother. Nevertheless, the trial court terminated the father's parental rights so that "we will not have a repeat of what we have already seen."¹ Fortunately, this father was able to afford counsel, appeal the holding, and obtain an appellate court reversal requiring the trial court to make a "less severe" disposition.²

In Indiana, an indigent parent faced with a similar situation would not be as fortunate. Unlike many other states,³ Indiana presently provides no right to counsel or appointed counsel for any of the parties to a neglect hearing. Consequently, a neglect proceeding may be brought by the state upon an allegation that the child (1) has not proper parental care or guardianship, (2) is destitute, homeless, or abandoned, (3) habitually begs or receives alms, (4) may be living in an improper place, or (5) is in an environment dangerous to life, limb, health or morals,⁴ and a disposition entered by the court ranging from placement of the child under supervision in his own home to termination of all parental rights, all without the presence of counsel on behalf of the parent or the child.

Due to the severity of the potential disposition of a neglect case, two fundamental questions arise. First, does the parent and/or child have a constitutional right to counsel, including appointed counsel, at such proceedings? Second, notwithstanding the existence of any constitutional right to counsel, should the legislature provide such a right as a matter of policy? Since fundamental legislative policy considerations are fostered by the same rationale that is used to support constitutional contentions, an examination of the constitutional dimensions of the right to counsel in neglect proceedings provides substantial justification for legislative proposals.

Constitutional Dimensions

It has been well established that the right to counsel is an essential element for a fair criminal trial, even where noncapital cases are involved.⁵ However, the courts have

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1. *People in the Interest of K.S.*, 515 P.2d 130 (1973).
2. *Id.*
3. 36 jurisdictions provide a right to counsel to all parties.
 4 jurisdictions provide a right to counsel to parents only.
 1 jurisdiction provides a right to counsel to the child only.
 25 jurisdictions provide right to appointed counsel to all parties.
 6 jurisdictions provide right to appointed counsel to parents only.
 1 jurisdiction provides right to appointed counsel to child only.
 15 jurisdictions provide right to counsel on appeal.
4. IC. 1971 31-5-7-6.
5. *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

been reluctant to extend this right to civil proceedings. In the leading case of *In re Gault*,⁶ the Supreme Court held that due process requires that a juvenile be given a right to an attorney in a delinquency proceeding even though such a proceeding is technically civil rather than criminal. The court concluded that when a delinquency proceeding may result in a commitment to a state institution, such a hearing must be regarded as "criminal," and to do otherwise would be to disregard substance because of the feeble enticement of the "civil" label of convenience which has been attached to juvenile proceedings. "Commitment is a deprivation of liberty (and) is against one's will, whether it is called criminal or civil."⁷

It would appear then from the language in *Gault* that the substantive effect of the adjudication is more important than the label attached to it, so that due process requirements apply to any situation where one's personal liberty is at stake. Furthermore, the court has for some time recognized that the concept of liberty which enjoys constitutional protection goes far beyond freedom from personal incarceration alone. Rather, the term "liberty" has been defined by the court to include:

... the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *to establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁸

(emphasis added)

Thus, if the right to raise children is fundamental, it is a logical step to conclude that the rationale of *Gault* that applies constitutional safeguards to a "quasi-criminal" proceeding would also require such safeguards to be applied to the neglect proceeding.

Nor is this concept weakened by the fact that *Gault* speaks only of the constitutional rights of the child. Obviously, the only difference between the "commitment" of a juvenile and the "placement" of a neglected child is a semantic one when viewed in terms of the mandatory separation of the parental relationship. In a like manner the underlying criminal characterization of the *Gault* case coupled with the preceding definition of liberty can be extended to cover the position of a parent faced with the possible termination of parental rights. This attitude has been reflected by minority of courts⁹ which have reasoned that it is fundamentally unfair to label a neglect proceeding "civil" and thereby justify the denial of procedural due process to parent-defendants. Rather, any such procedure must comply with the demands of procedural due process. Many of these courts have justified this conclusion in part by citing with approval the language of Justice Black that:

Here the state is employing the judicial mechanism it has created to enforce society's will upon an individual and take away her children. The case by its very nature resembles a criminal prosecution. The defendant is charged with conduct -- failure to care properly for her children -- which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society. And the cost of being unsuccessful is dearly high -- loss of the companionship of one's children.¹⁰

6. 387 U.S. 1 (1967).

7. *Id.* at 49-50.

8. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922).

9. See e.g., *Cleaver v. Wilcox*, 40 U.S.L.W. 2658 (N.D. Cal. 1972); *Friesy v. Caha*, 208 N.W. 2d 259 (Neb. 1973); *Kurtis v. B.* 285 N.E. 2d 288 (N.Y. 1972); *State v. Jamison*, 444 P. 2d 15 (Ore. 1968).

10. *Meitzer v. C. Buck Le Craw & Co.*, 402 U.S. 954, 959 (1971). (Black, J., dissenting).

Having found applicable the requirements of procedural due process to neglect hearings, the courts must then consider whether the right to counsel and appointed counsel are mandated by due process requirements. Several arguments may be made in support of finding the existence of the right to counsel. First, as emphasized in the above statement by Justice Black, the litigants in a neglect proceeding are not engaged in a private dispute, but rather are defendants where the state seeks "to deprive the natural parent of his or her right to care for and control his or her child through an adjudication that the parents' conduct is neglectful, abusive, or otherwise inadequate."¹¹ In this regard, it is interesting to note that the Supreme Court has held that it is a violation of due process to deny indigents access to the courts for failure to pay filing fees in divorce cases when the courts are the only authority which may dissolve marriages --just as the courts are the only authority which may terminate parental rights.¹² Yet the Court, while stating that there are important fundamental liberties associated with the right to marry and raise a family, has thus far failed to extend the rationale in *Boddie* beyond the divorce case.

A second case argument to be made in favor of the right to counsel arises from the imbalance in the quality of representation if counsel is not afforded. How can a parent, without counsel, be expected to adequately defend himself without any experience with procedure, evidence, cross-examination, or other tools of the adversary system? This problem is especially acute in view of the fact that neglect proceedings are most often brought against parents of low income and minimal education.¹³ Therefore, some courts have reasoned that this imbalance of expertise and experience between the parties is an important justification for affording the right to counsel.¹⁴

The third argument in support of the right to counsel stems from the potential for criminal charges to be brought against the parent-defendant. Although only fourteen jurisdictions specify a criminal penalty for neglect, every jurisdiction has common law or statutory criminal penalties for the often raised corollary offense of mistreatment of children. In addition, those jurisdictions having criminal penalties for neglect impose fines ranging from fifty dollars to one thousand dollars and imprisonment from 30 days to 5 years. Since indigent parents would be entitled to the aid of counsel in a criminal proceeding, the same right should be afforded indigent parents at a neglect proceeding to prevent such violations as the unknowing waiver of the privilege against self-incrimination.

A final argument for appointed counsel in neglect proceedings arises from the severity of the penalty which may be assessed. It has been said that "the permanent termination of parental rights is one of the most drastic actions the state can take against its inhabitants."¹⁵ To rationalize such a sanction on the grounds that the state is merely protecting the best interest of the child is to ignore the consequences of this proceeding on the parent. The parent stands to suffer a most grievous loss even without the stigma and hardships of a criminal conviction and consequently the severity of the sanctions available in a neglect proceeding should justify the requirement of appointed counsel.

11. *Cleaver v. Wilcox*, 40 U.S.L.W. 2658 (N.D. Cal. 1972).

12. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

13. *Kay and Phillips*, *Poverty and the Law of Child Custody*, 54 Cal. L. Rev. 717, 734-35 (1966).

14. *State v. Jamison*, 444 P. 2d 15 (Ore. 1968).

15. *Id.*, p. 17.

Although the Supreme Court has not yet directly given its recognition to the indigent parents' right to appointed counsel in neglect proceedings, several lower courts relying on the logic of the above mentioned arguments have clearly enunciated the right to appointed counsel along with the requirements that the parent be informed of this right. In the leading case of *In re Ella B*,¹⁶ a neglect proceeding was brought against the parent-defendant on the allegation that she had left her three year old daughter alone at home, harnessed in a crib, from 1 a.m. to 4 a.m. and during that time the child was allegedly kidnapped and raped by a friend of the mother. At the hearing, the court informed the mother of the contents of the petition, then advised her as follows:

The Court: You may be represented by an attorney in this proceeding, in which case you must obtain one yourself, and pay for him out of your own funds, or you may waive an attorney and either admit or deny the facts in the petition if you want. Do you want an attorney?

Mrs. B: No.

The Court: Do you admit the facts in the petition?

Mrs. B: Yes, I do.

Immediately thereafter, the judge made a determination of neglect and ordered the child placed in the custody of a state agency.

Having gained the assistance of the Legal Aid Society, Mrs. B was able to appeal the Family Court's order. The issue which reached the New York Court of Appeals was whether the Family Court should be required to advise an indigent parent charged with child neglect that he or she has a right to be represented by assigned counsel even where the controlling statute makes no provision for appointed counsel in the case of indigency.¹⁷ The state argued that the Family Court was under no obligation to inform the parent of the right to appointed counsel absent the parent's indication of indigency and a statutory mandate to do the same. However, counsel for Mrs. B sought recognition by the Court of Appeals of the fundamental nature of the parent-child relationship and urged first that such a relationship cannot be infringed upon unless there is basic due process, which of necessity includes the right to assigned counsel in cases of indigency, and second that the Family Court should be required to advise a parent of this right. Furthermore, no valid waiver of counsel can be made unless the parent has been specifically informed of such a right by the court. Therefore, the original order of neglect must be vacated since the judge had not informed the appellant of her right to appointed counsel.

The Court of Appeals accepted the appellant's arguments and held that a fundamental right is involved in all child neglect proceedings, and that this right cannot be intruded upon by the state unless the constitutional requirements of due process and equal protection are met. The Court expressed its conclusion as follows:

In our view, an indigent parent, faced with the loss of a child's society as well as the possibility of criminal charges . . . is entitled to the assistance of counsel. A parent's concern for the liberty of the child, as well as for his

¹⁶ 30 N.Y. 2d 352, 285 N.E. 2d 288, 334 N.Y.S. 2d 133 (1972).

¹⁷ The statute here in question was N.Y. Family Ct. Act 1043(a) (McKinney Supp. 1972).

care and control, involves 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. To deny legal assistance under such circumstances would -- as the courts of other jurisdictions have already held . . . -- constitute a violation of his due process rights and, in light of the express statutory provision for legal representation for those who can afford it, a denial of equal protection of the laws as well.¹⁸

Once having found the existence of the right of an indigent parent to assigned counsel in neglect proceedings, the court then went on to say that such a right would be meaningless if the parent is not advised of this right by the judge. Accordingly, the court found that the judge's statements in this case "completely excluded the availability of assigned counsel or other free legal assistance"¹⁹ and therefore the appellant did not knowingly or intelligently waive her right to counsel.

Following the same rationale as expressed by the New York Court of Appeals, the Supreme Judicial Court of Maine has also held that an indigent parent against whom a custody petition is instituted is entitled to have counsel appointed at the state's expense unless the right to counsel is knowingly waived.²⁰ In *Danforth v. State Department of Health and Welfare*, the child was removed from the custody of the parents following a hearing at which both parents were present but were not aware or advised of any right to court appointed counsel. The *Danforth* court concluded that while the raising of children is not expressly mentioned in the constitution and has never been directly considered by the United States Supreme Court, the language of several Supreme Court cases give ample support that the right to raise one's child is protected by the constitution.²¹ This attitude was subsequently verified by the Supreme Court when Justice Stewart wrote "this Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process clause of the Fourteenth Amendment."²² Thus, once having established that the constitutional safeguards of due process are applicable to the neglect proceeding, the Court then concluded that the adversary nature of the proceeding coupled with the severity of the potential consequences precluded the satisfaction of due process without affording the right (and notice of the right) of appointed counsel for indigent parents.

Legislative Solutions

Although the New York Court of Appeals and the Supreme Judicial Court of Maine lead a growing minority of courts which have imposed stringent requirements of procedural due process in proceedings by the state to terminate parental custody, the absence of a definitive disposition by the United States Supreme Court of the indigent parent's right to counsel in neglect proceedings leaves the primary responsibility for assuring that this right is provided to indigent parents with the state legislature. In fact, the legislature is actually better equipped than the courts to provide for the practical implementations of the decision to provide appointed counsel. For example, it must be clarified as to who among the numerous private, county, city, state, and federal agencies

18. 285 N.E. 2d 288, at 290 (1972).

19. *Id.*

20. *Danforth v. State Department of Health and Welfare*, 303 A. 2d 794 (Me. 1973).

21. *Id.* at 796.

22. *Cleveland Board of Education v. LaFleur*, 94 S. Ct. 791, 796 (1974).

will actually pay for the assigned counsel in the neglect proceedings. Also, conflicts of interest might prevent Legal Aid Society attorneys from representing indigent parents in neglect proceedings if, as is usually the case, the child involved is represented by a legal guardian who is a Legal Aid employee.

Presently, Indiana does not provide counsel for parents in any juvenile court actions either by statute or by judicial decision. The failure to provide for the appointment of counsel presents a significant problem in view of the multitude of statutes dealing with parental responsibilities.²³ Most of these provisions provide for circumstances which may lead to termination of parental rights. Both because loss of custody, even temporarily, is a serious penalty and because of the potential for even more drastic consequences, Indiana must provide counsel to protect the rights of indigent parents in dependency and neglect proceedings.

Currently, thirty-one jurisdictions have statutes which provide for a right to appointed counsel to indigent parents in a neglect proceeding.²⁴ The legislative policy considerations behind the enactment of these statutes closely parallel the constitutional arguments discussed above. However, the legislative process may extend legal protection without the restrictive characterization of fundamental rights inherent in the judicial extension of constitutional rights.

Therefore, the legislature should amend the present neglect statute to include the right to appointed counsel for indigent parents as well as a requirement that the court so inform the indigent parent of this right. The specific language of the amendment may be suggested as follows:

A minor who is the subject of the proceeding and his parents, guardian or legal custodian or responsible relative or next friend who are parties respondent shall have the right to be present, to be heard, to present evidence, to examine pertinent court files and records, to cross examine witnesses, and to be represented by counsel. At the request of any party unable to employ counsel, the court shall appoint counsel. The court shall inform each party of his rights herein provided, shall determine whether any party is indigent, and shall determine that any waiver of these rights are knowingly and intelligently made.

23. Ind. Ann. Stat. 31-1-17-1, 31-5-5-2 to 4 (Code ed. 1973); 35-14-3-1, 35-14-1-2, -4, -5 (1971), Ind. Ann. Stat. 10-807, -815, -815, 816 (Supp. 1973).

24. Arizona, California, Colorado, Connecticut, D.C., Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Wisconsin, Wyoming.