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COMMENTS

LOIS R. v. SUPERIOR COURT — *The Rights of Parents in Juvenile Neglect and Dependency Proceedings.*

ALTHOUGH NO ONE would deny the right of children to receive care or treatment necessary to their health (even, if proper, under the auspices of the juvenile court), there has been an undue emphasis in all juvenile court jurisdictions throughout the country upon what the states consider the welfare of the child.¹ The emphasis is "undue" for at least three reasons: (1) it assumes (or has created) a false dichotomy between the interests of the child and those of the parent; (2) it has been used to the exclusion, even of acknowledgment of parental rights vis-a-vis their children and, additionally, has resulted in infringements upon other substantive rights of the parent;² and (3) "welfare of the child" has led to the application of ambiguous, political and highly discriminatory criteria by which parents are deprived of their children.

The foregoing notwithstanding, assuming we start anew, it is clear that the courts must recognize the existence of certain parental rights concerning care and custody of children.³ In California, if the lead of a recent Court of Appeals decision is followed, not only must such rights be acknowledged, additionally procedures must be established and followed to secure those rights in the judiciary's balancing the interests of child and parent.⁴

TO COMPREHEND the treatment of parents in juvenile court dependency and neglect proceedings, one must recognize that the juvenile courts have been used as an instrument of socialization of the poor and the "misfit" — i.e., to impose the value structure of the dominant culture. The juvenile court process has been, in Professor ten Broek's language, part of the "family law of the poor"⁵ (as contrasted with the family law of the remainder of the community).

Failure to acknowledge this leaves unexplained the chasm between pronouncements of the Supreme Court with respect to the dominant position of parental rights in our social schemata⁶ and the actual treatment of parents in the juvenile court process. Supreme Court pronouncements have been, in practice, translated into rights for that segment of society other than the poor.

The importance of parental rights to the indigent enmeshed in juvenile court proceedings is of tremendous proportions, for involvement of the poor is on no casual basis; it is a daily and pervasive occurrence.

In California, for instance, dependency and neglect actions affect thousands of families each year. In 1967, there were 15,067 dependency "arrests,"⁷ and in fiscal year 1968-1969, California juvenile courts adjudicated 12,940 dependency cases.⁸

1. In the guise of the child's "welfare," the most flagrant abuses against the parent have been justified; e.g., denial of court-appointed counsel for the indigent parent; unreasonable intrusions into parents' homes; discriminatory treatment of the poor on the basis of socio-economic biases and ignorance and lack of appreciation of standards of life in poverty communities; holding detention hearings without the presence of the parent; a lessened burden of proof than is applicable in the ordinary civil action, resulting from a shifting of the burden to the parent to establish non-culpability, and from a combination of relaxation of and non-conformance to basic evidentiary rules observed in other proceedings (such as admissibility of hearsay and non-expert opinion evidence, most often in the form of social study reports).

2. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971), in which the court held that as a condition of receipt of AFDC, a recipient parent, without constitutional infirmity, be made to submit to intrusions into her home in the form of caseworker home visitations, a condition, as noted by Justice Douglas in his dissent, that is not deemed appropriate in cases of subsidies to farmers and to industry.

3. See, e.g., *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 266-267.

4. In the course of any juvenile court neglect or dependency adjudication, however, as in the *Lois R.* case discussed *infra*, there is no justification for so "balancing" the rights of parents against those of their children.

5. ten Broek, "California's Dual System of Family Law: Its Origins, Developments, and Present Status," 16 *Stanf. L. Rev.* 257-314, 900-981, 17 *Stanf. L. Rev.* 612-682 (1964 and 1965).

6. See, e.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

7. *Crime and Delinquency in California, 1967*, California State Dept. of Justice, Division of Law Enforcement, Bureau of Criminal Statistics, App. 5, p. 307.

8. *Annual Report of the Administrative Office of the Courts* — 1969, 94, 96.

Very seldom do the children of affluent parents become the subjects of dependency hearings. As commentators have recently pointed out, "the educated, economically independent family is the rare exception among the neglect referrals."⁹

There has historically been an inextinguishable linkage between poverty, dependency upon welfare, and juvenile court proceedings. Professor ten Broek described as follows the dilemma in which a parent receiving welfare payments finds himself or herself because of the tendency on the part of the welfare caseworker during home visits to question the household's manner of life:

Where there is an AFDC home,

"Parental right is diminished by the more or less continuing contact and active interests of social workers and other officials. To some extent, this curtails the exclusiveness of parental control, leaving the parent less free to determine the place of abode and the manner and standard of living. It also leaves the parent less free to lead his or her private life. Because of the presence of the social worker, however occasional questions of fitness are more likely to arise with regard to the management of the household and budget, the suitability of the home for the rearing of the children, issues of morality, extramarital relations, drinking, and the like."¹⁰

THE INCIDENCE and effects of juvenile court neglect actions among the poor have been exacerbated among racial minority communities because of the disproportionate numbers of families in those communities who are dependent upon welfare.¹¹

Hence, it is undeniable that the safeguarding of parental rights, together with the corollary right of children to live in the home of their natural parents, is of tremendous importance in the poor and racial minority communities.

Following the dictate of *In re Raya*¹² that parental rights do have a role to play in dependency or neglect adjudications and such rights must be given effect in the procedures adopted during the course of the hearing, the California Court of

Appeals in *Lois R. v. Superior Court*,¹³ not only recognized the dominant position of parental rights in society, for both rich and poor, but gave effect to that principle by holding that concepts of *parens patriae* and the "welfare of the child" cannot be used to treat parents as non-parties to the litigation, to not grant them procedural and substantive safeguards or to justify in the juvenile court relaxed rules of procedure.

The specific evil overcome by *Lois R.* was that of a juvenile court judge assum-

9. Kay and Phillips, "Poverty and the Law of Child Custody," 54 *Cal. L. Rev.* 717, 734-735 (1966). See also ten Broek, *op. cit.*, n. 1, *supra*, *passim*.

"It [the juvenile court] is 'a poor man's court.' . . . [This] judgment was correct when it was written in 1964 and is correct today. For evidence we need to look no further than the faces and personal effects of those who wait to appear before the judges." Paulsen, "Juvenile Courts, Family Courts, and the Poor Man," 54 *Cal. L. Rev.* 694 (1966).

"Jurisdictional provisions of a juvenile court are likely to reach disproportionate numbers of the children of the poor. Juvenile courts throughout the United States may assert authority over 'neglected' children. Poor children fall into the 'neglect' category more frequently than the offspring of the well-to-do **** a child of parents who are very poor stands in danger of a court-ordered separation from his parents to an extent which children of the middle and upper classes do not." *Id.*, at 699.

10. ten Broek, *op. cit.*, n. 1, *supra*, 17 *Stanf. L. Rev.* 612, 649. See also ten Broek and Wilson, "Public Assistance and Social Insurance — A Normative Evaluation," 1 *U.C.L.A. L. Rev.* 237, 264-266 (1954).

It has been noted that the home visitation is "the heart of welfare administration." "Rehabilitation, Investigation and the Welfare Home Visit," 79 *Yale L. J.* 746, 748 (1970).

Judge Skelley Wright described one aspect of this nation's dual system of law in the following terms: "Welfare has long been considered the equivalent of charity and its recipients have been subjected to all kinds of dehumanizing experiences in the government's efforts to police its welfare payments. In fact over half a billion dollars are expended annually for administration and policing in connection with the aid to families with dependent children program. Why such large sums are necessary for administration and policing has never been adequately explained. No such sums are spent policing the government subsidies granted to farmers, airlines, steamship companies, and junk mail dealers, to name but a few. The truth is that in this subsidy area society has simply adopted a double standard, one for aid to business and the farmer and a different one for welfare." Wright, "Poverty, Minorities and Respect for the Law," 1970 *Duke L. J.* 425, 437-438.

11. That there is a heavy concentration of welfare case-loads in these communities is indicated by their disproportionate poverty. See, e.g., *Poverty in Southern California: How Shall the Wrong be Righted?*, Southern California Research Council (1969), Table 4, "Community Profile of Watts," p. 11, and Table 5, "Community Profiles, South & East Los Angeles," p. 12.

12. 255 *Cal. App. 2d* 260 (1969).

13. 19 *Cal. App. 3d* 895 (1971).

ing the role of prosecutor,¹⁴ thereby losing the impartiality required by due process to judge the facts, rule on objections and motions, and in the end, decide whether or not the allegations of the petition should be sustained.

As described in *Ruiz v. Delgado*,¹⁵ quoted by the court in *Lois R.*, fusion of the roles of judge and prosecutor operates as follows:

"Under the procedure in the Puerto Rico District Court the judge must alternate roles in rapid succession, or even assume both at once. Thus, when interrogating a witness he is examining for the people, but when listening to the answer to the question he has propounded, he is weighing it as judge, and at the same time considering what question, as prosecutor, to ask next. Correspondingly, when he listens to the answer to a question put by the defense, he must, as judge, impartially evaluate the answer, but, simultaneously, as prosecutor he must prepare the next question for cross-examination. The mental attitudes of the judge and prosecutor are at considerable variance. To keep these two personalities entirely distinct seems an almost impossible burden for even the most dedicated and fairminded of men."

The general evil aimed at in seeking relief from such conduct in the juvenile court is vindication and protection of the substantial rights of parents enveloped in the proceedings of that court, regardless of relaxation of either substantive or procedural rules, previously sanctioned by statute or court-developed under the justification of *parens patriae*.

"[Even] if the type of conduct indulged in by [the referee¹⁶] is authorized by statute, we¹⁷] find that it nevertheless violates a parent's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution."¹⁸

NOT ONLY IS *Lois R.* a vindication of parental rights; it also represents protection for the child. The right of natural parents to the care, custody and control of their children is of fundamental importance in our system. This society has in numerous ways and throughout its history expressed its commitment to the family as its basic organizational unit for socializa-

tion of the young and for transmission to them of its values. Implicit in this commitment, as well as corollary to the parental prerogative to raise children in the parental home, is the right of the child to live in the home of his parents.

Although, at the point at which a petition is filed in juvenile court alleging parental neglect, it is appropriate for purposes of such a proceeding to recognize a theoretical and potentially real conflict between parent and child and therefore provide independent representation for the child, this assumption of conflict cannot be allowed to be expanded into a conclusive presumption of parental unfitness merely by reason of the filing of a petition, so as to justify under the guise of *parens patriae* or any other convenient label or concept, denial to parents, and at the same time their children, of the fundamental, reciprocal interests to have and to live with one another.

A "benefit" cannot be foisted upon one who neither desires nor needs it. Therefore, neither care nor treatment is appropriate, and hence the interests of parent and child may not, for all purposes, be deemed conflicting until and unless there has been an adjudication of lack of proper and effective parental care, predicated upon competent and adequate evidence and fair procedures.

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14. Assuming the role of prosecutor involves "structuring the case" (which means eliciting all evidence for the county welfare department; the petitioner who initiated the juvenile court proceeding examining the petitioner's witnesses, cross-examining witness on behalf of the parent; and otherwise determining the course of the litigation by raising objections *sua sponte* and ruling thereon).

"By examining the . . . witnesses [for the welfare department], cross-examining those of . . . [the parent], and making objections to testimony of . . . [the parent's] witnesses, [the referee] virtually presented the Department's case and countered . . . [the parent's] case." 3 Cal. App. 3d at 898. Such "structuring," of course, constitutes *advocacy* on behalf of a particular party to the proceeding, making it impossible for the parent to obtain a fair evaluation of the facts and issues."

15. 359 F. 2d 718, 720 (D.C. Puerto Rico).

16. See notes 14 and 15, *supra*, and accompanying text.

17. Cal. Welf. & Instit. C. § 680 provides that the court is to "control all proceedings during the hearings with a view to the expeditious . . . ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought."

18. 19 Cal. App. 3d at p. 899.