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Infants - Foster Families - Remove of Foster Children from Foster Homes Without a Prior Hearing Violates Their Constitutional Rights to Procedural Due Process

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INFANTS—Foster Families—Removal of Foster Children From Foster Homes Without a Prior Hearing Violates Their Constitutional Rights to Procedural Due Process. *Organization of Foster Families for Equality and Reform v. Dumpson*, 418 F. Supp. 277 (S.D.N.Y. 1976), *appeal docketed*, 45 U.S.L.W. 3169 (U.S. Aug. 9, 1976) (No. 76-183).

Plaintiffs, the Organization of Foster Families for Equality and Reform (OFFER) and three individual foster familes,[1] brought a class action[2] against defendants, administrators and executive directors of various social service agencies.[3] Plaintiffs requested a

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1. Organization of Foster Families for Equality and Reform v. Dumpson, 418 F. Supp. 277 (S.D.N.Y. 1976), *appeal docketed*, 45 U.S.L.W. 3169 (U.S. Aug. 9, 1976) (No. 76-183).

(N.B. The majority opinion had been reported in the advance sheets at 411 F. Supp. 1144; however, the dissent was not printed. After the West Publishing Co. became aware of the omission, it decided to remove the case from the bound volumes of 411 Federal Supplement and print it in its entirety (*i.e.* both majority and dissenting opinions) in a later volume of the Federal Supplement. As this Casenote went to press, the case was published in volume 418 of the Federal Supplement advance sheets.)

Seven foster children lived with their respective foster parents, the Smiths, Lhotans and Goldbergs, for more than one year. The Catholic Guardian Society notified Mrs. Madeline Smith that her foster children, Eric and Danielle Gandy would be removed from her care because "it is now in their best interests to leave your home." The agency was concerned that her arthritis would interfere with her ability to supervise the increasingly active children. Mrs. Smith refused to let the children go and the agency informed her they would be forcibly taken from her. It was at this time that this action was begun.

The Nassau County Department of Social Services Children's Bureau informed Mr. and Mrs. Lhotan that their foster children would be removed from their home because the four girls were growing too attached to their foster family. The Lhotans requested a temporary restraining order which Judge Robert Carter granted on July 8, 1974. It was dissolved March 3, 1975. At the same time Patricia Wallace, the biological mother, began habeas corpus proceedings in the state court to secure the return of her children. On February 23, 1976 the Supreme Court of the State of New York, Appellate Division, Second Department, upheld a lower court ruling ordering the removal of the children from the Lhotan home. 418 F. Supp. at 279-80.

The Goldbergs, the third plaintiff foster family, received unofficial information that Rafael would be removed from their home to live with his aunt. They joined in the class action to insure that they would be entitled to a pre-removal hearing if and when such a decision was made. *Id.*

2. Intervenor-defendants, the biological parents, asked the court to certify as a class all natural parents who have voluntarily placed children in foster care. Plaintiff foster parents moved pursuant to Rule 23 of the Federal Rules of Civil Procedure to certify all foster parents having a foster child who has lived continuously with them for over one year. Judge Carter granted the motions and certified each group as a class. *Id.* at 278 n.3.

3. The defendants included: James Dumpson, individually and as Administrator of the New York City Human Resources Administration; Elizabeth Beine, individually and as Director of the New York City Bureau of Child Welfare and as Acting Assistant Administrator

declaration that the statutes[4] and administrative rule[5] authorizing removal of foster children from foster homes without a prior hearing violated the children's constitutional rights[6] to equal protection and due process. The applicable statutory scheme permitted the removal of a foster child from a foster home, on ten days notice, at the discretion of the social services agency. Under these procedures, an aggrieved party could request a conference with the agency to discuss the removal but could not formally contest the removal.[7]

In a two to one decision, the United States District Court for the Southern District of New York held that the removal of foster children from foster homes in which they had been living for more than one year, without a prior hearing, violated the procedural due pro-

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of New York City Special Services for Children; Adolin Dall, individually and as Director of the Division of Interagency Relationships of the Bureau of Child Welfare; James P. O'Neill, individually and as Executive Director of Catholic Guardian Society of New York; Bernard Shapiro, individually and as Executive Director of the New York State Board of Social Welfare; Abe Lavine, individually and as Commissioner of the New York State Department of Social Services; and Joseph D'Elia, individually and as Commissioner of the Nassau County Department of Social Services. *Id.* at 277-78.

4. N.Y. Soc. Serv. Law § 383(2) (McKinney 1976) provides:

> The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

N.Y. Soc. Serv. Law § 400 (McKinney 1976) provides:

> 1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.
>
> 2. Any person aggrieved by such decision of the commissioner of public welfare or city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. . . .

5. 18 N.Y.C.R.R. § 450.14 (1974) provides:

> (a) Whenever a social services official or another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster home, he or such other authorized agency . . . shall notify the foster family parents in writing of the intention to remove such child at least ten days prior to the proposed effective date of such removal. . . . Such notification shall further advise the foster family parents that they may request a conference with the social services official . . . at which time they may appear, with or without a representative to have the proposed action reviewed. . . .

6. The three judge court was convened pursuant to 28 U.S.C. § 2281 (1970).

7. 18 N.Y.C.R.R. § 450.14 (1974).

cess rights of the children.[8] It concluded that the danger of "the harmful consequences of a precipitous and perhaps improvident decision to remove a child"[9] mandated a prior hearing and it enjoined defendants from removing foster children who had resided in their foster homes for more than one year without granting such a pre-removal hearing.[10]

The court in the instant case found the specific procedures outlined in section 450.14[11] of the Department of Social Services Regulations constitutionally defective.[12] Under these procedures the only opportunity for a foster parent to object to the removal of his child prior to the time of removal was at the conference with an official of the social service agency. The rule did not entitle the foster parents to examine agency files nor did it permit the "representative" who could accompany the foster parents to present or cross-examine witnesses. Nevertheless, while the agency had no obligation to state its reasons for the removal, the foster parents had the burden of establishing why the agency should not remove the child. Once the child had been removed, section 400(2) of the Social Services Law[13] entitled the foster parents to a post-removal hearing.

In holding that agency transferral procedures required certain due process protections, the court relied on prior Supreme Court decisions which had established that children were "persons" within the

8. 418 F. Supp. at 282.

9. *Id.* at 283.

10. *Id.* at 284. Plaintiffs, citing Perry v. Sindermann, 408 U.S. 593 (1972), also asserted that "the length of the average child's stay in foster care creates an 'informal tenure' system raising legitimate expectations that their role as foster parents will not be abruptly terminated." 418 F. Supp. at 279. In *Perry*, respondent teacher in the state college system of the State of Texas had a series of one year contracts from 1959 to 1969. During 1968 to 1969, there was a controversy between respondent and the college administration. In May, 1969 his contract was terminated. Respondent was not provided an official statement of the reasons for the termination, and was not given an opportunity for a hearing to challenge the basis of the nonrenewal. The Supreme Court held that respondent's allegations had raised a question of fact as to whether he had an implied contract as to tenure which he relied upon and which, under the fourteenth amendment, entitled him to a hearing to challenge the nonrenewal of his contract. 408 U.S. 593 (1972).

Plaintiffs in *Dumpson* claimed that they had a similar tenure right with their foster children and that the state could not arbitrarily upset this attachment. The court rejected this argument. 418 F. Supp. at 281.

11. 18 N.Y.C.R.R. § 450.14 (1974).

12. 418 F. Supp. at 284.

13. N.Y. Soc. Serv. Law § 400(2) (McKinney 1976).

meaning of the fourteenth amendment. In *In re Gault*,[14] the Supreme Court held that juveniles accused of delinquent behavior came within the protection of the due process clause and thus had a right to a fair hearing before the state could deprive them of their liberty.[15] In *Goss* v. *Lopez*,[16] the Court held that the state could not deprive a student of an opportunity to pursue a public education on the grounds of alleged misconduct without providing "fundamentally fair procedures to determine whether the misconduct has occurred."[17]

The court in the instant case extended the reasoning of this line of due process cases. In the best interests of the child and to avoid the risk of harmful dislocations,[18] the court provided guidelines which social service agencies must follow before transferring a foster child.[19]

The primary requirement established was the necessity of a hearing prior to transfer of the foster child. At the hearing, all concerned parties including the foster parents, the child, and the biological parent may present any relevant information to the administrative decisionmaker charged with determining the future placement of the child.[20] This arrangement is designed to insure that all relevant information is available to the hearing officer. The court stated:[21]

> [W]hen the question is whether a foster child is to be moved from one foster home to another, the state in its parens patriae capacity, will be better able

14. 387 U.S. 1 (1967).

15. *Id.* at 31-57. The Court established the following requirements for procedural due process: (1) The notice must be timely, in writing, and indicate the specific charge or factual allegation to be considered at the hearing; (2) The right to counsel must be available at the proceedings; and (3) The right to confront and cross-examine witnesses must be preserved. *Id.* at 57.

16. 419 U.S. 565 (1975).

17. The procedures the court established were: (1) The student must be given oral or written notice of the charges against him; and (2) The student must receive a hearing where he has the opportunity to present his version. The hearing is generally to precede the suspension. If this is impossible it is to be as soon after suspension as is practicable. *Id.* at 579-83.

18. 418 F. Supp. at 284. Under present procedures a post-removal hearing may reverse the decision, but the reunion of child and foster parent cannot erase the injury caused by uprooting the child. *Id.*

19. *Id.*

20. *Id.* at 282. The court stated that although the decision was limited to the class represented in the action (*i.e.* all children in foster care for one year or longer) a similar result would be in the best interests of a child placed in a foster home for long term care. *Id.*

21. *Id.* at 283.

to make an informed decision after a hearing at which all relevant information has been presented.

This hearing is required in all cases, and its commencement is not dependent upon the initiative of third persons.[22] The court noted that in some cases there may be a conflict between the interests of the foster parents and the best interests of the child. The requirement of a mandatory hearing protects the foster child from the situation where the foster parents may have interests adverse to those of the child and may decide not to request a hearing.

The court also considered the need for adequate representation of the child's best interests at the hearing. It advised that under certain circumstances the social service agency should appoint an adult to represent the interests of the child.[23] In making this determination, the agency should consider the child's age, sophistication, and ability to communicate his feelings effectively.[24] The representative need not be an attorney[25] since this would give the proceeding an adversary cast. The court stated specifically that an adversarial hearing is not a constitutional requisite for minimal due process.[26] Furthermore, it was reluctant to impose such strict requirements upon trained social workers. The court indicated it would allow state and local officials to formulate specific procedures in accord with the principles outlined in the opinion.[27]

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22. *Id.* at 285.

23. *Id.*

24. *Id.* at 286.

25. *Id.* Baskin, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974) discusses the need to solicit the choice of a competent child in order to serve the best interests of the child. The note discusses the state's intervention into the parents' rights regarding their child's upbringing. It refers to natural parents, but the analysis of soliciting the child's preferences can be applied where a foster child is being removed from his foster home at the discretion of the state. The note states that the child's preference can be solicited either by expert testimony or by directly asking the child, once it has been established that he is of sufficient age, mental capacity and independence. "If the children's wishes are to be respected, they must be sought out. . . ." *Id.* at 1405.

26. 418 F. Supp. at 286.

In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court held that although due process requires a hearing before a prisoner can be denied his "good-time" or be confined in solitary, there is no constitutional requisite that the inmate have an attorney for his hearing. "The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals." *Id.* at 570.

27. 418 F. Supp. at 286.

While this case was pending, New York City revised its procedures regulating the transfer of foster children from foster homes.[28] The *Dumpson* court found these revised procedures a "significant improvement over the agency conference and post-removal hearing."[29] The new rules mandated a pre-removal independent review at the foster parents' request. They also provided that a supervisory official, who had no previous involvement with the decision to remove the child, would review the case. At the hearing, the foster parents and the agency could be represented by counsel and each could present witnesses and evidence. The witnesses had to be sworn, and all testimony was subject to cross-examination. The agency's files used to support the proposal to remove the child were open to examination by counsel for the foster parents. The rules also entitled the parties to a recording of the hearing at cost. Furthermore, they required that the hearing official issue a decision, within five days. The hearing official also had to notify the foster parents of their right to request a post-removal hearing.[30]

Despite the improvements, the *Dumpson* court also found the revised New York City procedures constitutionally defective.[31] The court held that these procedures were faulty since they provided for a hearing only upon request.[32] Moreover, where the transfer involved was from a foster home to the child's natural parents, the revised procedures did not provide for a hearing, even upon request. The court held that the requirements of due process do not distinguish between natural and foster parents, and that a hearing is mandatory in both situations.[33] The *Dumpson* court also indicated that the revised New York City procedures failed to provide for an independent representative to protect the interests of the child.[34]

Plaintiffs in *Dumpson* raised an equal protection issue which the

28. 418 F. Supp. at 278 n.4. The court indicated that these revised procedures were outlined in New York City's internal memorandum of August 5, 1974. *Id.* at 285.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* *See In re* Beste, 515 S.W.2d 530 (Mo. 1974) (the issue of whether due process required a hearing prior to termination of legal custody was raised but was not decided by the court); *see also* Henry, *Preadoptive Parents-Right To Due Process Hearing Prior To Custody Termination*, 40 Mo. L. REV. 380 (1975).

33. 418 F. Supp. at 285.

34. *Id.*

court termed "novel" but did not decide.[35] Plaintiffs argued that a foster home was "entitled to the same constitutional deference as that long granted to the more traditional biological family."[36] They argued that the Supreme Court had indicated its willingness to look beyond legal formalities when determining what will be considered a "family."[37] In *Stanley* v. *Illinois*,[38] the state had taken the children of unmarried parents into its custody when their mother had died. The father claimed this procedure deprived him of equal protection under the fourteenth amendment. The Court, while upholding the father's claim, stated:[39]

> To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.

The foster parents in *Dumpson* claimed that a family is a psychological entity characterized by emotional interdependence and that a foster family constitutes the equivalent of a biological family. Therefore, the foster parents argued, a foster family should have rights under the law equal to those of a biological family.[40] The *Dumpson* court did not decide this issue, basing its decision solely on the grounds of due process.[41]

Another unusual claim which plaintiffs raised was their right to "familial privacy," the right of parents and guardians to direct the upbringing and education of children under their control.[42] The court discussed two cases where a parent's right to familial privacy was upheld. *Meyer* v. *Nebraska*[43] involved an instructor in a parochial school who had been convicted of violating a statute which prohibited teaching a foreign language to children below the eighth grade level. The Supreme Court, applying the concept of "familial privacy," held that a teacher's occupation gives him the right to

35. *Id.* at 282.
36. *Id.* at 281.
37. *Id.*, *citing* Stanley v. Illinois, 405 U.S. 645 (1972).
38. 405 U.S. 645 (1972).
39. *Id.* at 652, *quoting* Glona v. American Guarantee Co., 391 U.S. 73, 75-76 (1968).
40. 418 F. Supp. at 281.
41. *Id.* at 282.
42. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
43. 262 U.S. 390 (1923).

teach and that parents have the right under the fourteenth amendment to engage him to instruct their children. The state could not arbitrarily abridge this right.[44]

In *Pierce* v. *Society of Sisters*,[45] appellee private school challenged a statute which required every parent, guardian or other person having control, charge, or custody of a child between eight and sixteen to send him to a public school.[46] The Supreme Court declared that the fourteenth amendment protected appellees against deprivation of their property without due process of law. It held that the right to conduct schools was a property interest and that under the doctrine of *Meyer*, parents and guardians had the right to direct the education of their children.[47]

Judge Milton Pollock, in his dissent in *Dumpson*, criticized the majority opinion in three respects. First, he contended that the foster parents did not have standing to assert the rights of the foster children,[48] since Judge Robert Carter had appointed an independent representative to protect the children's interests. This representative had consistently argued that a mandatory hearing was not in the best interests of the foster children. Judge Pollock criticized the majority for reaching a result which purported to apply due process protections to benefit foster children while the representative of the children had argued against such protections.[49]

Secondly, Judge Pollock contended that the record did not sup-

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44. *Id.* at 400. In People *ex rel.* Kropp v. Shepsky, 305 N.Y. 465, 113 N.E.2d 801 (1953), an eighteen year old unmarried woman petitioner was compelled to put her child in a foster home with the understanding that the child was not eligible for adoption. Petitioner requested the child's return. The court, citing *Meyer*, held that "No court can, for any but the gravest reasons, transfer a child from its natural parent to any other person . . . since the right of a parent . . . to establish a home and bring up children is a fundamental one and beyond the reach of any court." *Id.* at 468, 113 N.E.2d at 803, *quoting* Meyer v. Nebraska, 262 U.S. 390 (1923). The court went on to say that the primacy of parental rights cannot be ignored. 305 N.Y. at 469, 113 N.E.2d at 804.

45. 268 U.S. 510 (1925).

46. *Id.* at 530.

47. *Id.* at 534-35.

48. 418 F. Supp. at 288 (Pollock, J., dissenting).

"No one with standing to claim that the children require the due process protection sought herein is making that claim. . . ." *Id.* at 288-89. In *Griswold v. Connecticut*, the Supreme Court had held that appellant doctors had standing to raise the rights of their patients who were not parties to the action but had interests which the suit could adversely affect. 381 U.S. 479, 481 (1965).

49. 418 F. Supp. at 288 (Pollock, J., dissenting).

port the majority's assumption that a pre-removal hearing would aid the child.[50] He concluded that the only way a child could participate in the proceedings would be to have a representative, not necessarily a lawyer, represents his interests. He stated that this role duplicates that of the social worker:[51]

> Rather than relying on the disinterested social judgment of professional social workers acting under the aegis of well-conceived tried and tested statutes, the Court's decision embroils the child in legalistic, psychological theorism; leaving the child a pawn in a game from which the child should be spared. No evidence has shown that the present procedures are conducive to or have resulted in hasty or ill-advised separations from the viewpoint of the foster child.

Finally, Judge Pollock criticized the court's interference with the decisions of the state legislature.[52] After pointing out that the court should not overturn a statute "absent adequate proof that it is irrational or unfair,"[53] Judge Pollock claimed that the majority did not decide the issues on procedural due process grounds but reached its decision out of sympathy for the situation of the foster parents.[54]

The Supreme Court has stated that due process is required before the state can deprive a person of his liberty or property.[55] In *Dumpson* the constitutional right deserving protection is less clearly defined than in most due process cases. The foster children here were not losing tangible property or their actual liberty. However, the *Dumpson* court indicated that a child's preference to live in a certain home is a protectable interest.

In its holding, the court has reaffirmed the concept that a child is a "person" under the fourteenth amendment with clearly protectable rights.[56] A foster child is at the mercy of the state. He has a right to express a preference for where he will live, either personally or through a representative. The state should not have the right to abridge his liberties by denying him the opportunity to be heard. This long awaited decision has extended some protection to children in an area where protection is most needed.

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50. *Id.* at 290.
51. *Id.*
52. *Id.* at 291.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*