

SUPREME COURT OF NEW HAMPSHIRE

In re C.M.

163 N.H. 768 (2012) · Decided June 29, 2012

SUMMARY

The New Hampshire Supreme Court considered whether due process requires appointed counsel for an indigent parent in a child abuse or neglect proceeding under RSA chapter 169-C. The court held that there is no per se constitutional right to appointed counsel in every such proceeding, but that appointment may be required on a case-by-case basis when necessary to reduce the risk of erroneous deprivation. The court reached the same conclusion under the New Hampshire and Federal Constitutions and remanded the matter.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Hicks, J.; Conboy, J.; Lynn, J.
JURISDICTION	New Hampshire
DECIDED	June 29, 2012
DISPOSITION	remanded
PROCEDURAL POSTURE	Interlocutory transfer without ruling from the Superior Court concerning whether due process requires appointment of counsel for an indigent parent in a child abuse or neglect proceeding.
STANDARD OF REVIEW	The court independently determined the constitutional due-process question, applying the three-prong Mathews v. Eldridge balancing test.
PRECEDENTIAL VALUE	Published precedential opinion
PARTIES	Larry M., Sonia M. v. New Hampshire Division for Children, Youth and Families

TOPICS

family law procedure

parental rights

child custody

due process

civil procedure

PRACTICE AREAS

family law

constitutional law

civil procedure

QUESTIONS PRESENTED

1. Whether Part I, Articles 2 and 15 of the New Hampshire Constitution require appointment of counsel for an indigent parent in every proceeding under RSA chapter 169-C in which the State seeks custody of a child based on allegations of abuse or neglect.
2. Whether the Fourteenth Amendment requires appointment of counsel for an indigent parent in every such abuse or neglect proceeding.
3. Whether due process may require appointment of counsel on a case-by-case basis when the facts and circumstances of a particular proceeding make counsel necessary to protect the parent's liberty interest.

HOLDINGS

1. Due process under Part I, Articles 2 and 15 of the New Hampshire Constitution does not create a per se right to appointed counsel for every indigent parent in an abuse or neglect proceeding under RSA chapter 169-C.
2. The facts and circumstances of a particular RSA chapter 169-C proceeding may require appointment of counsel for an indigent parent to adequately protect due process rights; the trial court must make that determination case by case in the first instance.
3. The Fourteenth Amendment provides no greater protection under these circumstances than the New Hampshire Constitution; it likewise does not require appointment of counsel in every RSA chapter 169-C proceeding.

KEY QUOTATIONS

“For these reasons we conclude that, on balance, due process does not require that indigent parents have a per se right to appointed counsel in abuse or neglect proceedings under RSA chapter 169-C. We agree with the State that the facts and circumstances of a particular case may require the appointment of counsel to adequately protect a parent’s right to due process.” (at 777-78)

“Accordingly, we conclude that while due process does not require that counsel be appointed for indigent parents in every proceeding brought under RSA chapter 169-C, a determination of whether appointed counsel is necessary to adequately reduce the risk of erroneous deprivation should be made on a case-by-case basis in the first instance by the trial court.” (at 778)

FACTUAL BACKGROUND

DCYF alleged that Larry M. and Sonia M. neglected their two children by failing to provide a safe and sanitary home and adequate supervision and by exposing the children to domestic violence. The family division granted DCYF ex parte custody, found reasonable cause at a preliminary hearing, and later found both parents had neglected the children. The parents were represented by appointed counsel during the initial proceedings, but after the legislature abolished the statutory right to counsel for indigent parents in abuse or neglect proceedings, they sought continued appointment on constitutional grounds.

PROCEDURAL HISTORY

DCYF obtained ex parte custody of the parents' children and filed neglect petitions. After a preliminary hearing, the family division continued custody with DCYF and appointed counsel for both parents; after adjudicatory and dispositional hearings, it found neglect and continued DCYF custody. Following the 2011 statutory abolition of the indigent parent's statutory right to counsel, the parents moved to continue appointed counsel, and the Superior Court transferred the constitutional question to the Supreme Court of New Hampshire without ruling.

DISPOSITION

remanded

REMAND INSTRUCTIONS

The trial court must determine on a case-by-case basis whether appointed counsel is necessary to adequately protect an indigent parent's due-process rights in the particular abuse or neglect proceeding.

CASES CITED

- In re Kotey M., 158 N.H. 358, 359, 361 (2009)
- In re Guardianship of Nicholas P., 162 N.H. 199, 203 (2011)
- State v. Veale, 158 N.H. 632, 636 (2009)
- State v. Ball, 124 N.H. 226, 231-33 (1983)
- In re Father 2006-360, 155 N.H. 93, 95-97 (2007)
- In re Shelby R., 148 N.H. 237 (2002)
- Foster v. Bd. of Sch. Com'rs of Mobile Cty., Ala., 872 F.2d 1563, 1569 n.8 (11th Cir. 1989)
- Williams v. W.C.A.B. (Green Const. Co.), 687 A.2d 428, 430 n.2 (Pa. Commw. Ct. 1997)
- In re Brittany S., 147 N.H. 489, 491, 493 (2002)
- In the Matter of Jeffrey G. & Janette P., 153 N.H. 200, 203 (2006)
- Petition of Kerry D., 144 N.H. 146, 149 (1999)
- State v. Robert H., 118 N.H. 713, 716 (1978)
- In re Craig T., 147 N.H. 739, 744-45 (2002)
- Lassiter v. Department of Social Services, 452 U.S. 18, 27-28, 31-32 (1981)
- Troxel v. Granville, 530 U.S. 57, 65 (2000)
- In re Baby K., 143 N.H. 201, 205
- Petition of Preisendorfer, 143 N.H. 50, 53
- Smith v. Marion County DPW, 635 N.E.2d 1144, 1148 (Ind. Ct. App. 1994)
- State in Interest of C.V. v. T.V., 499 So. 2d 159, 162 (La. Ct. App. 1986)
- Matter of Perry, 385 N.W.2d 287, 292-93 (Mich. Ct. App. 1986)
- In re Gina D., 138 N.H. 697, 700-01
- In Interest of D.B., 385 So. 2d 83, 91 (Fla. 1980)
- In re Tracy M., 137 N.H. 119, 122

OPINION

HICKS, J.

HICKS, J. This case is before us on an interlocutory transfer without ruling from the Superior Court (Tucker, J.). See SUP. Ct. R. 9. The trial court transferred the following question: “Does the Due Process Clause of the New Hampshire Constitution (Part I, Articles 2 and 15) or the Fourteenth Amendment of the Federal Constitution require the appointment of counsel for an indigent parent from whom the State seeks to take custody of a minor child based on allegations of neglect or abuse?” We conclude that while due process does not require the appointment of counsel in every such proceeding, the facts of a particular case may require the appointment of counsel.

We accept the facts as presented in the interlocutory transfer statement. See *In re Kotey M.*, 158 N.H. 358, 359 (2009). On April 14, 2011, Larry M. and Sonia M. (the parents) were served with petitions pursuant to RSA 169-C:7 (2002), by which the New Hampshire Division for Children, Youth and Families (DCYF) sought custody of their two minor children, C.M. and A.M.

Two days earlier, the Newport Family Division, pursuant to an ex parte petition, had granted custody of the children to DCYF. See RSA 169-C:6 (2002 & Supp. 2011). DCYF alleged that the parents were neglecting their children by failing to provide a safe and sanitary home and adequate supervision and by exposing them to domestic violence in the form of threatening and intimidating behaviors by the father. *771On April 15, the parents appeared at a preliminary hearing at which the court found that “reasonable cause exist[ed] to believe,” RSA 169-C:15, I (2002), that the children were neglected and determined that the ex parte order granting custody of the children to DCYF should continue.

The court appointed counsel to represent each of the parents. See RSA 169-C:10,11(a) (2002) (amended 2011). An adjudicatory hearing was held on May 12, at which the parents were represented by appointed counsel. See RSA 169-C:18 (2002 & Supp. 2011). Following the hearing, the court found that both parents had neglected the children and continued the order granting legal custody to DCYF.

On June 13, a dispositional hearing was held, at which both parents were represented by appointed counsel. See RSA 169-C:19 (2002 & Supp. 2011). Subsequently, the court issued an order maintaining legal custody of the children with DCYF and directing the parents to undertake certain measures before the children might be safely returned to them. Each parent filed an appeal to superior court and a de novo hearing was scheduled for August.

See RSA 169-C:28 (2002). Effective July 1, 2011, the legislature amended RSA 169-C:10, 11(a), abolishing the statutory right to counsel for an indigent parent alleged to have abused or neglected his or her child. See Laws 2011, 224:77. Subsequently, the parents each filed a motion to continue

court-appointed counsel, asserting that appointment of counsel for indigent parents in child abuse or neglect proceedings is constitutionally mandated under Part I, Articles 2 and 15 of the New Hampshire Constitution and the Fourteenth Amendment to the Federal Constitution.

Part I, Article 2 provides in part: “All men have certain natural, essential, and inherent rights — among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness.” N.H. CONST, pt. I, art. 2. Parental rights are “natural, essential, and inherent” within the meaning of this article.

In *re* Guardianship of Nicholas P., 162 N.H. 199, 203 (2011) (quotation omitted). “Similarly, the United States Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Id.* (quotation omitted). Part I, Article 15 provides in part: “No subject shall be... deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.” N.H.

CONST, pt. I, art. 15. The phrase “law of the land” means due process of law. *State v. Veale*, 158 N.H. 632, 636 (2009). *772We address this question first under the State Constitution, *State v. Ball*, 124 N.H. 226, 231 (1983), and cite federal opinions for guidance only. *Id.* at 232-33.

We are the final arbiter of our constitution’s due process requirements. In *re* Father 2006-360, 155 N.H. 93, 95 (2007). In determining whether the State Constitution requires the appointment of counsel in a given proceeding, we employ the three-prong test articulated by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In *re* Kotey M., 158 N.H. at 361; *State v. Hall*, 154 N.H. 180, 182 (2006). This test balances: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

In *re* Brittany S., 147 N.H. 489, 491 (2002); *Mathews*, 424 U.S. at 335. At the outset, the parents argue that based upon *In re Shelby R.*, 148 N.H. 237 (2002), “this Court must rule that Part I, Article 2 of the New Hampshire Constitution requires the appointment of counsel for indigent parents when the State seeks to take custody of their children pursuant to RSA Chapter 169-C.” We decline, however, to apply that opinion as controlling precedent on the question before us.

As pointed out in *Shelby R.* in the dissenting opinion of Justice Duggan, a decision by a plurality of an appellate court has no precedential value. *Shelby R.*, 148 N.H. at 248 (Duggan, J., concurring in part and dissenting in part); see *Foster v. Bd. of Sch. Com’rs of Mobile Cty., Ala.*,

872 F.2d 1563, 1569 n.8 (11th Cir. 1989) (noting that plurality opinion of United States Supreme Court is not binding); *Williams v. W.C.A.B.*

(*Green Const. Co.*), 687 A.2d 428, 430 n.2 (Pa. Commw. Ct. 1997) (recognizing that plurality opinion of state supreme court is not precedential). Accordingly, we address the transferred question as an issue of first impression and employ the three-prong balancing test set forth above.

As to the private interest of the parents, we have consistently recognized that the right to raise and care for one's children is a fundamental liberty interest protected by the State Constitution. See, e.g., *In re Father* 2006-360, 155 N.H. at 95; *In the Matter of Jeffrey G. & Janette P.*, 153 N.H. 200, 203 (2006); *Brittany S.*, 147 N.H. at 491; *Petition of Kerry D.*, 144 N.H.

146, 149 (1999); *State v. Robert H.*, 118 N.H. 713, 716 (1978), reversed on other grounds by *In re Craig T.*, 147 N.H. 739, 744-45 (2002). "[P]arental rights are natural, essential, and inherent rights within the meaning of the State Constitution," and "[t]he loss of one's children can be viewed as a sanction more severe than imprisonment." *In re Baby K.*, 143 N.H. at 205 *773 (quotation omitted).

Likewise, the United States Supreme Court has determined "that a parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection." *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (quotation omitted).

This interest "is perhaps the oldest of the fundamental liberty interests recognized" by the Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). As the State acknowledges in its brief, "[t]he primary private interest of a parent alleged to have abused or neglected his or her child is the parent-child relationship," and, [u]ndoubtedly, the provisions of RSA chapter 169-C have an [e]ffect on a parent's right to raise and care for his or her child.

For example, where the court has made a finding of abuse or neglect, the court may issue orders that permit the child to remain with the parents subject to conditions including supervision of parents by DCYF, participation of parents in therapy or medical treatment, and assistance of homemakers or parent aides. See RSA 169-C:19,1.

The court may also order that legal custody of the child... be temporarily transferred to DCYF or a relative. See RSA 169-C:19, III. Given that it is undisputed that the private interest affected is a fundamental liberty interest, we next consider whether the procedures at issue create the risk of an erroneous deprivation of this protected liberty interest, "and the probable value, if any, of additional or substitute procedural safeguards." *Petition of Preisendorfer*, 143 N.H.

50, 53 (1998) (quotation omitted). In the context of the issue before us, we examine whether the absence of counsel impermissibly increases the risk of an erroneous result in a child abuse or

neglect proceeding under RSA chapter 169-C, thereby depriving the parents of the right to the care and custody of their children. Pursuant to RSA chapter 169-C, when allegations of child abuse or neglect have been made, if the trial court finds reasonable cause that the allegations are founded, it must hold an adjudicatory hearing.

See RSA 169-C:15, 111(d) (Supp. 2011). At an adjudicatory hearing, the petitioner must present witnesses to testify and any other evidence in support of the petition. RSA 169-C:18, III. The parents “have the right to present evidence and witnesses on their own behalf and to cross-examine adverse witnesses.” *Id.* The court is not bound by the technical rules of evidence and may admit evidence that it considers relevant and material.

RSA 169-C:12 *774(2002). The proceedings are held in a closed courtroom before a judge without a jury. RSA 169-C:14 (Supp. 2011),:18. The parents argue that without appointed counsel to represent them, the procedures set forth in the statute for the initial adjudicatory hearing create the risk of an erroneous deprivation of their protected liberty interest because of the relatively low preponderance of the evidence standard and because few parents are equipped to understand and confute expert medical and psychiatric testimony.

In addition, the parents contend that the absence of the technical rules of evidence elevates the risk of erroneous deprivation in that the common use of hearsay evidence to support the State’s claim of abuse and neglect “neutralizes any mitigation of the risk of erroneous deprivation that the lack of technical rules of evidence might provide.” The State argues that because the rules of evidence do not apply, the parents are not burdened by difficult questions of evidentiary law, and because the proceedings are held in a closed courtroom without a jury, the parents can present their case “free from the distraction created by members of the public and the complications of a jury trial.” The State also argues that the statute provides procedural protections that reduce the risk of erroneous deprivation in that: the court’s orders are subject to regular review, see RSA 169-C:22 (2002),:24 (Supp.

2011); the parents are provided with a notice explaining the nature of the hearings and their possible consequences, see Form NHJB-2192-DF, available at <http://www.courts.state.nh.us/forms/nhjb-2192-df.pdf> (07/01/2011); and the court must determine at the preliminary hearing that each parent “understands the possible consequences to parental rights should the court find that the child is abused or neglected,” RSA 169-C:15, IV (2002).

We underscore that a child abuse or neglect proceeding is not synonymous with a proceeding to terminate parental rights under RSA chapter 170-C. Abuse or neglect proceedings and termination of parental rights proceedings have distinct and separate purposes.

In proceedings to terminate parental rights, the purpose of which is to permanently sever the parent-child relationship, the standard of proof is beyond a reasonable doubt and indigent parents

have a right to court-appointed counsel. See RSA 170-C:10 (2002); *In re Baby K.*, 143 N.H. at 205.

The overriding goal of abuse or neglect proceedings is to reunify the family. See RSA 169-C:2 (2002). Unlike in proceedings to terminate parental rights, in abuse or neglect proceedings the deficiencies that formed the basis for the initial petition may be rectified and the parental ties are not permanently severed.

The provisions of RSA chapter 169-C are intended to achieve the purposes of *775keeping a child in contact with his home community and in a family environment by preserving the unity of the family and separating the child from his parents only when the safety of the child is in danger or when it is clearly necessary for his welfare or the interests of the public safety and when it can be clearly shown that a change in custody and control will plainly better the child.

RSA 169-C:2,11(b). To comply with the provisions of RSA chapter 169-C, the State must “[p]rovide assistance to parents to deal with and correct problems in order to avoid removal of children from the family.” RSA 169-C:2,1(c).

The trial court may not terminate parental rights in an abuse or neglect proceeding, see RSA 169-C:24-a (Supp. 2011), and its “dispositional order is not permanent and is subject to review,” *In re Father 2006-360*, 155 N.H. at 97.

As other jurisdictions have similarly concluded, while an abuse or neglect proceeding is a first step in a process that may ultimately result in termination of parental rights, such a result is by no means a foregone conclusion. See, e.g., *Smith v. Marion County DPW*, 635 N.E.2d 1144, 1148 (Ind. Ct. App. 1994) (entry of a child in need of services “decree does not necessarily pave the path to a termination of the parent-child relationship”); *State in Interest of C.V. v. T.V.*, 499 So.

2d 159, 162 (La. Ct. App. 1986) (State sought temporary custody of the child only until the parents could be taught parenting skills; permanent removal was not even considered until extensive efforts to rehabilitate the parents proved unsuccessful); *Matter of Perry*, 385 N.W.2d 287, 292 (Mich. Ct. App. 1986) (“the fact that an adjudicative hearing is the first and a necessary step in a juvenile court neglect proceeding is of little moment” as not every hearing precedes or results in a decision to terminate parental rights).

Under the procedures contained in RSA chapter 169-C, a parent charged with abuse or neglect is provided a full hearing with an opportunity to call witnesses, present evidence, and cross-examine adverse witnesses. See RSA 169-C:18, III.

The statute also requires that the trial court determine whether each parent understands the possible consequences to parental rights should the court find that the child is abused or neglected and each parent is required to sign a statement that he or she understands the consequences to

parental rights. RSA 169-C:15, IV; see Form NHJB2192-DF, available at <http://www.courts.state.nh.us/forms/nhjb-2192-df.pdf> (07/01/2011) (notice to accused parent).

Although there is a relaxed evidentiary standard in neglect or abuse proceedings, evidence nevertheless must be material and relevant. In re Gina D., 138 N.H. 697, 700-01 (1994). *776 Contrary to the parents' argument that the statutory procedures increase the risk of erroneous deprivation, we have previously concluded that the fact that the court is not bound by the technical rules of evidence and that the proceedings are held before a judge without a jury actually reduces the risk that a parent will suffer an erroneous deprivation of his or her liberty interest.

In re Father 2006-360, 155 N.H. at 97; Brittany S., 147 N.H. at 493. We adhere to our prior decisions and conclude that the procedures set forth in RSA chapter 169-C are facially sufficient to prevent the risk of an erroneous deprivation of a parent's fundamental liberty interest in the care and custody of his or her children.

The third prong of the due process analysis takes into account "the government's interest, considering the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Preisendorfer, 143 N.H. at 53 (quotation omitted). RSA chapter 169-C was enacted "to provide protection to children whose life, health or welfare is endangered and to establish a judicial framework to protect the rights of all parties involved in the adjudication of child abuse or neglect cases." RSA 169-C:2, I. Pursuant to the statute, "[e]ach child coming within the provisions of this chapter shall receive, preferably in his own home, the care, emotional security, guidance and control that will promote the child's best interest; and, if the child should be removed from the control of his parents, guardian or custodian, adequate care shall be secured for the child." Id. The statute seeks to coordinate efforts by state and local authorities, in cooperation with private agencies and organizations, citizens' groups, and concerned individuals, to: (a) Protect the safety of the child. (b) Preserve the unity of the family whenever possible. (c) Provide assistance to parents to deal with and correct problems in order to avoid removal of children from the family. (d) Take such action as may be necessary to prevent abuse or neglect of children. (e) Provide protection, treatment and rehabilitation, as needed, to children placed in alternative care.

Id. The chapter is to "be liberally construed to the end that its purpose may be carried out... [t]o provide effective judicial procedures through which *777 the provisions of this chapter are executed and enforced and which recognize and enforce the constitutional and other rights of the parties and assures them a fair hearing." RSA 169-C:2,11(c).

Thus, under the objectives stated in the statute, the State shares the parents' interest in maintaining the parent-child relationship. The State also shares an interest in a proceeding that produces fair results. The State's interest diverges, however, when it comes to the fiscal burden associated with appointed counsel.

The State represents that in fiscal years 2010 and 2011, it expended more than one million dollars on appointed counsel and that that “expense must be viewed in light of the other expenses the State incurs in protecting the interest of children subjected to abuse or neglect proceedings.” While the State’s fiscal concern may be legitimate, “it is hardly significant enough to overcome private interests as important as those here.” *Lassiter*, 452 U.S. at 28.

To summarize, the fundamental nature of the parents’ interest favors the appointment of counsel. As set forth above, however, the procedural protections embodied in the statute prevent the risk that an uncounseled parent will be erroneously deprived of the care and custody of his or her child.

In addition, because the State in its role as *parens patriae* has a significant interest in protecting the best interest of children and providing reasonable services to assist with the statutory goal of family reunification, the State shares with the parents a desire for a correct result.

For these reasons we conclude that, on balance, due process does not require that indigent parents have a *per se* right to appointed counsel in abuse or neglect proceedings under RSA chapter 169-C. We agree with the State that the facts and circumstances of a particular case may require the appointment of counsel to adequately protect a parent’s right to due process.

As the State acknowledges, there may be abuse or neglect cases that, for example, present complicated legal issues or require expert testimony, and given that “[p]arents involved in such cases are likely people who are not equipped to understand or challenge such testimony... the presence of counsel could make a determinative difference in the outcome.” Accordingly, we conclude that while due process does not require that counsel be appointed for indigent parents in every proceeding brought under RSA chapter 169-C, a determination of whether appointed counsel is necessary to adequately reduce the risk of erroneous deprivation should be made on a case-by-case basis in the first instance by the trial court.

See, e.g., *In Interest of D.B.*, 385 So. 2d 83, 91 (Fla. 1980) (counsel will always be required for parents where permanent termination of custody might result, but where there is no threat of permanent termination of parental custody, “the right to counsel should be determined on a case-by-case basis”); *Matter of Perry*, 385 N.W.2d at 292-93 (case-by-case analysis whether due process requires court-appointed counsel in a neglect proceeding).

The Federal Constitution offers no greater protection than the State Constitution under these circumstances, see *In re Tracy M.*, 137 N.H. 119, 122 (1993); *Lassiter*, 452 U.S. at 31-32. Thus, we reach the same result under the Federal Constitution as we do under the State Constitution. Remanded. LYNN, J., concurred specially; CONBOY, J., dissented.