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Constitutional Law - An Indigent's Right to a Blood Test in a Paternity Suit

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CONSTITUTIONAL LAW—AN INDIGENT'S RIGHT TO A BLOOD TEST IN A PATERNITY SUIT— *Little v. Streater*, _ U.S. _, 101 S. Ct. 2202 (1981).

INTRODUCTION

Modern courts frequently allow the use of blood grouping tests in paternity cases. "There is now . . . practically universal and unanimous judicial willingness to give decisive and controlling evidentiary weight to a blood test exclusion of paternity."[1] A 1976 report developed jointly by the American Bar Association and the American Medical Association confirmed the ability of blood grouping tests to exonerate innocent putative fathers.[2]

Many states have developed statutes relating to the use of blood grouping tests in paternity cases.[3] The State of Connecticut has such a statute which provides that a court, on motion of any party, may order the parties to submit to blood grouping tests.[4] The statute further provides that "the cost of making such tests shall be chargeable against the party making the motion."[5] The United States Supreme Court considered the constitutionality of

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1. 1 S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 9.13 (1980).

2. Miale, Jennings, Rettberg, Sell & Krause, *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAMILY L. Q. 247 (1976).

3. In 1979, North Carolina adopted a new paternity blood test statue, N.C. GEN. STAT. § 8-50.1 (Cum. Supp. 1979). *See* Note, *The Use of Blood Tests in Actions to Determine Paternity*, 16 WAKE FOREST L. REV. 591 (1980) for a discussion on the improvements made in blood tests and an evaluation of the major changes in this amended statute.

4. CONN. GEN. STAT. § 46b-168 (1981).

5. In its entirety, CONN. GEN. STAT. § 46b-168 (1981) states:

> In any proceeding in which a question of paternity is an issue, the court, on motion of any party, may order the mother, her child and the putative father or the husband of the mother to submit to one or more blood grouping tests, to be made by a qualified physician or other qualified person, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion.

this Connecticut provision in *Little v. Streater*.[6] The Court held that the Connecticut statute, denying a defendant blood grouping tests because of his lack of financial resources, violated the due process guarantee of the Fourteenth Amendment.[7] In a unanimous decision, the Court concluded the statute, requiring the party requesting blood grouping tests to pay for such tests, was a denial of an indigent's opportunity to be heard.[8]

THE CASE

On May 21, 1975, plaintiff Gloria Streater, while unmarried, gave birth to a female child. Because the child was a recipient of public assistance, Connecticut law required Streater to disclose the name of the putative father.[9] Streater identified defendant Walter Little as the child's father. The Department of Social Services provided an attorney for Streater, and she brought a paternity suit against Little to establish his liability for the child's support. At the time the paternity action was commenced, Little was incarcerated in the Connecticut Correctional Institution. Little moved to order blood grouping tests on plaintiff and her child pursuant to state statute.[10] Little asserted that he was indigent and asked that the State be ordered to pay for the tests. The trial court granted the motion to order blood grouping tests but denied the request that they be furnished at the State's expense. Because Little could not pay for the blood grouping tests, none were performed. The paternity suit was tried and both Streater and Little testified at trial. The trial court found that Little was the child's father, entered judgment against him and ordered him to pay child support.[11]

On appeal, the Appellate Session of the Connecticut Superior Court affirmed the trial court's judgment in an unreported *per curiam* opinion and held that Connecticut's blood test statute did

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6. _U.S._, 101 S. Ct. 2202 (1981).

7. *Id.* at_, 101 S. Ct. at 2203.

8. *Id.*

9. Connecticut law compelled her, upon penalty of fine and imprisonment for contempt "to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child." CONN. GEN. STAT. § 46b-169 (1981).

10. CONN. GEN. STAT. § 46b-168 (1981).

11. _U.S. at_, 101 S. Ct. at 2203. The damages of $6,974.48 included the "lying-in" expenses of plaintiff and the child, "accrued maintenance" through October 31, 1978 and the "costs of suit plus reasonable attorney's fees."

not violate the due process and equal protection rights of an indigent defendant in a paternity proceeding.[12] Little then petitioned for certification to the Connecticut Supreme Court. Certification was denied.[13] The Supreme Court of the United States noted probable jurisdiction,[14] held the Connecticut statute violated Fourteenth Amendment due process, reversed the judgment and remanded the case.[15]

BACKGROUND

The number of illegitimate children born in the United States is staggering and is on the rise. Not only has there been an increase in the number of illegitimate births, but the rate has also been accelerating.[16] Possibly in response to this increase and the consequent problems, Congress enacted Section 602(a)(26)(B) of Title 42 of the United States Code. The act requires that states provide programs to undertake to establish the paternity of and secure support for children born out of wedlock. Another act of Congress provides for paternity determination services which are available upon request for a reasonable fee.[17]

In regard to this same problem, the Connecticut Legislature enacted a chapter relating to paternity matters.[18] In particular, the statutes state that courts may order blood tests when paternity is in dispute[19] and compel the mother of a child who is a recipient of public assistance to disclose the name of the putative father and institute an action to establish the paternity of the child.[20]

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12. Appellate Session relied on its prior decision in Ferro v. Morgan, 35 Conn. Supp. 679, 406 A.2d 873, *cert. denied,* 177 Conn. 753, 399 A.2d 526 (1979), in which, with a similar fact situation and identical issue, the Superior Court of Connecticut had upheld CONN. GEN. STAT. § 46b-168 (1981). The Superior Court overruled a trial court order that the cost of blood tests be paid by the state. The Superior Court held that requiring a putative father to bear costs of blood tests did not violate due process, indicating that defendant had meaningful opportunity to be heard at a meaningful time. The apparent rationale behind the court's holding seemed to be that blood grouping tests are not very reliable and, therefore, are not of crucial importance.

13. 180 Conn. 756, 414 A.2d 199 (1980).

14. _U.S._, 101 S. Ct. 350 (1980).

15. _U.S. at _, 101 S. Ct. at 2211.

16. *See* Miale, *supra* note 2, at 249.

17. 42 U.S.C. § 654(6)(A), (B) (1976).

18. Chapter 815y (1979).

19. CONN. GEN. STAT. § 46b-168 (1981).

20. CONN. GEN. STAT. § 46b-169 (1981).

The nature of paternity actions in Connecticut places an unusual evidentiary burden on a defendant. A defendant is permitted to testify in his own behalf in paternity actions; according to the statute, however, "if such mother or expectant mother continues constant in her accusation, it shall be evidence that the respondent is the father of such child."[21] In a 1971 decision,[22] the Connecticut Supreme Court indicated that a prima facie case made out by the mother places upon the reputed father the burden of showing his innocence.[23] The reputed father must show his innocence by evidence other than his own testimony.[24] Thus, a defendant in a paternity action in Connecticut is placed at a disadvantage in that his testimony alone is insufficient to overcome the plaintiff's prima facie case.[25]

Although blood tests were first admitted into evidence in American courts in the 1930s, blood grouping tests in paternity proceedings have only been used with frequency during the last decade.[26] Recent improvements in these tests have made them more reliable. According to a 1976 joint ABA-AMA report, the correct use of blood test systems provides a 91-93% cumulative probability of negating paternity for erroneously accused men.[27] The present reliability of the systems indicates the probable value of blood tests results in paternity cases.[28]

As the accuracy of blood grouping tests improved, and as the use of these tests increased, states began to enact statutes providing for and regulating the use of blood tests. Connecticut's statutes provide that the court may order the mother, the child, and the putative father to submit to blood grouping tests and that the results of such tests are admissible in evidence if the results establish definite exclusion of the putative father.[29] Connecticut's provisions are similar to those of other states. But unlike most other statutes, Connecticut's law mandates that the "costs of making such tests shall be chargeable against the party making the motion."[30]

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21. CONN. GEN. STAT. § 46b-160 (1981).
22. Kelsaw v. Green, 6 Conn. Cir. Ct. 516, 276 A.2d 909 (1971).
23. *Id.* at 519-520, 276 A.2d at 911-912.
24. *Id.*
25. _U.S. at_, 101 S. Ct. at 2208.
26. *See* Note, *supra* note 3.
27. *See* Miale, *supra* note 2, at 257.
28. _U.S. at_, 101 S. Ct. at 2206.
29. CONN. GEN. STAT. § 46b-168 (1981).
30. *Id.* Note that North Carolina also requires defendants requesting blood

Prior to the 1970s, indigents were seldom afforded access to civil proceedings. Then in 1971, the United States Supreme Court, in *Boddie v. Connecticut*,[31] held that due process forbids a state from denying access to its court to indigents who in good faith seek judicial dissolution of their marriage. The parties in *Boddie*, welfare recipients residing in Connecticut, were unable to bring their divorce actions in the Connecticut courts because they were unable to pay the $60 cost of bringing an action for divorce.[32] The Court held that persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.[33]

ANALYSIS

In *Little v. Streater*, the Supreme Court held unconstitutional a statute which denied a defendant blood grouping tests because of his lack of financial resources.[34] The Court concluded that the statute, requiring a party who requested blood tests to pay for the tests, was a denial of an indigent's opportunity to be heard. Using an analysis indicated in *Matthews v. Eldridge*, the Court determined that Connecticut's statute violated the due process guarantee of the Fourteenth Amendment.[35] The three elements to be considered in a *Matthews* analysis are: (1) the private interests at stake; (2) the risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguard; and, (3) the governmental interests affected.[36]

After applying a *Matthews* analysis, the Court found that defendant had been deprived of due process. The private interests were found to be substantial. The putative father's pecuniary interest in avoiding a substantial support obligation was important

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tests in paternity proceedings "to initially be responsible for any of the expenses thereof." N.C. GEN. STAT. § 8-50.1(b)(2) (Cum. Supp. 1979).

31. 401 U.S. 371 at 374-383 (1971).

32. *Id.*

33. *Id.* at 377. *See also* Note, *Divorce—Indigent's Right to Avoid Payment of Filing Fees*, 26 ARK. L. REV. 87, 90 (1972), in which the author comments, "The Court obviously felt that the right of access to the courts in a divorce action was one of those fundamental rights necessary to our system of justice that was guaranteed all citizens and made applicable to the states by the due process clause of the fourteenth amendment."

34. _U.S. at_, 101 S. Ct. at 2211.

35. 424 U.S. 319, 335 (1976).

36. *Id.* at 335.

in itself. In addition, paternity proceedings have quasi-criminal overtones in Connecticut.[37] The Court also indicated that familial bonds are important and should be accorded constitutional protection.[38] Finally, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination.[39]

In considering the risk that the procedures used in a Connecticut paternity action will lead to erroneous results, the Court determined that the risk that an indigent defendant will be erroneously adjudged the father is considerable because of the usual absence of witnesses in a paternity proceeding, the self-interest coloring the testimony of the litigants, and the refusal of the state to pay for blood grouping tests.[40] Furthermore, because of the recognized accuracy with which blood grouping tests "definitively exclude a high percentage of falsely accused putative fathers,"[41] the availability at trial of blood tests results is a valuable procedural safeguard.[42]

The governmental interests in *Little* were conflicting. Little argued that, unlike a common dispute between private parties, the State's involvement was considerable, giving rise to a constitutional duty.[43] A state has a legitimate interest in the welfare and support of a child born out of wedlock who is receiving public assistance, and an interest in an accurate and just determination of paternity.[44] A state also has a financial interest in avoiding the expense of blood grouping tests.[45]

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37. CONN. GEN. STAT. § 46b-171 (1981) provides that if a putative father is found guilty, his subsequent failure to comply with the court's support order is punishable by imprisonment. Note, however, that a paternity action itself does not result in imprisonment.

38. _ U.S. at _, 101 S. Ct. at 2209. The Supreme Court in earlier decisions has indicated the importance of familial bonds. *See* Stanley v. Illinois, 405 U.S. 645 (1976), where a father was given an interest in his non-marital child's custody and adoption. *See also* Lassiter v. Department of Social Services, _ U.S. _, 49 U.S.L.W. 4586 (1981), where the Court held that the termination of familial bonds demands procedural fairness.

39. *Id.* at _, 101 S. Ct. at 2209.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at _, 101 S. Ct. at 2207. Since the child was a recipient of public assistance, the State's Attorney General automatically became a party to the action. Burger, C.J., indicated that, "state action has undeniably pervaded this case."

44. *Id.* at _, 101 S. Ct. at 2209.

45. *Id.*

Nevertheless, the Court concluded that Connecticut's monetary interest was not significant enough to overcome the important private interests involved.[46] States are entitled to reimbursement from the federal government for 75% of the funds they expend on operation of approved child support plans, including the development of evidence regarding paternity.[47] Furthermore, numerous other states advance the expenses of blood grouping tests for an indigent and then tax these expenses as costs to the parties.[48]

The highest courts of Colorado, Massachusetts, and West Virginia have held that under their respective state constitutions and the United States Constitution, putative fathers may not be denied access to blood grouping tests on the basis of indigency.[49] In addition, several states have statutes by which blood grouping tests can be made available to indigents.[50]

The fact that the child in *Little* was a recipient of public assistance and the fact that the State paid the fees for the plaintiff's attorney appears to have influenced the Court's decision. Chief Justice Burger indicated that the state is "responsible for an imbalance between the parties."[51]

The onerous evidentiary burden of a defendant in a Connecticut paternity action, coupled with the denial of the evidence of blood tests, which in effect forecloses a potentially conclusive means for a defendant to exonerate himself, appeared to have weighed heavily in the Court's evaluation of the competing interests in *Little*.[52] The Court held that Little lacked a meaningful op-

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46. _ U.S. at _, 101 S. Ct. at 2210.

47. 42 U.S.C. § 655(a)(1) (1976 ed. and Supp. III) and regulations under 42 U.S.C. § 1302.

48. *See* ARK. REV. STAT. § 34.705.1 (1962); KAN. STAT. ANN. § 23-132 (1974); LA. REV. STAT. § 9:397.1 (West Supp. 1981); N.H. REV. STAT. ANN. § 522:3 (1974); ORE REV. STAT. § 109.256.(1) (1979); PA. CONS. STAT. ANN. § 42-6135 (Purdon Supp. 1981); TEX. FAMILY CODE ANN. § 13.03(b) (Vernon Supp. 1980).

49. *See* Franklin v. District Court, 194 Colo. 189, 527 P.2d 1072 (1977) (U.S. Constitution); Commonwealth v. Possehl, 355 Mass. 575, 246 N.E.2d 667 (1969) (U.S. Constitution and Massachusetts Constitution); State *ex rel.* Graves v. Dougherty, 266 S.E.2d 142 (W.Va. 1980) (U.S. Constitution and West Virginia Constitution).

50. *See, e.g.*, ALA. CODE § 26-12-5 (1977); D.C. CODE § 16-2343 (Supp. V 1978); MD. ANN. CODE § 16-66a (Supp. 1980); MICH. COMP. LAWS ANN. § 722.716(c) (1968).

51. _ U.S. at _, 101 S. Ct. at 2208.

52. *Id.* at _, 101 S. Ct. at 2210.

portunity to be heard.[53]

The *Little* holding, following the rationale of *Boddie*, indicates a trend toward allowing indigents greater access to civil proceedings. The provision of legal counsel to indigents in paternity proceedings would seem to be the next logical step. While the Supreme Court has not yet made such a finding, the highest courts of four states have recognized the right of indigent defendants in paternity suits to counsel.[54] These courts based their decisions on the Due Process Clause of the Fourteenth Amendment, and the fact that counsel for the plaintiff was supplied by the State.[55]

The North Carolina Court of Appeals, based on the Fourteenth Amendment Due Process Clause and the North Carolina Constitution, held in *Wake County ex rel. Carrington v. Townes*,[56] that an indigent defendant has a right to appointed counsel in paternity suits instituted by the State. The court noted the *Little* holding and decided the case using some of the same rationale followed in *Little*. The defendant's liberty, property, and familial interests were balanced against the State's interests. The Court concluded, ". . . counsel for the indigent defendant is essential to his having a *meaningful* opportunity to be heard."[57]

In deciding *Little*, the Supreme Court has announced a procedural requirement clearly applicable to North Carolina.[58] By requiring all defendants who request blood tests in paternity proceedings to initially be responsible for the cost of the tests, North Carolina, like Connecticut, may be denying indigents in paternity

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53. *Id.*

54. Reynolds v. Kimmons, 569 P.2d 799 (Alaska 1973); Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, *cert. denied*, 100 S. Ct. 209 (1979); Artibee v. Cheboygan Circuit Judge, 397 Mich. 54, 243 N.W.2d 248 (1966); Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979).

55. 569 P.2d at 801-802, 24 Cal. 3d at 26-27, 593 P.2d at 229-230, 154 Cal. Rptr. at 532-534; 397 Mich. at 56-57, 243 N.W.2d at 249-250.

56. _ N.C. App. _, 281 S.E.2d 765 (1981).

57. *Id.* at _, 281 S.E.2d at 773.

58. N.C. GEN. STAT. § 8-50.1(b)(2) (Cum. Supp. 1979). Upon receipt of a motion to compel blood tests and the entry of an order for blood tests, the court shall proceed as follows: "By requiring the plaintiff, alleged-parent defendant or other interested party requesting blood tests . . . to initially be responsible for any of the expenses thereof and upon the entry of a verdict of parentage or non-parentage, by taxing the expenses of blood tests . . . as costs . . . ." Note that North Carolina's statute, unlike Connecticut's, provides that the expense of the blood tests will be taxed as costs. However, the party requesting the tests must pay for them initially. If the requesting party is an indigent, he still may be denied the right to the blood tests.

proceedings the due process opportunity to be heard. While the precise issue has not yet been litigated in this state, some change in the North Carolina statute seems necessary to provide the constitutional guarantees recognized in *Little*. While not addressing the issue of providing indigent North Carolina defendants with free blood grouping tests, the North Carolina Court of Appeals in *Wake County*, did recognize that *Little* held an indigent defendant who faces the State in a paternity suit has, upon demand, a constitutional right to a free blood grouping test.[59] The court added, ". . . an indigent defendant's right to a free blood grouping test may be rendered meaningless without counsel to advise him of his right to demand such a test, to explain the test's significance, to ensure that the test is properly administered and to ensure that the results are properly admitted into evidence."[60]

Wake County indicates that North Carolina, in line with several other states, is moving towards providing indigents greater access to the courts.

CONCLUSION

Little struck down a Connecticut statute which required even an indigent party who requested blood tests in a paternity proceeding, to pay the costs of the test. The Supreme Court held that the application of the Connecticut statute to indigents violated the due process guarantees of the Fourteenth Amendment. The holding in *Little* is consistent with the Court's earlier decision of *Boddie*, in providing indigents greater access to civil proceedings. The Court put strong emphasis on familial bonds and showed a concern for the plight of indigents in securing protection of their constitutional guarantees. A continued trend in this direction is likely considering the recent decisions of several state courts. A liberal extension of *Little* might lead to greater access for indigents to other types of civil proceedings. Without state imposition of barriers, indigents would be afforded the same opportunity to utilize the courts as the more affluent.

Finally, as one court indicated, "unless the rights of indigent

59. _ N.C. App. at _, 281 S.E.2d at 771.
60. *Id.* at _, 281 S.E.2d at 771.

defendants are protected, courts risk finding not the right man, but simply the poorest man to be the father of the child."[61]

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61. Salas v. Cortez, 24 Cal. 3d at 30, 595 P.2d at 232, 154 Cal. Rptr. at 535.