

# FEATURE: PROTECTING TEXAS CHILDREN: THE CONSTITUTIONAL RIGHTS OF CHILDREN

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## Text

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The U.S. Supreme Court has long recognized that children are protected by the U.S. Constitution. "Whatever may be their precise impact, neither the Fourteenth Amendment, nor the Bill of Rights, is for adults alone." [In re Gault, 387 U.S. 1, 13 \(1967\)](#). The Supreme Court has further said, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." [Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 \(1976\)](#).

This article focuses on two specific rights of children under the U.S. Constitution that can arise in a child protection case: the right to effective assistance of counsel and the right to sibling access. The cases cited underscore the importance of safeguarding these rights. These cases can also be used in legislative advocacy to ensure that all aspects of the child protection system in Texas are funded sufficiently to fully protect the rights of the children in the state's care. The purpose of this article is to encourage judges and attorneys to give the utmost consideration to protecting children's constitutional rights throughout all stages of involvement in the child welfare system, including post-disposition of the initial child abuse case for those children who remain in the permanent managing conservatorship of the state. A longer version of this paper, addressing additional specific rights of children, can be found in the Texas Lawyers for Children Online Legal Resource and Communication Center ([www.TexasLawyersforChildren.org](http://www.TexasLawyersforChildren.org)).

[\*751]                    **The            Right            to            Effective            Assistance            of            Counsel**  
**Case Law**

In light of the fundamental liberty interests at stake and the gravity of the potential harm and losses to which children involved in child protection cases may be subjected, a federal district court in Georgia has held that children have a constitutional right to effective assistance of counsel throughout all stages of the child welfare court processes. [Kenny A. v. Perdue, 356 F.Supp.2d 1353 \(N.D. Ga. 2005\)](#), *rev'd on other grounds*, [130 S.Ct. 1662 \(2010\)](#), was a class-action suit brought by foster children from two Georgia counties asserting various constitutional claims against the state agencies and officials operating the foster care system. The foster children also brought a claim against the two counties involved, alleging that the counties had failed to provide foster children with adequate and effective legal representation.

The federal district court concluded, "It is well settled that children are afforded protection under the Due Process Clauses of both the United States and Georgia Constitutions and are entitled to constitutionally adequate

procedural due process when their liberty or property rights are at stake." [350 F.Supp.2d at 1359](#). The court elaborated on the liberty interests at stake, saying:

The Court finds that children have fundamental liberty interests at stake in [child welfare] proceedings. These include a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents. On the one hand, an erroneous decision that a child is not deprived or that parental rights should not be terminated can have a devastating effect on a child, leading to chronic abuse or even death. On the other hand, an erroneous decision that a child is deprived or that parental rights should be terminated can lead to the unnecessary destruction of the child's most important family relationships.

Furthermore, a child's liberty interests continue to be at stake even after the child is placed in state custody. At that point, a "special relationship" is created that gives rise to rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm. [citations omitted]. Thus, a child's fundamental liberty interests are at stake not only in the initial ... hearing but also in the series of hearings and review proceedings that occur as part of a [child welfare] case once a child comes into state custody. [Id. at 1360](#).

**[\*752]** The court held that the foster children's liberty interests could only be adequately protected if they had legal counsel. The court explained:

[J]uvenile court judges, court appointed special advocates (CASAs), and citizen review panels do not adequately mitigate the risk of ... errors. Judges, unlike child advocate attorneys, cannot conduct their own investigations and are entirely dependent on others to provide them information about the child's circumstances. Similarly, citizen review panels must rely on facts presented to them by state and county personnel, including local [child protection agency] offices. As a result, their reviews are only as good as the information provided to them by [the child protection agency] and other state and local agencies. CASAs are also volunteers who do not provide legal representation to a child. Moreover, CASAs are appointed in only a small number of cases. The Court concludes that only the appointment of counsel can effectively mitigate the risk of significant errors in [child welfare] proceedings.

Finally, the Court must consider the government's interest, including the function involved and the fiscal and administrative burdens that a right to counsel would entail. In this case, the function involved is that of the state as *parens patriae*, which refers to "the state in its capacity as provider of protection to those unable to care for themselves ... ." [S]uch protection can be adequately ensured only if the child is represented by legal counsel throughout the course of [the child welfare] proceedings. Therefore, it is in the state's interest, as well as the child's, to require the appointment of a child advocate attorney. This fundamental interest far outweighs any fiscal or administrative burden that a right to appointed counsel may entail. [Id. at 1361](#).

Finally, the court held that "[t]he right to counsel, of course, means the right to *effective* counsel." *Id.* The plaintiff foster children provided evidence that the children's attorneys failed to meet with their child clients much of the time and that in some cases the attorneys did not review the child's medical, social service, education, or other records. Moreover, one attorney testified that she did "not have time to investigate whether her child client [was] receiving appropriate medical or social services or to monitor whether her child client [was] in a safe foster care placement." [Id. at 1363](#). In light of this evidence, the court denied the county defendant's motions for summary judgment.

Similarly, a New York appellate court found that a child has a constitutional right to effective assistance of counsel in a child welfare court proceeding. *In the Matter of Jamie TT.*, [191 A.D.2d 132 \(N.Y. 1993\)](#), involved a 13-year-old girl who was the subject of a child abuse case alleging sexual abuse by her adoptive father. The court held that "Jamie had a constitutional as well as a statutory right to legal representation of her interests in the proceedings on the abuse petition. Her constitutional and statutory rights to be represented by counsel were not satisfied merely by the state's supplying a lawyer's physical presence in the courtroom; Jamie was entitled to 'adequate' or 'effective' legal assistance." [191 A.D.2d at 136](#).

Although Jamie had had a court-appointed law guardian as her legal advocate, the court found the legal representation to be ineffective. Citing numerous failures of the child's attorney, including the failure to adequately cross-examine or call witnesses, the court concluded that "[t]he deficiencies noted cannot be explained as merely losing trial tactics. No conceivable forensic stratagem could justify the absence of preparation and advocacy skills shown here which in a criminal case would clearly have required reversal ... The Law Guardian's failure to take an active role in the proceedings is alone sufficient to require reversal ... ." [Id. at 137-38.](#)

### **Practical Application**

The important constitutional rights at stake and the gravity of potential harm if errors are made make it imperative that judges appoint well-trained and highly qualified attorneys to represent these children during their time in the child welfare system. For those children growing up in the permanent managing conservatorship of the state, this would mean appointing a committed attorney for each child. Additionally, judges should not hesitate to hold attorneys accountable and remove them if they fail to provide zealous representation for their child clients.

### **The Right to Sibling Access Case Law**

The U.S. Supreme Court has not specifically addressed a child's constitutional right to maintain family relationships; however, former Justice John Paul Stevens commented on this right in his dissenting opinion in [Troxel v. Granville, 530 U.S. 57 \(2000\)](#). Justice Stevens opined that:

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds [citation omitted], it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this court reject any suggestion that when it comes to parental rights, children are so much chattel. [530 U.S. at 71.](#) See also, [Smith v. Org. of Foster Families for Equality and Reform, et al., 431 U.S. 816 \(1977\)](#) (dicta that children have a constitutionally protected right to familial privacy in the integrity of their family unit).

[\*753] Likewise, the U.S. Supreme Court has not yet addressed whether minor siblings have a constitutional right to maintain contact with each other once they are placed in foster care by the state. The cases cited above would be relevant to this question. Additionally, a federal district court has concluded that children in foster care have a constitutional right to maintain their relationships with their siblings through reasonable contact under both the associational freedoms of the First Amendment and the substantive due process protections of the Fourteenth Amendment. In [Aristotle P. v. Johnson, 721 F.Supp. 1002 \(N.D. Ill. 1989\)](#), seven foster children ranging in age from 1 to 18, who were under guardianship of the Illinois Department of Children and Family Services (DCFS), brought a class-action suit against the director of DCFS and the guardianship administrator, challenging the defendants' practices of placing siblings in separate foster homes or residential facilities and denying them the opportunity to visit their siblings who were placed elsewhere. In denying the defendants' motion to dismiss the foster children's constitutional claims, the court analyzed the rights at issue.

As to the plaintiffs' claims under the First Amendment, the court agreed that the "practice of placing siblings in separate placements and then failing to provide visits among siblings on a reasonable basis violates their right to freedom of association under the *First Amendment* ... ." [721 F.Supp. at 1005.](#) The court found it particularly compelling that foster children's "relationships with their siblings are even more important because their relationships with their biological parents are often tenuous or non-existent." [Id. at 1006.](#)

The court also agreed that the foster children's relationships with their siblings were a protected liberty interest under the substantive due process clause of the Fourteenth Amendment. Citing [Moore v. East Cleveland, 431 U.S. 494 \(1977\)](#), the court determined that "the *Fourteenth Amendment* embraces a right to associate with one's relatives." [721 F.Supp. at 1007.](#) In *Aristotle P.*, the court noted that the defendants' policies resulted in the physical separation of the plaintiffs and their siblings for extended periods of time. In some instances, the foster children

were unable to maintain any relationship at all with their siblings, and in others, the children never got to know their siblings who had been taken into the state's custody as infants. The court concluded, "Thus, the defendants' policies have seriously damaged, if not severed, the relationships between the plaintiffs and their siblings. ... [T]he plaintiffs have sufficiently alleged the existence of a policy which deprives their liberty interests in their sibling relationships ... ." [721 F.Supp. at 1008](#). Significantly, the court noted, "The fact that the plaintiffs' injuries are psychological rather than physical is of no moment. ... [T]he protections of the Due Process Clause against arbitrary intrusions on personal security include both physical and emotional well-being." *Id.*, citing [White v. Rochford, 593 S.2d 381, 385 \(7th Cir. 1979\)](#).

### **Practical Application**

If a foster child's attorney seeks visitation for the child with siblings, and the court denies the request, the attorney should consider whether some form of appellate review or other legal action would be appropriate in order to establish that the child has a constitutional right to preserve the integrity and stability of his or her family. Additionally, confirming the existence of this constitutional right in the 5th Circuit would give the Texas Legislature a greater incentive to make sure that the Texas Department of Family and Protective Services has the funding it needs to facilitate sibling visits, ensuring that foster children are able to maintain these very important relationships with their siblings.

### **Conclusion**

More than children's constitutional rights are at stake in child protection cases. The attorney's advocacy and the judge's decisions have an impact on every aspect of a child's life. If judges and attorneys focus more attention on safeguarding children's constitutional rights, they can help improve the child welfare system in Texas one case at a time.

## **Graphic**

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