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Due Process: Voluntary Commitment of Minors

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DUE PROCESS: VOLUNTARY COMMITMENT OF MINORS—*Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975).

"Children's Rights in Mental Commitments Expanded in Landmark Federal Case Holding Pennsylvania Practice Unconstitutional." This is the title of a press release by the Mental Patient Civil Liberties Project[1] immediately following the decision of *Bartley v. Kremens*.[2] The release optimistically predicts that the *Bartley* decision will have a major impact on the rights of juveniles in "voluntary" commitment proceedings. David Ferleger, Esquire,[3] stated in the release:

> For the first time, a federal court has declared that children are not second-class citizens in the eyes of the Constitution simply because someone says the child is "crazy."
> The abuses of psychiatry and the overuse of mental institutions will certainly be curbed if the Court's order is obeyed. This opinion recognizes the life-long damage which is inflicted on a child once he or she is stuck with the label of "mental patient."[4]

Until now, children committed to mental institutions by their parents had no claim to due process. No child had standing to object to his/her commitment, nor was any child's interest protected when it came into direct conflict with the interests of the parents. Although the *Bartley* decision appears to provide solutions to the problems which have been encountered in dealing with the "voluntary" commitment of juveniles,[5] many important questions must be answered before its full impact can be measured. What will be the result if there is no direct conflict between the interests of the parents and those of the child? What are the requirements in commitment proceedings which constitute due process? Will these same

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1. Mental Patient Civil Liberties Project, Press Release, July 1975.
2. 402 F. Supp. 1039 (E.D. Pa. 1975).
3. Mr. Ferleger is the Director for the Mental Patient Civil Liberties Project as well as counsel for the plaintiffs in this case.
4. Mental Patient Civil Liberties Project, Press Release, July 1975.
5. There is a technical distinction between voluntary commitment and voluntary admittance in Pennsylvania. Voluntary commitment refers to a procedure whereby the prospective patient and the psychiatrist enter into an agreement which provides for a definite commitment period. Some adult patients select this procedure because they can maintain a voluntary status and are entitled to the respective benefits afforded adult patients. Psychiatrists may enter into such an agreement to insure that the patient stays in the facility for a minimal period of time. Voluntary admittance refers to a procedure which is initiated by the consent of the individual to be committed or of his/her parents. One argument in support of this procedure is that a volunteer will be more eager for treatment. For full discussion of the subtle differences between the phrases mentioned above see Comment, *Hospitalization of Mentally Disabled in Pennsylvania: The Mental Health - Retardation Act of 1966*, 71 DICK. L. REV. 300, 308-17 (1967). For purposes of this note the terms will be used interchangeably.

requirements be applied to all situations? Will other states with similar commitment practices adopt the approach espoused by the *Bartley* court? In other words, will the plan devised by the court in *Bartley* remedy the abuses of the "voluntary" commitment statutes?[6]

I. THE BARTLEY DECISION

The *Bartley* case involves a class action instituted by children under 19 years of age who have been committed or might be committed[7] to a state mental facility. The plaintiffs sought to have a three-judge federal panel[8] declare §§402 and 403[9] of the Pennsyl-

6. It must be remembered that the federal courts have treated due process as a flexible concept, the content of which "varies according to specific factual contexts." Hannah v. Larche, 363 U.S. 420, 442 (1960).

7. On April 29, 1974, the court determined this was a proper class action. 402 F. Supp. 1039, 1041, n. 1 (E.D. Pa. 1975).

8. Jurisdiction was determined by invoking 28 U.S.C. §§1331, 1343(3) and 42 U.S.C. §1983 1970, Act of April 20, 1871 ch. 22, §1 17 Stat. 13.

9. 50 Pa. Stat. Ann. §§4402, 4403 1966:

Section 402. Voluntary admission; application, examination and acceptance; duration of admission.

(a) Application for voluntary admission to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such is eighteen years of age or younger.

(b) When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he may be admitted.

(c) Except where application has been made under the provisions of Section 402 (a)(2) and the person is still eighteen years of age or younger, any person voluntarily admitted shall be free to withdraw at any time. Where application has been made under the provisions of Section 402 (a)(2), only the applicant or his successor shall be free to withdraw the admitted person so long as the admitted person is eighteen years of age or younger.

Section 403 of the Pennsylvania Mental Health and Mental Retardation Act of 1966 provides in part:

Section 403. Voluntary commitment; application, examination and acceptance; duration of commitment.

(a) Application for voluntary commitment to a facility for examination, treatment and care may be made by:

(1) Any person over eighteen years of age.

(2) A parent, guardian or individual standing in loco parentis to the person to be admitted, if such person is eighteen years of age or younger.

(b) The application shall be in writing, signed by the applicant in the presence of at least one witness. When an application is made, the director of the facility shall cause an examination to be made. If it is determined that the person named in the application is in need of care or observation, he shall be committed for a period not to exceed thirty days. Successive applications for continued voluntary commitment may be made for successive periods not to exceed thirty days each, so long as care or observation is necessary.

vania Mental Health and Mental Retardation Act unconstitutional and to have the state enjoined from using those provisions when entertaining applications for "voluntary" admission[10] of juveniles into State mental health facilities. Plaintiffs' arguments were based upon alleged violations of the due process and equal protection clauses of the fourteenth amendment to the U.S. Constitution.[11] Ultimately, the court held §§402 and 403 of the Pennsylvania mental health act facially unconstitutional. To remedy the lack of due process in Pennsylvania's "voluntary" commitment procedures the court prescribed the following safeguards:

> (1) a probable cause hearing within seventy-two hours from the date of initial detention;
> (2) a post-commitment hearing within two weeks from the date of initial detention;
> (3) written notice, including the date, time, and place of the hearing, and a statement of the grounds for the proposed commitment;
> (4) counsel at all significant stages of the commitment process and if indigent the right to appointment of free counsel;
> (5) presence at all hearings concerning proposed commitment;
> (6) a finding by clear and convincing proof that there is need for institutionalization;
> (7) the rights to confront and to cross-examine witnesses, to offer evidence in own behalf, and to offer testimony of witnesses.[12]

II. Analysis of Conflicting Interests

One presiding federal judge evaluated the situation in *Bartley* aptly when he stated that the matter involved "a very difficult and sensitive problem."[13] The court first had to determine whether or not the plaintiffs were entitled to the procedural safeguards of due process under the fourteenth amendment.[14] Whenever an individual is subjected to a deprivation of constitutional rights and the grievous loss of liberty, adequate procedural safeguards of due process

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(c) No person voluntarily committed shall be detained for more than ten days after he has given written notice to the director of his intention or desire to leave the facility, or after the applicant or his successor has given written notice of intention or desire to remove the detained person.

10. Admissions may be accomplished by parents, guardians, or a person standing *in loco parentis* to the person to be admitted.

11. The decision in Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975) was based on a due process argument advanced by the plaintiffs.

12. 402 F. Supp. at 1053.

13. Evening Bulletin, May 11, 1973, at B-13, col. 4 (Gibbons, J., quoted).

14. Although due process is a flexible concept, the factual situation presented in the case must fall within the property and liberty language of the fourteenth amendment. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

must be afforded.[15] As the decision of *Dixon v. Attorney General*[16] clearly indicates, the state is required to provide such safeguards when there is a possibility of wrongful deprivation of one's liberty by commitment to mental institutions. In the words of Huyett:

> These safeguards attempt to protect persons from an arbitrary or erroneous deprivation of liberty or property, whether that deprivation be imposed for benevolent or punitive reasons.[17]

As a logical extension of the above mentioned principles the court found that the injuries alleged in the *Bartley* case did fall within the parameters of the fourteenth amendment.

The initial determination that due process safeguards were applicable to the *Bartley* case only provided the court a basis from which to work, *i.e.*, to determine what process was due the plaintiffs. The court then found itself thrust into the midst of an ongoing debate concerning the priorities to be assigned the interests of the various parties involved. Traditionally, the concept of parental control over a child has permeated our legal reasoning.[18] Time and time again the federal courts have reiterated the proposition that the family unit's integrity must be preserved.[19] Therefore, courts have held that the parents could control the destiny of an unemancipated minor.[20] To state the principle simply, many courts have acted on the assumption that the parents *always* act in the best interests of the child. Slowly, with the advent of decisions like *In re Sippy*,[21] support for the proposition of giving absolute deference to parental judgment is being eroded. *Bartley* may be seen as the culmination of the erosion of this proposition.

It stands to reason that a parent may not always be acting in the best interest of a child when having that child committed to a mental health facility. Notwithstanding the ease with which "voluntary" commitment can be effected,[22] there are many other factors influencing a parent's decision to commit the juvenile in question. For example, the moment of decision-making may be one of great emotional stress.[23] In these situations there is a great need for objec-

15. 402 F. Supp. at 1045 *citing* Wolff v. McDonnell, 418 U.S. 539 (1974).

16. 325 F. Supp. 966 (M.D. Pa. 1971).

17. 402 F. Supp. at 1045.

18. Wisconsin v. Yoder, 406 U.S. 205, 231 (1972); Ginsberg v. New York, 390 U.S. 629, 639 (1968); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

19. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

20. Rule v. Geddes, 23 App. D.C. 31 (1904).

21. 97 A.2d 455 (Mun. Ct. App. D.C. 1953).

22. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CALIF. L. REV. 840 (1974) [hereinafter cited as Ellis].

23. 48 NOTRE DAME L. REV. 133, 139 (1972).

tivity and expertise. The majority in *Bartley* found that a child's interest must be fully considered, but the court was careful not to preclude all considerations of the parents' interests.[24] The inference to be drawn is that a balance must be struck between the conflicting interests of the child and the parents by a disinterested review of the situation.[25]

Similarly, the *Bartley* court rejected the argument that the state's role as *parens patriae* would afford sufficient protection for the juvenile to be committed.[26] It was conceded by the court that the state does have an interest in protecting the mental well-being of a child, preserving the family unit, and protecting society, but that these interests do not require the courts to ignore the due process clause of the fourteenth amendment.[27] Thus, a balance should be struck between the varying interests of the parties involved in the *Bartley* case. No longer should the interests of a child be subordinated to those of the parents or the state. It appears that this balance might be attained through the safeguards prescribed by the *Bartley* court, *e.g.*, a probable cause hearing.[28]

III. Due Process Requirements Enunciated in Bartley Compared to an Alternative Theory

Once the *Bartley* court decided that the fourteenth amendment was applicable to the factual situation presented and that a child's interests should not be subordinated to those of the parents or the state, it set forth the specific requirements of due process which had to be met in Pennsylvania's "voluntary" commitment proceedings.[29] By establishing certain safeguards to be applied whenever a "voluntary" commitment procedure is initiated, this court was seeking to put an end to the abuses of the typical commitment procedure.[30] However, the question still remains: Are the safeguards announced

24. 402 F. Supp. 1039, 1048 and n. 12 (E.D. Pa. 1975).

25. It does not appear that a staff psychiatrist provides the disinterested review needed. Ellis at 863-66.

26. The *parens patriae* argument advanced in *Bartley* was based on the fact that the state is not an adversary party. Therefore, the state will protect the child and his/her interests when deciding whether or not to commit that child to a mental institution. The state also argues that because it is not an adversary the children cannot complain of the alleged deprivation. 402 F. Supp. at 1046.

27. 402 F. Supp. 1039, 1048 and n. 12 (1975).

28. All hearings required by the court will be held before the courts until the legislature devises a plan for unbiased tribunals to provide review by conducting the hearings.

29. See p. 233 *supra*.

30. A primary example of an abuse of a "voluntary" commitment procedure is a parent committing a mongoloid child to Polk State Hospital because the rest of the family wanted to go on a vacation. 402 F. Supp. at 1044.

by the majority in *Bartley* an appropriate means for reaching the desired goal?

The procedural requirements in Bartley seem to embody the full spectrum of safeguards established in precedent such as *Lynch v. Baxley*,[31] *Heryford v. Parker*,[32] and *Dixon v. Attorney General*.[33] This prescription of due process by the *Bartley* court goes a long way in providing a juvenile protection from any arbitrary deprivation of liberty, *i.e.*, confinement, but the safeguards come into effect only after the child has been confined for some length of time not exceeding 72 hours.[34]

In theory it appears that an even more effective method of protecting a child's interests can be established before any confinement. This method would require the appointment of a guardian *ad litem* and an independent psychological examination of the child. Such a theory finds indirect support in both *Dixon v. Attorney General*[35] and *Horacek v. Exon*.[36]

The *Dixon* case involved the recommitment of individuals after their original confinement (based upon criminal conduct) was terminated.[37] During the disposition of that case the District Court for the Middle District of Pennsylvania deemed it proper for a guardian *ad litem* to be appointed to oversee the various plaintiffs' interests.[38] The court also held that in preparation for a hearing the individual in question was entitled to independent and expert examination.[39]

Similarly, in *Horacek*,[40] the Nebraska district court deemed it appropriate to appoint a guardian *ad litem*. To quote that court:

> In view of the possibility that the interests of the parents bringing the action under the civil rights act on behalf of their children confined in a state home for the mentally retarded, might conflict with those of their children residing at home, the discreet course would be to appoint a guardian ad litem who would not displace the parents as

31. 386 F. Supp. 378 (M.D. Ala. 1974) (due process included notice, probable cause hearing, and right to counsel).

32. 396 F.2d 393 (10th Cir. 1968) (due process in this case included that one be fully advised of his/her rights and be entitled to counsel).

33. 325 F. Supp. 966 (M.D. Pa. 1971)(due process in this case included that one be advised of his/her rights, right to counsel, entitled to full hearing, and entitled to confront witnesses).

34. 402 F. Supp. at 1053.

35. 325 F. Supp. 966 (M.D. Pa. 1971).

36. 357 F. Supp. 71 (D. Neb. 1973).

37. The *Dixon* case held 50 Pa. Stat. Ann. §4404 (1966) unconstitutional.

38. 325 F. Supp. 966 (M.D. Pa. 1971).

39. *Id.* at 974.

40. This suit was brought under the civil rights act to remedy poor conditions at various state mental health facilities.

representatives of the plaintiff children but would be alert to recognize potential and actual differences in position.[41]

The appointment of a guardian after the parent has made his decision to commit the child and before any confinement would serve several purposes. Initially, the guardian would review the factual situation and inquire into the motivation behind the decision to commit the youth. There is the possibility that the parent may be dissuaded from committing the child when the guardian does not find commitment in the best interests of the child. If the parent is not dissuaded, then the guardian would assume the role of protector of the child's rights. At this point the guardian could request an independent and expert examination[42] of the child. The guardian may also seek out legal counsel to represent the child. Approaching the problem in this manner would eliminate the flagrant abuses of the "voluntary" commitment procedures immediately. No longer would a child be placed in a mental institution because his family wants to go on a vacation[43] or because the child watches too much television.[44]

There appears to be no good reason to wait until a child is committed to provide protection for his/her rights. Indeed the damage may already have been done with the commitment of the individual, however temporary, *i.e.*, being forced to carry the stigma of having been a mental patient. The above-mentioned guardian theory provides a solution to this problem, whereas the *Bartley* court's prescription of due process seems to fall short of its goal. Its prescription does not appear to contemplate children being incapable of understanding the complex problems that they might face. If a child is too mentally immature to comprehend the situation, then it is unlikely that the same child will want to test the validity of the commitment. Under the guardian theory the guardian will have recognized the problem and will have taken the appropriate action on behalf of the juvenile.

It seems as though the guardian theory would be an effective means of reaching the desired goal, *i.e.*, to eliminate the abuses of the "voluntary" commitment procedures. However, there are practical problems which may be insurmountable. First of all, assuming that there has been an increase in the number of "voluntary" com-

41. 357 F. Supp. at 74.

42. For a full discussion of the role that an independent psychiatrist can play, see Ellis at 870.

43. 402 F. Supp. at 1043.

44. The Philadelphia Inquirer, October 7, 1973, at p. 1, col. 4 (Sunday ed.).

mitments proportional to the increase in the number of young people in the population of mental hospitals,[45] will there be enough qualified people willing to act as guardians? One could argue that since every child who is "voluntarily committed" is entitled to legal counsel, the solution is to have legal counsel double as a guardian *ad litem*. Although this argument is not without its merit, one of the most obvious reasons for not proceeding in this manner is that counsel may not have the desire or expertise to assume a dual role. This may be one reason that courts such as the *Bartley* court have not incorporated into their thinking a theory similar to the guardian theory presented here.[46]

If implemented, the guardian theory may eliminate flagrant abuses of the "voluntary" commitment procedures, but it may also discourage parents from seeking help for a child with a mental disorder. This is precisely the result the *Bartley* court wanted to avoid. Such a lengthy and complex procedure for the commitment of a child in need of care may have a counter-therapeutic effect. This is the major reason advanced by psychiatrists and psychologists for keeping mental commitment proceedings out of the courts.[47]

Finally, who will pay the guardians for their services? If the parents are required to pay, they will have to pay someone to advocate against their interests. This does not make sense either logically or practically. As evidenced by the aforementioned arguments opposing the implementation of the guardian theory, the *Bartley* court has supplied the most substantial protection that can practically be afforded a child in a "voluntary" commitment proceeding.

IV. Possible Impact of the Bartley Decision

The civil commitment provision in §406 of the Pennsylvania statute[48] presents the first major restriction upon the impact of this decision. It provides a vehicle for effectively circumventing the post-commitment hearing as well as the other due process safeguards announced by the court. Under §406 the supervisor of the institution

45. Kay, Farnham, Karren, Knakel and Diamond, *Legal Planning For The Mentally Retarded: The California Experience*, 60 Cal. L. Rev. 438, 516 (1972).

46. Another interesting theory was implemented by the federal court in Saville v. Treadway, 404 F. Supp. 430 (M.D. Tenn. 1974). This plan provided for a three-member board to screen applications made by parents to voluntarily admit their child. The theory supporting this plan parallels the guardian *ad litem* theory presented in this note in that it provides due process prior to any confinement as well as effectively screening frivolous applications for commitment.

47. Ellis, 62 Cal. L. Rev. 840 (1974).

48. 50 Pa. Stat. Ann. §4406 (1966). Section 406 permits involuntary detention of persons upon petition to the state court of common pleas.

of commitment can initiate a civil commitment proceeding. As a result, there is the possibility that a child's status may be changed from "voluntary" to involuntary, thus escaping the teeth of the *Bartley* decision. The plaintiffs did not challenge §406; therefore, the court was unable to pass upon the issue. Not until §406 is reconciled with *Bartley, i.e.*, ruled unconstitutional or amended legislatively in order to meet the procedural safeguards required by this court, can the full impact of *Bartley* be felt. It provides only partial protection for the constitutional rights of juveniles.

The Supreme Court has never decided the issue of due process in "voluntary" commitment proceedings[49] and *Bartley* only establishes the law for the state of Pennsylvania. It has no binding effect upon any other state. Therefore, the impact of *Bartley v. Kremens* is far from reaching the "major" proportions suggested by the press release published by the Mental Patient Civil Liberties Project mentioned above.[50]

Due to the restrictive impact of this decision, steps must be taken to further protect the rights of juveniles in "voluntary" commitment proceedings not only in Pennsylvania, but in all of the other states which have "voluntary" commitment statutes.[51] The *Bartley* court has done an admirable job in establishing a method for protecting juveniles. As evidenced by the fact that the court could not pass on the constitutionality of §406, it is apparent that judicial innovation is very limited. The most effective way to solve the problems presented here is to have the legislature promulgate new legislation recognizing the rights and needs of the children affected.[52]

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49. Bartley v. Kremens has been docketed for review by the Supreme Court of the United States. 44 U.S.L.W. 3525 (U.S. Mar. 23, 1976).

50. See page 231 *supra*.

51. Many other states have similar voluntary commitment statutes, *See e.g.*, Ill. Ann. Stat. ch. 9 1/2, §§5-2 (Smith-Hurd Supp. 1973); Ind. Ann. Stat. §22-1205 (Burns Supp. 1973); Mich. Comp. Laws Ann. §330.19(a) (Supp. 1973).

52. Journal Herald, Feb. 18, 1976, p. 21, col. 2. This newspaper article suggests that Ohio has just enacted new legislation giving mentally retarded individuals many needed rights.