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Constitutional Law - Right to Counsel - Guardian Ad Litem May Waive Minor Defendant's Right to Counsel

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the issue presented in *Trans-Lux* cannot be avoided. New York State[27] is pressing the Court for an answer in the censorship area; the Court itself has left the door open to such attempts.[28]

Whether or not the Supreme Court will approve the standard of *Trans-Lux* is an open question. The Court tends to reverse motion picture cases merely by referring to *Burstyn* or *Roth* without giving a detailed analysis.[29] Granting that the Court is reluctant to give any more leeway than it has to the censorship area because of the basic freedoms involved, a realistic standard is nevertheless essential to clear the air for effective enforcement. It would seem that the test suggested in *Trans-Lux* is the most logical and reasonable that has been elicited so far.

Of course, even if acceptable, the actual operation of such a test as implemented by statute will be a difficult problem of administration. Determination of whether or not a particular scene does offend the obscenity standard will be perilous indeed. How the courts will correct administrative abuses caused by improper application of an approved standard, however, is a problem for the future.[30]

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CONSTITUTIONAL LAW — RIGHT TO COUNSEL — GUARDIAN AD LITEM MAY WAIVE MINOR DEFENDANT'S RIGHT TO COUNSEL.

In Re Mears (Vt. 1964)

Petitioner's son, a minor of almost twenty years, was arraigned on complaints charging him with burglary, a felony, and with petit larceny and breach of the peace, misdemeanors. Petitioner was present at the arraignment. The court inquired of the petitioner whether he was acting as guardian ad litem for his son.[1] After receiving an affirmative reply, the

27. Presumably the other nine states with movie censorship statutes would be similarly desirous of a definite answer. They are: Florida, Kansas, Louisiana, Maryland, Massachusetts, New York, Ohio, Pennsylvania and Virginia. Not all of them have survived to the present time; for example, the Pennsylvania statute was declared unconstitutional in Hallmark Productions, Inc. v. Bd. of Censors, 384 Pa. 348, 121 A.2d 584 (1956).

28. This is especially true in Times Film Corp. v. Chicago, 365 U.S. 43, 81 S.Ct. 391 (1961).

29. Although it may seem that the Court has already extended the dominant theme test to motion pictures, this does not necessarily follow. There has been no publicly evidenced extension of that test to motion picture censorship. It may be that on careful consideration, the Court will come to the conclusion that a different standard is needed for moving pictures.

30. Chief Justice Warren gives some examples of abuses under other statutes in his dissent in Times Film Corp. v. Chicago, 365 U.S. 43, 69–72, 81 S.Ct. 391, 405–07 (1957).

1. VT. STAT. ANN. tit. 33 § 678 (1961). Whenever a minor is charged with a crime in any court and is not represented by counsel the court shall forthwith appoint a guardian ad litem to defend the interests of the minor. Whenever a minor is charged with a felony in any court, he shall be represented by counsel.

court advised both the accused and his father of the son's right to counsel and of the fact that the court would assign counsel if they desired. The father stated, "We do not wish to have counsel."[2] Pleas of guilty were entered at this time, and sentences were later imposed. Petitioner, by habeas corpus, sought to test the legality of his son's confinement because counsel was not appointed to represent his son in violation of a state statute which makes such appointment mandatory when a minor is charged with a felony[3] and because such failure with regard to the felony conviction contaminated the proceedings with respect to the misdemeanor convictions. The Supreme Court of Vermont *held* that the felony conviction was vacated by reason of the failure to comply with the statute but that the misdemeanor convictions were unaffected, the guardian having waived the accused's right to counsel with respect to them. *In re Mears,* 198 A.2d 27 (Vt. 1964).

The primary issue in the instant case relates to the validity of the waiver of the accused's right to counsel by the guardian ad litem. The dissent[4] reasoned that the right to counsel is a personal right and cannot be waived by anyone other than the person accused.[5] A person accused of a crime in a state court has a right to be represented by counsel. To deny him that right is a violation of the due process requirement of the fourteenth amendment.[6] The right to counsel may be waived if such waiver is intelligently and competently given.[7] This right may be waived effectively by a minor although the age of the accused is an important factor in determining whether or not there has been an intelligent waiver.[8]

An important distinction must be drawn between a minor being prosecuted as an adult in the typical criminal proceeding, and a minor being "prosecuted" in a juvenile court proceeding.[9]

In the former situation it is clear that he may waive his right to counsel.[10] Likewise, a youthful petitioner in a habeas corpus proceeding will naturally have an advantage over an adult similarly situated.[11] It is reasonable to infer from the youth of the convict that he was inexperienced and did not fully realize what his right to counsel imported even though explained by the court, and that, consequently, his waiver of that important right was not a responsible decision.

One of the main purposes of a statute which requires the appointment of a guardian ad litem for a minor charged with a crime is to protect

2. *In re* Mears, 198 A.2d 27, 29 (Vt. 1964).
3. *Supra* note 1.
4. Chief Justice Holden dissented, 198 A.2d 27, 34 (Vt. 1964).
5. *In re* Mears, 198 A.2d 27, 35 (Vt. 1964).
6. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963).
7. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938).
8. Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191 (1957).
9. *Cf.* Annot., 60 A.L.R.2d 691 (1958). In the juvenile courts there is a split of authority whether a minor has such a right. This split is caused by the nature and philosophy of juvenile court proceedings.
10. Haughey v. Smyth, 187 Va. 321, 46 S.E.2d 419 (1948), *cert. denied,* 334 U.S. 853, 68 S.Ct. 1509 (1948).
11. *Cf.* Annot., 71 A.L.R.2d 1160 (1960).

the minor from his own lack of intelligence, competency and experience. In civil proceedings the powers of a guardian ad litem are somewhat circumscribed. For example, as a general rule he may not admit anything or stipulate anything which may be detrimental to the rights of the ward.[12] The dissent in the principal case seizes upon this limitation and reasons that the same standard should prevail in criminal proceedings. But it is far from clear why this should be. A minor can waive his constitutional rights in a criminal proceeding; this he cannot do in a civil proceeding. The purpose of a guardian ad litem in a civil proceeding is to defend or prosecute suits for minors who are disabled by law from doing so themselves. A judgment rendered against a minor in a civil suit is void or voidable if he was not represented by a guardian ad litem.[13] However, such is not the case when a minor is prosecuted in a criminal case, unless it is so provided by statute as in the principal case. At common law a minor, no matter how young, could be prosecuted for criminal offenses. His disabilities in civil proceedings were never extended to criminal proceedings. It is only in relatively recent years that juvenile courts were established and jurisdiction over youthful offenders removed from regular criminal courts. A minor in a typical criminal proceeding stands on the same footing with an adult defendant. A statute which requires the appointment of a guardian ad litem recognizes that a minor in that predicament needs additional safeguards. Thus, if the minor himself suffers no legal disabilities in the criminal courts, his guardian's ad litem powers and duties should not be circumscribed.

There is an extreme paucity of case law concerning the power of a parent or guardian of an accused minor to waive the minor's right to counsel. In *McBride v. Jacobs*,[14] the court said:

> Obviously not all minors are capable of making a waiver. Where the court finds for any reason the minor is not capable of a waiver the parent may so waive provided the court also finds there is no conflict of interest between them, and of course the waiver by the parent must be an intelligent, knowing act.

In the case of *In Re McDaniel*,[15] the court said:

> If the record had reflected that the court at arraignment had made inquiry as to the financial ability of the mother to employ counsel to advise with her and her son, and if she was not able to employ counsel, had offered to appoint counsel without cost to her, and she and the

12. See, *e.g.*, Kennard v. Wiggins, 349 Mo. 283, 297, 160 S.W.2d 706, 712 (1942) (dictum): "The guardian ad litem . . . can waive nothing and admit nothing against his ward, but the adversary of such infant must prove his whole case, whether it be one in equity or at law." In Anderson v. Anderson, 133 N.J. Eq. 311, 314, 32 A.2d 83, 85 (Ch. 1943), the court stated: "[H]e cannot admit, without formal proof, the verity of matters of fact disserviceable and disadvantageous to the advocacy of the interests of the infant."

13. See, *e.g.*, Equitable Life Ins. Co. v. Cook, 229 Iowa 911, 295 N.W. 428 (1940).

14. 247 F.2d 595, 596 (D.C. Cir. 1957). It is interesting to note that Chief Justice Holden cites this case in support of his argument. He also cites People v. Hardin, 207 Cal. App. 2d 336, 24 Cal. Rptr. 563, which is clearly distinguishable.

15. 302 P.2d 496 (Okla. Ct. Crim. App. 1956).