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Constitutional Law - Lipscomb v. Simmons: State Foster Care Funding for Non-Relatives Only, Social Welfare or Parens Patriae

David Peterson

CONSTITUTIONAL LAW

SUMMARY

LIPSCOMB v. SIMMONS: STATE FOSTER CARE FUNDING FOR NON-RELATIVES ONLY, SOCIAL WELFARE OR *PARENS PATRIAE*

I. INTRODUCTION

In *Lipscomb v. Simmons*,[1] the Ninth Circuit, sitting *en banc*, held that the Oregon statute[2] providing for state-funded benefits of all non-relative foster homes, but not those of relatives, did not violate the Equal Protection Clause of the Constitution[3] and provided a rational basis for dealing with the foster care system.[4]

In a 7 to 4 decision, the rehearing affirmed the district court decision and reversed an earlier Ninth Circuit holding.[5]

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1. Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992) (en banc) (per Goodwin, J., with whom Tang, J., Norris, J., Beezer, J., Brunetti, J., O'Scannlain, J., Rymer, J., joined; Kozinski, J., Fletcher, J., Poole, J., and Nelson, J., dissenting).

2. OR. REV. STAT. § 418-625(2) (1991), which reads:

> "Foster home" means any home maintained by a person who has under the care of the person in such home any child under the age of 18 years not related to the person by blood or marriage and unattended by its parent or guardian, for the purpose of providing such child with care, food and lodging. . . .

3. *Lipscomb*, 962 F.2d at 1376; U.S. CONST. amend. XIV, § 1.

4. *Lipscomb*, 962 F.2d at 1380.

5. Lipscomb v. Simmons, 884 F.2d 1242 (9th Cir. 1989).

II. FACTS

The named plaintiffs, Sheri Lipscomb and Autumn and William Scalf, were three children residing in Oregon. The state took them from abusive homes, and they have close relatives who wish to care for them.[6] They sued on behalf of all Oregon children who have been removed from their natural homes by the state and who have been denied state-funded foster care benefits and medical assistance solely because they are related to their foster parents.[7] The district court divided the class plaintiffs into two sub-classes:[8] those who are placed with relatives and are denied foster care benefits; and those who are not placed with relatives or are removed from relatives because of the state's policy of not providing funding.[9] The district court granted summary judgment to the defendants after determining that the Oregon statute did not violate the Equal Protection Clause.[10] The plaintiffs appealed, and the Ninth Circuit reversed.[11] The Ninth Circuit concluded the State has an affirmative obligation to secure the foster children's fundamental right to live with close relatives.[12] A rehearing *en banc* was granted.[13]

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6. Lipscomb v. Simmons, 962 F.2d 1374, 1382-83 (9th Cir. 1992). Sheri Lipscomb is severely disabled. Sheri's aunt and uncle did not have private medical coverage for Sheri. As relatives, they were ineligible to receive state foster care assistance. They were afraid that they would be forced to give Sheri up because of inability to pay her medical bills. Autumn and William Scalf's aunt and uncle were forced to give up the children because they were financially unable to meet the children's needs. The Scalf children were placed with unrelated foster parents, who received foster care benefits and medical coverage from the state.

7. *Lipscomb*, 884 F.2d at 1243. The Oregon statute actually strictly defines foster parents to exclude relatives. OR. REV. STAT. § 418-625(2) (1991). *See infra* note 46 for Oregon's restricted definition of relatives.

8. *Lipscomb*, 962 F.2d at 1376. The case was certified as a class action because Sheri Lipscomb was no longer a minor and the Scalf children were appointed a guardian. Thus, the original plaintiffs were no longer wards of the Oregon foster care system. Although affidavits of these children were originally submitted in the complaint, the majority refused to consider further detailed affidavits submitted on appeal of the summary judgment. *Id.* at 1382-83 n.9 and 1385 n.1.

9. *Id.* at 1376.

10. Lipscomb v. Simmons, 884 F.2d 1242, 1243 (9th Cir. 1989).

11. *Id.*

12. *Id.* at 1245, 1250.

13. Lipscomb v. Simmons, 907 F.2d 114 (9th Cir. 1990).

III. BACKGROUND

Oregon statutes give two relevant state goals for the foster care program. The Children's Services Division (CSD) of the Oregon Department of Human Resources is required to design its rules "to protect the best interests of children in foster homes."[14] Oregon law also declares a preference for placing foster children in the homes of relatives where possible.[15]

A federal district court in *Youakim v. Miller*[16] considered the Illinois administration of federally funded foster care under Title IV-E.[17] On appeal in *Miller v. Youakim*,[18] the United States Supreme Court struck down the Illinois law on statutory grounds, without reaching any constitutional questions. This law denied payments to relatives who met state licensing requirements for participation under the federal foster care benefit program.[19]

California has a state funded program similar to that of Oregon.[20] In *King v. McMahon*,[21] the California Court of Appeals reversed a Superior Court order enjoining enforcement of a state law which denied state foster care benefits to children living with relatives, while granting benefits to foster children living

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14. Lipscomb v. Simmons, 962 F.2d 1374, 1381 (9th Cir. 1992); OR. REV. STAT. § 418.640(1) (1991).

15. *Lipscomb*, 962 F.2d at 1376; *see* Or. Admin. R. 412-27-045, which provides:

> CSD will protect a child's right to live with his or her immediate or extended family. . . In determining either the temporary or permanent placement of a child, CSD will consider placement with relatives in preference to persons the child does not know.

16. *Lipscomb*, 962 F.2d at 1381; Youakim v. Miller, 314 F. Supp. 1204, 1208 (N.D. Ill. 1974). The district court found the Illinois statute did not violate the Equal Protection Clause. *Id.* Summary judgment for the state was vacated and remanded for determination based upon a recent federal statutory interpretation by HEW in Youakim v. Miller, 425 U.S. 231, 235-6 (1976) (per curiam). The Supreme Court raised the question of Supremacy Clause issues to resolve conflict between the federal and state statutes. *Id.* at 234.

17. *Lipscomb*, 962 F.2d at 1376; *see* 42 U.S.C. §§ 606(a), 607, 672(a).

18. 440 U.S. 125 (1979).

19. *Id.* at 126-29. The Court followed a Department of HEW administrative interpretation of the AFDC-FC statute as requiring payment to relatives. *Id.* at 132.

20. CAL. WELF. & INST. CODE, § 11402, subd. (a) (1991).

21. 186 Cal. App. 3d 648 (1986).

with non-relatives.[22] The Court of Appeals found that the program met the requirements of equal protection under the California Constitution.[23] The court refused to apply the strict scrutiny used by the lower court.[24] Rather, it used a rational basis test to find that the program classification scheme served a legitimate state interest.[25]

IV. THE COURT'S ANALYSIS

The Ninth Circuit in *Lipscomb v. Simmons*[26] applied first a strict scrutiny analysis and then a rational basis test in evaluating the Equal Protection Clause of the Fourteenth Amendment.[27]

A. STRICT SCRUTINY

The Ninth Circuit looked to a heightened standard of scrutiny, which is required when legislative classifications either disadvantage a "suspect"[28] or "quasi-suspect"[29] class or hinder the exercise of "fundamental rights independently protected against governmental interference."[30]

The Ninth Circuit rejected outright any constitutional claims of the first sub-class of plaintiffs: those who live with relatives but receive no state funds.[31] The court also refused to rec-

22. *Id.* at 651.

23. *Id.* at 651-52; Cal. CONST. art. I § 7.

24. *King*, 186 Cal. App. 3d at 651. California courts under the California constitution have applied strict scrutiny to a broader range of classifications and accepted additional fundamental rights compared to the United States Supreme Court's interpretation of similar provisions in the federal Constitution. *Id.* at 656-58.

25. *Id.* at 651.

26. Lipscomb v. Simmons, 962 F.2d 1374 (9th Cir. 1992).

27. *Id.* at 1378, 1380; *see* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-42 (1985), which describes various classifications recognized for strict scrutiny; *see* Dandridge v. Williams, 397 U.S. 471, 484-87 (1970), which describes the test for a rational basis upon which state economic and social legislation will be upheld.

28. *See, e.g., City of Cleburne*, 473 U.S. at 440. A suspect classification based on race, alienage, or national origin is assumed to be irrelevant to any legitimate state interest and to be founded on prejudice. *Id.*

29. *Id.* at 440-41. The Court rejected mental retardation as a quasi-suspect class and emphasized the reluctance of courts to recognize a broader general principle to define suspect classes. *Id.*

30. *Lipscomb*, 962 F.2d at 1378.

31. *Id.* at 1376-77. The fact that the children continue to live with relatives made

ognize, as a new suspect class for equal protection purposes, the second sub-class of plaintiffs: children who are denied the opportunity to live with relatives under Oregon policies.[32]

The Ninth Circuit rejected the plaintiffs' argument that they have a fundamental constitutional right to live with extended family members.[33] It found that, in certain situations, citizens might have a right to be protected from governmental intrusion in extended family relationships.[34] In the present case, however, the Ninth Circuit emphasized such governmental interference was absent, reasoning that a foster child is not prohibited from living with relatives when they are deemed acceptable as foster parents.[35] The court suggested further that any right to the exercise of a family relationship would not create a corresponding affirmative obligation on the part of the government to aid the exercise of that right.[36]

After concluding that the plaintiffs were not a "suspect class" and that Oregon has no obligation to fund the plaintiffs' exercise of a right to maintain family relationships, the Ninth Circuit declined to apply heightened scrutiny.[37]

B. Rational Basis Test

The Ninth Circuit next applied the rational basis test to the

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their claims of discrimination tenuous. *Id.* at 1377.

32. *Id.* at 1378. The court found precedent for refusing to recognize close relatives (citing Lyng v. Castillo, 477 U.S. 635, 638 (1986)) and also the non-affluent (citing Dandridge v. Williams, 379 U.S. 471, 483-87 (1970)) as suspect classes for equal protection purposes. *Id.*

33. *Lipscomb*, 962 F.2d at 1378.

34. *Id.* at 1378-79; *see* Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 499, 503-05 (1977), in which the Court broadened the sanctity of family protection beyond the nuclear family in striking down a zoning ordinance which prevented extended family members from living together in single dwelling units.

35. *Lipscomb*, 962 F.2d at 1379; *see Lyng*, 477 U.S. at 638, which found in the context of the federal food stamp program that the lack of government payments was not sufficient to find interference with the right of association of relatives.

36. *Lipscomb*, 962 F.2d at 1379; *see* DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 196 (1989) (state is under no obligation to protect a child not in its custody from the abuse of his father even after notice); Harris v. McRae, 448 U.S. 297, 317-18 (1980) (state has no obligation to fund abortions or other medical services); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (state has no obligation to provide adequate housing).

37. *Lipscomb*, 962 F.2d at 1379.

claims under the Equal Protection Clause of the Fourteenth Amendment.[38] Under this test, state economic and social legislation is normally given wide deference as long as the law is designed to rationally promote a legitimate state interest.[39]

The court found that there were valid state interests which could motivate Oregon to distribute state welfare funds differently between relative and non-relative placements.[40] By enlisting relatives who are willing to provide unsubsidized foster care,[41] the state then has more money available for the welfare of children living with non-relatives.[42] An undesired result of this policy, the court noted, is that fewer children may have the opportunity to live with their relatives.[43] However, the court emphasized that the state could have concluded that the overall effect is a greater level of benefits for all foster children.[44] The court further reasoned that a more inclusive classification for benefits might bankrupt the entire state program.[45] Finally, the Ninth Circuit suggested that often a child's interest is better served by placing the child with non-relatives.[46]

The majority acknowledged that the Oregon legislature required that the program be designed "to protect the best interests of children in foster homes."[47] However, the Ninth Circuit determined that the constitutional requirement was only that

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38. *Id.* at 1380.

39. *Id.* The court did not limit itself to the state's actual reason for the classification but looked for any legitimate reason. *Id.*; *see* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (in evaluating an economic regulation with environmental impact, a reasonable but mistaken basis will not be struck down even if it results in some inequality); *see also* Dandridge v. Williams, 397 U.S. 471, 487 (1970) (The law will not be judged against the lofty, ideal objectives of the state. The court will not "second-guess" the disbursement of welfare funds to meet those objectives).

40. *Lipscomb*, 962 F.2d at 1380.

41. *Id.* Children placed with relatives may be eligible for other types of federal and state aid, such as AFDC, SSI, or Medicaid. *Id.*

42. *Id.* at 1380.

43. *Id.* at 1381.

44. *Id.* at 1380-81. No evidence was presented that any individual child was provided with inadequate care because of the challenged legislative scheme. *Id.* at 1382.

45. *Id.* at 1381.

46. *Lipscomb*, 962 F.2d at 1383. A non-relative may have superior qualifications. Oregon has a restricted definition of relative as a "grandparent, sister, brother, aunt or uncle who is related by blood, adoption, or marriage." *Id.; see* Or. Admin. R. 412-27-030. Oregon's preference for relatives is based on providing only adequate care. *Id.*; *see* Or. Admin. R. 412-27-045; *see also* King v. McMahon, 186 Cal. App. 3d 648, 664 (1986).

47. *Lipscomb*, 962 F.2d at 1381; OR. REV. STAT. § 418.640(1) (1991).

"the state provide *adequate* care to the children in its custody."[48] Despite the minority's call for an individualized approach based on *parens patriae*,[49] the court required that the program only have a rational basis when viewed as a whole.[50]

C. DISSENT

The dissent agreed that normally, after rejecting strict scrutiny, courts focus on "programs as a whole" and give a state wide latitude by applying a rational basis test.[51] The dissent distinguished this situation,[52] however, because Oregon has a conflict of interest between its position as *parens patriae*[53] and its own self-interest in saving money.[54] The dissent asserted that the state voluntarily assumed the responsibilities of a fiduciary to look after the best interests of each foster child.[55] That child, because of age and circumstances, has no opportunity to promote his or her own interest.[56] The dissent urged that because

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48. *Lipscomb*, 962 F.2d at 1381 (emphasis original). The court found that the state owes a child in its custody, based upon a protected liberty interest, only reasonable safety and minimally adequate care. Based on other cases where individuals are in the government's custody, the majority found that the government is required to aid the exercise of constitutional rights only when that custody directly prevents the exercise of those rights. These cases require only adequate medical care to prisoners and reasonable safety of mental patients. *Id.* at 1379; *see also* DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 199 (1989).

49. *Lipscomb*, 962 F.2d at 1388-89. "*Parens patriae*, literally 'parent of the country,' refers traditionally to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves such as juveniles, the insane, or the unknown." West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971).

50. *Lipscomb*, 962 F.2d at 1382.

51. *Id.* at 1384 (Kozinski, J., dissenting).

52. *Id.* The dissent criticized the application of broad administrative procedures which result in inequities toward family interests, citing Stanley v. Illinois, 405 U.S. 645, 656-57 (1972) which says:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

53. *Lipscomb*, 962 F.2d at 1384.

54. *Id.* at 1384-85.

55. *Id.* at 1384.

56. *Id.* at 1389. Foster care differs from most social welfare programs: children are legally incapable of granting or refusing consent as to whether they will be removed from the home, they cannot freely decide whether or not to take advantage of available state

the State stands *in loco parentis* to the child, the court is entitled to look more closely at the rational results of the program than when a state is acting in its normal legislative or administrative capacity.[57]

The dissent found substantial precedent for the proposition that when the state exercises power over children as *parens patriae*, it "exercises a discretion in the interest of the child. . . ."[58] The dissent maintained that Oregon law reflects a strong preference for foster care by relatives for a purpose.[59] The dissent explained that in addition to providing the best environment for the child, many children with physical disabilities cannot easily be placed with unrelated foster parents.[60] After removal from the relative's home, the state then pays strangers or an institution for the upkeep and medical care of the child.[61] The state ends up paying out at least as much money, and the child is denied the love and concern of his or her family members.[62] The dissent argued that, in light of the state's duty, each child is entitled to have key decisions as to care made for his or her own best interest, rather than to serve some "collateral purpose."[63]

The dissent found that Oregon's policy prevents the plaintiff children from obtaining the care of family members "who, *in the state's own professional judgement*, are best suited to provide them a loving family environment."[64] The dissent concluded that the state may not devise a scheme which presumptively inhibits the most favorable placement of children "on the

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benefits, and they have no right to direct what happens to them thereafter. *Id.*

57. *Id.* at 1385.

58. *Id.* at 1386 (citing New York Foundling Hosp. v. Gatti, 203 U.S. 429, 439 (1906) (state has absolute right of parent with responsibility of that custody); *accord* Stantosky v. Kramer, 455 U.S. 745, 766 (1982); *see also In re* Eric J., 25 Cal. 3d 522, 530 (1979) ("When the minor must be removed from the custody of his parents for his own welfare . . . the state assumes the parent's role. . . ."); *accord* Schall v. Martin, 467 U.S. 253, 265 (1984) (in allowing pretrial detention of juveniles). A minor's liberty interest is "subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child." *Id.*

59. *Lipscomb*, 962 F.2d at 1386.

60. *Id.* at 1387. According to the dissent, it is likely that if Sheri leaves the DeFehr's home, she will be placed in an institution. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1388-89 (following duty based on *parens patriae*).

64. *Id.* at 1390 (emphasis original).

basis of a circumstance over which the children have no control."[65] The dissent finally urged that the rational basis of the Oregon statutes be evaluated against their "noble purpose".[66]

V. CRITIQUE

The majority treats these foster children[67] as if they were ordinary, free citizens and considers their extended families unimportant in evaluating the financial decisions of the state legislative scheme.[68] The Ninth Circuit takes a traditional approach and defers to the state's judgment to devise a rational overall program which provides for the adequate care of all foster children.[69]

Yet, the Ninth Circuit also feels compelled to plead the individual case that, contrary to the State's declared beliefs and to historical precedent,[70] foster children are not necessarily better off with relatives. The current program does not promote the best interests of a large class of foster children: those who would be aided in placement with relatives by state funding.[71] Perhaps

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65. *Id.* at 1390; *see also* Stanley v. Illinois, 405 U.S. 645, 656 (1972), where the Court found that equal protection requires individualized hearings on fitness before unwed fathers can be separated from their children. The state's expediency in presuming the unfitness of the father was held insufficient to justify separation of a nuclear family. *Stanley*, 405 U.S. at 658.

66. *Lipscomb*, 962 F.2d at 1391.

67. A summary of federal constitutional law concerning foster children can be found in John F. Gillespie, *Annotation: Status and Rights of Foster Children and Foster Parents Under the Federal Constitution*, 53 L. Ed. 2d 1116 (1991).

68. The court found that "Oregon has no affirmative obligation to fund plaintiff's exercise of a right to maintain family relationships free from governmental interference. . . ." Lipscomb v. Simmons, 962 F.2d 1374, 1379 (9th Cir. 1992). However, the state's decision to place with a non-relative effectively cuts off the child's right of family association. The child then no longer has any visitation rights with relatives other than parents (who may no longer be interested). In order to balance the right of family association against the state's decision to fund and place with a non-relative, the court should require at least a hearing under due process. If the court increased the burden on non-relative placement when relatives express some interest in the child, the state would be pushed toward increasing compromise in favor of the child's best interest and relative placement.

69. The problems children face in having their interests represented is documented by analysis of several test cases in ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN (1985).

70. For an analysis supporting the importance of extended family relationships in American history, see Justice Powell's opinion in Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 504-06 (1977).

71. The foster care system is in large part unsuccessful in finding foster homes from

an intermediate concession of medical benefits without payment for living expenses would allow more foster children to live with relatives.

The dissent makes an interesting connection between the fiduciary duty of the state and the foster child's best interest. In every other aspect of foster care placement, the Children Services Division (CSD) is required to look at the child as an individual with particular needs. The CSD determines the special needs of a child and the ability of a relative to fill those needs. The statutory scheme then defeats the natural fruition of placement with that relative because it refuses resources for medical and physical essentials. The state then provides those same resources to the second choice, a non-relative or institution. The minority correctly contends that a fiduciary duty analysis requires rationality on an individualized basis.[72]

VI. CONCLUSION

The Ninth Circuit held that Oregon has rationally fashioned a program which both meets its budgetary constraints and provides for the welfare of all children in foster care.[73] The classification scheme does not disadvantage a suspect class or impinge upon fundamental rights of family association. It meets minimum constitutional requirements of rationality as applied to social welfare programs. Therefore, the Ninth Circuit found that an individualized, need-based program should not be forced upon the state.[74]

*David Peterson**

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the same racial background as the children. *See* Janet R. Fink, *Effects of Crack and Cocaine Upon Infants: A Brief Review of the Literature*, 10 CHILDREN'S LEGAL RTS. J. 4, 8 n.2 and n.4 (1989). In urban areas, a large majority of foster care placements are related to drug abuse. The increasing number of infants with cocaine and HIV backgrounds is straining the foster care system. *Id.*

72. Justice Brennan's dissent in *DeShaney* succinctly argues that when the state cuts off private support, it has a duty to provide public aid. DeShaney v. Winnebago County Dept. of Social Serv., 489 U.S. 189, 206-08 (1989). In the present case, the state has separated the child from its parents and so may be under duty to provide public aid in placements.

73. Lipscomb v. Simmons, 962 F.2d 1374, 1384 (9th Cir. 1992).

74. *Id.*

* Golden Gate University School of Law, Class of 1995.