ORIGINAL

In the

Supreme Court of the United States

HILMAR G. MOORE, ET AL., Appellants,	)	
Vs	)	No. 78-6
JOHN PLEASANT SIMS, ET AL., Appellees.	)	

Washington, D. C.
February 26, 1979

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HILMAR G. MOORE, ET AL., Appellants, v. JOHN PLEASANT SIMS, ET AL., Appellees.	No. 78-6

Washington, D. C.

Monday, February 26, 1979

The above-entitled matter came on for argument at 1:02 o'clock p. m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DAVID H. YOUNG, ESQ., Assistant Attorney General of Texas, Austin, Texas; on behalf of the Appellants.

WINDELL E. C. PORTER, ESQ., Gulf Coast Legal Foundation, 2601 Main Street, Houston, Texas; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Moore v. Sims.

Mr. Young, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID H. YOUNG, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. YOUNG: Thank you, Mr. Chief Justice, and may it please the Court:

Today we are concerned with numerous sections of title 2 of the Texas Family Code which is Texas' effort to deal with the law of parents and children. It is a codification obviously of many parts. It in part reflects case law as they existed prior to its passage in 1974. It in part reflects what the legislature or what the case law in the absence of statute said the law was, and it also, of course, reflects changes that the legislature made in the statutes and case law.

Those various aspects of the Family Code have an interplay in the sections which are before you here today. Some of the sections which we will be discussing are matters of law that pertain to virtually any case in the civil courts in Texas, and others are sections that pertain to the more limited aspects of child abuse and still others are sections which have only to do with certain instances or certain procedures in child abuse.

Because of the numerous chapters and sections involved, when I am making my argument I will try to use more than merely numbers of chapters when I am describing things. For instance, chapter 17, I will always try to refer to that as to the emergency protection provisions; chapter 14 I will try to remember to refer to as the conservatorship or custody provisions; likewise, chapter 15, termination of parental rights; chapter 11, which is involved here as well, is essentially a wholly procedural chapter; and chapter 34 is involved as not a judicial per se chapter at all, it is really an investigative agency kind of chapter.

I would also like to utilize some of my time to very briefly state what the court below held, because we are not appealing everything that the court below held, and from reading the opposing briefs, it is at least my judgment that many of those briefs are on issues that are not before this Court.

QUESTION: Is it possible to briefly state what the court below held?

MR. YOUNG: I hope so. I want to try. I think it is difficult and I certainly don't want to use up all of my time doing it.

First of all, of course, the abstention issue we clearly are appealing. They held section 1110, a procedural statute, unconstitutional on its face because it failed to

require an attorney ad litem for a child in any suit affecting a child under the emergency statute, conservator statute, or the termination statute. We are only appealing that as to the necessity for an ad litem at the emergency hearing, the chapter 17 hearing. We are not appealing it as to its impact on any of the other proceedings, whether for conservatorship or permanent or temporary basis or termination.

Three held in three sections, 1111, 1705 and 1706, that all were unconstitutional, as failing to require an adversary hearing within ten days of the emergency taking of a child. We are not appealing any of those.

They held section 1115 unconstitutional on its face as to the standard of proof, saying clear and convincing evidence was required, instead of preponderance. We are appealing that.

They held section 1702 unconstitutional in that -- saying it was unconstitutional on its face, but saying that immediately -- the statute says a child that is seized will immediately be taken before a court or the agency seizing the child will immediately obtain a judicial sanction, if you will, to have possession of a child. They interpreted that to mean that immediately is the "very day" of the taking. We are appealing that limited aspect of the holding.

They said that 1703 is unconstitutional on its face in that it fails to require all reasonable efforts to serve

notice of one of these suits. We are not appealing that and we would frankly characterize that as one of the more gratuitous holdings of the court below, because there is no question that all reasonable efforts should be made and were made in this instance to notify the parents of the proceedings, and in fact they had actual notice.

They held that section 3405 was unconstitutional on its face, as failing to require notice in a hearing for the parents before any psychological or psychiatric examination of the children. We are not appealing that. That wasn't even at issue in this case. Physical examination was at issue in this case, and the court made no adverse holding as to that.

They also held the child abuse, neglect, report and inquiry system unconstitutional as applied, in that the state had provided for a central registry of cases of suspected abuse and those cases on that registry were not limited to instances in which a judicial determination as to the abuse had been made.

Finally, they held 3408 unconstitutional on its face, that being the confidentiality provision, and held it unconstitutional inasofar as it did not provide for parents to be notified of the contents of the record that the state had on them or requiring the states upon request to reveal the contents of the records, except for informance. We are

not appealing that.

One other thing which is confusing, also is that the Woods case, it is my understanding, is not before this Court. It was consolidated on a limited issue of the right of indigents to appointed counsel, and in their decision in this case and in their judgment, the court below said that consolidation was ill-advised. We did not in our brief anyway cite to you what became of that case. The court allowed the state courts to proceed and in December of 1976, some two or three months after the decision in this case was rendered, the Court of Civil Appeals reversed the judgment and restored the children to Mrs. Woods. That decision is reported at 545 Southwest 2nd 573. The reversal was based on an insufficiency of evidence kind of question.

That I hope gets me into what I would like to talk about regarding abstension, because in that case, the Woods case, the state courts were allowed to function, were allowed to go ahead through their normal processes and what happened is that the parents won.

To talk about abstension, it is also necessary to spend just a little bit of time on a chronology of the events that occurred.

On March 25, 1976, there was a report of child abuse at the school in question. A Department of Human Resources worker went there to investigate it, and the

children were taken to a child welfare clinic. The next day, the very next day, not the very day but the very next day, a temporary order was obtained. The day after that, Paul Sims, who is the subject of this litigation really, was hospitalized where he would remain for some ten days. On the 5th of April, the first --

QUESTION: It says March 31 --

YOUNG: I beg your pardon?

QUESTION: On March 31, they went to a judge to modify that order, didn't they?

YOUNG: No, Your Honor. According to the deposition of Judge Lowry -- which I will discuss -- they did attempt apparently to file a motion to modify it. It is my understanding that the District Clerk said that Judge Lowry was not present, he being the judge which had entered the temporary emergency order a few days before that, and went to see another judge to see if he would hear it. He evidently said he did not want to hear it, and they left.

QUESTION: This is not the only point that is not clear in this case.

MR. YOUNG: That's right. That is why I am taking some time to go through it in the first place. On the 5th, however, Judge Lowry was around and a hearing was had in his court room. The 5th was the ninth day of the duration of the ten-day emergency order. At that time, the plaintiffs

below had pending a habeas corpus action and a hearing was conducted at the bench, if you will. All this is explained in some detail in Judge Lowry's deposition. And the motion to modify was never mentioned to him at that time.

QUESTION: When you say a habeas corpus action, a state habeas action?

MR. YOUNG: Yes, sir.

QUESTION: The initial order was a state court order, was it not?

MR. YOUNG: Yes.

QUESTION: Was that entered in any pending proceeding that actually had been brought?

MR. YOUNG: Yes. The proceeding -- there were two state court proceedings before the federal court hearing on the --

QUESTION: Briefly can you tell us what those were?

MR. YOUNG: Yes. The first one was the one that I mentioned on the 27th.

QUESTION: Brought by whom?

MR. YOUNG: Brought by the state -- I've forgotten the name of the individual who signed the complaint, but it was brought by the state. This was the day after the children were picked up at school. They were in foster care.

QUESTION: So this was a state agency, a proceeding brought by a state agency?

MR. YOUNG: Yes.

QUESTION: And who were the defendants?

MR. YOUNG: The Sims, the parents.

QUESTION: That is one.

MR. YOUNG: That's one.

QUESTION: What is the next one?

MR. YOUNG: The next one was as a result of this hearing on the 5th in Judge Lowry's court, wherein the motion for habeas was pending, also that was onthe 9th or the 10th day, I've forgotten which, of this ten-day order. Questions as to venue of these proceeding were presented.

QUESTION: Who brought the second proceeding?

MR. YOUNG: The second proceeding was brought during a continuance of this hearing. The hearing was convened at 10:30 in the morning. As a result of the hearing, Judge Lowry had substantial questions as to venue of these proceedings in his mind. It was discussed by counsel for both parties before the court and he said he will recess this hearing until 5:00 o'clock to give the parties, both parties an opportunity to file whatever it is they are going to file. As a result of that, at four-something, the state filed a second suit.

QUESTION: In the same county or different?

MR. YOUNG: In Harris County, the same county.

QUESTION: The same county.

MR. YOUNG: And as a result of that second --

QUESTION: Naming again the Sims as defendants?

MR. YOUNG: Yes. As a result of the second suit, the judge took official cognizance, if you will, of the venue issue, transferred that second suit to Montgomery County and transferred with it the habeas action on which no action had been taken.

QUESTION: Who brought the habeas action?

MR. YOUNG: The Sims.

QUESTION: The Sims. So we have three proceedings pending before anyone went into federal court?

MR. YOUNG: You could even say four, if you wanted, because at some point the Sims also brought or attempted to bring an original habeas action I believe in the Court of Civil Appeals, which is an intermediate court, which they refused to take, there having been no decision below.

QUESTION: But they didn't succeed in getting in, did they?

MR. YOUNG: They didn't succeed but, as I understand it, that is not the question.

QUESTION: No. What I am trying to get at is the actual pending state proceedings, were there two brought by the state agency, both in Harris County, one transferred to some other --

MR. YOUNG: Montgomery County.

QUESTION: Montgomery County -- and the habeas proceeding brought by the Sims in Harris County, also transferred to Montgomery, is that it?

MR. YOUNG: That's right.

QUESTION: Now, the initial order was entered in that first state agency proceeding, was it?

MR. YOUNG: Yes.

QUESTION: I see.

MR. YOUNG: And that order, pursuant to chapter 17, was good for only ten days, in this subsequent hearing that we are talking about, not an ex parte hearing, as the first one had been, when the order was obtained.

QUESTION: That was on the ninth day?

MR. YOUNG: It was on the 5th, so it would be the ninth day, which is why I think he said he gave them until 5:00 o'clock to get whatever additional pleadings, motions they would have. That order expired by its own terms on the tenth day. After that tenth day, there was nothing possible further to do, so --

QUESTION: But the proceeding in which that order was entered was not terminated, with the expiration of the order, did it?

MR. YOUNG: Well, that is a very close question and I think that is why the second proceeding was filed seeking temporary conservatorship and why it is that proceeding that

was transferred along with the habeas to Montgomery County.

QUESTION: Well, let me put it to you this way: In your abstension argument, what state proceedings as pending do you rely upon?

MR. YOUNG: We allege that chapter 17 was filed before any proceedings of substance on the merits in federal court.

QUESTION: Well, don't confuse me with these numbers.

MR. YOUNG: I'm sorry, I said I would try not to. The first one --

QUESTION: What was the first state proceeding?

MR. YOUNG: The emergency proceeding filed the day after the child was picked up.

QUESTION: That was pending, you say, when the federal suit was brought? You said earlier --

MR. YOUNG: We argue that. It is a question of definition of what --

QUESTION: In any event, the second --

MR. YOUNG: There was no order in effect by the time the --

QUESTION: In any event, you say the second state agency proceeding, initially brought in Harris and transferred to Montgomery, that certainly was a pending proceeding when the --

MR. YOUNG: Without question.

QUESTION: All right.

MR. YOUNG: As was the habeas.

QUESTION: As was the habeas.

MR. YOUNG: Yes.

QUESTION: All right.

MR. YOUNG: At least two, probably three.

QUESTION: Montgomery County adjoins Harris on the north?

MR. YOUNG: Yes, it is immediately to the north. I don't believe there are any counties in between. You can't tell one from the other. It is all urban.

QUESTION: Is it perfectly clear that the second proceeding was pending, because the order was entered, as my notes show, on April 6th and it wasn't until April 19th that the federal case was filed, and there is more than a ten-day gap and anything -- was that another ten-day order that expired by its terms?

MR. YOUNG: That gets to -- that is was subsequently interpreted to be by the federal court. It was not clear from the statute that it would expire after ten days. The state didn't believe --

QUESTION: If you so view it --

MR. YOUNG: The state didn't believe it would expire after ten days, but we are not appealing that aspect.

QUESTION: If you so view it, that would have no more

been pending than the first one. They would be in precisely the same status, wouldn't they?

MR. YOUNG: Oh, yes, because I distinguish between a pending lawsuit and an order that is in effect. It wouldn't be necessary for any order to be in effect to have a pending lawsuit in state court, if my understanding is correct.

QUESTION: Well, couldn't the other side argue that after the ten days had run on, say, April 16th, that you retained custody of the children without any legal support for what you are doing?

MR. YOUNG: Oh, they did and that is what they did argue on April 5th in the hearing in federal court, whereupon we said, accepting that -- we didn't use these words, but accepting that as given, then can we go file another lawsuit in Montgomery County and get all this cleared up, and it was our understanding that the managing judge said yes, whereupon we did on May 14th, whereupon the Sims absented themselves from anywhere where they could be served with the writ of attachment that went with that case but somehow mysteriously they must have learned about it because they returned to federal court on the 21st seeking a temporary restraining order against the attachment. That hearing, by the way, which was not -- it was some 16 days after the Attorney General's office and the other defendants had entered an appearance of some sort anyway in that hearing in federal

court, and we were never notified of the application for a temporary restraining order, there was no hearing conducted on it, but it was granted.

QUESTION: If you rely on the May 14th action, a new suit brought then, that is almost a month after the federal case had been filed.

MR. YOUNG: That's right, and it is that aspect of the confusion why in our abstension argument we put it under several different sections and dealt with Hicks v. Miranda kind of an issue of whether a federal case -- whether a state court proceeding has to be pending before there are substantial proceedings on the merits in federal court as a separate issue.

QUESTION: Well, the case --

MR. YOUNG: We say we would have it either day.

QUESTION: On the temporary restraining order you weren't notified, but you were notified after it was granted?

MR. YOUNG: Oh, sure.

QUESTION: You would know about that.

MR. YOUNG: Without question. The effect of that temporary -- the relief that had been sought immediately as a result of that second suit in Montgomery County was to have the child placed with his maternal grandparents where he had been staying a good part of the time anyway and where he had been going to school, because they [illegible] Harris County.

So somehow while absenting themselves from the prospects of service, the Sims did find out obviously and seek out some relief from the state court action.

I mentioned earlier the confusion that results because the Family Code contains different things, and one of the things that is so confusing in the first federal court hearing is the distinctions between venue and jurisdiction on the one hand and the Family Code's concept of continuing jurisdiction on the other.

The Sims argued in the state court that there was no continuing jurisdiction in that case in Harris County and therefore it should be dismissed. Well, continuing jurisdiction didn't have anything to do with this case. There was no proceeding already pending in Harris County which would have been sufficient to give a Montgomery County court continuing jurisdiction, because, as I say, there was no case pending in Montgomery County to which the Harris County court would have to have referred it back.

What the Harris County court did was take these arguments that both sides were making, i.e., the fact that the children and the parents both resided in Montgomery County, and realized that mandatorily under the Family Code that meant venue was in Montgomery County, and while he did have jurisdiction, he did have jurisdiction and he says in his deposition that it is sufficient to enter the show cause

order that he did and transfer it back.

MR. CHIEF JUSTICE BURGER: Mr. Young, you have only got a couple of minutes left, and you had better get to the heart of your case.

MR. YOUNG: Okay. Maybe the last thing I had better say about abstension is that Hicks does away with this, Hicks v. Miranda in our view does away with the race to the courthouse theory. There is no issue that all the parties had actual notice in federal court of what the state intended to do. It was explicitly addressed to the judge, and we think he consented in effect to it. In any event, there is no finding below of the kind of bad faith or harassment that would be necessary to overcome abstension. There is not even a bad faith allegation in the pleadings. There is one harassment allegation as to the last proceeding in Montgomery County. No findings below about bad faith or harassment, and we are the appellant and they are not.

I realized I have used up virtually all of my time on only one of the three big issues of the case. I can't really address the other two in the remaining time, so I would like to just reserve the remainder of my time. Abstension will solve all the other issues if it is decided our way anyway, so I would just like to reserve the rest of my time.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Ms. Porter.

ORAL ARGUMENT OF WINDELL E. C. PORTER, ESQ.,

ON BEHALF OF THE APPELLEES

MS. PORTER: Mr. Chief Justice, and may it please the Court --

QUESTION: Ms. Porter, at some time, perhaps the earlier the better, it would be interesting to me to have you give me your version of the facts very briefly.

MS. PORTER: Yes, sir.

QUESTION: What happened? When was this child picked up and why, and then how soon after that were these proceedings begun?

MS. PORTER: All right, sir, I will do that. Let me state at the outset, sir, that we realize and we submit and acknowledge that there is a compelling state interest in a state being able to pick up children in emergency situations.

QUESTION: Do you concede that this was an emergency?

MS. PORTER: No, sir, I do not concede that this is an emergency. What we concede to, sir, is that there is an interest here on the part of the state that if in fact there were any children at any particular time, now or even then, in danger of any harm, that that state has an interest in being able to take those children into custody.

QUESTION: And primarily that is a matter for the

state courts, is it not?

MS. PORTER: That particular -- yes, sir, is. What we are concerned about is what happened after the children were taken into custody.

QUESTION: Why was this particular child picked up?

MS. PORTER: All right, sir. On March 25th -- just briefly -- a referral was made to the Child Welfare Department, the child was picked up, three of the children were picked up, not just Paul. The referral was only in respect to Paul. On March 26th there was a suit that was filed for protection of the child, supposedly with a referral only as to Paul, the suit was filed in relationship to all three of the children. On March 26th, the first ex parte order was issued by the judge.

QUESTION: How soon after they were taken into custody was there a medical examination?

MS. PORTER: Sir, the children were taken to the hospital that very day.

QUESTION: Are these pictures in the appendix, are those pictures, were they taken that very day?

MS. PORTER: Your Honor, I do not know when those pictures were taken. Those pictures were stipulated into evidence. I would assume -- and usually in the regular course of business, when Child Welfare picks up the children, the pictures are usually taken at that same time, but this is just

something --

QUESTION: A picture of one child or of all three, these pictures?

MS. PORTER: Sir, I believe that those pictures are only of one child.

QUESTION: Yes.

MS. PORTER: It is difficult to determine whether or not some of them are of all three, but I believe that they are only as to the one child and that is to the boy child, Paul.

QUESTION: They are rather telling, aren't they, exhibits of child abuse?

QUESTION: Were they not buttressed also by the doctor's examination which said that there had clearly been a case of child abuse?

MS. PORTER: Your Honor, they were buttressed by an affidavit by the doctor. However, there was never any testimony because there was never any court hearing. Usually, what occurs is when these particular suits are filed, there is usually an affidavit presented to the judge by the social worker or by the attorney from Child Welfare which states what the result of the doctor's examination is.

On March 31st, the appellees went in and sought to modify the March 26th ex parte order. That order lasted no longer than ten days. After the expiration of that order,

pursuant to the Texas Family Code, the judge was to do either one of two things, order the children restored to the parents or direct Child Welfare or its attorneys to file a suit affecting the parent-child relationship. On March 31st, the appellees went into court to file a writ of habeas corpus.

I'm sorry, I left out one fact about the March 31st order. The motion to modify, they were not even allowed to file that particular motion, and we feel that that was effectively denying them any particular access.

QUESTION: Wasn't it that the judge wasn't there?

MS. PORTER: Sir, in the request for admissions, it states and admits that the motion was stamped by the clerk. They said that the judge was not there, but then the motion was returned back to appellees. They were not even allowed to file it, to leave it there and to set a hearing for another time.

QUESTION: Is that clear?

MS. PORTER: I believe, sir, that it is clear from the request for admissions that are in the appendix.

QUESTION: That they weren't permitted to file?

MS. PORTER: It is not clear, sir, from any testimony. It is just that --

QUESTION: The courthouse was open --

MS. PORTER: Yes, sir.

QUESTION: -- and if they tended a paper with the

right fees, couldn't they file any paper?

MS. PORTER: Supposedly, sir, they were supposed to be able to file.

QUESTION: Maybe, supposedly, it is either permissible or not.

MS. PORTER: Sir, they should have been able to file it, however --

QUESTION: Well, were they?

MS. PORTER: No, sir, they were not permitted to file.

QUESTION: Well, why were they denied the right to file?

MS. PORTER: I do not know, sir. The judge was not there.

QUESTION: Is there anyting in the record to show that they were denied the right to file?

MS. PORTER: No, sir, only the written --

QUESTION: Well, how can we take your word for it if it is not in the record?

MS. PORTER: Let me say this, sir, only the admittance that it was stamped and returned to the attorney for appellees, and the usual practice is that if it is stamped it is received, and if the judge is not there then what they would do would be to set a hearing on it later on. The writ of habeas corpus was filed on March 31st. The writ

was denied. The judge would not rule on the writ because he said he lacked jurisdiction because the appellees were residents of Montgomery County. On that same day, sir, later on, another suit was filed concerning -- affecting the parent-child relationship. That suit, along with the writ of habeas corpus, was what was transferred to Montgomery County.

QUESTION: Which writ of habeas corpus, the one that you didn't file?

MS. PORTER: The one, sir, of March 31st that the judge refused to act on, sir.

QUESTION: Well, how could you do that if it hadn't been filed?

MS. PORTER: No, sir. What the court refused --

QUESTION: Do you see what confuses me?

MS. PORTER: I understand.

QUESTION: In one place in the record it says it wasn't filed.

MS. PORTER: Let me --

QUESTION: And in the next place in the record, it says it was filed and transferred to Montgomery.

MS. PORTER: Let me see if I can clarify this.

QUESTION: The March 31st order was not a writ of habeas corpus. That motion was a motion to modify the March 26th ex parte order where the judge took custody of the children for the ten-day period. After not being permitted

to have a hearing on the March 31st motion to modify the March 26th ex parte order, they then went back and attempted to file a writ of habeas corpus, because at that time the ex parte order pursuant to the Texas Code of Civil Procedure had expired because it only lasts for ten days. After refusing to rule on the writ because of lack of jurisdiction, then the case was transferred to Montgomery County, along with a second suit that was filed on the very same day that the parents were in court trying to have a hearing on the writ of habeas corpus. All of this was transferred to Montgomery County on April 5th.

It is really interesting to note that, although the parents had been in the court room, that there was still no effort to even notify them about the second ex part hearing order that was issued; further, that that order stated that a show cause hearing would be held, but it stated in blank, it didn't say when, where, who or what. They were never notified of that order. They were never notified of that particular suit, for whatever reasons.

The appellees filed their original complaint in federal court on April 19th. It is our contention that there was no pending state court proceeding in which the appellees could have litigated their constitutional claims by way of a defense.

QUESTION: They couldn't have in Montgomery County?

MS. PORTER: Sir, there was no action, although it was transferred, there was no action taken by the Montgomery County court to st a hearing.

QUESTION: Well, could they have asked for it?

MS. PORTER: Your Honor, as far as I know and from the record, they made attempts to ask for a hearing.

QUESTION: Where do we find that in the record?

MS. PORTER: It is purely speculative, sir. It is not -- they talk about the people going from one place to another and trying to find out what was happening in Montgomery County.

QUESTION: Were those ex parte orders appealable?

MS. PORTER: No, sir, they were not appealable. They are interloccutory decisions. And further, as a matter of Texas state law, if a person wants to raise questions concerning the constitutionality of seizure of children, they cannot raise it even on appeal, and the case is In Re: R.E.W.

We believe that this Court's ruling in Gerstein v. Pugh is applicable in this particular case. There was nowhere for them to go.

QUESTION: You mean there is no court in Texas that would entertain a claim that the children were unconstitutionally seized and retained by the state?

MS. PORTER: Your Honor, the only thing that they would have been able to do -- and they would not have been

able to raise their constitutional questions or the issues of constitutional law in either a writ of mandamus or a writ of habeas corpus, which are the two things --

QUESTION: Why not?

MS. PORTER: Because the writ of mandamus, sir, would have dealt with whether or not the relief sought or whether or not there was an abuse of discretion, say, if a writ of mandamus had been filed for the clerk not receiving the motion to modify or for the judge not having a hearing on the motion to modify. And of course, the writ of habeas corpus would only deal with who had legal custody.

QUESTION: Well, wouldn't that have been a sufficient remedy at that point? The question was whether the state of Texas had lawful custody, and your clients said the state does not have lawful custody, and why couldn't you raise all of the constitutional questions in that proceeding?

MS. PORTER: Let me state this, sir: On May 4th they made another attempt for a motion for leave to file a writ of habeas corpus to the Texas Court of Civil Appeals, and that motion for leave to file the writ of habeas corpus was denied.

QUESTION: Under Texas law, you would file your writs in the Court of Appeals?

MS. PORTER: Yes, sir, on this particular --

QUESTION: Why? Is there a statutorial reason?

MS. PORTER: Yes, sir, there is.

QUESTION: Could it not be filed in --

QUESTION: I thought you filed it in the District Court?

MS. PORTER: They did attempt, sir, to file it in the District Court, in Harris County District Court, and that was where His Honor refused to even rule on the writ because of lack of jurisdiction, because the family were residents of Montgomery County.

QUESTION: Well, you could have done it in Montgomery County, couldn't you?

MS. PORTER: Your Honor --

QUESTION: Couldn't you have filed a writ of habeas corpus in Montgomery County on May 4th?

MS. PORTER: If, sir, there was any pending proceeding.

QUESTION: In this particular case, could you have not filed the petition that you filed in the Court of Appeals, couldn't you have filed it in the Montgomery County court?

MS. PORTER: Your Honor, they had the choice --

QUESTION: Couldn't you?

MS. PORTER: Yes, however, they had a choice as to which court they went to.

QUESTION: Then why didn't you?

MS. PORTER: Because, sir, as the statute permits,

they chose to file the writ of habeas corpus with the Court of Civil Appeals which had jurisdiction over the Montgomery County court, since they are all in the same area.

QUESTION: Did it have jurisdiction over that case? Didn't it tell you it didn't have jurisdiction?

MS. PORTER: No, sir, the Court of Civil Appeals would have had jurisdiction.

QUESTION: Well, what did the Court of Appeals do to your petition?

MS. PORTER: The Court of Civil Appeals refused to even let them file it.

QUESTION: Because they didn't have jurisdiction.

MS. PORTER: Your Honor, no reasons were given for the refusal to file. There was no action taken in Montgomery County, by the Montgomery County court until May 14th of 1976, and then on May 21st, there was a hearing then set for May 21st.

It appears, sir, that the burden, the state is putting the burden on the family to go in and to accord themselves a hearing. The interest that the state sought to protect, there was no danger to that, as all of the time the children were in the custody of the state. And I might point out that even though the case was transferred to Montgomery County, where no action was taken in Montgomery County, and it was transferred with the show cause hearing, that the children remained

in the custody for the entire 42-day period of the Harris County Child Welfare.

QUESTION: Ms. Porter, like Justice Marshall, I don't understand why nobody on behalf of the parents, when the children were out of their custody all of this period of time, ran into the -- why they didn't go into the Montgomery County court and say, "Hey, I want our children back."

MS. PORTER: Apparently, sir -- and this is just information, this is not in the record -- there was much stipulation and very little testimony. However, sir, apparently there were attempts to find out what was going on in Montgomery County.

When the case was transferred, it was transferred by Judge Lowry who was the Harris County District Judge, with an order on it that a show cause hearing would be held. And in accordance with Texas Civil Procedure, Rules of Civil Procedure and the Family Code, that show cause hearing should have been held by the Montgomery County court within ten days of the issuance of that order. However, it was not.

QUESTION: When it wasn't held after ten days, it seemed to me he had an open and shut case to go in and say we want our children back, and they were not being held with any lawful authority at that point.

MS. PORTER: That is when the decision was, sir, to go to the --

QUESTION: To the wrong forum.

MS. PORTER: -- Court of Civil Appeals.

QUESTION: And I suppose the judges on the Court of Civil Appeals thought, well, why don't they go into the county court in Montgomery County. That is what I would have thought.

MS. PORTER: Your Honor, no reason was given for that refusal to let them file that writ. We do contend that there was no pending proceeding. The appellant relies very heavily on Younger v. Harris. However --

QUESTION: Counsel, is your petition for habeas corpus in the record?

MS. PORTER: Your Honor, it is on the docket.

QUESTION: But what were your allegations in your habeas corpus petition, do you remember?

MS. PORTER: We --

QUESTION: Didn't you allege unconstitutionality in your habeas corpus petition?

MS. PORTER: No, sir. I will have to speak, sir -- I was not counsel at that stage. I will have to speak from my conversations with the attorney who filed it.

QUESTION: Have you ever read the habeas corpus petition?

MS. PORTER: Yes, sir. It just states briefly that the children were wrongfully in the custody of Harris County

Child Welfare and the constitutional issues are not raised. And I would think, sir, that --

QUESTION: They could have been, though, I suppose, right there. They might have been denied, but you could have raised them, you could have alleged them, I suppose.

MS. PORTER: Yes, sir. They could have been --

QUESTION: And if it had been denied, you could have appealed.

MS. PORTER: They could have been raised. However, sir, generally, as far as writs of habeas corpus are concerned, it just deals with custody and who has the right to --

QUESTION: I know, but one ground for alleging, as the Chief Justice suggested to you, one ground for claiming illegal custody would be that the state was violating the Constitution by holding the children.

MS. PORTER: Yes, sir, except that at that point, and even at the point of the Court of Civil Appeals writ, there was no pending state proceeding. Both of the --

QUESTION: Except that one.

MS. PORTER: Both -- the first one, but on May 4th, when they filed in the Court of Civil Appeals, there was no proceeding that was pending in order for them to avail themselves of, and I would think that the Younger doctrine and those related cases at least contemplate that in the visuals that the litigants have some reasonable way, some means, some

real valid means of being able to raise the constitutional issues.

I would like to speak a little about the CANRIS statute, and that's the process that the state gathers information concerning abuse or alleged abuse of children. This statute does not provide for the persons even finding out what information is alleged. There is no opportunity there for the persons to correct the information.

QUESTION: Ms. Porter, I understood your opponent to say that although the court held that aspect of the statute unconstitutional, they are not appealing that holding. Is that right?

MS. PORTER: I understood, sir, that -- and it could be that I misunderstood him -- I thought, sir, that he was saying that they were not appealing that section of chapter 34 which deals with --

QUESTION: Failure to give notice to the parents.

MS. PORTER: -- the failure to give notice to the parents.

QUESTION: Yes.

MS. PORTER: But that failure to give notice to the parents, sir, that he is referring to is the failure to give notice to the parents when, say, Child Welfare is going in and requesting an order which could issue without notice and without a hearing to have either the children or the parents

examined, and I thought that that is what he was alluding to.

I do know that the state has put in their brief that CANRIS does not injure persons. We feel that it does because there is no way, there is no opportunity for them to correct any information, and we would think that there should be provided at least some type of opportunity.

QUESTION: Well, up to now you haven't given me any inkling of why this matter could not have been settled in the state courts where custody of children is normally the kind of problems that are settled there. Up to this point, I haven't any idea why a federal court should be in this case at all.

MS. PORTER: Your Honor, the reasons are because there was no pending action. Both of the orders had expired. The Montgomery County court, although they were bound to have a show cause hearing within ten days -- and I would say even the Harris County court would be bound, since it was the judge in Harris County who issued that ex parte order and the show cause hearing, that those are the reasons why it could not be resolved. There was nothing there, sir.

QUESTION: Well, I confess, I can't escape the feeling on this record, including the reading of the opinion of the United States District Court, that some people were more interested in a constitutional case than in trying to do something to take care of these children.

MS. PORTER: I do not have any knowledge, sir, of whether or not that is true. It just appears to me that the state, with all of its resources, were putting the burden on the appellees to raise or to find ways of having a hearing. There were a total of 42 days here that transpired. The only hearing that was held was the one on April 5th in which the case was transferred from Harris to Montgomery County.

QUESTION: From that moment on, did you ever go to the courthouse in Montgomery County for any purpose?

MS. PORTER: Your Honor, I will just state what has been related to me. As far as I understand, and it is not in the record, unless it is in the deposition of Miss Gladys Goddney, who was the attorney at that time, that efforts were made to find out what was going on in Montgomery County.

QUESTION: But that doesn't answer my question. My question was did anybody representing these children, the parents or anybody in the family at any time go to the courthouse where this case was transferred and ask anybody anything?

MS. PORTER: Your Honor, I cannot say specifically from my own knowledge that that happened in respect to the parents. Let me state with respect to the children that had an attorney been appointed to represent the interests of the children at the initial --

QUESTION: Your answer is nobody?

MS. PORTER: No, sir, not as to the parents.

QUESTION: Well, you say all of these didn't. I don't want to know who didn't go. I want to know who did go.

MS. PORTER: As far as I know, no one, sir. I would also like to point out that at that particular time, the only person or the only persons whom we feel were adequately represented possibly at that time were the parents because there was no attorney appointed, and the Texas statute did not require the appointment of an attorney to represent the children.

QUESTION: Well, the parents went and got attorneys, didn't they? Didn't the parents go and get an attorney?

MS. PORTER: Yes, sir, except that here we --

QUESTION: So they could have gotten an attorney and gone to Montgomery County?

MS. PORTER: They could have, sir.

QUESTION: Where are these children now?

MS. PORTER: The children, sir, were ordered returned to their parents by the federal court.

QUESTION: How long were they in the custody of the state?

MS. PORTER: They were in the custody of the state for 42 days.

QUESTION: 42 days?

MS. PORTER: Yes, sir.

QUESTION: By that time, they probably were healed of the very serious wounds that are shown in these photographs.

MS. PORTER: Your Honor, I would like to point out that in the District Court's opinion, the court does state that there was never any evidence to show as to whether or not there was any abuse by the parents. One of the things that happened immediately before the referral was made was that the father was at the school and he saw the child poking a pencil at a little girl and he told him to stop, and Paul, the child, did not stop, and he paddled the child in the presence of the teacher.

Now, Paul has stated -- and this is not in the record -- that he was paddled after his father left by the teacher who wanted to paddle him some more. And I would just once again say that there was no determination by the Federal District Court and no evidence presented as to whether or not there was any child abuse, and I suppose that would be something that would be at issue in any pending state litigation.

Let me say this on the Woods case, if I may: I know what has become of the Woods case, because I represent Miss Woods. Again, after the Court of Civil Appeals returned the child, Child Welfare reinstituted an action against her, and that case is now pending, there is a final hearing now pending in that case.

QUESTION: In federal court or state court?

MS. PORTER: In state court, sir.

The other thing that -- the other reason why a writ of habeas corpus or any remedy, say, if there had been any pending proceeding, would not be available was because in Texas by statute the ex parte orders may be stacked. In other words, if one goes into court and obtains a restraining order or an ex parte order, the statute fails to say how many you can have. However, appellants had conceded to that fact and they are not contesting that, but that was one of the things that was at issue at that particular time, because the court at that time and not made a determination as to whether or not the stacking, where one order could be issued immediately, almost after another order had been expired, was unconstitutional either on its face or as applied.

The other thing is -- and I think that what has happened with Miss Woods is that this shows the likelihood of what may reoccur again. This is not an isolated instance. Appellants stated that the children are presented to the court. They are not presented to the court. There was no presentation here.

As I said before, we are not saying that if in the event that there is child abuse the children should not be taken into custody. But we are hoping and we are saying that should they be taken into custody, that because of the

fundamental rights involved, because of the reciprocal rights between parents and children, that a hearing should be held, and that hearing should be held immediately in order to make some determination as to whether or not there is any validity, say, to the deferral. This was not done.

QUESTION: What do you mean by "immediately"?

MS. PORTER: By immediately, sir, I would say as soon as practically possible.

QUESTION: Well, the court below held the same day, didn't it?

MS. PORTER: Your Honor, if I may, there were two judgments and, yes, they did hold, sir, the same day. However, in the appendix, in letters passed between the appellants and the court, it does state and it does interpret that, immediately or the same day has been interpreted and agreed to be 24 hours. The Texas Department of Human Resources has gone as far as issuing directives. I myself try these cases and we know that they have these hearings within 24 hours.

QUESTION: Suppose they are picked up on Saturday night. When should the hearing be held?

MS. PORTER: Your Honor, there are two answers to that question. One would be, I suppose, that because of the circumstances involved, it should still be immediately. The other would be to have the hearing on the next business or the next court day. But it should be as soon as practically

possible.

QUESTION: Is Conroy where Montgomery County is?

MS. PORTER: Yes, sir, Conroy is the city in Montgomery County.

QUESTION: I thought so.

MS. PORTER: For those reasons, I would ask that this Court affirm the decision of the three-judge district court.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Young?

ORAL ARGUMENT OF DAVID H. YOUNG, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. YOUNG: Yes, Your Honor --

QUESTION: Before you start, do we by chance have any of the state court pleadings, state court proceedings in the file here?

MR. YOUNG: Not that I recall. I recall that the docket sheets or something were entered into evidence at the first federal court hearing, but I don't recall that the pleadings themselves were entered.

QUESTION: I would have thought that might have been quite relevant to the abstension issue, as to what the pleadings in the state court were.

MR. YOUNG: Well --

QUESTION: But you don't think that the petition for habeas corpus, for example, ever got into the record in the federal court?

MR. YOUNG: Not that I recall.

QUESTION: I suppose they are available though?

MR. YOUNG: Oh, certainly.

QUESTION: And I suppose you have copies in your own files of the pleadings in the state cases that were filed by the state?

MR. YOUNG: I have a five-drawer file cabinet full of things, and I am sure it is in there.

QUESTION: And you were probably served with a petition for habeas corpus, too, weren't you?

MR. YOUNG: I don't believe so. There are many things in this case we have not been served with, and I have no recollection --

QUESTION: It works both ways apparently.

QUESTION: If we were interested in getting those pleadings, is it --

MR. YOUNG: We can obtain them somehow and submit them to the Court if --

QUESTION: I think it would be very --

MR. YOUNG: I think the --

QUESTION: Would you undertake to get them?

MR. YOUNG: I will.

QUESTION: The entire file.

MR. YOUNG: Our files, as the case may be.

QUESTION: Pardon?

MR. YOUNG: Our files. There may be more --

QUESTION: Not your files. What we want is the files of the records.

QUESTION: I am interested for myself, I am interested in the state's pleadings and any answers to them in the state cases and in the petition for habeas corpus that was filed.

MR. YOUNG: The state's pleadings are in the record.

QUESTION: In this record?

MR. YOUNG: I believe so.

QUESTION: Then they were not printed.

MR. YOUNG: Not in the appendix, but they are in the record. I understood the entire record is --

QUESTION: So the entire record of the three-judge court is here?

MR. YOUNG: Yes. I believe the state's pleadings are there. I just do not specifically recall that the habeas is there.

QUESTION: But you don't think the federal habeas petition is here? I mean the --

MR. YOUNG: I am just reluctant to say it is, because I can't specifically remember, like I do remember the state's

pleadings are there.

QUESTION: But you could get that from the county court, couldn't you?

MR. YOUNG: I could get whatever files Harris or Montgomery County have.

QUESTION: I think we should examine the record here and then perhaps request from counsel copies of what we need.

MR. YOUNG: Whichever would be satisfactory.

The answer to one of the questions about an open and shut case on habeas after ten days is yes. When an order expires by the statute or by its own face, habeas, there is no need to -- you can draft a habeas petition in any form you want and win.

QUESTION: But not in the Court of Civil Appeals.

MR. YOUNG: But not in the Court of Civil Appeals. Likewise, a mandamus action, for instance, against a clerk would be brought in the District Court, against a judge. It could be brought in the Supreme Court with original jurisdiction. You just have to get in the right place.

The issue as to why counsel at this argument right here kept saying that the cases were transferred from Harris County to Montgomery County because Harris County didn't have jurisdiction. That is not why they were transferred. They were transferred because Harris County didn't have venue. Harris County did have jurisdiction. All of the

rationale for that is in Judge Lowry's deposition, which is also in the record in this case.

QUESTION: Mr. Young, section 10 of the judgment says that section 3408 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, and so forth, be made available to the parents of the subject investigation. Do I correctly understand you are not appealing from that paragraph?

MR. YOUNG: That is correct, we are not appealing that.

Let me see if I can answer some of the other questions. The pictures are all of one child, Paul Sims. Two were taken by the Child Welfare worker, three by a police officer at the hospital. I don't recall whether it is two and three or three and two, but they are all of the same child, all within a very short span of time.

The result of the federal court taking the view it did on abstension is, of course, that the appellees get to litigate their constitutional claims but nobody ever gets a hearing on the merits about what happened to this child or these children. That is what the state was after. That is what the state repeatedly tried to get before the federal court. The state even asked the federal court to -- being there and seeing how things were going, they even asked the federal court to appoint an ad litem for the child and it

was denied, saying in effect why don't you apply the same standard to yourself that you want us to follow, and the court didn't do it.

With regard to the question of the motion to modify, the appellants didn't have anything to do with that. The appellants are not the judge nor are they the District Clerk. The normal procedure in Texas is that you file a pleading that requires a hearing, as that would, and you go to the judge.

Now, any judge that was there in Harris County could have heard it. It was true apparently that the judge that was there was reluctant to hear it, but there is no indication whatsoever that appellees went to him and asked him to hear it. There is no indication. All the evidence is to the contrary, that they fled Montgomery County to keep from having a hearing. They said there was no hearing where they could raise all their issues. Well, the last thing they wanted was a hearing in Montgomery County. They didn't go to work, they didn't send the kids to school, and they couldn't be found.

The issue of whether or not an emergency order is appealable, I would submit is answered by appellee's own case. The R.E.W. cite that I gave you earlier, the Woods case, it says at page 575 in Volume 545 of Southwest 2d, "An appeal could have been taken from the emergency order, even though

the appeal would not have stayed the order," citing section 1707 of the Family Code. There is --

QUESTION: What is R.E.W.?

MR. YOUNG: R.E.W. is the state court version of the Woods case which was temporarily consolidated with this one and is now no longer consolidated. It reversed the termination of criminal rights in that case, but it was on the factual insufficiency of the evidence.

There is a split in the different Courts of Civil Appeals in Texas as to whether or not all such temporary custody orders are appealable or not.

QUESTION: Can't they go to the Supreme Court?

MR. YOUNG: I suggest it should, and that is the place to resolve it and, like this Court, one of the ways to get to the Texas Supreme Court is when there is a split in the circuit, so to speak, and that is where that issue should be resolved.

With regard to CANRIS, the Child Abuse and Neglect Report and Inquiry System, the District Court didn't say -- the District Court's opinion is not even internally consistent on this point, I don't believe. They didn't say we couldn't make the investigations, they didn't say we couldn't keep accusatory files. They said we could keep investigative files. What they said was you can't store it and retrieve it electronically. That is all the opinions means on the

Child Abuse and Neglect Report and Inquiry System, and that is -- if we are here, as we are, talking most of our time about comity and federalism and allowing the state to go about its own business, if you can't keep your files in the medium of your own choosing, then the federal courts have gone to meedling.

QUESTION: Could I stop you a moment. Was the petition for habeas corpus that was filed initially and then transferred to Montgomery County, was that petition ever acted on? Was it ever denied?

MR. YOUNG: No. The normal course in Texas is that if someone files a petition asking for relief, they go to the judge, to the clerk and get a hearing on it. The Sims filed that petition and never asked for a hearing as far as I am aware.

QUESTION: So it is still sitting there?

MR. YOUNG: It is still there.

QUESTION: Of course, if the children were held -- they were returned anyway.

MR. YOUNG: They were returned so long ago that it is problematical whether we could do anything about it now.

QUESTION: It is moot now, isn't it?

MR. YOUNG: That is one of our contentions, yes, that the passage of time has just -- we didn't ask for termination in the first place. When we were only seeking temporary

conservatorship of a child to try to give him some help while he needs it, then once the time is past where he needs it, there is not much point in our trying to do anything.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 2:05 o'clock p.m., the case in the above-entitled matter was submitted.)

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