



The 9th Circuit Weighs in on the Rights of Parents, Including Those with Legal, but not Physical, Custody

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I. OVERVIEW

A string of recent decisions in the Ninth Circuit has altered the landscape of rights held by parents and children involved in the child welfare system. In 2009, the court limited the circumstances under which a child could be interviewed at her school without parental consent, and it established the right of parents to be present at the child's forensic medical examinations conducted at the direction of child welfare, with few exceptions.¹ Simultaneously, the court held that non-custodial parents have a liberty interest in the custody and management of their children, and therefore are entitled to some level of due process of law before being separated from their children by the state, except in an emergency.² More recently, the Court affirmed the right of parents to be informed about their child's detention and placement in protective custody when public officials encouraged and facilitated the transfer.³ For families in the child welfare system, these decisions embody a significant expansion of children's rights under the Fourth Amendment and parents' rights under the Fourteenth Amendment.⁴ Attorneys representing parents in the Ninth Circuit should familiarize themselves with these important changes in order to provide their clients with effective assistance in dependency cases.

II. CASE LAW

Greene v. Camreta extended the Fourth Amendment rights of children to prohibit direct involvement by law enforcement in at-school interviews of suspected child abuse victims absent parental consent, exigent circumstances, or a warrant and probable

cause.⁵ In *Greene*, a CPS caseworker and an armed county sheriff did not notify the mother before they interviewed her child at school regarding allegations of sexual abuse committed by the child's stepfather.⁶ The two-hour interview of the child constituted a seizure, thus triggering the Fourth Amendment.⁷ The court declined to find the investigation of child abuse to be a special exception permitting a relaxed application of Fourth Amendment protections.⁸ Thus, to proceed with the interview, parental consent, probable cause and a warrant (or its equivalent), or the existence of exigent circumstances was necessary.⁹ The consent of school employees was not deemed an adequate substitute for parental consent, despite the doctrine of *in loco parentis*.¹⁰ Furthermore, this child was not in imminent danger of serious bodily harm at the time of the interview, so the exigent circumstances exception was inapplicable.¹¹ Because the defendants in *Greene* also lacked probable cause and a warrant, the court found that they violated the child's constitutional right under the Fourth Amendment to be free from unreasonable seizures.¹² Despite a finding of wrongdoing by the defendants, the Ninth Circuit upheld the District Court's grant of summary judgment for the defendants on the basis of qualified immunity.¹³ The defendants were entitled to qualified immunity because this constitutional protection had not been clearly established prior to the incident in this case.¹⁴

Additionally, *Greene* extended the Fourteenth Amendment rights of parents by holding that parents cannot be excluded from a forensic medical examination of a child without parental consent, a legitimate basis for the exclusion, or an emergency.¹⁵ If one of these exceptions exists, a parent may be kept out of the examination room, but retains the right to be in the facility during the examination.¹⁶

Decided on the same day as *Greene*, *Burke v. County of Alameda* held that parental interests in the custody and management of their children, including the medical examination rights established in *Greene*, extend to parents who have legal custody of their children, regardless of whether or not they also have physical custody.¹⁷ The Fourteenth Amendment guarantees that "parents and children will not be separated by the state without due process of law except in an emergency."¹⁸ In an emergency (where the state has reasonable cause to fear imminent bodily injury to the child), a child may be taken into protective custody without a warrant.¹⁹ In *Burke*, a suspected

child abuse victim was taken into protective custody without a warrant following an investigative interview by a police officer.²⁰ The child's father, who had only legal custody and posed no threat to the child, was not contacted before the child was taken into protective custody.²¹ The court held that parents with legal, but not physical, custody of their children are "not without *any* interest in the custody and management" of their children, though it did not define the extent of this interest.²² Therefore, the father's Fourteenth Amendment rights may have been violated by the state's actions.²³

Continuing this trend, the Ninth Circuit recently handed down a decision in *James v. Rowlands*, a case out of the Eastern District of California, regarding parents' right to notification of actions public officials take involving their children.²⁴ In *James*, a father with legal, but not physical, custody of his daughter, C.J., brought a claim against two CPS caseworkers and a deputy sheriff for failing to inform him of an investigation into the alleged molestation of his daughter and subsequent attempts to change her testimony.²⁵ The court declined to rule on these claims.²⁶ The petitioner also claimed that the defendants violated his Fourteenth Amendment rights by failing to inform him of the decision to "detain C.J. temporarily and take her into protective custody and . . . a voluntary agreement with C.J.'s mother . . . to place C.J. with her maternal grandmother for the duration of the trial."²⁷ The court held that parents have the right to be informed about their child's detention and placement in custody when the officials have encouraged and facilitated the transfer.²⁸ In so finding, the court applied *Burke* to extend this right not only to parents with physical custody, but also to those possessing only legal custody.²⁹ This right of notification may only be abrogated in instances where public officials have "reasonable cause to believe that such notification would put the child in imminent danger of serious bodily injury."³⁰

III. CONCLUSION

The recent holdings of *Greene*, *Burke*, and *James* provide additional protections under the Fourth and Fourteenth Amendments for children and parents in the investigation phase of the child protective services system. Although these are civil rights cases and not juvenile court cases, attorneys representing parents and children in dependency proceedings in the Ninth Circuit should be familiar with them.

¹ See *Greene v. Camretta*, 588 F.3d 1011, 1030 (9th Cir. 2009); National Center on Substance Abuse and Child Welfare, *Research, Fact Sheets, and Statistics*, <http://www.ncsacw.samhsa.gov/resources/resources-research.aspx> (stating 3.4 million children nationwide were examined and/or interviewed as to allegations of sexual abuse in 2004).

² See *Burke v. County of Alameda*, 586 F.3d 725 (9th Cir. 2009).

³ See *James v. Rowlands*, No. 08-16642, 2010 U.S. App. LEXIS 10723, *24 (9th Cir. May 26, 2010).

⁴ See generally *Greene*, 588 F.3d 1011; *James*, 2010 U.S. App. LEXIS 10723.

⁵ *Greene*, 588 F.3d at 1030.

⁶ *Id.* at 1017.

⁷ *Id.* at 1022.

⁸ *Id.* at 1027.

⁹ *Id.* at 1030.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1016.

¹⁴ *Id.*

¹⁵ *Id.* at 1037 (citing *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000)).

¹⁶ *Id.*

¹⁷ *Burke*, 586 F.3d 725, 733 (9th Cir. 2009) (“[T]he Fourteenth Amendment’s protection of parental rights prohibits the state from separating parents from their children ‘without due process of law except in an emergency.’”) (italics removed) (citing *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000)).

¹⁸ *Wallis*, 202 F.3d at 1136.

¹⁹ *Id.* at 1138.

²⁰ *Id.* at 730.

²¹ *Id.* at 733.

²² *Burke*, 586 F.3d at 733. (italics in the original).

²³ *Id.* (“The reasonableness of the scope of [the state’s] intrusion upon [the father’s] rights is for the jury to decide.”)

²⁴ *James*, 2010 U.S. App. LEXIS 10723.

²⁵ *Id.* at *2.

²⁶ *Id.* at *13, *16.

²⁷ *Id.* at *2.

²⁸ *Id.* at *23.

²⁹ *Id.* at 19.

³⁰ *Id.* at *24.