

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

EDWARD R. MYERS,

Plaintiff-Appellant,

v.

**LOUDOUN COUNTY SCHOOL BOARD and
COMMONWEALTH OF VIRGINIA,**

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

**SUPPLEMENTAL BRIEF OF APPELLEE
COMMONWEALTH OF VIRGINIA**

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SUPPLEMENTAL BRIEF OF APPELLEE

Appellee, the Commonwealth of Virginia, hereby files this supplemental brief pursuant to this Court's Order of March 31, 2005. In response to the questions posed by that order, it is reasonably clear that in almost all cases where the issue arises, it is the practice of federal courts to insist that minors be represented in federal district court by counsel and not by their parents *pro se*. It is equally clear that the question is not jurisdictional.

ARGUMENT

I. THE FEDERAL COURTS GENERALLY DO NOT PERMIT PARENTS TO REPRESENT THEIR CHILDREN.

A. Other Federal Circuits Addressing the Question are Unanimous.

The federal appellate courts that have decided the issue are unanimous that parents, although permitted to serve as plaintiffs under Fed. R. Civ. P. 17(c), ought not be permitted to represent their children *pro se*.¹ See *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997); *Johns v. County of San Diego*, 114 F.3d 874 (9th Cir. 1997); *Osei-Afriyie v. Med.*

¹There is no right to represent oneself in civil matters. Permission for a nonlawyer to represent himself in federal court is granted by federal statute. The statute does not include permission for parents to represent their children *pro se*. 28 U.S.C. § 1654.

Coll. of Pennsylvania, 937 F.2d 876 (3d Cir. 1991); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153 (10th Cir. 1986). Regardless of context, the Second, Third, Ninth, Tenth and Eleventh Circuits all agree that the risk that meritorious claims of minors will be compromised as a result of inadequate representation by nonlawyer parents requires that counsel be retained to represent children’s interests in federal district court. Indeed, this result is entirely consistent with the more general proposition that nonlawyers may not represent others in federal court.² See, e.g., *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41 (1st Cir. 1982).

The Eleventh Circuit, in *Devine v. Indian River Sch. Bd.*, affirming the district court’s denial of a motion to allow counsel to the parent to withdraw and the parent to proceed on behalf of his child *pro se*, reasoned that it was “compelled to follow the usual rule-- that parents who are not attorneys may not bring a *pro se* action on their child’s behalf-- because it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents.” *Devine*, 121 F.3d at 578, 582.

² In addition, in Virginia, any effort by a nonlawyer to represent the interest of another in any tribunal violated the Unauthorized Practice of Law Rules of the Virginia State Bar. Professional Guidelines 2004-05, UPR 1-101 (Va. State Bar).

Echoing the Eleventh Circuit, the Second Circuit, in *Cheung v. Youth Orchestra Found.*, ruled that “[t]here is nothing in the guardian-minor relationship that suggests that the minor’s interests would be furthered by representation by the non-attorney guardian.” *Cheung*, 906 F.2d at 61 (addressing a civil rights complaint). *See also Johns*, 114 F.3d at 876-77 (adopting the reasoning of *Cheung* to preclude a *pro se* plaintiff-parent from representing his minor child on a claim that the child’s civil rights were violated).

B. This Court’s Analysis in *Doe v. Board of Education* is Instructive.

In *Doe v. Board of Education*, 165 F.3d 260 (4th Cir. 1998), this Court upheld a district court’s determination that parents successfully representing minor children *pro se* in Individuals with Disabilities Education Act (“IDEA”) claims could not recover attorney’s fees. Although the parent in *Doe* was a licensed attorney, and the issue decided in that case was not the issue presented by the Court here, this Court’s analysis in *Doe* is nonetheless instructive. Rejecting an argument that the attorney parent was acting *pro se*, the Court relied, in part, upon decisions of the Second and Eleventh Circuits that non-attorney parents may not represent their children *pro se* in IDEA cases.

This Court explained:

Like attorneys appearing *pro se*, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that reason rather than emotion will dictate the conduct of the litigation. Certainly the danger that a child's meritorious claim will be ineffectively prosecuted by an irrationally emotional attorney-parent is at least equal to the danger that the meritorious claim of a *pro se* civil rights plaintiff, who is also a lawyer, will be bungled without the assistance of an independent attorney.

Id. at 623. (internal citation omitted). It would seem to follow - from the concern for adequate representation of a child's interests and the presumption that nonparent lawyers are best suited to represent those interests - that the hazards implicated by *pro se* representation of minors by their parents are only exacerbated where that parent is a nonlawyer. However, the precise issue presented by the Court in this case has not been expressly ruled upon by this Court.

C. Virginia District Courts Have Adopted the View Implied by *Doe*.

The district court for the Eastern District of Virginia has twice declined to permit non-lawyer parents to represent their children *pro se*. In *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168 (E.D. Va. 1994), the Eastern District of Virginia denied a Rule 41(b) motion to dismiss based on the argument that a parent's attempt to represent his child violated Federal Rule 17. *Brown*, 868 F. Supp. at 172. Although it ruled that the absence of

counsel was not a violation of Federal Rules 17 or 41, the district court also ruled that a parent could not represent his child in the child's products liability claim. The court, instead of dismissing the case, appointed counsel to represent the minor plaintiff. *Id.* The court decided that the "strong interest in regulating the practice of law," "the importance of what is at stake for the litigant, and the final nature of the adjudication of the rights in question" weighed against permitting such representation of the child by his parent *pro se*. *Id.* at 172, 171. *But see Maldonado v. Apfel*, 55 F. Supp. 2d 296, 308 (S.D.N.Y. 1999)(declining to dismiss an appeal from denial of claim by the Social Security Administration because, inter alia, it would be difficult to find counsel willing to represent the party appealing).³

In 2004, the Eastern District of Virginia again applied the "rule against allowing *pro se* parents to litigate on behalf of minors" set out in *Brown. Gallo v. United States*, 331 F. Supp. 2d 446 (E.D. Va. 2004). Denying the United States' motion to dismiss the minor's tort claim, the court reasoned that the risk that the child's potentially meritorious tort claim could not be adequately protected or vigorously prosecuted by a nonlawyer

³ The district court in *Maldonado*, however, expressly limited the context in which it was making an exception to the general rule to "appeals from denials by the [Social Security Administration] of [Supplemental Security Income] benefits." *Id.* at 302, 306-07.

in complex lawsuits meant that, although her mother could sue as her daughter's next friend, she could not represent her. Even so, dismissal was "unwarranted" and the court permitted the plaintiff-parent sixty days to retain counsel. *Id.* at 448-49.

II. THE RULE IS NOT JURISDICTIONAL.

This Court may determine that the district court should not have permitted Myers to proceed without counsel to represent his children. However, the absence of counsel did not deprive the district court of jurisdiction and, therefore, does not deprive this Court of jurisdiction to consider Myers' appeal.

A. Even If the District Court Should Have Dismissed the Children's Claims For the Absence of Counsel, this Court Is Not Precluded From Hearing the Appeal Presented by Counsel.

The question of jurisdiction is one of subject matter and standing. There is no doubt that the federal district courts have subject matter jurisdiction over claims that state law violates the protections of the Federal Constitution. Thus, the district court had subject matter jurisdiction over the Establishment and Free Exercise Clause claims alleged by Myers, as next friend on behalf of his children, and over the Substantive Due Process Clause claim he asserted on his own behalf. There is also little doubt that, assuming the allegations of the complaint to be true, Myers satisfied the

requirements of Article III standing both for himself and as next friend on behalf of his children. These conclusions are not undermined by the fact that he did not retain counsel to represent the children in the trial court.

The cases addressing the question of *pro se* representation of minor children's claims by nonlawyer parents provide no basis upon which to conclude that counsel for the children is necessary to the district court's jurisdiction. The rule concerning representation of minors by their parents *pro se* does not arise out of the Constitution, or out of federal statute or the federal rules of court. Quite simply there is no definition or limitation of the jurisdiction of the federal courts that relates to the representation question. It is merely a rule of practice subject to the discretion of the trial and appellate courts weighing the respective risks to, and needs of, the parties. The fact that Myers' children were not represented by counsel did not deprive the district court of jurisdiction to hear their claims.

On appeal, the question of jurisdiction must be resolved before the Court reaches the merits. *See, e.g. Mellon v. Bunting*, 327 F.3d 355, 363-64 (2003). Assuming an appeal is timely perfected from a proper final order, as is true in this case, it is the jurisdiction of the trial court that matters. There is no doubt that the district court had jurisdiction to hear the constitutional claims of Myers and his children. Therefore, this Court has jurisdiction to

hear his appeal from the district court's decision. Arguably, Myers' retention of counsel on appeal obviates any need to remand the matter.

B. Myers Does Not Have Standing to Assert His Own Establishment Clause Claim Arising Out of His Children's Injury.

The only injury to himself that Myers alleged by his complaints was that Virginia's Pledge statute - and Loudoun County's implementation of it - deprived him of his right to raise his children as he sees fit; it interfered with his efforts to teach them their religious heritage and to raise them in his own religious tradition. This claim has traditionally been viewed as arising out of a parent's liberty interest under the Due Process Clause. It might also be argued that it implicates a violation of the Free Exercise Clause. It does not, however, describe a violation of the Establishment Clause. Thus, regardless of whether Myers has standing to bring an Establishment Clause claim based on his children's injury, he has not done so.

Some measure of confusion on this question is created by the Supreme Court's decision in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004).⁴ In *Newdow*, the Court held that a divorced parent, foreclosed by California law from asserting an Establishment Clause claim on behalf of his

⁴In its discussion the Court characterizes Newdow's claim that his parental rights are interfered with as his Establishment Clause claim.

child as next friend, lacked prudential standing to assert his own claim.⁵ The Court noted that the right Newdow asserted to influence his daughter's religious upbringing "free from governmental interference" implicated the rights of his daughter and that

"there are good and sufficient reasons for the prudential limitation on standing when rights of third parties are implicated - - the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them."

Id. at 2311. It is not entirely clear whether Newdow lacked prudential standing because his interests were not necessarily parallel with his daughter's or because it was really his daughter's claim he was asserting, not his own. *Id.* at 2311-12. However, the Court recognized that the parent's standing to pursue an Establishment Clause claim like Myers' "derives entirely from his relationship with his daughter," *Newdow*, 542 U.S. at 22, and "the interests of this parent are not parallel and, indeed, are potentially in conflict." *Id.* at 23. Newdow did not have standing to bring a claim for his own injury resulting from that of his daughter.

⁵ It is fair to say that, although the Supreme Court's analysis of its prudential standing jurisprudence in *Newdow* appears applicable to this case, "the requirements of prudential standing are less settled" than those of Article III standing. *Frank Krasner Enter. v. Montgomery Co.*, 401 F.3d 230, 234 n.6 (4th Cir. 2005).

Although there is no evidence in this record, as there was in *Newdow*, that Myers' children's interests are not parallel to his own, it remains true that Myers' standing to bring his own Establishment Clause claim would derive entirely from his relationship with his children. Given the notoriety that attends proceedings of this sort, and the effect that such proceedings might have on the lives of his children, it is entirely possible that their interests and his are no more parallel than were those of *Newdow* and his daughter. In addition, the same prudential concerns for adjudication where the rights of third parties are implicated seem to indicate that Myers also lacks prudential standing to pursue his own Establishment Clause claim based on the injury to his children.

CONCLUSION

It appears fairly well settled that, as a matter of federal practice, parents are not permitted to represent their children *pro se* in federal district court. However, the rule does not have any impact on the district court's jurisdiction to hear the case and, thus, has no effect on this Court's jurisdiction to hear Myers' appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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2. Exclusive of the table of contents, table of citations and the certificate of service, this brief contains 2,118 words.

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