

[J-092-1997]

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

IN THE MATTER OF: T.R., J.M., C.R. AND C.R.	:	No. 0089 E.D. Appeal Docket 1996
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	:	Appeal from the Order of the Superior
	:	Court entered October 5, 1995 at No.
	:	3682PHL94 affirming the Order of the
	:	Court of Common Pleas, Philadelphia
	:	County, Family Division, entered
	:	September 29, 1994 at Nos. 9204-6912,
	:	9405-2358, 2359 & 2360.
	:	
	:	
APPEAL OF: A.W.	:	Argued: April 30, 1997
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	:	
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DISSENTING OPINION

MADAME JUSTICE NEWMAN

DECIDED: June 23, 1999

Today we consider a landmark issue concerning a parent's right to privacy where there is strong evidence that the parent has abused his or her own child. The issue is whether a trial court, while performing a juvenile dependency disposition review because of a showing that a parent has abused or neglected a child, may order the parent to undergo a psychological evaluation and disclose the results of the evaluation to interested parties.¹

¹ This case does not involve any psychotherapist/patient privilege and concerns only the civil constitutional right to privacy. Therefore, any discussion of criminal constitutional rights, such as the right against self-incrimination or the right to confront

After carefully balancing the specific interests in this case, it is clear to me that the trial court had the inherent authority to compel the psychological examination of A.W. to create the most accurate assessment of her ability to care for her young children and prevent their future abuse and possible death. Further, an in camera review of the evaluation would protect the privacy interest of A.W., while still providing the trial court a concrete assessment of the parenting abilities of A.W.

I recognize that a fundamental right to privacy emanates from the Pennsylvania Constitution Article 1, § 1 and other sections of the Pennsylvania Constitution. In re B, 482 Pa. 471, 394 A.2d 419 (1978). Specifically, in Denoncourt v. Commonwealth of Pennsylvania, State Ethics Comm'n, 504 Pa. 191, 470 A.2d 945 (1983), this Court explained that the privacy interest pursuant to Article I, Section 1 involves a freedom from disclosure of personal matters. However, we also acknowledged that not every intrusion into an individual's privacy is unconstitutional. Denoncourt. To determine whether a particular intrusion is impermissible, this Court must analyze each case individually and carefully balance an individual's right to privacy against the countervailing state interest warranting the intrusion. *Id.* As we stated in Denoncourt, "the government's intrusion into a person's private affairs is constitutionally justified when the government interest is significant and there is no alternate reasonable method of lesser intrusiveness to accomplish the governmental purpose." *Id.* at 199-200, 470 A.2d at 949.

Here, the Commonwealth's interest is easily identifiable and clearly significant: to provide for the safety and welfare of its children who have been adjudicated dependent.

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witnesses, is beyond the scope of the issues in this case.

See 42 Pa.C.S. §6301. The Commonwealth's role as the protector of children is the "hallmark of a humane individual and of a civilized state." In re William L., 477 Pa. 322, 338, 383 A.2d 1228, 1236 (1978)(quoting Commonwealth ex rel. Children's Aid Society v. Gard, 362 Pa. 85, 99, 66 A.2d 300, 307 (1949)). By removing the child from his family, the government has assumed an awesome responsibility and it should be exacting and exhaustive in its investigation of the proper placement for the child. This decision-making process is critical because a placement error can result in the grave injury, if not the death, of the dependent child.

To prevent a tragic outcome, a trial court must attempt to find the reason why a parent cannot protect the child from injuries or why the parent is injuring the child. All of these issues must be explored and addressed in an effort to reunite the family. In many situations, the current psychological condition of the parent can be critical to deciding the source of the problems that originally brought the family to the attention of DHS. The life of a child may be saved by an expert's ability to interpret sophisticated psychological nuances. Thus, there is a significant government interest in obtaining a psychological evaluation of the parent. Denoncourt.

The countervailing interest in this case is A.W.'s right to privacy in her own mind and thoughts. Whalen v. Roe, 429 U.S. 589 (1977). While the Majority analogizes her situation with that of In re "B", I find it distinguishable. First, the facts of In re "B" required that the trial court consider whether a delinquent child should serve his sentence. Here the question is whether a child who has suffered serious physical injury in her mother's care should be

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returned to the mother's care. Clearly, the Commonwealth's interest in comprehending A.W.'s current mental and psychological state is more relevant here. Second, the issue in In re "B", disclosure of a mother's psychiatric history, is distinct from the instant case, which concerns a court-ordered psychological evaluation to assess a mother's fitness to regain physical custody of her dependent children. The nature of the information revealed, and therefore the privacy interest infringed, is different.

In In re "B", the Court noted that production of an entire psychiatric history infringes on the patient's "most intimate emotions, fears, and fantasies." *Id.* at 485, 394 A.2d at 425. Here, however, the trial court did not compel an exhaustive review of A.W.'s psychiatric history or require an extensive investigation into her intimate emotions, fears and fantasies; instead, it ordered a "targeted" psychological evaluation to garner an expert opinion on A.W.'s current mental status and ability to control her children and to protect them from harm.

The Commonwealth's interest in knowing the parent's current mental status, particularly where past neglect and abuse have led to repeated physical injury, outweighs the parent's privacy interest. In these cases, we should turn to an expert for advice concerning the psychological state of the parent. Here, A.W. has been involved with DHS for more than ten years and the children continue to suffer physical injuries including blindness in one eye, fractured ribs and back bruises, and a spinal fracture. These injuries are a result of her neglect and possible abuse and yet, A.W. seeks to regain custody of her children although she has refused to attend parenting classes or learn appropriate

disciplinary techniques.² A psychological examination is an important means to discover why, despite the best efforts of caseworkers, A.W. has been resistant and refuses to learn proper parenting skills. This psychological information may, in turn, lead to the most appropriate physical and legal disposition of the children. The state's interest in caring for the safety and welfare of her children outweighs A.W.'s privacy interest.

Moreover, in my opinion, the Juvenile Act implicitly provides for the trial court to order a psychological evaluation. Although the Juvenile Act does not expressly authorize a trial court to order a psychological evaluation of a dependent child's parent, such an order is consistent with the purpose of the Juvenile Act, which promotes that the placement of custody must be in the best interests of the child.³ An examination of the language of various provisions of the Juvenile Act reinforces this conclusion. First, the Juvenile Act permits broad discretion in the admission of evidence pertaining to a placement that will be in the child's best interests. Section 6341(d) allows the admission of "all evidence helpful in determining the questions presented," including oral and written reports, during a disposition review hearing. 42 Pa.C.S. §6341(d). It then goes on to state that the trial court can rely on the reports to the extent that the information is relevant. *Id.* After the child is

² The state is required to work in concert with the parent to correct problems that have led to child abuse and if the parent does not cooperate, termination of parental rights is a very real possibility. Matter of Welfare of S.A.V., 392 N.W. 2d 260 (Minn.App. 1986), *disapproved by* In re Welfare of J.W., 415 N.W.2d 879 (Minn. 1987).

³ One purpose of the Act is for the "care, protection, and wholesome mental and physical development of children coming within the provisions of this chapter." 42 Pa.C.S. §6301(b)(1). Children who are adjudicated dependent fall within the provisions of the Juvenile Act. 42 Pa.C.S. §6306(a)(1). A "dependent" child is one "without proper parental care or control, subsistence, education ..., or other care or control necessary for his physical, mental, or emotional health, or morals[.]" 42 Pa.C.S. §6302.

adjudicated dependent, Section 6341(e) permits the trial court to continue to conduct hearings and receive reports and other evidence bearing on the disposition of the child's need for treatment, supervision or rehabilitation.

Second, the language of the Act in Section 6339(a) explicitly authorizes the trial court to investigate a family member and does not expressly limit that investigation.

Section 6339(a) reads, in part, as follows:

(a) General rule.--If the allegations of a petition are admitted by a party or notice of hearing under section 6355 (relating to transfer to criminal proceedings) had been given, the court, prior to the hearing on need for treatment or disposition, may direct that a social study and report in writing to the court be made by an officer of the court or other persons designated by the court, concerning the child, his family, his environment, and other matters relevant to disposition of the case.

42 Pa.C.S. §6339(a)(emphasis added). There is no section governing or expressly limiting the investigation of a parent. Therefore, to achieve the best interests of the child, I believe that that the General Assembly implicitly provided the trial court with the authority to order a psychological evaluation of a dependent child's mother in a dependency proceeding.

The General Assembly has given the Commonwealth broad powers to make decisions regarding the welfare of a dependent child including, most important, the power to determine the child's living arrangements. 42 Pa.C.S. §6351. Section 6351 provides as follows:

§ 6351. Disposition of dependent child

(a) General rule.-- If the child is found to be a dependent child the court may make any one of the following orders of disposition best suited to the protection and physical, mental, and moral welfare of the child:

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(1) Permit the child to remain with his parents, guardian, or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child.

(2) Subject to conditions and limitations as the court prescribes transfer temporary legal custody to any of the following:

(i) Any individual resident within or without this Commonwealth who, after study by the probation officer or other person or agency designated by the court, is found by the court to be qualified to receive and care for the child.

(ii) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child.

(iii) A public agency authorized by law to receive and provide care for the child.

42 Pa.C.S. §6351.

To assist in the determination of proper physical custody, Section 6339(a) authorizes the trial court to order an "officer of the court or other person designated by the court" to conduct an investigation of the child, the child's family, his or her environment, and other relevant matters. 42 Pa.C.S. §6339(a). Although Section 6339(b) provides authority for the trial court to order physical and mental examinations and treatment of a child, there is no section of the Juvenile Act that explicitly provides for the physical or psychological examination of a parent in the context of a disposition review hearing. When interpreting a statutory scheme involving children, our decisions are guided by the polestar of effectuating the best interests of the child. *E.g.*, Robinson v. Robinson, 538 Pa. 52, 645 A.2d 836 (1994)(the standard in custody proceedings is best interests of the child); Oeler v. Oeler, 527 Pa. 532, 594 A.2d 649 (1991)(purpose of child support is to promote best interests of

child); Change of Name of Zachary Thomas Andrew Grimes, 530 Pa. 388, 609 A.2d 158 (1992)(change of name must be in best interests of child); School District of Wilkinsburg v. Wilkinsburg Education Ass'n, 542 Pa. 335, 667 A.2d 5 (1995)(guiding principle for examining problems with public education is the best interests of the children). This universal legal axiom, the best interests of the child, is implicit in the statement of purpose of the Juvenile Act and informs our interpretation of it. Hence, the statutory interpretation that "will encourage, rather than discourage, action related to the best interests and protection of the child, is preferred." In re Lowry, 506 Pa. 121, 130-31, 484 A.2d 383, 388 (1984). It is in the best interests of a child to live with an adult mentally capable of caring for the child and, as discussed later, in certain situations, the mental stability of a parent can only be determined through a psychological examination.

Additionally, I find persuasive Rule 1915.8 of the Rules of Civil Procedure authorizing the physical and mental examination of a child or a party to a child custody dispute, including a parent. Rule 1915.8(a) provides as follows:

RULE 1915.8 PHYSICAL AND MENTAL EXAMINATION OF PERSONS

(a) The court may order the child or a party to submit to an evaluation by an appropriate expert or experts. The order may be made upon the court's own motion or on motion of a party with reasonable notice to the person to be examined, and shall specify the place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

The Comment to Rule 1915.8 notes that the trial court, when making a child custody decision in the best interests of the child, "often requires information that can only be supplied by an expert evaluation of the parties and the subject child." Similarly, to make an

informed disposition in the best interests of the child, the Juvenile Act must accordingly permit the trial court to order a psychological examination to determine the mental status of a parent.

I further believe that the distribution of the report of A.W.'s psychological evaluation to the interested parties does not violate A.W.'s privacy rights pursuant to Article I, Section 1 of the Pennsylvania Constitution. The Commonwealth has a most important interest to determine the proper physical custody arrangement for a dependent child and to be certain to prevent placement of the child with an adult that is incapable to care for the child and can cause injury to the child. See 42 Pa.C.S. §6301(b)(1). After an in camera review of the report, the information should be given only to the parties of interest who are enumerated in the Juvenile Act, which provides sufficient safeguards to protect A.W.'s privacy interests. *E.g., In re June 1979 Allegheny County Investigating Grand Jury*, 490 Pa. 143, 415 A.2d 73 (1980)(limited disclosure of tissue reports to grand jury and supervising judge sufficiently protects the patient's privacy interests); see also Pennsylvania v. Ritchie, 480 U.S. 39 (1987)(due process permits a defendant to have a trial court conduct in camera review of Children's and Youth Services files of a child accuser to determine if there is information "material" to his defense). Here, by requiring an in camera review by the ultimate arbiter, the Commonwealth's interest in making the most informed custody placement will be achieved without disclosure of irrelevant private information.

Section 6307 of the Juvenile Act guides this distribution, which permits the limited disclosure of any file or record of the court to certain persons and entities. 42 Pa.C.S. §6307. Section 6307 provides as follows:

All files and records of the court in a proceeding under this chapter are open to inspection only by:

- (1) The judges, officers and professional staff of the court.
- (2) The parties to the proceeding and their counsel and representatives, but the persons in this category shall not be permitted to see reports revealing the names of confidential sources of information contained in social reports, except at the discretion of the court.
- (3) A public or private agency or institution providing supervision or having custody of the child under order of the court.
- (4) A court and its probation and other officials or professional staff and the attorney for the defendant for use in preparing a presentence report in a criminal case in which the defendant is convicted and who prior thereto had been a party to a proceeding under this chapter.
- (5) The Administrative Office of Pennsylvania Courts.
- (6) With leave of court, any other person or agency institution having a legitimate interest in the proceedings or in the work of the unified judicial system.

42 Pa.C.S. § 6307. The General Assembly has considered the privacy concerns of individuals involved in proceedings pursuant to the Juvenile Act and explicitly limited disclosure to the parties set forth in the Act. The limitations in Section 6307 promote the Commonwealth's goal of making the most informed placement decision, but are narrowly tailored to prevent any significant violation of a parent's privacy. I believe that there is no less intrusive method to achieve the Commonwealth's compelling interest. The psychological evaluation is only permitted in situations where the trial court concludes that routine observation and assessment methods fail to describe accurately the parent's psychological problems, and the children continue to suffer physical injury. The

psychological evaluation is then reviewed in camera to enable the trial judge to make the educated determination of its relevance and its ability to change untenable situations. The psychological evaluation will then only be distributed to those parties that the General Assembly, pursuant to Section 6307, deemed appropriate to review the evaluation.

Because I find that the trial court properly ordered a psychological evaluation of A.W., I respectfully dissent. For the foregoing reasons, I conclude that the Juvenile Act authorizes the order of the trial court compelling A.W. to submit to a psychological evaluation.

Mr. Justice Castille joins this Dissenting Opinion.