To: COURT IMPROVEMENT PLAN COMMITTEE
From: Patricia Cochran, Esquire, Jonathan J. Houlon, Esquire, Alan M. Lerner, Esquire[1]
Date: December 22, 2005
RE: COURT ORDERED MENTAL HEALTH EVALUATIONS IN DEPENDENCY CASES

I. Questions Presented and Conclusions

In a dependency case, under what circumstances may a court require a parent/caregiver (parent) to undergo a mental health evaluation?

A court, in a dependency case, may order a parent to undergo a mental health evaluation when the court determines that the state's interest in protecting the best interests and safety of the child outweigh the parent's right to privacy. To reach that conclusion, the court must find that the state's interest in protecting the best interests of the child would be significantly assisted by receipt of information available from the mental health evaluation, and there is no reasonable alternate of lesser intrusion by which to obtain that information. However, if the court orders a mental health evaluation of a parent, and the parent fails to cooperate, the court may draw a negative inference from that conduct.

II. Current Case Law

Article I, § 1 of the Pennsylvania Constitution protects an individual's right to privacy. Stenger v. Lehigh Valley Hospital Center, 530 Pa. 426, 609 A.2d 796 (1992); Denoncourt v. Commonwealth State Ethics Commission, 504 Pa. 191, 198, 470 A.2d 945, 948 (Pa. 1983); In Re June 1979 Allegheny County Investigating Grand Jury, 490 Pa. 143, 415 A.2d 73, 77 (Pa. 1980).

[1] Your presenters wish to express their appreciation for the excellent research assistance provided by Sabrina L. Schwager, University of Pennsylvania Law School, Class of 2007.

An individual's right to keep her own mind and thoughts to herself is a privacy interest also protected under Art. I, § 1 of the Pennsylvania Constitution. See In The Matter of T.R., 557 Pa. 99, 731 A.2d 1276 (1999). However, the right of privacy is not unqualified, but must be balanced against other state interests. Id., 557 Pa. at 106, 731 A.2d at 1280. One such interest is, in a dependency case, the state's interest in securing "enough information about the children to make intelligent decisions about [their] placement.…" Id.[2]

The Pennsylvania Supreme Court, in In the Matter of TR, reversed the lower court's decision ordering a parent to undergo a psychological evaluation to assist the court in determining whether to return the children to the care of their mother. The plurality opinion cited the standard in Denoncourt that "a 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." 470 A.2d at 949. More recently, we have stated the test in terms of whether there is a compelling state interest. Stenger, 609 A.2d at 802. In reality, the two tests are not distinct. There must be both a compelling, i.e. 'significant' state interest and no alternate reasonable method of lesser intrusiveness." In the Matter of TR, 557 Pa. at 106, 731 A.2d at 1280. The plurality opinion went on to point out that given the abundance of evidence demonstrating the unfitness of the mother to care for her children, there was an alternate method to accomplish the governmental purpose of determining the proper placement of the children.

The dissent argued that what was at issue for the parent was neither the disclosure of the parent's full psychiatric/psychological history, nor "an extensive investigation into her intimate

[2] Mr. Chief Justice Flaherty wrote an opinion announcing the judgment of the Court, in which Mr. Justice Cappy joined. Mr. Justice Zappala concurred in the result. Mr. Justice Nigro filed a concurring opinion. Madame Justice Newman filed a dissenting opinion in which Mr. Justice Castille joined. Thus, there being no majority opinion, the decision is not of precedential value. See, In the Interest of O.A., 552 Pa. 666, 717 A.2d 490, 496 (Pa. 1998); Hoy v. Angelone, 554 Pa. 134, 720 A.2d 745, 750 (1998). However, on the issues discussed above, all justices agreed.

emotions, fears, and fantasies; instead it ordered a 'targeted' psychological evaluation to garner an expert opinion on [the parent's] current mental status and ability to control her children and to protect them from harm." Id., 557 Pa. at 110, 112, 731 A.2d at 1282, 1283 (dissenting opinion of Madame Justice Newman). Her opinion concludes that "there is no less intrusive method to achieve the Commonwealth's compelling interest." Id., 557 Pa. at 118, 731 A.2d at 1286. Importantly, the dissent argues that the privacy interests of the parent can be further protected by having the psychological report first given to the court for an in camera review, and then if the trial judge deems it material to her decision, giving it to only those parties authorized under the Juvenile Act, 41 Pa. C.S.A. §6307 to receive it. Id.

Mr. Justice Nigro filed a concurring opinion asserting that if a parent refuses to submit to a court ordered psychological evaluation "the trial court should be entitled to draw a negative inference from that refusal…." Id. 557 Pa. at 109, 110, 731 A.2d at 1282.

Subsequently, in In the Matter of K.D., 1999 Pa. Super. 290, 744 A.2d 760, the Pennsylvania Superior Court, finding Justice Flaherty's opinion in T.R. persuasive, held that the record "*under the circumstances of this case*, provided insufficient reason to subject the parent to a mental health evaluation." 1999 Pa. Super. at 296, 744 A.2d at 761. The best interests of the child could be maintained without the parent undergoing a mental health evaluation, and thus, there was no compelling or significant government interest. Notably, the Court did not rule that all mental health evaluations would be impermissible; but rather that in this case, such an examination was unwarranted.

Moreover, in In the Matter of J.Y., 2000 Pa. Super. 169, 754 A.2d 5, the Pennsylvania Superior Court upheld a trial court's requirement that the parents attend a mental health program. While the Court agreed that the parents, based upon the decision in In the Matter of T.R., had

every right to refuse the order and maintain their privacy, it also held that "nothing in T.R. prevents the trial court from taking [the parents'] refusal into account when determining whether to change the goal for [the children]." Id., 2000 Pa. Super. at 183, 754 A.2d at 9. With regard to the parents' refusal of the lower court's order to participate in a GED program, the Superior Court held, "We agree with appellants that no service recommended by the court is mandatory for parents. However, in making its ruling on the status of the children, the court is not prohibited from considering the refusal of services. Such a refusal certainly impacts upon the children's best interests, the standard by which a change of goal must be determined…." Id., 2000 PA. at 186, 754 A.2d at 10. Thus, the Court in In the Matter of J.Y. held that although a court may order mental health services for parents in dependency cases, parents may defy such orders, but at the risk of losing their children.

Based upon the foregoing, it appears that a judge sitting in dependency court may order a parent to undergo a psychological evaluation to provide relevant information to assist the court in making a decision, where the desired information is not reasonably available through some less intrusive means. Thereafter, if the parent refuses to cooperate with the ordered evaluation, the court may draw a negative inference in making the determination in question.

III. Mental Health Procedures Act

Under the Mental Health Procedures Act, a person may be subjected to involuntary "examination and treatment" if "as a result of mental illness, his capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations…is so lessened that he poses a clear and present danger of harm to others…" 50 Pa.C.S.A. § 7301(a) (2005). A person constitutes a clear and present danger to others when it is established that within the past 30 days, the person "has inflicted or attempted to inflict serious bodily harm on another and that there is a

reasonable probability that such conduct will be repeated." 50 Pa.C.S.A. § 7301(b) (1976). There is a potential application of this statute to dependency cases. When it is established that a parent has abused a child in the past 30 days and may do so again, a court may, under the Mental Health Procedures Act, order the parent to undergo a mental health evaluation. However, it may also be argued that the MHPA provisions are meant to be used only when the issue is whether to require a person to undergo involuntary treatment, not simply for purposes of evaluation for use in another proceeding, such as those under the Juvenile Act. The MHPA's limitations as to whom documents relating to treatment may be released, as set forth below, could be seen as supporting this view.

According to § 7111 of the Mental Health Procedures Act, all documents concerning persons in treatment are confidential, and may only be released to others involved in the treatment, a county administrator, a court in the course of legal proceedings covered by the act (commitment actions), and where treatment is undertaken in a Federal agency. 50 Pa.C.S.A. § 7111 (1976).

Based upon the foregoing, it is not likely that the MHPA will be of significant use in seeking to compel psychological evaluation of a parent in a dependency case.