DALE E. SHOOP, Plaintiff, v. DOROTHY GARTLAND, Defendant, C.P. Fulton County Branch, Civil Action–LAW, No. 186–2000C

Procedural Due Process — Inmate Visitation — Right to Counsel

1. Parental visitation is a constitutionally protected liberty interest of all citizens regardless of status as prison inmate, thus procedural due process must be afforded.

2. Due process must be afforded inmates requesting parental visitation, to include a hearing, notice and the right to request to be present at hearing.

3. Prison inmates may be present at a visitation hearing only if benefit of their presence outweighs the burden of the Commonwealth.

4. A visitation hearing may be held in the absence of an inmate-petitioner so long as he was given an opportunity to correspond to the court by an informal letter, addressing both the substantive and logistical issues to be resolved.

5. There is a rebuttable presumption that visitation to an inmate-parent is not in the best interests of the child.

6. Appointment of counsel is not necessary in a civil action by an incarcerated parent for visitation, as there is no possibility of deprivation of physical liberty and a resulting visitation order may be modified at any time.

7. Overall concern in evaluating visitation requests is the best interests of the child.

8. A strict standard is to be applied in resolving requests for parental visitation; it may be denied only if the parent suffers from mental or moral deficiencies which pose a grave threat to the child.

9. A parent's criminal record and particular violation for which he is currently serving a sentence may represent a moral deficiency.

Appearances:
Dale E. Shoop, Plaintiff
Carrie Bowmaster, Esq., Counsel for Defendant

OPINION

Walker, P.J., February 13, 2001

Procedural Background

Plaintiff Dale A. Shoop, incarcerated in a state correctional institution in Somerset, Pennsylvania, initiated the instant action by complaint for custody/visitation filed September 11, 2000. The court granted plaintiff in forma pauperis status and allowed him thirty (30) days to submit an amended complaint, which he accordingly filed on October 18, 2000. By order dated November 1, 2000, this court then directed plaintiff to forward an informal letter to the court in response to a detailed list of questions propounded by the court within the order. Plaintiff answered the queries by letter filed on

November 8, 2000, and the court thereafter set January 18, 2001, as the date for the visitation hearing, ensured that defendant had notice of the hearing and denied plaintiff's request for appointment of counsel.

Defendant Dorothy Gartland (now Dorothy Knepper) attended the visitation hearing with counsel and testified along with her sister, Martha Downey. Plaintiff was not present at the hearing, as his writ of habeas corpus ad testificandum was denied on January 1, 2001.

Preamble

Plaintiff has presented a surprisingly novel scenario to the court. The court must ultimately determine whether he, an inmate in a state correctional institution, is entitled to exercise his visitation rights while in state prison. Though there has been a visitation hearing and we are now at the stage to dispose of that ultimate question, the court believes it would be instructive to first provide greater detail in regards to two of its prior orders in this matter. Therefore, before turning to the merits, the court will briefly explain the significant constitutional issues that have arisen and how each was resolved.

1. Procedural Due Process and Inmate Visitation

Parental visitation, whether for an inmate or civilian, is a constitutionally protected liberty interest. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). As such, procedural due process clearly attaches and must be afforded. *Matthews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). The process incarcerated prisoners are entitled to upon the filing of a visitation petition includes a formal hearing, notice of the hearing and the right to request that they be present at the hearing by means of a writ of habeas corpus testificandum. *Vanaman v. Cowgill*, 363 Pa.Super. 602, 526 A.2d 1226 (1987). However, they need only be present at the hearing after the court weighs the benefits of their live presentation against the costs and burden on the Commonwealth. *Id.* Indeed, the court may conduct a visitation hearing in an inmate-party's absence after the court first allows the inmate to submit an informal brief/letter to offer his solution to any logistical problems with visitation at the SCI. *Sullivan v. Shaw*, 437 Pa.Super. 534, 539, 650 A.2d 882, 885 (1994).

In *Sullivan*, the Superior Court reviewed a case in which an inmate's request for visitation was denied because the trial court found that the child's mother had no vehicle, could not afford the trip to the SCI and that forcing the child to travel to the prison was not in her best interests. *Id.* at 437 Pa.Super. 536, 650 A.2d 883. The inmate, Sullivan, appealed on the grounds

that his due process rights were violated by the Commonwealth's refusal to transport him to the visitation hearing, and, though the Superior Court disagreed with his argument, it remanded the matter for a fuller hearing. *Id.* at 437 Pa.Super. 537, 650 A.2d 884. The court explained that prisoners' claims can be heard without a bring-down, but that a more "reasonable approach" would be to allow an inmate to file an informal brief to the court addressing any concerns. *Id.* at 437 Pa.Super. 539, 650 A.2d 884-5.

This court then acted upon *Sullivan*'s guidance in the instant matter by directing plaintiff to respond to a series of questions posed by this court's order dated November 1, 2000. The series of questions advanced by the court, spanning four (4) pages, completely addressed its concerns regarding, for example, the necessity of plaintiff's presence at the hearing, the logistics of transporting the children to the Somerset SCI, his views on the best interests of the children and his past emotional and financial relationship with the children. The court's order thus afforded plaintiff an opportunity to be heard in a meaningful way, and possibly abdicated any need for his presence at the pending visitation hearing. Indeed, the order expressly informed plaintiff of his right to request to be present at the hearing by means of a writ of habeas corpus ad testificandum, but that he should answer the questions as thoroughly as possible given that his letter may be his only opportunity to be heard.

The questions contained within the court's November 1, 2000, order are as follows:

> 8. In accordance with *Sullivan v. Shaw*, plaintiff is directed to submit an informal letter to this court fully addressing the following concerns of the court[1]:
>
> a. Is plaintiff's presence necessary at the visitation hearing in Fulton County? If so, why? Is it simply a chance to be released from the confinements of the prison?
>
> I. What evidence would plaintiff present at the hearing?
>
> II. What witnesses does plaintiff anticipate will be called to testify for him at the hearing? Will they be present at the hearing whether or not plaintiff is there?

[1] As this may be plaintiff's only opportunity to be heard in this matter, the court suggests that he answers the questions as thoroughly and completely as possible.

> b. Why does plaintiff suggest that he and his family can give love to his children beyond the love their mother, the defendant, and her family has given them?
>
> c. How will plaintiff's children benefit from the proposed visitation? What specifically will they learn from plaintiff's message?
>
> d. Who will transport the children from their home in Ft. Littleton, Pa., to the SCI in Somerset, Pa.? Please provide the court names and addresses of those individuals, as well as their relationship to the children.
>
> e. By what means will the children be transported? If by personal vehicle, please provide the make, model and year of the vehicle(s) to be used. Is it known to plaintiff whether the vehicle is insured? If so, by whom?
>
> f. Who will pay the costs of transporting the children? Why?
>
> g. How often does plaintiff propose he should be allowed visitation? Monthly? Bi-monthly? Quarterly? Why?
>
> I. What specific days?
>
> II. How long should the visitation last each time?
>
> III. Should the visitation be supervised?
>
> h. There is a rebuttable presumption that visitation to an incarcerated parent is NOT in the best interests of a child. *Etter v. Rose*, 454 Pa.Super. 138, 141, 684 A.2d 1092, 1093 (Pa.Super. 1996). How is visitation in an SCI possibly in the children's best interests?
>
> I. How will the travel to Somerset from their home affect the children physically and emotionally?
>
> II. Will the children be stigmatized, fearful or emotionally upset by simply being physically present in an SCI?
>
> III. Will the children be stigmatized, emotionally upset or embarrassed to see their father in the prison, knowing he is a convicted criminal?

IV. Please describe the facilities where the visitation may take place. Is it one large room where other prisoners will be present with their families? Is physical safety an issue?

V. Please explain in greater detail the supervision and security present in the visitation facilities.

i. Please fully elaborate on your genuine interests in these children at this time.

j. Please fully describe your relationship and contact with each of these children in the past, prior to your present incarceration.

k. Please fully describe your relationship and contact with these children since having been incarcerated.

l. How long have you been incarcerated? For what crime? How much of your sentence remains to be served?

m. What specific, recent events have led you to move the court for visitation at this time?

n. How has plaintiff financially supported each of these children from their births until the present time?

o. As the plaintiff is proceeding in forma pauperis, the court recognizes that it is unlikely that he will hire outside counsel. Are you going to request the court to appoint counsel for you in this matter? If the answer is in the affirmative, please do so in your informal letter.[2]

p. Does the defendant have legal counsel? If so, please provide the name, address and telephone number of her attorney.

q. Please provide the court with any and all other relevant information that you feel will help it decide what is in the best interests of the children.

[2] The court forewarns plaintiff that appointment of counsel in a civil matter concerning custody/visitation (which may be modified at any time the best interests of the child requires) such as this is unlikely. See *Duttry v. Talkish*, 394 Pa. Super. 382, 576 A.2d 53 (1990).

10. Plaintiff is given 30 days to submit a letter to the court addressing the above issues. Defendant need not provide the court a letter, as she will be present at the visitation hearing.

11. Plaintiff is hereby given formal notice that he has the right to request to be present at the visitation hearing by means of a writ of habeas corpus ad testificandum.

Plaintiff timely responded to the court's questions and then filed a writ of habeas corpus ad testificandum on December 28, 2000, squarely compelling the court to make a decision concerning his presence at the hearing. The November 1, 2000, order specifically asked whether plaintiff's presence was necessary at the hearing, what evidence he would present and what witnesses would testify for him. His reply was "No," and "none as of yet." In closing, plaintiff mentioned that "It is not necessary that I be at the visitation hearing unless further ordered." The court was hardly surprised by plaintiff's later change of heart at the eleventh hour, as we suspected early on that plaintiff would take steps to secure a "day-trip" out of the prison at the Commonwealth's expense. But given plaintiff's unequivocal responses to the court's order, his writ was denied. The approach this court took under the direction of *Sullivan* allayed any due process concerns associated in denying the writ, for not only had there been an inquiry as to why plaintiff felt he should be present at the hearing, but he was given the opportunity to be heard on the merits as well.

2. Appointment of Counsel and Inmate Visitation

Plaintiff also requested that the court appoint counsel in response to question 8(o) of the November 1, 2000, order, despite the fact that he was put on notice that such a request would not likely be granted due to the nature of the proceedings. First, the instant action does not present a situation where, upon losing, plaintiff faces the chance of being deprived of his physical liberty. See *Lassiter v. Department of Social Services*, 452 U.S. 18, 26, 101 S.Ct. 2153, 2159, 68 L.Ed.2d 640 (1981). Truly, this is not the type of criminal proceeding of which plaintiff is obviously already familiar. Should he lose on the merits instantly, plaintiff only stands to lose his visitation rights at this time.

In *Duttry v. Talkish*, an inmate's request for appointed counsel in a custody/visitation action was denied and the inmate pursued an interlocutory appeal of that decision. *Duttry v. Talkish*, 394 Pa.Super. 382, 576 A.2d 53 (1990). Although the case's holding in *Duttry* surrounded the interlocutory nature of the appeal, the succeeding dicta within the opinion illustrates that

such a request need not be granted in a case involving visitation. The court observed that counsel is not necessary in cases concerning visitation, because the resulting visitation orders are capable of modification at any time, unlike, for example, an order which permanently terminates parental rights. *Id.* at 394 Pa.Super. 392, 576 A.2d 58. Ergo, the denial of plaintiff's request does not have "such cryptic connotations, as in termination, paternity, dependency or involuntary commitment hearings...." *Id.*

Last, this issue does not present a particularly Byzantine set of issues. Ultimately, plaintiff need only address the children's best interests and prove that he is not mentally or morally deficient, so as to present a grave threat to the children. To this point, the court has taken his pro se status into account and afforded him the opportunity to correct any mistakes in his pleadings and other filings. Likewise, we went to great lengths to fashion our questions in such a way that plaintiff could answer them without the aid of counsel, and he was able to respond in great detail without the aid of counsel.

Findings of Fact

1. Plaintiff Dale A. Shoop is the natural father of Shaunna R. Shoop (9 years of age), Tanner A. Shoop (8 years of age) and Whitney N. Shoop (7 years of age).

2. Plaintiff and natural mother, Defendant Dorothy Gartland (Knepper), had a relationship from approximately 1987 to 1994.

3. Plaintiff and Defendant were never married.

4. Defendant pleaded guilty to a conspiracy charge in the Fulton County Court of Common Pleas in October of 1990, and received a sentence of sixty (60) months probation.

5. While on probation on the 1990 conspiracy charge, defendant failed a urinalysis test, thereby violating the conditions of his probation. He thus received a sentence of seventeen (17) to sixty (60) months incarceration in a state correctional institution.

6. On August 13, 1991, defendant pleaded guilty to harassment in the Fulton County Court of Common Pleas and was sentenced to ninety (90) days probation.

7. After a trial by jury in the Fulton County Court of Common Pleas on a charge of possession of a small amount of marijuana, defendant was sentenced to thirty (30) days probation on August 11, 1992.

8. Plaintiff was sentenced to thirteen (13) to twenty-six (26) months on June 22, 1995, after pleading nolo contendere to a charge of receiving stolen property in the Huntington County Court of Common Pleas.

9. On June 22, 1999, plaintiff pleaded guilty to indecent assault in the Cambria County Court of Common Pleas.

10. Plaintiff is currently incarcerated in a state correctional institution in Somerset, Pennsylvania, serving a sentence of fourteen (14) to sixty (60) months on the 1999 indecent assault charge.

11. Plaintiff's last contact with defendant was over two years ago.

12. Plaintiff has not seen his children in approximately two years.

13. Plaintiff's children have visited him during his prior periods of incarceration.

14. Defendant has never mailed correspondence regarding the children to plaintiff while he was incarcerated.

15. Plaintiff is in arrears in child support by approximately two thousand three hundred forty dollars ($2,340).

16. SCI Somerset offers a correction officer-supervised visitation room that could be utilized should plaintiff's prayer be granted.

Discussion

Visitation, as distinguished from partial custody, is "the right to visit a child, but does not include the right to remove the child from the custodial person's control." Pa.R.C.P. 1915.1. The public policy of the Commonwealth is "when in the best interest of the child, to assure reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage...." 23 Pa.C.S. §5301. "The polestar and paramount concern in evaluating parental visitation, in dependency as well as non-dependency situations, is the best interests and welfare of the children." *Albright v. Commonwealth ex rel. Fetters*, 491 Pa. 320, 323, 421 A.2d 157, 158 (1980). However, in a parental visitation case the law demands a stricter standard than the children's best interests standard because of the constitutionally protected liberty interest in parental visitation explained above. *Green v. Sneeringer*, 431 Pa.Super. 66, 69, 635 A.2d 1074, 1075 (1993). Ergo, the court may deny a parent visitation only where the evidence indicates that the "parent suffers from **mental or moral deficiencies which pose a grave threat to the child**." *Id.* at 431 Pa.Super. 70, 635 A.2d 1076.

There is no evidence presently before the court that would suggest plaintiff suffers from a clinically diagnosed mental deficiency. The factual findings outlined above do indicate, however, that plaintiff has serious moral deficiencies, for it is hardly radical to equate the criminal lifestyle with moral deficiency. It is important to view plaintiff's crimes both **quantitatively** and **qualitatively**, though either analysis illustrates that plaintiff's unfortunate lack of discipline and self-control has let him become a reprobate-recidivist. He has been before a court of law on criminal charges on at least six (6) occasions, on various charges, and is currently serving state time on his latest transgression. What plaintiff's diverse criminal history illustrates to the court is that he is chiefly concerned with his own physical gratification and urges, responsibilities and law be damned.

Of note is the time period during which plaintiff has engaged in criminal activity. The record before the court indicates that plaintiff's first adult offense, conspiracy, was adjudicated in 1990[3]. As Shaunna is now nine (9) years old, she must have been born shortly after plaintiff's first few mistakes. Instead of picking himself up, dusting himself off and resolving to assume the responsibility of fatherhood, plaintiff indulged his shallow carnal desires. As more children were born, plaintiff subsequently continued to disregard the law. More disturbingly, as more children were born to plaintiff, the more serious or intense his crimes became. One could pose the argument that while plaintiff has committed crimes, the only really "serious" offense relevant to this dispute is the most current indecent assault. The court does recognize that some crimes are more "serious" than others, as the sentencing guidelines reflect. Yet the applicable standard instantly is "moral deficiency," and the court views **any** violation of the law as a representation of such a deficiency. If it is not so, then the offenses should be decriminalized by our General Assembly.

Assuming arguendo that plaintiff's earlier offenses are irrelevant and should not be considered, or that they were not so serious to rise to the level of moral deficiency, or that the he served his debts to society on the earlier crimes, the presumption should be that the system has worked to rehabilitate plaintiff and he is now ready to be an upstanding citizen and involved father. So has this leopard changed his spots? No. In fact, he is **currently** incarcerated once again for his most disturbing offense to date, indecent assault. Indecent assault is defined as follows:

[3] While the entire record surrounding that offense is not before the court, the court is not unaware of **defendant's** involvement in those nefarious events.

§ 3126. Indecent assault

(a) Offense defined. — A person who has indecent contact with the complainant or causes the complainant to have indecent contact with the person is guilty of indecent assault if:

(1) the person does so without the complainant's consent;

(2) the person does so by forcible compulsion;

(3) the person does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;

(4) the complainant is unconscious or the person knows that the complainant is unaware that the indecent contact is occurring;

(5) the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance;

(6) the complainant suffers from a mental disability which renders him or her incapable of consent;

(7) the complainant is less than 13 years of age; or

(8) the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.

(b) Grading. — Indecent assault under subsection (a) (7) is a misdemeanor of the first degree. Otherwise, indecent assault is a misdemeanor of the second degree.

18 Pa.C.S.A. §3126.

The sort of father that would commit one of the "indecent" acts outlined in the above statute must be classified as "morally deficient" as well, and any contrary conclusion may only be obtained after a rigorous but unavailing exercise of semantical acrobatics.

In *Etter v. Rose*, the Superior Court, building upon its reasoning in *Sullivan v. Shaw*, stated in dicta that "[w]hile there is no case law which permits denial of visitation with a parent because of incarceration alone, we believe there is a basis for creation of a *presumption, to be rebutted by the prisoner parent, that such visitation is not in the best interests of the child.*" *Etter v. Rose*, 454 Pa.Super. 138, 141, 684 A.2d 1092, 1093 (1996) [italics added]. Though this court is somewhat confounded by *Etter*, as it applies the best interests standard instead of the mental or moral deficiency/ grave threat standard, it gave plaintiff the opportunity to respond to the presumption offered in *Etter*. In response, plaintiff proposed that the children could see him and see what they will go through if they end up in prison. As to the logistics and costs of transportation, plaintiff related that he had no concrete plans and no one offered any evidence on his behalf at the hearing. Ultimately, plaintiff suggests in his letter that he now wants to be involved in the full panoply of decisions affecting his children, and he has fully utilized his opportunity to wax philosophic on the overall benefits of a child's interaction with both parents.

Conclusion

Perchance plaintiff has conclusively changed his ways, is now repentant and wants to prospectively rebuild any bridges he has not already burned. From the perspective of where he is now confined, such aspirations probably appear attainable and may in fact be attainable. But it is also conceivable that plaintiff now seeks to use his visitation rights for his own interests instead of those of his children, in order to break up the monotony of prison life and possibly secure him a trip home for a visitation hearing. But the motivation behind this action is of no consequence because the court must look at the cold record and measure it in light of the children's best interests and plaintiff's fitness.

The record displays a natural father who has had infrequent involvement with his children in the past, who has not paid child support and who evidences a pattern of selfish and criminal behavior. Not only is it not in the children's best interest to make such a long journey to a prison of all places, but the company of such a father can only do more harm than good at this time. The court is more than willing to take judicial notice of plaintiff's proposition that a child may be benefited by the interaction with both parents, but such is not the case when one of the parents has plaintiff's criminal history and is currently incarcerated for indecent assault.

ORDER OF COURT

February 13, 2001, the court having considered Plaintiff Dale E. Shoop's complaint for custody/visitation, his response to the court's November 1, 2000, order, the evidence presented at the hearing, the record and applicable legal standards, it is hereby ordered that the instant complaint is dismissed, as plaintiff's moral deficiency poses a grave threat to the children and his request for visitation is not in the best of the children at this time.