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Family Law—Non-Disclosed Psychiatric And Psychological Reports In Custody Cases Held Improperly Considered

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NON-DISCLOSED PSYCHIATRIC AND PSYCHOLOGICAL REPORTS IN CUSTODY CASES HELD IMPROPERLY CONSIDERED

In a proceeding brought to change custody of an infant, the parties stipulated that the Family Counseling Unit, an advisory arm of the Family Part of the Supreme Court, could investigate the principals and report its findings to the Court. There was no express provision for the non-disclosure of this report. The original stipulation authorized the family counselor to have the principals examined by a psychiatrist and a psychologist, but this authorization was deleted from the final stipulations. In spite of this deletion, the trial court availed itself of the services of both the psychiatrist and the psychologist. The lower court considered the reports of all these independent investigations in reaching its decision but did not disclose them to the parties. In the Court of Appeals, *held*: that the trial judge did not err in considering the reports of the psychiatrist and psychologist and in not disclosing of these reports. *Kesseler v. Kesseler*, 10 N.Y.2d 445, 180 N.E.2d 402, 225 N.Y.S.2d 1 (1962).[1]

Despite the usefulness of the reports of social scientists in custody suits, it has been almost universally held that in the absence of stipulation or waiver, decisions based on such reports, when there has been no disclosure to the parties are erroneous.[2] Behind these decisions lies the principle that no court should act in secrecy, and justice should be openly administered. At least one court held that deciding a case on the basis of evidence not made available to the parties, and in the absence of consent, amounts to a deprivation of due process.[3] On the other hand, there are certain practical and legal considerations which make the common law evidentiary procedures unsatisfactory.[4] Disclosure in open court of reports which are likely to contain comment on private affairs of the principals might well aggravate antagonism between the parties and make amicable settlement more difficult.[5] Another problem is that the reports of social workers are composed largely of conclusions drawn from interviews with third persons and as such are inadmissible under the common law hearsay rule.[6] A further contention in favor of nondisclosure is that the social worker finds it very difficult to obtain candid reports from third persons when they are aware that their statements will be made known to the parties.[7] It must be observed that none of these arguments fully apply to the reports of psychiatric and psychological examinations. Since the investigations of the psychiatrist and the psychologist are centered on the principals, the problem of the hearsay

1. 10 A.D.2d 935, 201 N.Y.S.2d 194 (1st Dep't 1960), affirming 11 Misc. 2d 607, 178 N.Y.S.2d 160 (Sup. Ct. 1958).
2. Fewel v. Fewel, 23 Cal. 2d 431, 144 P.2d 592 (1943); Williams v. Williams, 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955); Tumbleson v. Tumbleson, 117 Ind. App. 455, 73 N.E.2d 59 (1947); Thompson v. Thompson, 238 Minn. 41, 55 N.W.2d 329 (1952).
3. Williams v. Williams, supra note 2.
4. "Use of Extra-Record Information in Custody Cases," 24 U. Chi. L. Rev. 349 (1956).
5. Id. at 355.
6. "Use of Extra-Record Information in Custody Cases," supra note 4, at 358.
7. "Use of Extra-Record Information in Custody Cases," supra note 4, at 354.

objection to their testimony in open court would not arise. Although it is possible that the report of the psychiatrist and the psychologist might contain comment on the emotional adjustment of the parties, the detached objectivity of such comment would probably prevent it from increasing bitterness. In order to mitigate the effect of the common-law rules of evidence when applied to custody cases and to make available to the trial judge the invaluable research of social workers, the courts in many jurisdictions have held that when the parties have so stipulated or have consented by acquiescence, the trial court may order an independent investigation and act on the reports so obtained without revealing the information to the parties. This is a statement of the rule of *Rea v. Rea*,[8] the leading case in the area. The cases which have so held have been concerned with the reports of the family counselors or welfare workers and have not specifically dealt with the reports of psychiatric and psychological examiners.

The New York courts have long held that the parties to a matrimonial action may stipulate to allow confidential interviews between the judge and the child and have declared that in custody cases, "the courts are not so limited that they may not depart from strict adversary concepts."[9]

In *Kesseler v. Kesseler*, the Court of Appeals held that Special Term did not err in refusing to let the parties examine the family counselor's report although there was no express stipulation for non-disclosure. The Court declared that "the natural purport of such stipulations, unless they state otherwise, is that the common-law rules of evidence are suspended *pro tanto* in adapting to the social nature of the problems to be solved."[10] The Court found little difficulty in arriving at the conclusion that the parties may stipulate the confidentiality of the reports of family counselors in view of its earlier stand that interviews between judge and child may be kept confidential pursuant to stipulation. The Court reversed the Appellate Division and ordered a hearing de novo because more than three years had passed since the custody change challenged here had occurred, and because defendant, by placing the infant in the care of his consort, had not properly complied with the provisions of the custody decree.

The Court of Appeals did, however, hold that Special Term erred in considering the reports of the psychiatrist and the psychologist. The problem is, what was the basis for this part of the Court's decision? Did it follow the formula established in *Rea v. Rea*? As previously stated, *Rea v. Rea* and the other cases from foreign jurisdictions dealing with the problem of independent investigations made in connection with custody proceedings, dealt only with the investigations of family counselors or welfare workers. Was New York

8. 195 Or. 252, 245 P.2d 884 (1952).

9. People ex rel. Fields v. Kaufman, 9 A.D.2d 375, 377, 193 N.Y.S.2d 789, 792 (1st Dep't 1959).

10. Kesseler v. Kesseler, 10 N.Y.2d 445, 454, 180 N.E.2d 402, 407, 225 N.Y.S.2d 1, 8 (1962).

unwilling to extend the *Rea* rule to the reports of psychiatrist and psychologist? As mentioned previously, the arguments favoring non-disclosure of social workers' investigations do not fully apply to favor the non-disclosure of reports of psychiatrists and psychologists. The Court declared that it did not go so far as to hold that the parties *could not* stipulate that these reports be made confidentially to the court, but stated that the parties did not so stipulate and expressly refused to do so. This statement is a possible ground for an argument that the Court would refuse to permit consideration of psychiatric and psychological reports even with stipulation. However, the dissent claimed that the majority adapted the *Rea* formula to determine whether independent investigations made either by social workers, psychiatrists or psychologists are valid. If the *Rea* rule has been extended to include investigations by psychiatrists and psychologists, then the Court should have looked to find stipulations and/or acquiescence of the parties to such investigations, *assuming that the issue of acquiescence was properly raised.* Obviously, there was no stipulation for an investigation; but was there acquiescence? It may be that the deletion of the stipulation concerning such reports was considered to be such affirmative action as to bar further investigation of the actions of the parties for the purpose of finding acquiescence. The appellant had at least three opportunities to bring the issue of the judge's consideration of the reports in question, yet failed to do so. On February 17, 1958, when the judge at Special Term announced his preliminary decision, based in part on the confidential reports, appellant did not ask to see them. In her motion for reargument, appellant again failed to object to the use of the reports. Her acquiescence continued through the decision of April 2, 1958, and the contempt proceedings which followed. In spite of these actions, the Court refused to find acquiescence on the part of the appellant. There are four possible bases for the Court's decision that Special Term erred in considering the reports of the psychiatrist and psychologist. The Court may not have extended the *Rea* rule to investigations made by psychiatrists and psychologists, or it may have extended the *Rea* rule to include them but did not find acquiescence. Both of these explanations are based on the assumption that the Court saw a significant distinction between the family counselor's report and the reports of the psychiatrist and the psychologist. If this is true, the Court would refuse to permit the consideration of undisclosed psychiatric and psychological reports even in the face of a stipulation providing for such consideration. However, it is possible that while *Rea v. Rea* and its companion cases dealt only with investigations made by family counselors, welfare workers, or probation officers, to which the arguments in favor of non-disclosure fully apply, the Court of Appeals was willing to apply that holding to the investigations of psychiatrists and psychologists and not consider this action a significant extension of the doctrine. If this is true, then there are still two alternative explanations for the Court's decision. The Court may have searched for acquiescence but could not find it. Or it is

possible that the Court has adopted only part of the rule of *Rea v. Rea* and will permit non-disclosure of any independent investigation only when there has been express stipulation. It appears that no certain explanation can be given.

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INSURANCE

JURY TRIAL WAIVED BY LIFE INSURANCE BENEFICIARY THROUGH DILATORY TACTICS

The insured died approximately nine months after he took out a life policy in October 1959. The policy contained a clause making it incontestable by the insurer two years after the date of issue. The insurer notified the beneficiaries by letter in September 1960, some thirteen months prior to the expiration of the period of contestability, of its intent to rescind the policy due to alleged fraud and misrepresentation by the insured in his application for insurance. Subsequently the insurer began a suit for rescission with service of complaint, after a month of attempting service, on April 25, 1961, seven months after the notice. The beneficiaries submitted in answer a general denial and a counterclaim demanding that the policy be declared valid and the insurer be declared liable to them for the face value of the policy. They later moved for a separate trial of the factual issues raised by the counterclaim and for a stay of the equity action pending the outcome of the jury trial. The Court of Appeals held that the Appellate Division[1] had not abused its discretion in reversing the Supreme Court, Special Term order granting the motion. It stated that the beneficiaries had waived a jury by dilatory tactics in not initiating a suit at law during the seven months between notice by the insurer and commencement of the suit in equity. *Phoenix Mutual Life Insurance Company v. Conway*, 11 N.Y.2d 367, 183 N.E.2d 754, 229 N.Y.S.2d 740 (1962).

The Appellate Division generally has the same discretionary powers as does the lower branch of the Supreme Court; it may reverse on review any discretionary decision of that court even where no abuse of its powers is found.[2] However, a reversal without a finding of abuse is rare.[3] The background of the entire area of litigation between an insurer and the beneficiaries of the insured under a life policy containing an incontestability clause[4] must be viewed in light of the basic apprehensive view of juries taken towards insurance carriers. A number of similar New York cases indicate the common practice of a carrier of bringing a suit for rescission in equity quickly, or without adequate notice

1. 15 A.D.2d 924, 225 N.Y.S.2d 532 (2d Dep't 1962).
2. O'Connor v. Papertsian, 309 N.Y. 465, 131 N.E.2d 883 (1956); Hogan v. Franken, 221 App. Div. 164, 223 N.Y. Supp. 1 (3d Dep't 1927); 9 Carmody-Wait 573 and cases footnoted.
3. Hogan v. Franken, supra note 2.
4. See N.Y. Ins. Law § 155(1)(b) for statutory discussion of incontestability clauses.