

**COURT OF COMMON PLEAS OF  
PHILADELPHIA COUNTY, PENNSYLVANIA  
ORPHANS' COURT DIVISION**

**No. 805 AI of 2016  
Control No. 162343**

**Estate of ROSA SIMMONS, An Alleged Incapacitated Person**

**OPINION SUR APPEAL**

**OVERTON, J.**

Rosa Simmons has filed an appeal of this Court's March 27, 2017 Decree ordering Dr. Kenneth Rosenstein to conduct an independent medical evaluation of Rosa Simmons and this Court's April 4, 2017 Decree denying Respondent's request for stay of the Court's March 27, 2017 Decree.

***Facts and Procedural History***

Philadelphia Corporation for Aging ("PCA") filed a Petition for Adjudication of Incapacity and the Appointment of a Plenary Guardian of the Person and Estate on July 5, 2016. (Pet. for Adjudication). The Petition stated that Rosa Simmons a/k/a Rosa Reed-Simmons was an eighty-three year old female suffering from dementia. (*Id.* at ¶¶ 2-4). The Petition alleged that Rosa Simmons' conditions caused functional limitations that affected her ability to receive and evaluate information effectively and to make and communicate decisions. (*Id.* at ¶ 3). The Petition also stated that her conditions interfered with her ability to make informed judgments regarding her personal safety, medical care, and finances. (*Id.* at ¶ 4).

The Petition listed Rosa Simmons' next of kin as her Power of Attorney, Jarrod Dickason, her sister, Gladys Smith, and her goddaughter, Carol Diggs. (*Id.* at ¶ 7). PCA



nominated Gloria F. Byars as the proposed guardian of the person and estate. (*Id.* at ¶ 11). The Petition stated that Gloria F. Byars is a professional guardian affiliated with RES Consulting, LLC, and concentrates her practice in guardianship services of seniors and is well-suited to be guardian of the person and estate of Respondent. (*Id.*).

On July 6, 2016, the Court awarded a citation and scheduled a hearing for August 9, 2016. (07/06/16 Preliminary Decree). The Preliminary Decree stated the alleged incapacitated person shall be subject to a capacity evaluation by Petitioners expert prior to the date of a plenary guardianship hearing. (*Id.* at ¶ 6). On August 5, 2016, Leon A. Williams, Esquire entered his appearance on behalf of Rosa Simmons.<sup>1</sup> On August 9, 2016, an Alias Citation was awarded after Leon A. Williams, Esquire requested a continuance to conduct an investigation and interview Ms. Simmons. The hearings was continued to September 7, 2016. (08/09/16 Decree). The hearing was then continued to October 20, 2016, after David Nagel, Esquire, counsel for PCA, informed the Court that Leon A. Williams, Esquire stated Ms. Simmons is not available for an evaluation until September 22, 2016. On September 7, 2016 a citation was awarded for the October 20, 2016 hearing date. (09/07/16 Decree). On October 18, 2016, David Nagel, Esquire informed the court that Leon A. Williams, Esquire advised him that Ms. Simmons has recently undergone a full neuropsychological evaluation at the Penn Memory Center and that the results of this evaluation will not be available until on or about October 27, 2016. On October 19, 2016, a pluries citation was awarded for a November 29, 2016, hearing date. (10/19/16 Decree). On November 29, 2016, Leon A. Williams, Esquire appeared before the court and requested another continuance because Ms. Simmons was recently admitted into the hospital and could not attend.

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<sup>1</sup> On August 1, 2016, the Court appointed Charles M. Gibbs, Esquire to represent Rosa Simmons before Leon A. Williams was retained. On August 9, 2016, the order appointing Charles M. Gibbs, Esquire was vacated.

All other parties, including the doctor, were present at the November 29, 2016 court date. The matter was rescheduled to February 16, 2017. (11/29/16 Decree).

On February 16, 2017, Justin Williams, Esquire, counsel for PCA, told the court that Ms. Simmons, through counsel, submitted to a neuropsychological evaluation that is not directed to whether she had capacity but rather a general neuropsychological evaluation. (N.T. 02/16/17, 4:10-14). The Court told counsel that a decree would be issued ordering another evaluation. (*Id.* at 5:24 – 7:23). Leon Williams, Esquire indicated that Ms. Simmons will not appear in court, nor will she cooperate with any doctor expert or anybody associated with PCA. (*Id.* at 6:19-20; 7:10-13). On March 27, 2017, the court issued a decree ordering Dr. Rosenstein to complete the independent evaluation of Rosa Simmons and rescheduling the hearing to April 26, 2017. (03/27/17 Decree).<sup>2</sup>

On April 4, 2017, Appellant filed a brief requesting the Court to stay the decree of March 27, 2017 ordering Ms. Simmons to submit to a medical evaluation by Dr. Rosenstein. The Court denied said request and reiterated the order to submit to Dr. Rosenstein's medical evaluation. (04/04/17 Decree). The April 26, 2017 hearing was continued due to pending appeal.

On April 21, 2017, Appellant filed a timely Notice of Appeal. Statements of Matters Complained of on Appeal were requested and properly tendered on April 24, 2017. Appellant raised the following issues in his Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b):

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<sup>2</sup> The delay between the February 16, 2017 hearing and the March 27, 2017 decree was due the time spent finding an independent doctor willing to do the evaluation and coordinating with said doctor for available dates. PCA's 03/16/17 petition for an order compelling Ms. Simmons to submit to a psychological evaluation was moot because the Court already indicated at the February 16, 2017 hearing that an evaluation would be ordered.

1. The Honorable Trial Court Judge erred when ordering an independent evaluation of the Alleged Incapacitated Person.
2. The Honorable Trial Court's orders violate Article 1, Section 1 of the Pennsylvania Constitution and the First Amendment to the U.S. Constitution.
3. The Court's Order is collateral and immediately appealable.

### *Discussion*

#### **A. Ordering an Independent Evaluation of an Alleged Incapacitated Person is Within the Authority of the Court**

Appellant asserts that the Court erred by ordering an independent evaluation of Ms. Simmons prior to the Response Date to PCA's Petition for an Independent Medical Evaluation. This claim is without merit.

Pursuant to 20 Pa. C.S. § 711-712, Orphans' Court has mandatory jurisdiction over the estate of an incapacitated person and non-mandatory jurisdiction over the appointment of a guardian of an incapacitated person. Pursuant 20 Pa. C.S. § 721 and § 5512, venue lies in the county where the incapacitated person is domiciled, is a resident or is residing in a long-term care facility. Pursuant 20 Pa. C.S. § 5511(d), the court, upon its own motion or upon petition, shall order an independent evaluation which shall meet the requirements of section 5518.

Section 5518 provides as follows:

To establish incapacity, the petitioner must present testimony, in person or by deposition from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner, which establishes the nature and extent of the alleged incapacities and disabilities and the person's mental, emotional and physical condition, adaptive behavior and social skills The petition must also present evidence regarding the services being utilized to meet essential requirements for the alleged incapacitated person's

physical health and safety, to manage the person's financial resources or to develop or regain the person's abilities; evidence regarding the types of assistance required by the person and as to why no less restrictive alternatives would be appropriate; and evidence regarding the probability that the extent of the person's incapacities may significantly lessen or change.

20 Pa. C.S. § 5518.

Rosa Simmons resides at 1207 South 46<sup>th</sup> Street, Philadelphia, Pennsylvania, 19143. (Pet. for Adjudication at ¶ 2). Thereby making it the proper jurisdiction and venue for an Incapacity hearing for Ms. Simmons who is a resident of the city and county of Philadelphia. PCA made service upon Ms. Simmons. (N.T. 02/16/17, 6:21-7:6). Furthermore, the Court was well within its authority to order Dr. Rosenstein to complete an independent evaluation. While §5511 (d) states the court shall give due consideration to the appointment of an evaluator nominated by the alleged incapacitated person, it does not require the court to appoint the respondent's evaluator. This action was initiated on July 5, 2016. There have been six continuances since the original hearing date of August 9, 2016. Appellant had ample time to have an evaluation completed that complied with the requirements of § 5518. Both parties have failed to accomplish this despite the many continuances. The evaluation Appellant submitted to does not comply with the requirements. Despite counsel's previous agreement and attempts to work out an adequate independent evaluation, they have failed to do so. (N.T. 02/16/17, 4:6-14). Appellant's Counsel indicated Appellant has refused and will continue to refuse to cooperate with PCA and doctor experts. (*Id.* at 7:9-17). The Court by its own motion issued a decree for an independent evaluation of the Appellant because it was in the best interest of the alleged incapacitated person who may be in need of guardianship services and in the interest of judicial economy after five continuances as of February 16, 2017. Appellant's argument that the March 27, 2017 decree was issued prior to the April 5, 2017 response date for PCA's March 13, 2017 Petition is meritless.

The March 27 Decree was not issued upon consideration of PCA's petition but rather was ordered verbally by the Court on February 16, 2017 after the parties have failed yet again to have an adequate evaluation for trial. The delay between the February 16, 2017 hearing and March 27, 2017 decree was due to finding an independent medical doctor that was available to complete the evaluation. The Court was confident that Dr. Rosenstein could finally get this matter to disposition one way or another because he has been appointed by the Court many times and is familiar with the process.

Therefore this claim is without merit.

**B. The Court's Decrees Did Not Violate Appellant's Constitutional Rights**

Appellant states the Court's Decree's ordering an independent medical evaluation violate her rights under Article 1, Section 1 of the Pennsylvania Constitution and under the First Amendment of the U.S. Constitution. This claim is without merit.

While the United States has recognized a constitutional right to a "Zone of Privacy" since the *Griswold* line of cases, that is not dispositive here. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Appellant cites *Denoncourt* for Pennsylvania's Constitutional right to be let alone. However, *Denoncourt* also indicates that "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." *Denoncourt v. Com., State Ethics Commn.*, 470 A.2d 945, 949 (Pa. 1983). Appellant relies on *In Re TR* to apply the right to privacy to the instant matter. In *TR*, the Pennsylvania Supreme Court held that mother's right to privacy under State Constitution precluded a compelled psychological evaluation and disclosure of results. *In re T.R.*, 731 A.2d 1276, 1281 (Pa. 1999). However this case is inapposite to the instant matter. *In re T.R.* was in the context of a juvenile dependency

dispositional review hearing. *Id.* at 1278. There was abundant information about the mother's ability to parent including but not limited to: children's fractured ribs, eye injuries, failure to attend parenting classes, testimony of children and social worker. *Id.* The court recognized that not every intrusion in an individual's privacy is unconstitutional but here the Commonwealth's interest to provide safety and welfare to children could be accomplished without the evaluation given the abundance of other evidence. *Id.* at 1282.

Here, unlike *In Re T.R.*, pursuant 20 Pa. C.S. § 5518, expert testimony is required to be presented either by live doctor testimony or a doctor's deposition. Someone simply cannot be adjudicated based upon evidence of injuries and testimony from lay witnesses. The issue concerning a medical evaluation is intertwined with the issue of whether appellant should be adjudicated an incapacitated person. The latter simply cannot be accomplished without the former. Therefore, there is no alternate reasonable method of lesser intrusiveness. The significant interest in this matter, similar to the interest in protecting children, is the interest in protecting the safety and welfare of alleged incapacitated persons who may be in need of guardianship services. Furthermore, Appellant has already submitted to a medical evaluation for this proceeding. (N.T. 02/16/17, 4:9-14). Any privacy interest Appellant had is reduced if not waived. Petitioner has the burden to prove the Appellant is incapacitated and in need of guardianship services by clear and convincing evidence. Appellant wants the court to accept an evaluation that does not comply with § 5518 and not give the Petitioner, who bears the burden of proof, the opportunity to rebut said evidence or even put on their case in chief. Additionally, any risk of injury to the Appellant due to disclosure is severely limited. All files and records of the court in an incapacity proceeding are limited to the judge, court officers/staff and the parties. The hearing itself is in a closed courtroom. The doctor is subject to HIPPA regulations. The

Court's final decree even includes: "All evidence received at the hearing concerning the present matter, including but not limited to medical depositions, all testimony and all exhibits, shall be SEALED and not made available except upon further Decree of this Court." Notwithstanding 20 Pa. C.S. § 5511(d), this claim is meritless.

### **C. The Court's Order was Interlocutory and Not Immediately Appealable**

Appellant asserts that this is a collateral order that is immediately appealable. This claim is without merit.

An appeal may be taken from: (1) a final order (Pa.R.A.P. 341); (2) an interlocutory order as of right (Pa.R.A.P. 311); (3) an interlocutory order by permission (Pa.R.A.P. 312, 1311, 42 Pa.C.S.A. § 702(b)); or (4) a collateral order (Pa.R.A.P. 313). *Stahl v. Redcay*, 897 A.2d 478, 485 (Pa. Super. 2006). A final order is one that disposes of all the parties and all the claims, is expressly defined as a final order by statute, or is entered as a final order pursuant to the trial court's determination. *Id.* Here the two decrees ordering an independent evaluation clearly are not final orders. No decision has been made by the Court that is dispositive of the ultimate issue of incapacity. The Court's order does not end or dispose of the case. Petitioners still must present their case and prove it by clear and convincing evidence.

In order for an order to be considered collateral and appealable it must be (1) separable from and collateral to the main cause of action where (2) the right involved is too important to be denied review and (3) the question presented is such that if review is postponed, until final judgment in the case, the claim will be irreparably lost. *Nemirovsky v. Nemirovsky*, 776 A.2d 988, 991 (Pa. Super. 2001). All three elements must be present. The United States Supreme Court has stated that the "collateral order doctrine" must be narrowly applied. *Geniviva v. Frisk*, 725 A.2d 1209, 1214 (Pa. 1999). "Narrow application prevents the collateral order rule from



subsuming the fundamental general precept that only final orders are appealable and from causing litigation to be interrupted and delayed by piecemeal review of trial court decisions.”

*Brophy v. Philadelphia Gas Works and Philadelphia Facilities Mgt. Corp.*, 921 A.2d 80, 87 (Pa. Cmmw. 2007).

*Miller v. Steinbach* held that an order requiring appellant to pay for the medical evaluation did not pass the first prong of the *Cohen* test requiring the order to be separate and collateral to the main cause of action because the issue concerning the psychological evaluations is intertwined with the issue of whether appellant should be granted custody of his child. *Miller*, 681 A.2d 775, 778 (Pa. Super. 1996). In regard to the second prong, it is not sufficient that the issue be important to the particular parties but rather it must involve rights deeply rooted in public policy going beyond the particular litigation at hand. 725 A.2d 1209 at 1214. Claims must be analyzed not with respect to the specific facts of the case, but in the context of the broad public policy interests that they implicate. Only those claims that involve interests deeply rooted in public policy can be considered too important to denied review. *Id.* Any assertion of a privacy concern does not automatically meet the second prong but rather the specific privacy concern must be evaluated and adjudged to satisfy the importance requirement. *Dougherty v. Heller*, 138 A.3d 611, 628–29 (Pa. 2016).

Here, as in *Miller*, the issue concerning the medical evaluation is intertwined with the issue of whether appellant should be adjudicated an incapacitated person. Therefore the order is not even separate from and collateral to the main cause of action. Furthermore, as previously discussed above, the privacy interest here does not raise to the level of a constitutional violation and therefore does not satisfy the “important” prong of the *Cohen* test. Appellant claim is not

separate and collateral to the main action nor is it deeply rooted in public policy. Therefore, this claim is without merit and the appeal itself should be quashed.

***Conclusion***

Based on the record, this Court's Decrees dated March 27, 2017 and April 4, 2017 Ordering Appellant to Submit to Dr. Rosenstein's Examination should be **AFFIRMED**.

**BY THE COURT:**

Date: 5/10/17

  
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**OVERTON, J.**

Justin Williams, Esquire

Leon A. Williams, Esquire