IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

STATE OF TENNESSEE, DEPARTMENT OF HUMAN SERVICES	)	CLAIBORNE COUNTY
	)	03A01-9602-JV-00043
	)	
Petitioner-Appellee	)	
	)	
	)	HON. DAVID RAY,
v.	)	JUDGE
	)	
	)	
CARLA ANN RIGGS LEWIS MITCHELL	)	
	)	
Defendant-Appellant	)	VACATED AND REMANDED

WILLIAM ALLEN OF OAK RIDGE FOR APPELLANT

CHARLES W. BURSON, Attorney General & Reporter, and LORRAINE LESTER-THOMPSON, Assistant Attorney General, OF NASHVILLE FOR APPELLEE

O P I N I O N

Goddard, P.J.

This is a proceeding to terminate the parental rights of Carla Mitchell and Gordon Terry Cheek as to their daughter, Jennifer Elaine Cheek, born August 7, 1983. Mr. Cheek was served by publication, did not answer, and an order was entered

terminating his parental rights. Ms. Mitchell contested the case, and after a plenary hearing, her parental rights were likewise terminated.

She appeals, raising the following issues:

> I. Whether the trial court followed the statutory requirements in terminating the mother's parental rights.
>
> II. Whether the trial court erred by hearing the child's testimony at trial ***ex parte***, and discussing the case with a DHS case worker ***ex parte***.
>
> III. Whether the trial court erred by denying pretrial discovery of the child's mental health records and records kept by the Department of Human Services.

In view of our disposition of this appeal it is not necessary that we detail the facts developed in great length. Suffice it to say that the record clearly shows that Jennifer was subjected on almost a daily basis to unspeakable acts of sexual abuse primarily at the hands of Mrs. Mitchell's then husband, James Lewis, from 1987, the date Mrs. Mitchell married him, until Jennifer was removed from the home in February 1991.[1] Jennifer is convinced that her mother knew of Mr. Lewis's abusive acts, notwithstanding the mother's protests that she did not. We find Mrs. Mitchell's testimony in support of her insistence that she never left Jennifer alone with Mr. Lewis during the period they were living together to be incredible. However that may, it is

[1] Jennifer was also abused by Mr. Lewis' two sons during this period, and earlier by a boy friend of a baby sitter.

crystal clear that Jennifer believed her mother knew and took no steps to protect her.

Jennifer's removal from custody of Mrs. Mitchell, who at that time was still married to Mr. Lewis, occurred because Jennifer told her aunt, Mrs. Mitchell's sister, of the abuse she was enduring. For the longest period of time Mrs. Mitchell denied that any abuse had occurred and refused to believe Jennifer's accusations. As a matter of fact, she did not leave Mr. Lewis until July 1992, and on more than one occasion had him join her in visitation with Jennifer after she was removed from the home and placed in the custody of the DHS. Finally, Mrs. Mitchell did state that she "had to believe her," although this statement was most likely prompted by her desire to re-establish a relationship with Jennifer--which had been severely, if not irretrievably, severed--and thereby regain custody.

Resolution of the first issue turns upon the provisions of T.C.A. 37-1-147(d)(1), and T.C.A. 37-2-403(a)(2), both of which have been amended since disposition of the case below. The provisions in effect at that time are shown in an appendix to this opinion. As to the former Code Section, Mrs. Mitchell argues that the Trial Court did not make findings of fact required by the Statute to authorize termination of parental rights. We are inclined to agree with this insistence. However, upon our de novo review, we find the Trial Court acted properly in terminating parental rights under the latter Code Section.

Apropos of the second issue, it appears that on two separate occasions, David Banner, a Social Counselor with the DHS, who signed the petition in this case seeking termination of parental rights, spoke with the Trial Judge with regard to the case. On the first occasion, November 18, 1994, Mr. Banner requested an order--which was later issued pursuant to the request--preventing Mrs. Mitchell from contacting Jennifer. The second occasion was on June 5, 1995, when Mr. Banner delivered a letter written by Jennifer to the Trial Judge.

Mr. Banner testified regarding the contacts as follows:

> Q As a result of whatever information -- You're not allowed to tell what she told you. But what did you do as a result of that information?
>
> A On November the 18th of 1994, I brought a restraining order up for the judge to sign to stop all contact.
>
> Q Okay. Tell the court how you obtained that, how you -- what process you went by to get him -- that order signed. I believe that was the next part of the order, the motion?
>
> A Yes. It was. I had been contacted by Camelot Care Center that Jennifer had reacted adversely to some correspondence from her mom, cards. And it was detrimental to her therapy.
>
> And there had been occasions that I'd been to visit Jennifer, myself, after a telephone call that she'd received, like, the day before, or a card.
>
> And Jennifer would be really different. Her behaviors would be more erratic. She would complain of hearing voices, voices to tell her -- telling her that she hated her mother, and that she did not want to see her mother, she wanted to hurt herself, after those phone calls or any contact from her mother.

So, based on that, in called the judge and explained to him what the situation was. And he told me that, if I'd bring an order up, he would sign it that day.

. . . .

Q Mr. Banner, I'm not sure that I understood exactly what your testimony was concerning June the 5th. Did you say that you came and met with the judge and told him what Jennifer wanted?

A On June the 5th we had a hearing on Terry Cheek, that the birth father, and was granted a default judgment to terminate rights.

And after that hearing, in came up and gave the judge the letter that you had -- that was stapled together in the file yesterday that the judge opened. And at that time I did tell him what Jennifer had said.

Q Okay.

A That she -- if she was made to go back home that she would run away or kill herself.

Q Of course, that didn't have anything to do with Terry Cheek's parental rights, did it?

A No, sir.

Additionally, under this issue, Mrs. Mitchell complains of the Trial Court's interviewing Jennifer over her objection with only the Trial Court, Jennifer, Jennifer's guardian ad litem, and the court reporter present.

As to the interview by the Court, which is a part of the record, we believe an unreported opinion of this Court, Greenfield v. Ferguson, filed in Nashville on July 11, 1985, and the cases cited therein is dispositive.

Greenfield, which was a parental rights termination case, addressed a similar interview by the Trial Court:

> After a hearing on the merits of the petition, at which the Trial Judge interviewed Daisy in his chambers out of the presence of the appellants or their counsel, he found that the statutory requirements had been met and entered an order terminating the appellants' parental rights and allowing the Greenfields to adopt Daisy.
>
> . . . .
>
> The appellants insist that the Trial Judge committed reversible error in interviewing the child in chambers without the parties or their lawyers being present. Although this may be a common practice in child custody cases in this state, there is very little authority on the point. What authority there is generally starts with the constitutional requirement that the courts shall be open and that every man shall have a remedy by due course of law. Tenn. Const. Art. I, §17. In reliance on this section, this court in an earlier unpublished opinion[2] held that the trial judge committed reversible error in refusing to allow the parties or their attorneys to view the contents of a master's report concerning a visitation plan for a minor child. Judge Lewis, writing for the court said:
>
> > For a court to issue an order based in whole or in part on a report kept secret from the parties is repugnant to our democratic system of government. The Constitution of Tennessee guarantees that the courts shall be open to all persons and that they shall have a remedy "by due course of law." Art. I, Section 17. This is a hollow guarantee if issues may be decided by the court on "evidence" known only to the court.
>
> We think the reasoning in our prior case is a conclusive answer to the question presented by the appellants. We also think the practice of interviewing witnesses in chambers without counsel being present violates the litigant's right to due process of law.

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[2] This opinion is not further identified in Greenfield, and we have been unable to identify it.

While it may be the contacts made with the Trial Judge, though clearly improper, were understandable, given the exigent circumstances obtaining at least insofar as the second interview is concerned, and while the contacts standing alone may not have been sufficiently egregious to require reversal, they, coupled with the Court's interview with the child, assuredly are.

In the event of re-trial, we deem it appropriate to briefly address issue three. We first note that the Rules of Juvenile Procedure provide the following:

> **Rule 25. Discovery.--** By local rule and according to whatever process, informal or otherwise, is appropriate for that court, each juvenile court shall insure that the parties in delinquent and unruly proceedings in juvenile court have access to information which would be available in criminal court and that parties in other cases have access to information which would be available in the circuit court.

The applicable Rule of Civil Procedure is Rule 26.02(1), which, as pertinent, provides the following:

> **26.02. Discovery Scope and Limits. --** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any

> discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

We are of the opinion that counsel was entitled to discover the medical records sought.

In support of our resolution of this issue, we note the holding of this Court in Hearn v. Pleasure, 624 S.W.2d 556 (Tenn.App.1981). That case sought an injunction requiring the DHS to permit examination of its records pursuant to the right of the plaintiffs to pre-trial discovery in Juvenile Court.

Judge Cantrell, in an exhaustive opinion relative to right to discovery, vis-a-vis due process, recognized that the due process concept did not originally encompass the right to discovery. The opinion noted, however, that the concept devolved through the years, and as we read the opinion under present day applications, would apply to the juvenile court, except for the fact that the time Hearn was decided the parties were entitled as a matter of right upon an appeal to a de novo hearing in circuit court.

Since the decision in Hearn, the Legislature has changed the appellate process and now juvenile cases come directly to this Court. Upon reading the opinion, we believe the principal underpinning for the decision was the right to de novo

review in Circuit Court. Because this has been removed, we conclude that counsel for Mrs. Mitchell was entitled to the records sought.

In conclusion as to this point, we note that the State does not contend the Trial Judge did not commit error, but rather did not commit "reversible error." While we tend to agree that the error in the context of the evidence introduced was harmless, we deem it appropriate, as already noted, to resolve this issue in the event of re-trial.

In the event of re-trial, we respectfully suggest that the Trial Judge--having permitted the ex parte contacts by Mr. Banner and having taken testimony from Jennifer in the absence of Mrs. Mitchell's counsel--should recuse himself and permit another Judge to hear the case.

For the foregoing reasons the judgment of the Trial Court is vacated and the cause remanded for further proceedings not inconsistent with this opinion. Costs of appeal are adjudged against the Department of Human Services.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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Charles D. Susano, Jr., J.