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Exclusion of Public From a Proceeding Merely Upon Request is in Excess of Court's Power

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A trial court may, in a dissolution of marriage proceeding, exclude the public and the press from trial; such exclusion, however, is within the court's jurisdiction only when cogent reasons for the exclusion exist.

In the dissolution of marriage[1] trial of Jackie and Beverly Gleason, the court ordered the exclusion of the public and the press from the entire proceeding at the request of the parties. A reporter who wished to attend the trial and her publisher filed a suggestion for the issuance of a writ of prohibition[2] in the District Court of Appeal, Fourth District, challenging the exclusion order.[3] The court, in granting the writ, *held*: Exclusion of the public and the press from a dissolution of marriage proceeding solely upon the request of the

1. FLA. STAT. §§ 61.001 *et seq.* (1975).

2. FLA. APP. R. 4.5(d). FLA. STAT. § 81.011 (1975) provides:

> The petitioner shall file a petition stating the nature of the action, the proceedings in the inferior court . . . sought to be prohibited, and demand that writ of prohibition be granted in that behalf.

3. There are two issues as to the propriety of the writ of prohibition. The first is whether the extraordinary remedy of prohibition, which challenges the acts of a court allegedly acting without or in excess of its jurisdiction, is proper to challenge an exclusion order of the trial court. State *ex rel.* Pope v. Joanas, 278 So. 2d (Fla. 1st Dist. 1973). The majority and the dissent disagreed sharply on this point. Other states have allowed the use of this remedy to challenge exclusion orders. *See* Phoenix Newspapers, Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563 (1971); Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (1955). The fact that these cases involved criminal trials whereas the present case deals with a civil action is irrelevant, as the sole question here is whether a trial court in improperly excluding the public is acting in excess of its jurisdiction, where prohibition lies, or merely making a procedural error, for which prohibition will not lie.

The second issue is whether the publisher in this case had standing to challenge the trial court's order. The majority ruled that the publisher had standing even though it had no right beyond that shared with the general public. Other courts have agreed that the press need not show any right greater than that of the general public to challenge an exclusion order. Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); E.W. Scripps Co. v. Fulton, *supra; see* CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); Craemer v. Superior Court, 265 Cal. App. 2d 216 (1968). New York requires the showing of a special interest above that of the general public. United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E. 2d 777 (1954). This requirement is satisfied by a showing that the order was "directed" at the challenger, even if it excludes the entire public and press. Oliver v. Postel, *supra*. Since the Florida rule is that anyone has standing to suggest a writ of prohibition, Frederick v. Rowe, 105 Fla. 193, 140 So. 915 (1932), and since the ability of the press to gather news is directly impaired by an exclusion order, there is justification for the majority's holding that no additional right or special interest is required of the press to challenge the order.

parties in an act in excess of the court's power. *State ex rel. Gore Newspaper Co. v. Tyson*, 313 So. 2d 777 (Fla. 4th Dist. 1975).

This case of first impression[4] presented three interrelated issues: (1) whether the public and the press have a right to attend, observe, and report civil trials; (2) if such a right exists, whether it is limited by the power to exclude the public from proceedings upon good cause; and (3) if such a limitation exists, whether the right of privacy of the litigants in a dissolution of marriage action would be a sufficient reason for complete exclusion of the public and the press.

Concerning the first issue, the relators[5] had contended that the right of the public to attend trials is based on the first amendment of the United States Constitution[6] and Article I, section 4 of the Florida Constitution,[7] which guarantee freedom of speech and of the press. They argued that excluding the press from a trial imposes a greater restraint on the freedom of the press than restricting the publication of facts concerning a public trial. The relators cited cases holding the latter situation unconstitutional absent a clear and present danger or a serious and imminent threat to a protected interest.[8] They also said that the free press and speech guarantees would be meaningless without the correlative rights of access to governmental proceedings, including trials.[9] The respondent, on the other hand, argued that no public right to attend trials exists.[10]

The court rejected the relator's theory of a constitutional right of public access, on the ground that freedom of the press does not

4. In the Commonwealth, exclusion of the public in divorce proceedings is reversible error. McPherson v. McPherson, [1935] App. Cas. 117; Scott v. Scott, L.R. [1913] App. Cas. 417. In Florida, there is no reversal if the appellant fails to show prejudice. Coggan v. Coggan, 214 So. 2d 368 (Fla. 2d Dist. 1968). The only other relevant American case is Bloomer v. Bloomer, 197 Wis. 140, 221 N.W. 734 (1928), where the Supreme Court of Wisconsin refused to reverse an exclusion order on appeal when the appellant had requested it at trial.

5. The party who files the suggestion for a writ of prohibition.

6. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. This limitation applies to the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652 (1925).

7. "Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." FLA. CONST. art. 1, § 4.

8. United States v. CBS, Inc., 497 F.2d 102 (5th Cir. 1974); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972); State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (1971); State *ex rel.* Miami Herald Publ. Co. v. Rose, 271 So. 2d 483 (Fla. 2d Dist. 1972).

9. Brief for Relator at 4.

10. Brief for Respondent at 4.

confer upon the press a constitutionally protected right of access to sources of information not available to others.[11] The court also rejected the respondent's argument, however, and instead recognized a public right of access to the courts based upon the common law and public policy.[12]

At common law, all trials, whether civil or criminal, were open and public,[13] with certain limited exceptions.[14] The public trial rule existed for reasons quite apart from those interests protected by the criminal defendant's constitutional right to a public trial,[15] and include the possibility that

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11. Tribune Review Publ. Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958). Cases which uphold challenges by the press to the exclusion of the public, Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956), and E.W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (1955), and which reject such challenges, United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954), have all recognized that freedom of the press is not directly involved. Recently, however, the United States Court of Appeals for the Sixth Circuit held a court order prohibiting extrajudicial comment by anyone involved in a trial invalid as an abridgment of freedom of the press. CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).

12. 313 So. 2d at 788. The existence of this right has been a matter of dispute in criminal cases. In United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954), the New York Court of Appeals held that the right to a public trial belongs to a criminal defendant alone. The court saw the right to a public trial as a device to secure the criminal defendant's right to a fair trial, and a right which he could waive. This view is supported by Geise v. United States, 262 F.2d 151 (9th Cir. 1958) and United States v. Sorrentino, 175 F.2d 721 (3d Cir. 1949). The dissent in *Valente* argued that the majority confused the criminal defendant's right to a public trial, guaranteed by the sixth amendment to the United States Constitution, with the common law right of the public to attend trials. While the former is a device to secure a fair trial for the criminal defendant, the latter is motivated by different considerations, such as improving the quality of the testimony and instilling public respect and confidence in the judicial system. This analysis was accepted in E.W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896 (1955). Likewise, it has been held that while a criminal defendant may waive his right to a public trial, he has no right to insist upon a private trial. Avery v. State, 15 Md. App. 520, 292 A.2d 728 (1972); *see* Lewis v. Peyton, 352 F.2d 791 (4th Cir. 1965).

Both *Scripps* and *United Press* involved situations where state law required that courts be "open." Both cases held that the provisions were merely declaratory of existing law, and *Scripps* explicitly states that the decision would be the same without that provision. Cases striking down exclusion orders based upon the same or similar provisions include: Phoenix Newspapers, Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563 (1971); Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); Des Moines Register and Tribune Co. v. Hildreth, 181 N.W.2d 216 (Iowa 1970) (civil case). Florida has no such provision.

13. M. HALE, HISTORY OF THE COMMON LAW (1971 ed.) 254-56; E. JENKS, THE BOOK OF ENGLISH LAW 73 (6th ed. 1966); *see* 3 W. BLACKSTONE, COMMENTARIES at 373.

14. Where there was danger of overcrowding, risk of violence and brawls, or moral harm of satisfying pruriency in trials of certain crimes, exclusion was allowed. 6 WIGMORE ON EVIDENCE, § 1835(1) (3d ed. 1940). It was also allowed where children or trade or official secrets were involved. JENKS, *supra* note 13 at 74.

15. *See* note 12 *supra*.

> any person, unconcerned as well as concerned, may as "amicus curiae" inform the court better, if he thinks they are in error, that justice may be done; . . . that truth may be discovered, in civil as well as criminal cases.[16]

Moreover, open access to the courts guarantees the public's respect for, acquaintance with, and confidence in judicial remedies.[17] Recognizing that courts are public institutions, the United States Supreme Court has said:

> A trial is a public event. What transpires in the court room is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.[18]

In addition to this legitimate interest that the public at large has in all judicial proceedings, the Supreme Court of Florida has recognized that citizens have a special interest in divorce actions.

> Since marriage is of vital interest to society and the state, it has frequently been said that in every divorce suit the state is a third party whose interests take precedence over the private interests of the spouses.[19]

This public interest is even stronger in Florida today, as the dissolution of marriage law is a new and controversial application of the no-fault principle to divorces. The voters of the state have an interest in the success of this new procedure.

Along with deciding that the public (and hence the press)[20] does in fact possess a right of access to the courts in civil proceedings,

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16. 11 How. St. Tr. 460, *quoted in* 6 WIGMORE ON EVIDENCE, § 1834 (3d ed. 1940).

17. 313 So. 2d at 786.

18. Craig v. Harney, 331 U.S. 367, 374 (1947). Significantly, the Texas court below had attempted to distinguish the civil from the criminal case by saying: "The case pending before the court was of consequence only to the litigants. The public, as such, had no interest in the outcome . . . ." *Ex parte* Craig, 150 Tex. Crim. 598, 616, 193 S.W.2d 178, 188 (1946), *rev'd*, 331 U.S. 367 (1947).

19. Posner v. Posner, 233 So. 2d 381, 383 (Fla. 1970); *see* Chamberlin v. Chamberlin, 44 Wash. 2d 689, 270 P.2d 464 (1954). Owing to the State's interest in both perpetuating the marital relationship and regulating the dissolution procedure, Florida courts have required that evidence be taken, Pickson v. Dougherty, 109 So. 2d 577 (Fla. 2d Dist. 1959), even under the new dissolution law, Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973). A divorce will not be granted merely upon the request of the parties. Underwood v. Underwood, 12 Fla. 434 (1868), quoted with approval in *Ryan*.

20. *See* note 3 *supra* for discussion of the press' standing to assert this public right.

the court also dealt with the question of whether a trial court has the power to exclude the public, and if so, when.

There have always been exceptions to the common law rule of open trials, either provided for by statute or recognized under the inherent power of the court to control its own proceedings.[21] Since Florida has no statutory provision for the exclusion of the public from dissolution proceedings[22] any power of exclusion must be based upon the inherent power of the trial court. While recognizing that this inherent power does exist, the court determined that it exists only where there are cogent reasons for exclusion,[23] because it directly contravenes the public's right of access.

The court's holding on this issue can be supported by analogy to criminal law. There, the inherent power to limit access or even exclude the public to prevent interference with the orderly course of the proceeding exists even though the defendant has a constitutional right to a public trial.[24] By reason of this conflict, the inherent power to exclude is limited to cases where there are cogent reasons for exclusion, and only as to that part of the proceeding for which those reasons exist.[25] By analogy, these limitations may be extended to civil cases, where the exercise of this power would directly contravene the public's right of access.

Thus, the ultimate issue in this case was whether a cogent reason for exclusion existed. The trial court had acted on the bare request of the parties who failed to advance any reasons, cogent or otherwise, to justify the exclusion. It was on this ground that the court invalidated the exclusion order.[26] The court did, however, discuss the right of privacy of the litigants, and indicated that there

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21. *See* note 14 *supra.*

22. Exclusion is statutorily allowed in divorce proceedings in Arizona, Connecticut, New York, North Dakota, and Oregon. Florida statutorily allows exclusion at bastardy proceedings, FLA. STAT. § 742.031 (1975), certain juvenile proceedings, FLA. STAT. § 63.162 (1975), and where any person under 16 is testifying concerning any sex offense, FLA. STAT. § 801.231 (1975). The first two involve only certain specified actions. The third situation involves a broader spectrum of cases, but specifically excludes the press from any exclusion order pursuant to it.

23. 313 So. 2d at 784.

24. Brumfield v. State, 108 So. 2d 33 (Fla. 1958); Robinson v. State, 64 Fla. 437, 60 So. 118 (1912); *accord*, United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965).

25. Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); *see* United States v. CBS, Inc., 497 F.2d 102 (5th Cir. 1974); United States v. Kobli, 172 F.2d 919 (3d Cir. 1949).

26. 313 So. 2d at 783.

may exist circumstances under which this right may be a cogent reason for exclusion.[27] Since the briefs of the respondent[28] and amicus curiae[29] specifically advance the right of privacy of the litigants as the reason for exclusion, any possible violation of this right should be investigated here. Inasmuch as the sole reason advanced for exclusion was the litigant's personal wishes, the only apparent aspect of the right of privacy concerned in this case was the desire of the litigants to avoid general publicity about the dissolution.[30]

Such a right of privacy may stem from either of two distinct sources. The first is the constitutional right to privacy[31] used in *Roe v. Wade*[32] to strike down various abortion statutes.[33] The Supreme Court recognized that only those personal rights which can be deemed fundamental are included in this right.[34]

Initially, this may imply that the privacy right asserted by the Gleasons was constitutionally guaranteed, as the right to marital privacy was found fundamental in *Griswold v. Connecticut*.[35] The privacy right of the Gleasons involved marital affairs and thus, according to this logic, must be protected as part of the fundamental right to marital privacy.

Such a simplistic approach, however, ignores the possibility that the right to marital privacy may not be fundamental under all

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27. 313 So. 2d at 785.

28. Brief for Respondent at 10.

29. Brief for Beverly Gleason as Amicus Curiae at 12; Brief for Jackie Gleason as Amicus Curiae at 14. The latter specifically raised the constitutional right of privacy of the litigants as a reason for excluding the public.

30. This view is supported by the scope of the exclusion order, which excluded the public from the entire procedure. If the litigants were concerned about the possible disclosure of intimate matters, a more narrowly drawn order excluding the public from only those parts of the procedure concerning those matters would have sufficed. The only aspect of the right of privacy that could justify exclusion from the entire trial is the desire of the litigants to avoid publicity generally about the trial.

31. *See* Loving v. Virginia, 388 U.S. 1 (1967) (invalidating miscegenation statutes); Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down certain anti-contraception laws).

32. 410 U.S. 113 (1973).

33. The Court basically adopted a substantive due process concept, and included the right to privacy in the "liberty" guaranteed by the due process clause. The Court held that the fundamental right to privacy could not be abridged absent a compelling state interest. Other decisions have based the constitutional right to privacy on the ninth amendment, Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), and on the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479 (1965).

34. "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy." Roe v. Wade, 410 U.S. at 152.

35. 381 U.S. 479 (1965).

circumstances. If this were so, any privacy right, no matter how small, which involves marital affairs would be raised to constitutional dimension. The fact that the Supreme Court has limited the constitutional right to privacy to "only [those] personal rights that can be deemed fundamental"[36] shows a hesitancy to expand this relatively new constitutional right. Furthermore, even assuming that the privacy right of the Gleasons was fundamental, it could still be abridged with a showing of a "compelling state interest."[37] The existence of such an interest depends upon the nature of the privacy right asserted and the rights of others that it involves.

Therefore, it is necessary to examine the facts of the instant case. The Gleasons asked for the exclusion order without giving any reasons.[38] The court granted the requested order as a matter of course,[39] and excluded the press and public from the entire proceeding.[40] These facts indicate that this case involved only the desire of public figures to avoid publicity.[41] Thus, this case should not be confused with one in which a narrowly drawn exclusion order protects against publicity concerning testimony about intimate affairs, where the privacy rights of the litigants would be far greater.

The mere avoidance of publicity has never been held to be of constitutional stature; indeed, most states do not even allow a remedy in tort for invasion of privacy,[42] where the cause of action is undue publicity. Therefore, even if it is found that public figures' right to avoid publicity is "fundamental," a "compelling state interest" may be found in the public's right to open trials, especially in dissolution cases.[43] Using either approach the result is the same; this exclusion order was not barred by the Constitution.

Another right of privacy may arise from the law of torts. Florida is among a minority of states that recognize such a right, which is "defined as the right of an individual to be let alone and live a life free from unwarranted publicity."[44] This right, however,

36. Roe v. Wade, 410 U.S. 113, 152 (1973).

37. *Id.* at 155.

38. 313 So. 2d at 783.

39. *Id.* at 779.

40. Reply brief for Relator at 1.

41. *See* note 30 *supra* and accompanying text.

42. Florida, however, does. *See* notes 44 and 45 *infra* and accompanying text.

43. *See* notes 12 to 18 *supra* and accompanying text.

44. Harms v. Miami Daily News, Inc., 127 So. 2d 715, 717 (Fla. 3d Dist. 1961); *see* Jacova v. Southern Radio and Television Co., 83 So. 2d 34 (Fla. 1955); Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944); Annot., 168 A.L.R. 430 (1947).

must be accommodated to the freedoms of speech and of the press, and the right of the public to the dissemination of information.[45] Moreover, it is limited with regard to persons and events in which the public has legitimate interest,[46] although such public figures do not waive their entire right of privacy.[47] While a revelation of intimate marital matters would probably be considered outside the limits of any such waiver, the violation of the desires of the parties to avoid general publicity about a dissolution proceeding would not.

Thus, under either theory and the facts of this case, a public trial did not threaten the litigants' right of privacy. Recognizing that there may be cases where exclusion will be necessary to protect the rights of the litigants, the court provided that the trial court may

> under its inherent power . . . for cogent reasons exclude the public and the press from any judicial proceeding to protect the rights of the litigants and otherwise further the administration of justice.[48]

In so holding, the court directed the trial court to look to

> the type of civil proceeding, the nature of the subject matter and the status of the participants [as] factors to be considered when evaluating the cogent reasons for excluding the public and the press from access to the court . . . .[49]

The main significance of the court's holding lies in its recognition of an enforceable public right of access to civil proceedings. This right implies that any restriction on access to a trial must be justified by cogent reasons. This gives the press a weapon, quite

45. Harms v. Miami Daily News, Inc., 127 So. 2d 715, 717 (Fla. 3d Dist. 1961).

46. *Id.* An actor is a public figure and waives at least part of his right to privacy. Chaplin v. NBC, 15 F.R.D. 134 (S.D.N.Y. 1953); Martin v. F.I.Y. Theatre Co., 10 Ohio 338 (1938). This is also true of the spouse of an actor. Carlisle v. Fawcett Productions, 201 Cal. App. 2d 733 (1962).

47. Battaglia v. Adams, 164 So. 2d 195 (Fla. 1964); Aquino v. Bulletin Co., 190 Pa. Super. 528, 154 A.2d 422 (1959). In libel actions, publications about divorces of non-public figures are not within the ambit of New York Times v. Sullivan, 376 U.S. 254 (1964), which held that a publication which concerns a subject of legitimate public interest is privileged and malice must be proved in a successful libel action. *See* Firestone v. Time, Inc., 96 S.Ct. 958 (1976). The *Firestone* definition of "public figure" does not control here as the truthful reporting of events, the subject of invasion of privacy litigation, does not require the same limitations as false reporting, the subject of libel suits. The *Firestone* opinion dealt only with libel actions.

48. 313 So. 2d at 787.

49. *Id.*

separate and apart from freedom of the press, with which to attack such restrictions. A recent case in the United States Court of Appeals for the Fifth Circuit[50] used this dual approach by invalidating a direct ban on publication as a violation of freedom of the press and invalidating a ban on courtroom sketching since there was no valid reason for it.

Significantly, the court in the instant case was explicit that the right of access is not absolute. Under certain circumstances, the litigant's right of privacy may be a cogent reason for the exclusion of the public. By leaving this possibility open, the court struck an appropriate balance between the right of the public to open government, including the judiciary, and the right of litigants not to have the most intimate details of their lives thrust into the public eye. By recognizing both of these considerations, and accommodating each to the other, the court has sought to solve the difficult problem presented by two fundamental rights in conflict.

TAMMANY DON TENBROOK

Military Restriction Triggers the Right to a Speedy Civilian Trial

The United States Court of Appeals for the Fourth Circuit was faced with a review of a denial of a speedy trial violation claim based upon a delay of over 4 years from commencement of military proceedings to a civilian indictment. In overruling the trial court, the fourth circuit gave an in depth analysis of the "factors" deemed controlling by the United States Supreme Court in reviewing such a claim. The author concludes that, notwithstanding a finding of a violation in the principal case, the right to a speedy trial may be at the mercy of prosecutorial discretion.

On May 1, 1970, appellant, a Captain in the United States Army, was charged by the Army with the murders of his wife and

50. United States v. CBS, Inc., 497 F.2d 102 (5th Cir. 1974).