

**Starcher, J., Concurring in part, Dissenting in part
Opinion, Case No.23872 State of West Virginia ex rel.
Melanie Kay P. v. Hon. A. Andrew MacQueen, III &
Rex A.**

No. 23872 -- State of West Virginia ex rel. Melanie Kay P. v. Honorable A. Andrew MacQueen, III, Judge of the Circuit Court of Kanawha County, and Rex A.

Starcher, J., concurring, in part, and dissenting, in part:

Although I agree with the majority that an additional examination concerning the allegations of sexual abuse is not warranted in these circumstances, I dissent because I find that the father has demonstrated a compelling need for an expert interview exploring the issue of visitation by the child with her father and paternal grandparents. Based on this compelling need, I would grant a moulded writ allowing a brief interview between the father's expert and the child limited solely to the visitation issue and would, unlike the majority, not block all inquiry by an expert chosen by the child's father.⁽¹⁾

In his brief the father indicates that his purpose in seeking the examination is to help determine the credibility of the allegations and to explore the child's reaction to visitation. During oral argument, counsel for the father indicated that the proposed brief examination would focus exclusively on the issue of visitation. If the expert interview is limited to exploring the child's reaction to visitation with her father and her paternal grandparents, I believe that the *Delaney* standards would allow the interview. See Syllabus Point 3, *State v. Delaney*, 187 W. Va. 212, 417 S.E.2d 903 (1992).

In this case, there is no evidence addressing the question of renewed visitation and the child's reaction to resuming contact with her father and paternal grandparents.⁽²⁾ Given the lack of evidence, the father has a compelling need or reason for information on visitation. Having established that a compelling need exists, the *Delaney* factors indicate that such a limited examination should be allowed because the child's privacy rights would not be severely compromised. Such an interview would not require the child to re-examine the sexual abuse, but would focus on the present relationships and

potential visitation, less emotional topics. Second, even a young child has an opinion on visitation, and an interview on the subject is not remote in time. Finally, the interview would have probative value on the issue of visitation and there appears to be no other information available. The visitation issue should not be ignored by the majority because given the child's age visitation will likely remain an outstanding issue for several years.

Based on the foregoing, I would grant a moulded writ allowing an interview by an expert chosen by the father; however, the interview would be limited to one hour and to the issue of a visitation. Because of the child's tender years, if need be, the interview could be conducted in such a way that the mother or her representative could monitor the interview to assure that the limitations are honored.

A moulded writ would address the petitioner's concern that the allegations of sexual abuse would be rehashed to the detriment of her daughter, the father's concern for evidence on the issue of visitation and the circuit court's concern about "what the nature of any continuing relationship between the child and father should be." Based on the foregoing, I dissent from the total ban needlessly imposed by the majority.

I am authorized to state that Justice McHugh joins in this separate opinion.

1. Although I am reluctant to interfere with the circuit court's exercise of discretion, because of the compelling circumstances of this case, I would limit the additional examination of the child. The granting of a moulded writ, which comports with the father's position in oral argument, follows the spirit of the circuit court's response and does not severely compromise the circuit court's decision allowing an interview.

2. Because this case arises from a petition for a writ of prohibition, the complete record is not before this Court. The material presented with the petition focuses on the sexual abuse allegations and there is no mention of the effect on the child of renewed visitation.