EWOCs and the "Reasonable Person" Problem

By Vesselin Mitev

Life's good. You're employed, healthy, and dating — a lot — on every website from Farmers Meet Up to Bumble to Coffee Meets Bagel. You've met a wonderful lady with two kids (and two divorces) and you've spent some time getting to know her and her two reasonably behaved children.

One day, you take the kids go-carting, and sign a consent form wherein you list yourself as the kids' "guardian" since you're not engaged to their mother and definitely not ready for that kind of commitment. In between rounds at the track, you turn around to see Billy, 15, downing a 32 ounce cup of what you can only hope is Coors Light. The next few hours are a blur, but long story short, you are now in Criminal and Family Court, charged with Endangering the Welfare of a Child, PL 260.10, and a concurrent Article 10 case in Family Court.

How did we get here? Despite the bail reform law swallowing every news cycle since Jan. 1, there's been an uptick in the prosecution of EWOC cases under subdivision 2 of PL 260,10; its extraordinary breadth and reach, I submit, render it in dire need of a constitutional challenge, tout suite.

Subdivision 1 of 260.10 is straightforward enough and has withstood constitutional challenges. It reads [that someone is guilty of endangering the welfare of a child] when:

> "He or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his or her life or health."

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However, a different animal emerges in subdivision 2, which reads [that someone is guilty of endangering the welfare of a child] by:

> "Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he or she fails or refuses to exercise reasonable diligence in the control of such child to prevent him or her from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten, three and seven of the family court act."

I'll spare the readers the cross-referencing to the Family Court Act or the Court of Appeals decision that says a person legally responsible for a child is also thereby "legally charged" as defined in 260.10.2. The murky issues arising out of what exactly constitutes "reasonable diligence in the control" of a child and the nebulous "commission by omission" fulcrum upon which the charged acts balance are enough to give a constitutional law professor night sweats.

More to the point, how is one to defend against such a charge? The first line of defense, clearly, is jurisdictional — that the person's contacts were insufficient with the child as a matter of law to make them a person legally responsible for the child's actions or inactions.

A 2015 Court of Appeals ruling reiterated the in-exhaustive list of factors the court can consider, including: "the frequency and nature of the contact between the child and [the subject], the nature and extent of the control exercised by the [subject] over the child's environment, the duration of the [subject's] contact with the child, and the [subject's] relationship to the child's parent(s).

The obvious, practical problem is in prosecutions either in Family and Criminal courts, which so often hinge upon or are at least intertwined with one another, the overloaded ACA or ADA is unlikely to consider these finer legal theologies and instead offer a deal or trial. Armed with that binary choice the chute now widens again into the prospect of convincing a trier of fact to either favorably rule on your motion to dismiss, or to buy whatever affirmative defense you've managed to conjure out of thin air.

In sum, the groundswell of subdivision 2 EWOCs can and should be curbed by the charging authorities. In the words of Dr. Ian Malcolm (paraphrased), just because they could, they didn't stop to think if they should.

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