IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ESTATE OF ADAM EARP, et al.	:	CIVIL ACTION
	:	
MARY ANN DOUD, et al.	:	NO. 96-7141

MEMORANDUM AND ORDER

FULLAM, Sr.J. MAY , 1997

This action was brought by the natural parents of Adam Earp, who was involuntarily removed from his mother's care, placed in a foster home, and whose short, unhappy life ended there as a result of fire. The foster care agency, Best Nest, Inc., as well as two of its employees, have moved for partial summary judgment. These defendants contend that they are not state actors for purposes of §1983.[1]

The issue to be decided here is whether a private agency which contracts with the government to provide foster care services is a state actor. The Third Circuit's pronouncement on the issue of whether a party which contracts with the government thereby becomes a state actor is instructive, but not controlling on these facts. In Black v. Indiana Area School Dist., 985 F.2d

[1] I have already ruled that the foster parents are not state actors.

707 (3d Cir. 1993), a case involving a school bus driver who molested students he was transporting, the court stated:

> [A] state contractor and its employees are not state actors simply because they are carrying out a state sponsored program and the contractor is being compensated therefor by the state. Nor does the fact that the activity being performed is a public function render the contractor and its employees state actors. For the nature of the contractor's activity to make a difference, the function performed must have been "traditionally the exclusive prerogative of the State."

Black, 985 F.2d at 710 (citations omitted)(emphasis in original). The Black court relied on the decision of the U.S. Supreme Court in Rendell-Baker v. Kohn, 457 U.S. 830 (1982)(a private school educating special needs students, predominantly at state expense, is not a state actor).

Plaintiffs place their primary reliance on Campbell v. City of Philadelphia, C.A. No. 88-6976, 1990 WL 102945 (E.D. Pa. July 18, 1990), which held that a foster care agency and its employees may be liable under §1983. The court stated:

> While child care and placement may not be the exclusive prerogative of the state, the enactment of child protection legislative [sic] in the majority, if not all, of the states delegates extensive responsibility for the welfare of abused or neglected children to the state.

Campbell, 1990 WL 102945, at *4.

There is a great deal of common sense appeal to this approach. After all, only the state has the authority involuntarily to remove a child from his parents' custody. However, as the moving defendants point out, Campbell is a pre-Black case. A more recent decision is Nixon v. Department of

Human Services, C.A. No. 95-4434 (E.D. Pa. Dec. 6, 1995). The Nixon court, relying on Black, stated:

> An independent contractor and its employees may only be liable under §1983: (1) where the state program they administer has been "traditionally the exclusive prerogative of the State," (2) where the state compelled or influenced their conduct, or (3) where there is a symbiotic relationship between the state and the independent contractor.
>
> Because the care of foster children does [sic] satisfy the public function, state compulsion, or symbiotic relationship tests, courts do not consider foster care organizations or foster parents to be state actors.

Nixon, slip op. at 3 n.2 (citations omitted)(emphasis in original).

While the weight of authority supports the conclusion of the Nixon court, I am persuaded that there is reason to distinguish between foster care agencies and foster parents for purposes of §1983 liability. While the day-to-day care of a child is not the exclusive prerogative of the state, the forcible removal of children from their homes most certainly is. And because there is no respondeat superior liability under §1983, unless plaintiffs can identify some unconstitutional policy or custom which caused their injury, the state has effectively contracted its §1983 liability out of existence. The situation here is, I believe, more clearly analogous to that of a physician who contracts with the state to provide medical care to prison inmates. Such a person is unquestionably a state actor for purposes of §1983 liability:

> Because the State, through incarceration, had deprived

> the inmates of access to medical care, it had a non-delegable constitutional duty to provide medical care of its own. It was only the State that could provide medical care to inmates and the physician with whom the State had contracted to provide such care, thus "function[ed] within the State system."

Black v. Indiana Area School Dist., 986 F.2d at 711 (quoting West v. Atkins, 487 U.S. 42, 55 (1988)). The state removed Adam from his home. It had a duty to provide him with a safe haven. The defendant undertook to carry out that governmental obligation, and became a "state actor" for purposes of §1983 liability.

An Order follows.

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O R D E R

AND NOW, this day of May, 1997, IT IS ORDERED that the motion for partial summary judgment of defendants Best Nest, Inc., Julius Cromwell and Kathy Desmond is DENIED.

Fullam, Sr.J.