ASCEND JUSTICE

Dupuy v. Samuels

In June 1997, over 150,000 Illinois residents filed the landmark case *Dupuy v. Samuels* (also known as *Tara S. v. McDonald*, *Dupuy v. McDonald*, and most recently, *Dupuy v. McEwen*). The suit is a constitutional case that challenges several core aspects of child protection investigations as violating the Fourteenth Amendment's guarantee of due process of law. The challenged policies include the lack of a constitutional standard for determining who is guilty of child abuse, the excruciatingly long hearing delays for people who seek to clear their names, the inadequate notices and information given to persons accused of abuse or neglect to enable them effectively appeal investigative findings against them, and demands made by state investigators that parents or children leave their homes at the outset of investigations, under threats that if they do not do so, their children will be taken into foster care. The *Dupuy* case has concluded successfully in part one and unsuccessfully in part two, setting the stage for advocacy that we continue.

Dupuy I: Child Care Employees' Rights

The first phase of the *Dupuy* case (*Dupuy I*), which has had five major federal court opinions to date, concerns the rights of child care employees (meaning anyone who regularly works with children, including teachers, day care owners and employees, social workers, health care workers and students in child care programs). These persons challenged the unconstitutional practices of the Department of Children and Family Services in finding them guilty of abuse prior to any opportunity for review of a decision by an investigator and supervisor alone, made absent consideration all of the evidence, including evidence that may exonerate the employee.

The *Dupuy I* plaintiffs, after extraordinarily intensive work by the lawyers on their behalf, proved that DCFS's error rate in indicating reports of child abuse was 75% in appealed cases. That is, when accused persons sought a neutral review of the facts, they were able to exonerate themselves of abuse allegations in 3 out of 4 cases. This astonishingly high "risk of error," led the federal court to find that the policies and practices of DCFS harm not only people who work with children, but the children of Illinois as well. 141 F. Supp. 2d at 1130.

On March 30, 2001, the federal court issued a sweeping opinion condemning all of the core policies the plaintiffs in *Dupuy* had challenged. *See* 141 F. Supp. 2d 1090 (N.D. Ill. 2001). *Dupuy v. Samuels* also raised a challenge to the practice of blacklisting childcare professionals by "indicating" them as guilty of child abuse or neglect with "practically nominal" amounts of evidence. An extensive opinion at 141 F. Supp. 2d 1090 (N.D. Ill, 2001)(*and see* 397 F. 3d 493 (7th Cir. 2005), affirming in part and denying in part subsequent injunction order)**,** describes in detail the relevant DCFS investigative practices. This part of *Dupuy* was settled effective March 9, 2007.

On July 10, 2003, after months of negotiations and proposals by the plaintiffs and DCFS for improving the child protection investigations, the court entered a class-wide preliminary injunction order that (a) required DCFS to consider all evidence, including evidence of innocence; (b) required DCFS to provide an "Administrator's Conference" which is a telephonic review of the

evidence available to any employee before an indicated report can be registered; (c) amended the notices sent to employees, including notices to employers; and (d) directed that there be expedited appeals decided within 35 days for employees who requested expedited treatment and 90 day appeal decisions otherwise. The Illinois Supreme Court has also discussed *Dupuy* and adopted as a matter of constitutional law a very strict 90 day limit. *See Lyon v. DCFS*, 209 Ill. 2d 264, 807 N.E. 2d 423 (2004).

In February 2005, the court of appeals ordered the processes available to child care employees also be provided to students and others pursuing a career in child care. (*See* 397 F.493 (7th Cir.), Feb. 3, 2005 opinion of the court of appeals, available in PDF on Opinions page). In June, 2005, the federal district court entered a further order implementing this ruling and amending the investigative summary form DCFS uses to make more explicit the requirement for consideration of exculpatory evidence.

A final settlement of *Dupuy I* was entered on February 26, 2007, calling for a two-year monitoring period.

Dupuy II: Safety Plans

In 2002, pursuing their rights, the *Dupuy* plaintiffs brought a second major claim for relief ("*Dupuy II* ") against unconstitutional "safety plans," under which DCFS investigators direct family members to leave their homes or restrict their contact with their children. On March 9, 2005, after a 22-day trial, the federal court found safety plans that last more than "a few days" violate substantial and procedural due process rights of families. In December, 2005, the court directed a process for review of safety plans after 14 days. Even though they had won an order from the court, the plaintiffs appealed this order on the ground that it authorizes safety plans with "mere suspicion" and permits safety plans to be in place without a sufficiently neutral or timely review. Indeed, the plaintiffs were concerned that there was no meaningful remedy, because the same investigative staff who imposed safety plans would review them and the district court did not enjoin threats.

On October 3, 2006, the court of appeals issued a sweeping ruling that declared safety plans to be uniformly voluntary, without applying the required standard for factual review by appellate courts (i.e., a showing of "clear error"). The court of appeals made this pronouncement despite Judge Pallmeyer having found safety plans to be routinely coerced. In making this ruling, Judge Posner found that the threats that ordinarily accompany the creation of a safety plan (i.e., that unless the family lives with the restrictions DCFS demands, DCFS will take their children into foster care) are not threats at all, unless DCFS *knows* that the parent is innocent at the time it makes the safety plan demand. Because safety plans are ordinarily done at the outset of an investigation, however, few investigators will have any information at all as to the guilt or innocence of the accused parent. Indeed, the absence of evidence was an issue the Dupuy plaintiffs had raised as a ground for their appeal. Judge Posner also declared that parents would refuse safety plans or would agree to have their children taken into state custody for two days in the face of a baseless threat; but not one parent has *ever* done what Judge Posner stated that parents "will do." Finally, the opinion treats safety plans as so innocuous as to raise no constitutional issues at all, but compares them to an

offer at a party of the choice between a "Manhattan vs. a Martini." As one of the *Dupuy* class members who testified at the 2002 trial commented on learning of Judge Posner's opinion: both Manhattans and Martinis "…contain a bitter pill. No good feeling results from drinking either one."

As a result of the recent court of appeals decision in *Dupuy II*, which affirmed the court's preliminary injunction in *Dupuy II* only because the defendant had not cross-appealed from that order, it is currently uncertain as to whether the plaintiffs will be able to secure any rights against safety plans. However, DCFS indicated that it intends to continue some of the procedures Judge Pallmeyer ordered in December 2005, including the informal review process and requirement of internal review by investigators every five days.