

When Is a Parent's Authority Apparent?

Reconsidering Third-Party Consent Searches of an Adult Child's Private Bedroom and Property

BY JASON C. MILLER

Ann Brown lives with her 30-something daughter and granddaughter in a condo she owns. What would happen if the police suspected her daughter of some crime and asked Ann to consent to a search of her daughter's private bedroom? Would she have authority to consent to a search of her daughter's personal property within that bedroom? Police will face these questions with increasing frequency. An AARP survey earlier this year reported that 33 percent of respondents aged 18 to 49 lived with their parents or their spouse's parents. (Donna Owens, *Multigenerational Living Under One Roof*, BALTIMORE SUN, March 22, 2009.) Experts predict that the recent economic downturn will increase that number as adult children move in with their parents. Furthermore, the retirement of the baby boom generation may lead more parents to move in with their adult children. Courts will increasingly face the difficult question of whether a parent has authority to consent to the search of the adult child's private bedroom and property.

The question of a parent's authority to consent to the search of the room or property of a minor child is not difficult. (*U.S. v. DiPrima*, 472 F.2d 550, 551 (1st Cir. 1973) ("Even if a minor child, living in the bosom of a family, may think of a room as 'his,' the overall dominance will be in his parents.")) But whether a parent's consent is enough to satisfy the Fourth Amendment in the search of an adult child's private bedroom, and the property in

that room, is a more difficult question. Some courts have applied a presumption of control to parent-child relationships regardless of the age or situation, while others have recognized that such a presumption is not appropriate in all circumstances.

The federal circuits that have addressed the question are split. In *Whitfield*, the D.C. Circuit held that a mother's consent to search her 29-year-old son's bedroom in her house was invalid. (*U.S. v. Whitfield*, 939 F.2d 1071, 1075 (D.C. Cir. 1991); see also *United States v. Robinson*, 999 F. Supp. 155, 163 (D. Mass. 1998) (citing *Whitfield* to hold that mother could not consent to search of closed containers).) The Fourth Circuit had held that a mother's consent to search her adult son's private room and bureau within that room was invalid where the room was regularly and exclusively occupied by the son. (*Reeves v. Warden, Maryland Penitentiary*, 346 F.2d 915, 926 (4th Cir. 1965).) But where the adult child was a mere guest occupant of the room, the Fourth Circuit allowed a parent to consent to the search of the room, but not the closed containers in that room. (*U.S. v. Block*, 590 F.2d 535 (4th Cir. 1978).) The Sixth Circuit declined to follow *Whitfield* and allowed a stepfather to consent to the search of the adult child's room and property within the child's room in the stepfather's house. (*U.S. v. Austin*, 1996 U.S. App. LEXIS 8256, *12 (6th Cir. 1996) (citing *U.S. v. Hall*, 979 F.2d 77 (6th Cir. 1991)); see also *United States v. Ladell*, 127 F.3d 622, 624 (7th Cir. 1997) (considering safety concerns, mother had authority to consent to search her son's room for guns).) The Tenth Circuit, however, rejected *Whitfield* altogether and held that "husband-wife or parent-child relationships give rise to a presumption of control for most purposes over the property," including to consent to a search. (*U.S. v. Rith*, 164 F.3d 1323, 1330-31 (10th Cir. 1999).)

State courts are also split. The Texas Court of Criminal Appeals recognized the privacy

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interests in an individual's bedroom, excluding evidence seized from an adult son's bedroom in a search authorized by the parent/home owner. (*Becknell v. State*, 720 S.W.2d 526, 528 (Tex. Crim. App. 1986); *see also State v. Harris*, 642 A.2d 1242 (Del. Super. 1993) (mother cannot consent to search of locked toolbox); *State v. Pinegar*, 583 S.W.2d 217 (Mo. App. 1979) (footlocker).) But the Court of Appeal of Louisiana admitted such evidence, holding that, "absent unusual circumstances, a parent possesses at least common authority over the residence occupied by the parent and his child." (*State v. Cambre*, 902 So. 2d 473, 484 (La. App. 5 Cir. 2005); *see also State v. Miller*, 799 A.2d 462, 469 (Md. Ct. Spec. App. 2002) (father could consent to search of basement bedroom, but not ruling on authority to search closed containers); *Colbert v. Commonwealth*, 43 S.W.3d 777 (Ky. 2001) (mother could consent to search of closed, unlocked safe in son's private bedroom).)

Why do different circuits and different states reach such different conclusions about the scope of a parent's authority? Perhaps it is a matter of requiring the police to do a more thorough investigation before accepting third-party consent to a search. "Some circuits have interpreted these precedents to require police to go behind appearances to verify third-party authority." (*U.S. v. Almeida-Perez*, 549 F.3d 1162, 1171 (8th Cir. 2008) (the Eighth does not).) The Tenth Circuit sees the difference between circuits as a question of how courts should define and analyze mutual use or control for most purposes to define authority. (*Rith*, 164 F.3d at 1329-30.)

Courts often assume that a parent has authority over the entire home. (*See Rith*, 164 F.3d at 1330.) If a person appears to have authority over an entire home, the police may search the entire home pursuant to that consent, unless part of the home is "appropriated for the exclusive use of one occupant," in which case the consent is insufficient. (*Almeida-Perez*, 549 F.3d at 1172 (citing *Florida v. Jimeno*, 500 U.S. 248, 251-52 (1991)).) However, Professor LaFave notes that "courts are disinclined to find that the son or daughter had exclusive possession of a particular room in the parents' residence." (WAYNE LAFAVE, 4 SEARCH & SEIZURE § 8.4 (4th ed. 2008).) The real difference is the assumption that some courts draw from the fact that the third-party consenter/home owner is also the parent. (*Almeida-Perez*, 549 F.3d at 1172) ("Regardless of whether the putative consenter actually has the right to enter an area within the house, the police are allowed to rely on facts that would convince a person of reasonable caution that the consenter has such authority.") To some courts, the parent-child relationship creates a "presumption of control" that police are allowed to rely on in conducting a consent search. (*Rith*, 164 F.3d at 1330.)

The split of authorities is really a split of assumptions. Some courts assume that parents can consent to the search of the adult child's private bedroom; some courts assume parents can consent to the search of property in that room; and some courts make no assumption at all. The assumption is driven by the relationship because property ownership alone is insufficient. To the Tenth Circuit, "[r]elationships which give rise to a presumption of control of property include parent-child relationships and husband-wife relationships." (*Id.*) "[A] relationship giving rise to a presumption of control cannot be premised on the general proprietary interest in the home of one of the parties." (*Id.* at 1331 (citing *U.S. v. Matlock*, 415 U.S. 164, 172 n.7 (1974)).) The adult child's privacy interest is not eliminated simply because he or she is not the home owner. (*U.S. v. Salvucci*, 448 U.S. 83, 91 (1980) (property ownership is "neither the beginning nor the end" of the expectation of privacy).) Merely living together also does not establish common authority over the private bedroom and closed containers of the other person. (*U.S. v. Duran*, 957 F.2d 499, 505 (7th Cir. 1992) ("Two friends inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms without explicitly making this expectation clear to one another."); *U.S. v. Heisman*, 503 F.2d 1284, 1287 (8th Cir. 1974) (covenant did not have authority to consent to a search of defendant's private areas).)

The apparent authority to consent is driven by the assumptions drawn about the parent-child relationship even among adults. Courts have found a "father's authority and control over his children's moral training, health, and personal hygiene" over his 19-year-old son. (*Vandenberg v. Superior Court*, 87 Cal. Rptr. 876 (Cal. 1970).) Based on this special authority of mothers and fathers, the courts that have found authority to consent assume something about the relationship between a parent and the adult child's bedroom and property.

All courts start with the assumption that with a minor child, the parent can certainly consent. (*Whitfield*, 939 F.2d at 1075) ("When a minor child's room is involved, agents might reasonably assume that the child's mother, in the performance of her parental duties, would not only be able to enter her child's bedroom but also would regularly do so.") This leads some courts to a general presumption of control from the parent-child relationship. (*Rith*, 164 F.3d at 1330-31.) The Sixth Circuit takes this link even farther and assumes that, while a 25-year-old has a greater expectation of privacy than an eight-year-old, if he or she lives in the parent's home the child lives subject to the parent's terms and control. (*Austin*, 1996 U.S. App. LEXIS at *12 (allowing search of property within room).)

The D.C. Circuit refused to make any assumption about the level of control a parent had over an adult child's private bedroom or personal property within that bedroom. The court found "no basis" for a presumption of parental control over the room of a 29-year-old child. (*Whitfield*, 939 F.2d at 1075.) Without more, the agents "had no way of knowing whether parents usually do not permit their adult sons and daughters to have exclusive use of the rooms they occupy" and made no effort to investigate the mother's arrangement with the son. (*Id.*; see also *Robinson*, 999 F. Supp. at 159 (noting that "the record lacks any evidence that the officers made any inquiry" in finding no authority).) The D.C. Circuit did not assume that a mother did *not* have authority; the court simply refused to assume that the mother did. The D.C. Circuit got it right.

There are different kinds of parent-child relationships and different relationships between parents and their adult child's private bedroom and closed containers within the parent's home. Some parents and adult children live together in a more traditional relationship, where the child lives under the parent's rules so long as he or she lives under the parent's roof. Even in that situation, though, the parent's rules may vary. Some parents may have closer to a landlord-tenant relationship with their rent-paying child. Some parents, though, may live with their adult children in relationships that are closer to the situation of normal rent-paying roommates. There are changes going on in society today that courts cannot ignore. Although a mother or father may be a nosier roommate than a college suitemate, an adult who chooses a parent as a roommate does not necessarily give up an expectation of privacy or establish common authority over the child's bedroom.

The nature of the parent's authority over a child is also less clear as they both age. Is a 55-year-old son living with his 75-year-old mother, or is the mother living with her son? Which party appears to have the superior authority that would allow police to search the room of the other? Moreover, there are different kinds of parent-child relationships. There are stepfathers and adopted mothers and many different permutations on the traditional parent-child relationship. Furthermore, there are over four million multigenerational households (those with at least three generations living together) in the United States and they are the fastest growing household arrangement in the country. (See Mireya Navarro, *Families Add 3rd Generation to Households*, N.Y. TIMES, May 25, 2006.) In a multigenerational household, the lines of apparent authority are blurred even further and identifying the "superior property interest" can be even more complicated. (*Colbert*, 43 S.W.3d at 777 (noting mother had "superior property interest" over son and son's

safe).) Not all adult children living with their parents are stereotypical dropouts playing videogames in the basement, or transitory adults moving between college and the workforce. It is simply not reasonable to treat equal, individual adults differently and automatically assume that a parent has authority to consent to the search of an adult child's private room and property.

The D.C. Circuit's opinion in *Whitfield* properly recognizes that there are different kinds of parent-child relationships and different levels of parental authority over adult children. Police cannot simply assume that a parent can consent because it is far from certain or even apparent that a parent can consent. Although others think that *Whitfield* ignores commonsense, *U.S. v. Rith*, 954 F. Supp. 1511, 1515 n.1 (1997) (D. Utah 1997), it simply recognizes that the situations can be too varied and complex to have a single "common sense" rule that covers them all. The government always has the burden of showing authority to consent to a search. (*Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).) And normally, authority to consent to the search of the premises does not give authority to search the property of the defendant on those premises. (*U.S. v. Mix*, 446 F.2d 615, 619 (5th Cir. 1971) (citing *Holzhey v. U.S.*, 223 F.2d 823, 826 (5th Cir. 1955).) Thus, the government bears the burden of establishing that the parent can, or reasonably appears that the parent can, consent to the search of the adult child's room and property therein. A mere presumption of control between parents and adult children should not satisfy that burden.

Elsewhere in the search context, the U.S. Supreme Court has recognized "[t]he need for a clear rule, readily understood by police officers and not depending on differing estimates" of the situation. (*Thornton v. U.S.*, 541 U.S. 615, 622-23 (2004).) When officers arrive at a suspect's residence, they will not immediately know who owns the home, which names are on the lease, if the child pays rent, or whether the parent routinely searches the child's room and closed containers for drugs and weapons. What they will almost certainly know, however, is whether the child is an adult or a minor. Officers will need to know whether, acting only on the apparent position of the cotenant as parent to the adult child, they can enter a bedroom and open containers or whether they cannot. Because of the possible variation in parent-child relationships, there is no basis for police to assume, without more, that the parent's consent operates to allow entry into the adult child's private bedroom and the right to open closed containers. This does not mean that others cannot enter an adult child's room to seize evidence or prevent contraband from being stored in his or her home.

A parent, when not acting as a police agent, could certainly enter the room without raising Fourth Amendment

concerns. The police can obtain a warrant or the consent of the adult child. And they should be able to rely on the consent of the parent when they inquired into the nature of the relationship between the parent, the child, and the relevant room and property, and the answers to their inquiry reasonably led them to believe the parent had authority. (*Rodriguez*, 497 U.S. at 188 (where police reasonably believed party had authority to consent, search is valid even if facts were not as they appeared).) Often this will require more than merely asking the parent if he or she has authority to consent; it may require at least some effort to ascertain facts by briefly asking about the relationship.

Courts have looked for “facts showing an agreement” in establishing the details of parental authority, such as a permission requirement to enter the adult child’s room or evidence that rent was paid. (*Rith*, 164 F.3d at 1330-31.) In *Austin*, the court noted that defendant paid no rent, there was no kitchen or outside entrance for his third floor living area, no locks, and the parents owned the furniture. (1996 U.S. App. LEXIS at *9-10.) Additionally, the parents often visited and even searched the room for drugs. (*Id.*) On the other hand, the mail intended for him was addressed “upstairs.” (*Id.*) Other facts courts have looked at include the child’s sharing the room with other siblings or a parent cleaning the room. (WAYNE LAFAYE, 4 SEARCH & SEIZURE § 8.4 (4th ed. 2008).) No single fact should necessarily be determinative, but they should all shed light on the relationship of the parent over the room and property. (*Whitfield*, 939 F.2d at 1071 (“An adult offspring who pays nothing to his parents might nevertheless enjoy exclusive use of a room within the home, while one who does make payments may have a quite different arrangement.”).)

Because police are relying on apparent authority when a parent consents to the search of an adult child’s room, after-the-fact analysis that indicates the child paid rent, had a formal relationship that excluded the parents from the room without permission, or even owned the home, would indicate only that the parent lacked actual authority. If police are allowed to assume that a parent has authority to consent to the search of an adult child’s room and property, then no after-the-fact showing that the parent lacked actual authority will defeat the officer’s right to rely on the appearance of authority at the time of the search. If, on the other hand, police cannot assume that all parents residing with adult children can consent to a search, then police need to ascertain some facts and gather information to establish the appearance of authority, even if later the situation turns out to be different than it appeared. That police officers cannot make an assumption of parental control over the private rooms and property of adult children without knowing more than the existence of a parent-child relationship is

a clear rule that officers can readily understand.

For example, if the police visit a suspect’s residence and upon meeting his father discover that the suspect lives with his father, the father and mother own the home, the suspect pays no rent, the father has maintained general access to and use of the room (including boarding guests in the room), the father freely enters the room without permission when his son is not home, and the father has stored his hunting clothes in the closet, then it would reasonably appear to the police that the father has the authority to consent to the search of the room. Even so, the father has not established authority to open closed containers that belong to the son, and police should not be able to do so absent some other information that makes it appear that the father has this authority.

If, on the other hand, a mother tells police that when her son moved back in she told him he would be living under her roof and under her rules, she had made it clear to him that she would check his room periodically for contraband, and, in fact, she had searched his room for drugs before, then officers could reasonably assume that the parent’s consent would allow them to both enter the room and open the suspect’s closed containers because the relationship at least appears to be one where the mother has control over personal property and closed containers as well.

But if police visit a suspect’s apartment and the mother tells police that her daughter’s name was also on the apartment lease, the daughter contributes money towards rent and household expenses, the mother does not enter the daughter’s room without permission, the adult daughter cleans her own room, and she thinks of the daughter’s room as private, then police could not assume that the mother’s consent would allow them to search either the private bedroom or containers inside that bedroom.

Whether a parent can consent to the search of an adult child’s private room and property depends on the circumstances. Ann Brown may or may not have authority to consent to a search of her 30-something daughter’s room and property depending on the nature of their relationship. Police cannot assume without inquiring based only on the parent-child relationship because of the diversity of possible parent-child relationships. Police will face more situations with adult children residing with parents (or parents residing with adult children) in the future with greater variation in those situations. By requiring police to more thoroughly develop an understanding of the relationship, rather than assuming all parents can consent to searches of all adult children’s rooms, courts would better protect the right to be free from unreasonable searches and seizures of both parents and their adult children. All adults should be treated as equals under the law, even those who reside with their parents. ■