

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KENNETH E. HORN, and	:	NO. 99-20,426
WILMA L. HORN,	:	
Plaintiffs	:	
	:	
vs.	:	
	:	
	:	CIVIL ACTION - Law
MINDY LOU (HILL) HORN and	:	Custody
ERIC J. HORN,	:	
Defendants	:	

OPINION AND ORDER

This custody case involves a dispute between paternal grandparents who have had defacto custody of a five (5) year old child. The natural mother of the child now seeks to have the child returned to her primary custody. At issue is Alex K. Horn, born July 16, 1994 to Eric J. Horn and Mindy Lou (Hill) Horn. The paternal grandparents are Kenneth E. Horn and Wilma L. Horn. A review of the history of the case is as follows:

Factual Background

At the time of the child's birth, the natural parents were residing with the paternal grandparents at their home on Pleasant Valley Road, Cogan Station, PA. Approximately seven (7) months after Alex was born the parents moved in with Jacob Helm, a nephew of the paternal grandparents. On July 4, 1995, approximately one (1) year after the birth of the child, Mindy Lou Hill and Eric Horn were married. During this period of time the grandparents continued to see the child on nearly a daily basis for babysitting purposes.

Also during this period of time, Alex would spend occasional nights at his grandparent's house.

In February 1997, the parents separated. The father, Eric Horn with Alex, moved back to the paternal grandparent's home. They have remained at this home since that date.

The mother, upon separation, became involved with her current finance, Michael Canfield. They have resided together at various locations but principally with Mr. Canfield's father in Olyphant, PA. There was a period of separation of approximately six (6) months in the second half of 1998.

Mindy Horn initially exercised shared physical custody taking the child on an alternating weekly basis. In September 1997, the parents participated in a custody mediation formally resulting in shared physical custody awarded to them on alternating weeks.

During this period of time, mother was employed principally as a topless dancer. It is the Court's understanding that her employment caused her to be on the road where she danced at various locations throughout Pennsylvania and Southern New York. Apparently, as a result of the demands of her employment and other factors in her life, her exercise of physical custody waned. From July 1998 through April 1999, mother's actual exercise of physical custody averaged less than two (2) days per month. On March 22, 1999, a custody action was filed by the paternal grandparents and served on the mother in the middle of April. A custody conference was held April 19, 1999.

Shortly after service of the Custody Petition, mother stopped employment as a

dancer and showed a renewed interest in Alex and re-established regular partial custody.

It appears the grandparents filed for custody in anticipation of Alex's entry into kindergarten in the fall of 1999.

Although shared physical custody was re-established by mother during the summer of 1999, Alex was enrolled in the Loyalsock School District to begin kindergarten. It would appear from the testimony that since the parties' separation, the grandparents have provided nearly all of the needs of the child including primary responsibility for parenting, housing, food, health insurance and a stable environment. The grandparents are in their mid-40's and live in a very appropriate home with two (2) acres located outside of Williamsport. The grandfather, Kenneth Horn, is an industrious gentleman who has provided well for his family and as a result, his home is paid for and his wife is not required to work. There is no question after reviewing the demeanor of these two (2) individuals that they care deeply for this child.

Eric Horn, father of the child, has lived in an apartment on his parent's property since the time of the separation. He appears to be a bit of a lost soul who has abdicated responsibility for his child to his parents. While he endorses the concept of his parents maintaining custody of Alex, he has not filed a Petition for intervention and is not maintaining any independent action for custody. He did indicate to the Court that he would like a continuing relationship with his son but is apparently content to endorse the concept of his parents being primarily responsible for the raising of this child.

The natural mother is presently unemployed and living with Mr. Canfield. They have indicated their intention to be married this New Year's Eve. However, the Court is unclear

as to whether the divorce has been finalized from Mr. Horn. Further, mother is pregnant with Mr. Canfield's child and is due in April.

It would appear the relationship with Mr. Canfield may not be as strong as mother would have the Court believe in that the parties did experience a separation of approximately six (6) months in late 1998. Mother has stepped up her efforts to renew her relationship with the child and apparently Alex is quite comfortable when he is in the mother's custody.

The course of this trial extended over several days from mid-September to early November and during this period of time, an interim Order was forged leaving Alex with the grandparents in the Loyalsock School District with mother having partial custody two (2) out of every three (3) weekends. Further, mother has the privilege of seeing the child during the week if she should choose to come to Williamsport from Olyphant. The Court does not have the benefit of a psychological evaluation to determine the level of bonding of Alex with the principal parties, i.e. the grandparents, father and mother. The Court also does not have any sense of the relationship between Mr. Canfield and Alex. It is against this background that the Court is asked to make a decision regarding the primary custody of Alex which includes where he will live and attend school.

Legal Background

There is little question that if this was a straight best-interest case played out on a level field, the grandparents would be the home of choice. The Court can, without hesitation, conclude that the atmosphere they provide for Alex is wholesome and beneficial. From the its observation, the Court easily concludes that these grandparents

care deeply for Alex and there is little doubt that Alex cares deeply for his grandparents.

A review of the current case law in this matter almost necessarily starts with Ellerbe v. Hooks, 490 Pa. 363, 416 A.2d 512 (1980) which provides parents with a prima facie right to custody of their children. While Ellerbe indicates that the evidentiary scale is tipped, and tipped hard, to the parents' side, it does leave the door open for consideration of qualifying third parties. In the instant case, there is no question that the grandparents, given their history with this child, have standing to assert a claim for custody.

The Ellerbe decision appeared to be the governing law until the Supreme Court reviewed the standards in Rowles v. Rowles, 668 A.2d 126 542 Pa. 443, (1995). This case like the instant case dealt with the relative positions of a parent versus a grandparent. It was a plurality decision. The standard espoused in the Rowles case was the Court should provide "special weight" and "difference" to the parent/child relationship and, "the relationship should not be disturbed without some showing of harm or unless circumstances clearly indicate the appropriateness of awarding custody to a non-parent". In Rowles, there were a number of factors that the Trial Court found that justified its award of custody to the grandparents. These included the fact that the grandparents were in good physical and mental health and they provided proper love, affection and guidance for the child and that the children had resided with the grandparents in a stable environment in excess of a year. The grandparents had demonstrated more permanency as a family unit than the parents.

While the Superior Court agreed with the Trial Court, the Supreme Court disagreed. The Supreme Court indicated the good qualities of a grandparent is not persuasive in

determining custody and although stability is to be considered by the Trial Court it is not to be given the effect of the controlling factor. It would appear that from the overall tenor of the decision, the parent would have to evidence a condition which would forfeit custody. It would further appear the Rowles case is not factually dissimilar from the instant case.

While there is little question that the grandparents have the superior physical and financial infrastructure and they can certainly provide a very loving and stable environment, there is no evidence the mother is incapable of taking care of this child in her present circumstance.

Although it was pointed out the mother presently does not own property or even a lease and has no employment, she has established herself in acceptable conditions. She has obtained housing which is not objected to and has financial support from her fiancé. This has allowed her to discontinue working so that she is in a full time position to care for Alex.

Perhaps the most troubling aspect of this entire scene is the fact that the present stability is newly acquired.

The mother, Mindy Hill, experienced a period of separation from Mr. Canfield from July 1998 through the end of the year. While Ms. Hill and Mr. Canfield minimized this separation, it is cause for the Court's concern. Certainly without Mr. Canfield's participation as Ms. Hill's primary support system, matters could be subject to a radical change. Ms. Hill would virtually be left without a home, money, transportation or any of the other bare necessities required for the care of Alex, if her relationship with Mr. Canfield is dissolved.

The Court will award primary custody of Alex to his mother, Ms. Hill. However, the Court will delay the transfer until the end of the present school year. This, in the Court's opinion, has a number of benefits. First, it will provide continuity to Alex during his first year in kindergarten of having the same school and school environment. Secondly, it will allow the grandparents a period of adjustment to prepare for the change. Thirdly, it will allow Ms. Hill additional time to prepare her son and make him comfortable with the environment in Olyphant. Fourth, and most important, it will provide the Court with assurance that the relationship with Mr. Canfield has stood a test of time that would be in excess of one (1) year. This will give Ms. Hill and Mr. Canfield the opportunity to carry through with their wedding plans and to provide the Court with a time tested validation of their relationship. Finally, it will allow the Court to use the opportunity of the summer vacation to further ease the transfer of this child.

The Court also notes that following the transfer, the grandparents will be accorded more than the usual visitation allowance. First, Alex has an unusually strong history and relationship with his grandparents which should be honored. Secondly, the father has not at this time presented an independent petition for partial custody and since the father is living on the grandparents' property, the Court is cognizant that he sees the child through the grandparent's partial custody.

ORDER

AND NOW, this 29th day of November, 1999, after a hearing and for the foregoing reasons, it is ORDERED and DIRECTED that Kenneth Horn, Wilma L. Horn, Mindy Lou (Hill) Horn and Eric Horn have shared legal custody of Alex Horn. The grandparents shall

continue with primary physical custody until the conclusion of the school year when primary physical custody of Alex shall be transferred to mother. Both periods of primary physical custody shall be subject to the following partial custody provisions. For the balance of the 1999-2000 school year, mother shall continue to have two (2) out of every three (3) weekends of partial custody consistent with the previous Order in this matter. In addition, mother shall have the privilege of visiting Alex during the week under the same terms and conditions as contained in the Court Order of September 10, 1999.

Mother shall enjoy additional time at Christmas commencing at 3:00 p.m. Christmas Day through 3:00 p.m., January 1, 2000. In the event the child's spring vacation falls over mother's weekend, then mother's weekend may be extended to include spring vacation.

For summer 2000, the parties shall share physical custody with the parties alternating week to week custody until the beginning of the school year 2000-2001. The parties may do this in a mutual agreeable fashion, however if they are unable to achieve agreement on the starting time, mother's first period of custody shall commence the Saturday following the completion of school at noon.

Commencing with the school year 2000-2001, mother shall have primary physical custody and the grandparents shall have custody on alternating weekends from Friday evening at 6:00 p.m. through 7:00 p.m. Sunday evenings. The grandparents shall also have five (5) days at Christmas commencing on December 26, 2000, at 9:00 a.m. through December 30, 2000 at 7:00 p.m. This schedule shall continue indefinitely including summers, accept that the grandparent's may have an additional week of vacation with Alex

during each summer. This week shall be at their election with notice to be given to the mother on or before June 1st of each year.

Transportation will be shared equally. If the parties cannot agree to a shared arrangement, it shall be consistent with past practice.

This Order is predicated upon the assumption that mother's living situation continues to be consistent with that presented at the hearing. Should there be any substantial deterioration in her living situation, the Court upon request of any of the parties, will convene a conference to determine whether additional testimony is warranted.

By The Court,

Dudley N. Anderson, Judge

cc: William J. Miele, Esq.
Elizabeth Sutliff, Esq.
Stacy A. Griggs, Esq.
Honorable Dudley N. Anderson
Gary L. Weber, Esq.