

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

R.C.,	:	
Plaintiff	:	
	:	
v.	:	No. 96-20,792
	:	
V.E.,	:	
Defendant	:	

OPINION and ORDER

This custody case involves a dispute between a R.C., the Maternal Grandmother and V.E., the father. The mother is incarcerated. The child is T.E., born on November 23, 1994.

The brief history of the case is as follows. Father obtained primary physical custody of the child after a custody trial held on January 11, 2000. His primary custody became effective at the conclusion of the 2000 school year. On March 25, 2003, after another custody trial, the court revoked his primary custody and once again awarded Grandmother primary custody. Father is now once again seeking primary physical custody of the child.

After hearing, the court finds it is in the child's best interest to remain in the primary care of her grandmother. While the court acknowledges the presumption in favor of the father, the evidence convincingly supports maintaining the current custody arrangement.

Father has cited K.B. II v. C.B.F., 833 A.2d 767 (Pa. Super. 2003) for the proposition that the court must find him unfit before awarding custody to Grandmother. The court does not agree. The pertinent statute, 23 Pa.C.S.A. §5313(b)(3), provides three scenarios under which a grandparent may be awarded primary physical custody:

(1) When the grandparent has assumed the role and responsibilities of the child's parent for at least twelve months, (2) When the grandparent has assumed responsibility for a child who has been determined to be a dependent child, or (3) When the grandparent assumes or deems it necessary to assume responsibility for a child who is substantially at risk due to parental abuse, neglect, drug or alcohol abuse, or mental illness.

The grandparents in K.B. made their claim for custody solely under the third scenario, because the child had not been declared dependent nor did they have in loco parentis status. The Superior Court, therefore, focused its analysis upon whether the child was substantially at risk due to parental abuse, neglect, drug or alcohol abuse, or mental illness. Finding that none of these conditions existed, the court concluded the grandparents could not be awarded primary physical custody.

By contrast, the case before this court fits squarely under the first condition: Grandmother has assumed the role and responsibilities of the child's parent for at least twelve months. Indeed, she has been the child's primary physical custodial for the majority of the child's life. Therefore, Grandmother need not show the child is at risk, nor that Father is unfit. In a battle between a parent and an individual with in loco parentis status, the parent need not always win, nor does the non-parent need to prove the parent is unfit. Charles v. Stehlik, 744 A.2d 1255 (Pa. 2000); Richards v. Hepfer, 764 A.2d 623 (Pa. Super. 2000); McDonel v. Sohn, 762 A.2d 1101 (Pa. Super. 2000).

Under §5313(b) the court must, however, find that Grandmother has genuine care and concern for the child, and that her relationship with the child began with the consent of a parent or pursuant to an order of court. And finally, the court must find it

is in the child's best interest to be in the custody of her grandmother. The evidence established all of these things.

In considering a primary physical custody dispute involving a third party versus a parent, the court must apply a "weighted best interest" standard in favor of the parent. We have done this, and find the evidence strongly establishes that it is in the child's best interest to remain in the primary custody of her grandmother, for the following reasons.

The testimony established that Father's home is not stable at this time, having just reconciled with his wife in December 2003. Furthermore, in February 2003, while he was having an affair with M.C., Father engaged in physically abusive behavior to M.C. in the presence of his daughter, which caused the child considerable trauma.

The court finds that Grandmother has been the child's primary caretaker during the majority of the child's life, and that Father has little, if any involvement in her education or extracurricular activities. She is doing well academically in her grandmother's care, as evidenced by her recent fourth grade report card, which was produced and entered as part of the record. The court believes that another change of school for the child at this point would not be in her best interest.¹

The court also finds that the rural environment at her grandmother's home is healthy for the child's development, and that Grandmother has demonstrated her ability to provide for the child's physical and emotional needs. In addition, Grandmother has displayed the ability to cooperate with Father, and to promote communication and contact between the child and her father. Furthermore, Grandmother has provided

religious instruction and has made a contribution to the child's spiritual development through church attendance.

With her grandmother, the child has a stable home environment, in which she is thriving. Although Father and his wife testified that their marriage is stable, in view of their "rocky" marital history and the existence of a long term affair between Father and M.C., the court cannot find that the situation is stable in the Edwards' home.

Finally, although the child is not quite ten years old, her opinion and preferences need to be considered. Her clear preference is to stay with her grandmother and she in fact expressed some fear of her father, although she also noted concern for his feelings and obvious affection for him.

Given the foregoing factors, the court finds it to be in the child's best interest to remain in the primary physical custody of Grandmother.

¹ Tiara had to change schools when Father obtained custody in 2000, and again when custody was changed back to Grandmother in 2003.

ORDER

AND NOW, this ____ day of November, 2004, for the reasons stated in the foregoing opinion, the Petition for Modification of Custody, filed by Father on July 27, 2004, is dismissed.

BY THE COURT,

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray
Anthony Miele, Esq.
John Felix, Esq.
Gary Weber, Esq.