

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

T.H.,	:	Custody
Plaintiff	:	
	:	
v.	:	No. 02-20,271
	:	
I.M.,	:	
Defendant	:	

OPINION
Issued Pursuant to Pa. R.A.P. 1925(a)

Mother has appealed this court's order of December 22, 2007, denying her petition for primary physical custody and awarding her partial physical custody.

At issue is the couple's son, D.J., born on August 8, 1994. D.J. has lived primarily with Mother since his birth, although at times he lived with other individuals and was placed in foster care during Mother's many bouts with mental illness and drug abuse. Mother's major mental health issue is her Multiple Personality Disorder, for which she has been hospitalized over a dozen times. In the summer of 2005, Mother had her most recent mental breakdown, and D.J. and his infant sister were placed in foster care. At the recommendation of the Agency, D.J. went to live with his father in Upper Darby on August 24, 2005, and has remained there since that time. Mother is now requesting that primary physical custody of D.J. be returned to her.

The court denied this request. After carefully considering all of the evidence introduced at the custody trial, we firmly believe it is in D.J.'s best interest to remain in Father's home. D.J. is doing very well in school, and is involved in sports in Upper Darby. D.J. has formed close bonds with Father, his stepmother, and his half-siblings at Father's residence. D.J. is obviously thriving in Father's home.

D.J. did express a preference to return to Mother's home, stating he wanted to be with his Williamsport friends, and that he felt more comfortable with Mother because he had been with her most of his life. He stated that living with his father was a "big change." However, the court did not find there to be a mature basis for this twelve-year-old's opinion that would warrant a change in the existing situation. Nor was the preference particularly strong, as D.J. clearly enjoys time with Father.

The court placed great weight on ensuring stability and predictability in D.J.'s life. D.J.'s life with Mother included periods of instability when D.J. was in the care of family members and foster care. By contrast, Father and his wife can offer D.J. a stable home environment. Both of them work, and they have arranged their work schedules so that one of them can be present with the children at all times. They own their own home, in which they have resided for four years. They are committed to their family, and are well able to provide for the physical and emotional needs of D.J. and his half-siblings.

The court is unwilling to jeopardize D.J.'s stability by placing him with Mother at this time. Certainly Mother appears to be doing well at the present time, but the court cannot ignore her history, which consists of periods of good parenting interrupted by relapses triggered by mental health issues and drug abuse. So long as Mother takes her medications and refrains from abusing drugs, Mother can adequately parent her children. However, it is not at all clear to this court that Mother has completely overcome these issues. The court was also troubled by Mother's testimony, in which she was somewhat evasive about her mental illness and drug abuse, and displayed a dismissive attitude about those concerns.

For these reasons, the court found that it would not be in D.J.'s best interest to change primary physical custody to Mother at this time. Nonetheless, we recognized that Mother and D.J. should spend a good deal of time together. Given the transportation difficulties, we fashioned an order giving Mother at least one long weekend each month, when D.J. has time off school, as well as the entire summer.

In Mother's Statement of Matters Complained of on Appeal, Mother raises a number of issues, which will now be addressed. First, Mother argues the court should have removed itself from hearing the custody case due to the court having called her a "nutcase." There is absolutely no record of the court having used this word in regard to Mother, nor was the issue raised at pre-trial, trial, or any place on the record.

Mother next argues the court should have recused itself from hearing the custody case because the court developed a prejudice against her during the course of the Children and Youth case we heard previously. This is highly ironic, given the fact it was this very court that gradually increased Mother's time with her infant daughter in foster care despite Agency resistance, and ultimately returned the child to Mother's custody. Moreover, Mother's history of mental illness and drug abuse was uncontested at the custody hearing, and Mother herself called her caseworker as a witness.¹ At all times, this court was able to be fair and impartial, and in our custody order of December 22, 2006, we congratulated Mother for the progress she has made on her mental illness and drug abuse issues. For these reasons, the court does not believe Mother was prejudiced in any way by having the same judge preside in her custody case and Children and Youth case.

Mother next points out that D.J. has learning disabilities, and that Father is unable to help him with his schoolwork due to Father's own learning difficulties. While it is true Father has only completed 10th grade, and has some learning difficulties, the evidence demonstrated that D.J. is doing well in school. His latest report card showed him having two C's and the rest A's and B's. Jennifer Fritz, D.J.'s learning support teacher, testified that D.J. attends all regular education classes, but receives extra help in reading and writing as needed. Although it does appear Father's wife S.H. is the main person who helps D.J. with his homework and communicates with the school, the court did not find that Father has delegated D.J.'s educational responsibilities to his wife.

Mother also asserts the court didn't take into account D.J.'s tardiness and absences. While there were a number of absences during the previous academic year, those were adequately explained due to D.J.'s asthma problems. For the academic year 2006-2007, there were few absences.

Mother next asserts the court erred because Father has attempted to alienate the child from Mother and her family. The court did not find this to be the case. Although Father did have concerns that Mother was still abusing drugs, the court found Father to be credible when he testified that he does not restrict D.J. from seeing his mother or speaking with her on the phone. Father did not exhibit hostility or ill will toward Mother. His primary concern is that D.J. be protected from the instability he experienced while living at his mother's residence.

Mother next asserts the court did not take into consideration her inability to travel back and forth to Upper Darby to maintain a steady relationship with D.J.. She

¹ The court had observed Mother a number of times at permanency hearings before returning the

complains about the lack of time with her son, and bemoans the fact that D.J. has virtually no relationship with his half-sister. The court was well aware of Mother's transportation problems, and the distance between Upper Darby and Williamsport. In developing the custody schedule set forth in the order of December 22, 2006, the court gave Mother one three-day weekend each month, as well as the entire summer. This gives D.J. plenty of time to spend with Mother, his half-sister, and Mother's family. The court also notes there are half-siblings in Father's home, as well, and D.J. has closely bonded with them.

Mother next asserts the court did not take into consideration Father's busy work schedule. She states that because of this schedule, the step-mother makes all major decisions, and is the primary caretaker of the child. The court fully considered Mrs. Holloway's role, and finds her to be a positive force in D.J.'s life. Furthermore, the court did not find that Father has abdicated his parental responsibilities to his wife.

Mother next asserts the court did not take into consideration the fact that Mother had been D.J.'s primary caretaker for most of his life, and that Father played a minor role prior to 2005. The evidence showed that Father was not aware he had a son until D.J. was at least five years old, and according to Mother's testimony, seven or eight years old. After the conclusion of a paternity test, D.J. began visiting Father on weekends and for entire summers.

The court did take into account that D.J. lived the majority of his life with Mother. However, Father has been D.J.'s caretaker since the summer of 2005, and D.J. is thriving under his care. Moreover, this court found that Mother's role as D.J.'s

younger child, and is intimately aware of Mother's struggles.

former primary caretaker was greatly outweighed by the advantages of living with his father, who has a stable home, steady employment, and no history of mental illness.

Finally, Mother asserts the court did not take into consideration that D.J. was raised in the Muslim faith and is now being raised in the Christian faith. Given the custody schedule developed by this court, both parents will have adequate opportunity to share their own faith with D.J., and D.J. will not be harmed by being exposed to two different faiths.

Mother lastly alleges the court did not consider various custody factors, a list of which she attached to her Statement of Matters Complained of on appeal. The court certainly did consider these factors, and will briefly address each one.

1. Character, conduct and fitness of the parties to parent.

Mother and Father are both fit parents. However, Mother's unstable history of mental illness and drug abuse raises concerns not present with Father.

2. Ability to provide for D.J.'s needs.

While both parents are able to provide for D.J.'s needs, D.J. is clearly benefiting from the stability and structure provided by Father's lifestyle, and the court is extremely reluctant to remove him from that environment.

3. Role of primary caretaker.

This factor has already been addressed.

4. Effect of any change in custody.

As already stated, the court does not believe a change in custody would be in D.J.'s best interest, as he is doing well at his Father's residence and the court does not want to jeopardize his stability.

5. The current marital status of each party.

Father is married, and D.J. is well bonded to his step-mother, whom he has begun calling “Mom.” Mother is not married.

6. The relative stability of each of the parties.

Father is the more stable parent. He owns his own home, he and his wife are both employed with responsible jobs, and there are no concerns regarding drug abuse or mental illness.

7. Education of D.J..

This factor has already been discussed at length.

8. Work schedules of the parties.

Father leaves for work at 5:30 a.m. and gets home at 6:30 p.m. on the weekdays; his wife works from 11:00 p.m. until 7:00 a.m. They have arranged their schedules so that one of them is always home with D.J.. Despite Father’s heavy work schedule, he is able to spend time with D.J., as was evident from D.J.’s testimony as well as Father’s testimony. Mother does not work, and therefore would be able to devote more time to D.J..

9. Expert opinions.

There were no expert opinions regarding custody.

10. Ability of parties to cooperate, communicate and promote contact with the child and communication between the parties.

As in many custody cases, the parties’ relationship is strained. However, as discussed earlier the court does not believe Father is thwarting contact between D.J. and

his mother, and if he should do so, this court is ready to enforce our order through contempt proceedings.

11. The preference of the child.

This factor has already been discussed.

12. Maintaining sibling relationships.

D.J. has two half-siblings living in his Father's home, and another half-sibling who comes to visit. D.J. has one half-sibling in Mother's home. Under the order issued by this court, D.J. will be able to maintain a relationship with all his half-siblings.

13. Existence of a support network, including family, friends and support group.

Mother has a support network of family, friends, a counselor, and Children and Youth workers. Evidence on Father's support network was not as extensive, but it is clear he has a close nuclear family, which includes Father's mother. D.J. has friends in Williamsport as well as in Upper Darby.

14. The parties' participation in the child's spiritual development and religion.

Mother is Muslim, and Father is Christian. Both parents attend services in their respective religions and there is no evidence exposure to both religions has harmed D.J..

BY THE COURT,

Date: Richard A. Gray, J.

cc: Jay Stillman, Esq.
I.M.
Gary Weber, Esq.