

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**C.H,** : **CUSTODY**  
 :  
 **Plaintiff** :  
 :  
 **v.** : **NO. 08-21, 009**  
 : **(cc. 04-30,455)**  
 **A.O, B.L, and LYCOMING CO. CYS** :

**Date: December 29, 2008**

**OPINION & ORDER**

This Order is entered in relation to a custody complaint filed by C.H. on July 28, 2008 wherein she requested partial custody and/or visitation of her grandchildren, I.L., date of birth February 14, 2002, age 6, and K.L., date of birth February 21, 2003, age 5 (hereinafter collectively referred to as the “children”). Jurisdiction of this case in the Court of Common Pleas Family Division is at issue as both children were adjudicated dependent in dependency proceedings in Juvenile Court on November 12, 2004, at docket number 04-30,455, and, at the time C.H. petitioned for custody, the children who remained dependent were under the legal and physical custody of Lycoming County Children and Youth Services (hereinafter “CYS”) and in placement out-of-home with foster parents.

We determined C.H. custody complaint must be dismissed. This decision is mandated by the decision reviewed by our Superior Court in the case of *P.T. & K.T. v. M.H.* 953 A.2d 814 (Pa. Super. 2008).

**BACKGROUND**

C.H. filed this action under the Grandparent Visitation Act, 23 Pa.C.S.A. § 5311, against the children’s natural parents and CYS. She is the children’s maternal grandmother. The children’s parents are B.L. and A.O. After a custody conference in Family Court, the

Master issued an Order in which she stated, “After consideration, the Master believes the Custody Complaint filed by the plaintiff...should be dismissed, based on *P.T. & K.T. v. M.H.*, 953 A.2d 814 (Pa. Super. 2008).” Acknowledging C.H.’ disagreement with the Master’s determination, the Master scheduled the matter for further proceedings in front of this Court. C.H.’ complaint in the Court’s Family Division was consolidated for disposition with the children’s Permanency Hearing in Juvenile Court case number 04-30, 455. This Court held a joint hearing on both cases on October 14, 2008.

The children and their family have been involved in the dependency proceedings since 2004. On November 12, 2004, an Order was entered adjudicating the children dependent and placing them in the legal and physical custody, care, and control of CYS with placement in an approved foster home. From that time on, the children have been both in their Father’s physical custody and in out-of-home placement under CYS supervision.

More recently, the children returned to the primary physical custody of their Father on March 5, 2007. See, Order of 3/5/2007, 04-30,455. The March 5, 2007 order conferred temporary physical custody of the children with their Father pending certain conditions be satisfied, for instance, that he not allow the children’s mother to visit or contact the children in any way. A final order was issued on March 25, 2007, after a case review hearing, that affirmed the adjudication of the dependency of the children, approving the Family Service Plan proposed by CYS, and moved for CYS caseworker Ms. Dangle continue to work with the family. The Court also found that the children’s best interests were served by the children’s father retaining sole physical custody. See, Order of 3/25/2007, 04-30,455.

Father’s sole physical custody was interrupted, however, when the children were placed

in detention care on an emergency basis for their own protection. See, Order of 1/10/2008, 04-30,455. On January 11, 2008, after a 72 hour hearing, the Court found that remaining in their Father's home was contrary to the children's welfare and directed that according to the children's best interests they be returned to the physical custody of CYS to be placed back into out-of-home placement. See, Order of 1/11/2008, 04-30,455. The Order also stated that the "parties shall work together... and possibly reach a resolution on kinship placement." *Ibid.* On January 17, 2008, after a 10 day hearing, the Court found, based on lengthy discussions and upon agreement of all the parties, that the children should "remain in the custody of [CYS] with their continued placement in the current resource home... [But, that] a timely review should be held so that we can determine whether or not the children should be returned to the biological father." See, Order of 1/17/2008, 04-30,455. This order further directed that the children and their father be in counseling with a psychologist, Mr. Robert Meacham, M.S. *Ibid.*

A review hearing occurred on March 12, 2008. At the hearing's conclusion, we issued findings and an order that I.L. and K.L. continued to be dependent children, and maintained them in the physical custody of CYS, as return of the children to the home of either parent at that time would have been contrary to their welfare and best interests. At this hearing the Court heard testimony from two psychologists, Mr. Meacham and Dr. Dowell, the latter of whom had been providing PTSD care for I.L.. Their recommendations proposed returning the children to Father's custody using a three step progressive 90 day program on the basis that CYS provide and Father take advantage of appropriate in home services recommended by Mr. Meacham and supported by Dr. Dowell. The Mother was barred from contact with the children. We also noted that given the long history of out of home placement of the children and I.L.'s PTSD

diagnosis, that this attempt at reunification may be the last opportunity for these children to be returned to the home of either parent.

On October 14, 2008, a dependency case review was held in Juvenile Court to address whether their father would be able to regain custody of the children or if termination of his parental rights would instead be a more likely outcome. Although CYS had determined Father's progress had earned him only a limited increase in times of physical custody with the children up to that point, given the progress Father had made and with agreement of all parties, the children's father regained sole physical custody of them. The children remained adjudicated as dependent. Their Mother did not attend this hearing and her future access to the children was again prohibited.

At the same time as the children's permanency hearing on October 14, 2008, we heard argument from C.H. on why her suit for partial physical custody of the children under the Grandparent Visitation Act 23 Pa.C.S.A. §5311 should go forward in the Court's Family Division, as well as why in the dependency action she should be permitted contact with her grandchildren. We determined C.H. had standing as of October 24, 2008 to participate in the dependency case. Father consented and CYS agreed that C.H. should be granted one weekend per month partial physical custody with I.L. and K.L.. C.H.' physical custody time was incorporated into the dependency order. Thus, C.H. got the very relief that she sought in the petition that she filed in Family Division trial court. Regardless, after argument and announcement of our dependency order, C.H. requested we issue an order determining the status of her custody complaint. It is upon consideration of that argument that this opinion is issued.

## **DISCUSSION**

Even if standing is conferred upon a grandparent by the Grandparent Visitation Act, it does not automatically mean that this Court has jurisdiction to hear the case in its Family Division when a parallel case exists in Juvenile Court.

When a child is adjudicated a dependent, the Court is to make an order best suited for the safety, protection, physical, mental and moral welfare of the child which would include determining with whom the child is to remain in physical custody and any conditions and limitations that the Court may deem appropriate including supervised contact for the protection of the child. See 42 Pa.C.S. § 6351 (a)(1), Persons with whom the Court may place physical custody of the child would include parents, guardian or other custodian any relative (such as a grandparent) or other resident of Pennsylvania in addition to a permanent legal custodian. § 6351 (a)(1), (2), (2.1). In addition, physical and legal custody of the child may be vested in CYS. § 6351 (a)(2). Accordingly, the dependency proceeding vests the Court with full authority to control all aspects of legal and physical custody of the child and will most likely (but not always) determine the custody rights of the parents as well as any and all third parties.

The right of non-parent third party claims to a child's physical custody, such as a grandparent, must be subject to the dependency proceedings in Juvenile Court. In instances such as the one before us a grandparent or a third party with standing may only obtain custody rights if they participate in or intervene in the dependency proceedings.

In *P.T. & K.T. v. M.H.*, the Superior Court held that “in the absence of case law referencing a clear right to initiate a superseding custody action in Family Division after a child has been adjudicated a dependent and while the dependency proceedings are progressing to the

dispositional stage,... in this setting, it is not appropriate to pursue custody in the Family Division until the underlying dependency proceeding has concluded.” *P.T. & K.T. v. M.H.*, 953 A.2d 819. In making this determination, the Superior Court “affirm[ed] the trial court’s decision effectively redirecting Appellants to the dispositional stage of the ongoing dependency proceedings.” *Ibid.*

Appellants in *P.T. & K.T. v. M.H.* were the maternal great Aunt and Uncle to a child that had recently become the subject of dependency proceedings in Juvenile Court. The child became the subject of dependency proceedings in Juvenile Court because he had been abandoned by his Mother, M.H. Although appellants, P.T. and K.T., had been the primary caretakers of the child for years, the child’s mother was performing her parental duties just prior to abandoning the child. *Id.* at 815. The Allegheny County Office of Children, Youth and Family (hereinafter “CYF”) first became involved with the child three months before the child was abandoned, while the child was in the care of the Aunt and Uncle, P.T. and K.T., and at this time CYF advised appellants that that they had no legal right to continue to exercise custody of the child and that the child’s mother was required to resume her parental duties and rights. *Ibid.*

Appellants first filed a custody complaint in Family Division trial court after the child was abandoned and prior to the child being adjudicated dependent. This complaint was referred to juvenile court to be heard simultaneous to the child’s on-going dependency proceeding. *Id.* at 815-816. At this proceeding the child was adjudicated dependent and the court declined to grant appellants’ standing. The court did not, however, formally determine Appellants’ status at this proceeding.

Standing was at the forefront of the court's considerations, in part, because Allegheny County local rule 1915.3(e) requires that grandparents and third parties obtain authorization from a motions court prior to proceeding with any "Generations" program. In effect, this rule dictates that a grandparent or third party must motion the court for standing prior to being allowed to argue the merits of any custody complaint; under local rule 1915.3(c), all complaints for custody must be filed in the Family Division so parties may participate in programs administered by "Generations."

Before the child's permanency hearing could take place, Appellants filed another custody complaint in Allegheny County's Family Division trial court. Appellants' second custody complaint simultaneously requested standing to file their custody complaint, legal and primary physical custody, and dismissal of the dependency proceedings in Juvenile Court. *Id.* at 816. The Family Division trial court granted Appellants standing in the dependency proceedings instead of the would-be custody matter. *Ibid.*

In denying Appellants' petition for standing to file a custody complaint, the trial court observed that [the child's] best interests was being served by the dependency proceedings in Juvenile Court and his continued placement under CYF's supervision. Moreover, the trial court accurately noted that Juvenile Court would maintain authority over any custody determination during the permanency period. Since Juvenile Court operated under the identical standard in determining placement and custody issues that Family Division would employ in a custody dispute, which is the child's best interests, the trial court reasoned that a second, simultaneous custody action would be redundant, wasteful, and confusing. Essentially, the Family Division trial court opined that the issue of Appellants' standing to file a custody complaint would not ripen for the purpose of a custody dispute with Mother until the dispositional stage of the dependency proceeding actually concluded. *See* Trial Court Opinion, 6/20/07, at 3-5.

*P.T. & K.T. v. M.H.*, 953 A.2d 817.

In interpreting this decision, the Superior Court found that the decision of the Family

Division trial court fully dismissed Appellants' custody complaint. The Superior Court reasoned that, as a result of the trial court's order, Appellants were confined to participation in the dependency proceeding's dispositional phase; appellants merely participated in the dependency action and did not seek to intervene in the dependency proceedings. *Id.* at 816-817.

The Superior Court's holding in *P.T. & K.T. v. M.H.* in 2008 redirects third parties suing for child custody out of Family Division trial court and into participation at dependency proceedings in Juvenile Court when dependency proceedings are in their dispositional phase:

[U]nder the particular circumstances of this case, it would be inappropriate to grant Appellants' standing to file a complaint for custody outside of the continuing dependency proceedings. Essentially, we agree with the trial court's conclusions that permitting Appellants to file a parallel custody action would present an unwarranted waste of judicial resources. Appellants' standing in the dependency proceedings is sufficient to protect their interests in obtaining custody... Thus, in the absence of case law referencing a clear right to initiate a superseding custody action in Family Division after a child has been adjudicated dependent and child dependency proceedings are progressing to the dispositional stage, we hold that in this setting, it is not appropriate to pursue custody in the Family Division until the underlying dependency proceeding has concluded.

*Id.* at 819.

The Superior Court's holding highlights the bright line distinction between dependency and custody proceedings. In doing so, the Superior Court erred on the side of caution in its decision, as it noted. The Superior Court stated that it was represented during oral argument that the child had been returned to its mother's custody, but since the record of the dependency action was not before the Superior Court, the court could not confirm that representation or, for that matter, determine the status of the dependency proceeding at all. *Id.* at 815. Because the Superior Court was unclear as to whether the child had been returned to its mother at the time



that the Family Division trial court referred the matter to dependency proceedings in Juvenile Court, it based its decision on the fact that on November 22, 2006, before appellants filed the second custody complaint, the dismissal of which was the issue on appeal, Juvenile Court had adjudicated the child dependent with the goal of reunification with mother. *Ibid.*

Thus, though Family Division did not explain exactly what portion of dependency proceedings the court was referring to as the dispositional stage, a child who is adjudicated dependent and in out-of-home placement qualifies as a being within the parameters of the courts holding, or within the dispositional stage of dependency proceedings. The same fact pattern applies to C.H.; when she filed the custody action *sub judice*; the children were under a dependency adjudication and disposition whereby the children had been placed in the custody of CYS. This decision is mandated not only by the reasoning in *P.T. & K.T. v. M.H.* but by application of the statutes and rules of court governing dependency.

The Juvenile Act 42 Pa.C.S. § 6351 provides

Disposition of dependent child: a. General Rule.—If the child is found to be a dependent child the court may make any of the following orders of disposition best suited to the protection and physical, mental, and moral welfare of the child: 1. Permit the child to remain with his parents, guardian, or other custodian, subject to conditions and limitations as the court prescribes... for the protection of the child...

This section emphasizes that the purpose of the court in dependency proceedings is to act in the best interests of the child, however, taking that standard to new heights by making the Court take a stance as the protectorate of the child. This dispositional stage is on-going in dependency proceedings until the dependency finding is vacated.

Rule 1100 of the Rules of Juvenile Court Procedure provides for the scope of the rules: “These Rules shall govern dependency proceedings in all courts. Unless otherwise specifically

provided, these rules shall not apply to orphan's court, domestic relations and delinquency proceedings..." The Rules do not similarly except their application in custody cases.

The purpose and construction of the Juvenile Rules are provided for in Pa.R.J.C.P. § 1101:

A. These rules are intended to provide for the just determination of every dependency proceeding. B. These rules establish uniform practice and procedure for courts exercising jurisdiction as provided by the Juvenile Act, 42 PA.C.S. § 6301 *et seq.*, and shall be construed to secure uniformity and simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay...

Of its foremost priorities, the Juvenile Act values uniformity and the elimination of unjustifiable expense and delay. Allowing parallel actions in Family Division to upset the custody determinations made in Juvenile Court would not only be a waste of judicial resources, but would also result in a lack of uniformity and clarity for children

Rule 42 Pa.C.S. § 6301(b) defines the purpose of the Juvenile Act as

1. To preserve the unity of the family whenever possible or to provide another alternative permanent family when the unity of the family cannot be maintained. 1.1. To provide for the care, protection, safety and wholesome mental and physical development of children coming within the provisions of this chapter... 3. To achieve the foregoing purposes in a family environment whenever possible, separating the child from parents only when necessary for his welfare, safety or health or in the interests of public safety. 4. To provide means through which the provisions of this chapter are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

A child's best interests are served by being raised within the family and that the state should not unnecessarily intrude upon, and thereby weaken, the family. *In re Custody of Hernandez*, 376 A.2d 648 (Pa. Super. 1977). It is, however, also true that the protectorate hand dealt Juvenile Court may make it necessary for the state to intrude upon the family when a

child is made to be dependent. Both considerations are taken in account by the Juvenile Act. Although, Family Court takes childrens' best interests into consideration, Family Court has no place in serving the same protectorate duty Juvenile Court was founded on. In this fashion, dependency proceedings usurp the jurisdiction of Family Court when a child is subject to dependency proceedings.

In the case at bar, C.H. was granted the very custody that she sought, partial physical custody, by the mutual consent of the parties at a consolidated hearing in front of this Court. The order we issued in the dependency proceeding in juvenile court at docket number 04-30,455, as the parties, including CYS, with the Court also agreeing, determined the best interests and welfare of the children would be assured by granting C.H. one weekend per month in which to exercise her periods of partial physical custody. The system worked well to protect the interest and rights of all concerned.

C.H. cites *R.M. v. Baxter*, 777 A.2d 446 (2001) as controlling in this case, arguing that the case acts to grant her standing as of right to pursue custody of her grandchildren in this Court's Family Division. We find this case is not dispositive of the issue currently before this Court in this matter. As Plaintiff's brief asserts, *R.M. v. Baxter* granted a grandparent automatic standing to pursue a custody claim regardless of a pre-dependency determination and had been placed for adoption. In *R.M. v. Baxter* the Supreme Court of Pennsylvania did not specifically hold that a grandparent may obtain an order in Family Division that supersedes a Juvenile Court order; the Supreme Court reach that issue.

As is similarly stated in the Superior Court's holding in *P.T. & K.T. v. M.H.*, the Supreme Court acknowledges in *R.M. v. Baxter* that "[t]he courts generally found standing in

third-party visitation and custody cases only where the legislature had specifically authorized a cause of action.” *R.M. v. Baxter*, 777 A.2d 450 (citing *Ken R. v. Arthur Z.*, 651 A.2d 1119 (Pa. Super. 1994)). From this rule the Supreme Court reasoned its issue in *R.M. v. Baxter* as “determine[ing] whether *section 5313* (the Grandparents Visitation Act, 23 Pa.C.S. § 5313) serves as such authority in this case.” *Ibid.*

The child that was the subject of the custody dispute in *R.M. v. Baxter* was an infant that was adjudicated dependent and then subsequently placed with foster parents with the goal of adoption. *Baxter* at 448. The child’s grandparent then filed a complaint for custody in Family Division trial court under 23 Pa.C.S. § 5313(b). One element of this statute is that a child is “substantially at risk due to parental abuse, neglect, drug or alcohol abuse or mental illness.” The argument used against conferring standing on the grandparent to pursue this custody action was that because the child was placed with a foster parent at the time the complaint was filed, the child was not a child “who is substantially at risk.” *Baxter* at 450. The grandparent countered that section 5313 confers automatic standing upon a grandparent to file for custody of her grandchild simply by virtue of the familial relationship. *Baxter* at 450-451. The Supreme Court agreed with the grandparent to the extent that it held that the grandparents claim should not have been dismissed for lack of standing and that conferring automatic standing on a grandparent, as was the intent of the legislature, “merely eliminates the preliminary standing requirement that a party establish a direct and substantial interest in the custody proceeding before the court.” *Baxter* at 451.

The issue in *R.M. v. Baxter* varies from the issue before us *sub judice*. We do not assert that C.H. does not have standing pursuant to the Grandparent Visitation Act to file a

complaint for physical custody/visitation. We hold, however, that regardless of standing the jurisdiction of such a claim in Family Division when a Juvenile Court has placed the child under its dependency supervision. A grandparent's right to pursue custody of their grandchildren cannot be interpreted to grant Family Division trial court the right to supersede Juvenile Court orders regarding children who are dependent.

### **CONCLUSION**

In *P.T. & K.T. v. M.H.*, the Superior Court held that “in the absence of case law referencing a clear right to initiate a superseding custody action in Family Division after a child has been adjudicated a dependent and while the dependency proceedings are progressing to the dispositional stage,... in this setting, it is not appropriate to pursue custody in the Family Division until the underlying dependency proceeding has concluded.” *P.T. & K.T. v. M.H.*, 953 A2d 814 (Pa. Super. 2008). We apply that holding to C.H.’ complaint and direct that her complaint must be dismissed. The best interests of the child have been, as they must be, served with jurisdiction of their custody determination in dependency proceedings in Juvenile Court.

**ORDER**

The custody petition filed in this matter on July 28, 2008 is hereby dismissed.

BY THE COURT,

William S. Kieser, Judge