

CP, : IN THE COURT OF COMMON PLEAS OF
Petitioner : LYCOMING COUNTY, PENNSYLVANIA
: vs. : NO. 99-20,867
RF, :
Respondent : 1925(a) OPINION

Date: December 8, 2008

**OPINION IN SUPPORT OF THE ORDER OF JUNE 4, 2008 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

CP, Mother of AF, age 15, has appealed this Court's order which awarded shared legal and physical custody of AF to Ms. P and AF's Father, RLF. This order directs that physical custody be shared during the school year with Father but with physical custody alternating weekends between the parents, with Mother also having every Wednesday evening from after school until 8:00 p.m., and during the non-school year directs that physical custody will alternate between the parents on a week to week basis. This order was entered following a one day custody trial held on June 4, 2008.

The significant issues presented by the appeal is whether or not the evidence supported the facts found by the Court and do those facts justify placing physical custody of AF with her Father during the school year, which effected a reversal of the prior physical custody order. This reversal of AF's physical custody was justified because of the prolonged significant emotional and physical conflicts between AF and her Mother which escalated to the point that upon a petition filed by the Lycoming County Children and Youth Agency AF by consensus was adjudicated dependent due to the seriousness of the parent child conflict between AF and her mother. This Court ascertained through the testimony including its interview with AF that the best interests of AF would be served by shifting primary physical custody to the Father in

order that the Mother/Daughter ongoing conflicts would not have to be dealt with on a daily basis between Mother and Daughter giving their relationship a chance to respond to the dependency intervention measures and improve over a period of time.

MATTERS COMPLAINED OF ON APPEAL

Ms. P contends in her Notice of Appeal, filed on July 7, 2008, of eight ways in which this Court misapplied the law or erred. We will consider this to be her Statement of Matters Complained of on Appeal although she did not file a specific Statement of Matters after we issued a rule and order to do so on July 15, 2008. Ms. P Notice of Appeal specifically sets forth the following:

- (1) Misapplied the law or erred by bypassing/discarding a scheduled pre-trial conference originally scheduled for July 9, 2008 and not allowing for conference to continue under Rule 212. By Pre-trial not taking place, the Defendant was not aware of any pre-trial documents, including witness list, nor their anticipated testimony, exhibits, etc. furnished by opposing party until four (4) business days prior to the morning of the trial, thus not allowing proper time for preparation of case by Defendant. By misapplying this rule, there was inadequate time for Defendant to prepare, gather own documentation, witnesses, exhibits, etc. due to home/cyber school parent/learning coach responsibilities to child in question.
- (2) Misapplied the law or Judge erred by further not asking Defendant why no legal council was present. This further made Defendant at a disadvantage because she was eligible to have services through North Penn Legal Services (NPLS), but opposing party's prior participation/representation by NPLS in previous custody related matters created a conflict for Defendant, furthering no legal representation or referral services to Defendant.
- (3) Misapplied the law or Court erred (rule 1915.8) by not ordering a psychological evaluation of child in question as requested by DPW's managed care for mental health,

CBHNP and Dr. Bonnie Whipple in previous evaluation that was conducted October 2007 requesting for another in four (4) months. Defendant filed Application for Continuance dated May 30, 2008 requesting for such evaluation. Defendant was denied continuance. Defendant had prior contact with Cleveland Way, Bethesda approximately 4-6 weeks prior to scheduled trial date, due to conflicts with Defendant's and Cleveland Way's schedule this inhibited progress of anticipated intake and evaluation to be further conducted prior to trial date.

- (4) Misapplied the law or Court erred by not soliciting or considering competent expert testimony to assist the judge in decision of this custody case. (K.W.B. v. E.A.B., 698 A.2d 609 (Pa. Super. 1997); E.A.L. v. L.J.W., 662 A.2d 1109 (Pa. Super. 1995).
- (5) Misapplied the law or Court erred by allowing the trial judge to essentially form his own opinion of what would be the best interest of the child and erroneously placed primary custody with father who allows and encourages problematic behavior and misconduct towards mother, allowing for further alienation of child from mother.
- (6) Misapplied the law or Court erred by placing primary custody with father, not knowing child would lose much needed medical coverage and managed care for mental health through DPW's Access Program, thus leaving child without any medical coverage to cover cost of ADHD meds, doctor's visits, drug and alcohol counseling, psychological evaluation and/or inpatient treatment, etc. Father has no coverage for child.
- (7) Misapplied the law or Court erred by placing primary physical custody with father specifically because Mother has adequately attended to and highly supports child's physical needs and mental concerns, provided child with adequate food, shelter, and clothing. She has addressed child's special needs relating to dyslexia, Oppositional Defiant Disorder (ODD), possible mental health issues, medication concerns, Attention Deficit Hyperactivity Disorder (ADHD) by taking child to and addressing concerns with child's pediatrician, psychologist for two separate neuro-psychological evaluations, school counselors, and addressing IEP/504 issues with school. Whereas father's abilities and intellect is limited.

- (8) Misapplied the law or Court erred by placing primary physical custody with father by separating said child from other maternal siblings.

CASE HISTORY

When AF was born, Ms. P and Mr. F were living together but not married. The parents have been in an ongoing custody litigation concerning AF since 1999 when the first petition for custody was filed, when AF was 6 years old. The current stage of litigation was commenced by the Father filing a custody modification petition on February 27, 2008. Father's petition sought primary physical custody of AF asserting that she had been stating a strong preference to live with her Father, the relationship between AF and her Mother had resulted in AF being adjudicated dependant, and AF's academic performance, behavior and attendance at school had declined. See, Petition 2/27/2008, paragraph 13. Father had filed a similar petition on September 20, 2007 at about the time that AF had been placed in an inpatient mental health treatment facility, The Meadows. This earlier petition was not pursued following an order as to dependency being entered by agreement of the Lycoming County Children and Youth Agency and both parents by the Honorable Kenneth D. Brown, P.J. on January 31, 2008, filed to JV-385-2007 to the Court of Common Pleas of Lycoming County. See Appendix A. In his January 31, 2008 order, Judge Brown entered an adjudication that AF was dependent and directed Children and Youth to maintain supervision of the case with the child remaining in the home of the Mother and Father to be considered by the Agency as a resource. Family Based Programs and other services were to be provided and a CASA was to be appointed. A custody conference was held on April 8, 2008 in which the Family Court Hearing Officer found that AF was 15 and in the ninth grade at Hughesville High School but had refused to go to school

and had been suspended in January for acting out in class and further suspended in February for 10 additional days when her cell phone rang in class and she refused to relinquish the phone to school personnel. The Mother then enrolled AF in Cyber School which was scheduled to continue to June 30, 2008. It appeared that AF was clear at conference that she wanted to live with Father, however, Mother was not willing to enter a modification of the custody order asserting that she was support staff for the cyber school and required to sign off on AF's homework and tests. A custody pre-trial conference was scheduled for July 9, 2008.

Judge Brown conducted a review of the dependency case and entered a further order of April 17, 2008 continuing dependency. See Appendix B. In that order, Judge Brown permitted AF to remain in Mother's home with partial custody to be schedule with Father as had been applicable to that point in time. AF was directed by Judge Brown to cooperate and continue in Cyber School and the parents and child were directed to cooperate with the CASA worker and Family Based mental health counselor. Judge Brown specifically directed that the Mother should not engage in corporal punishment of AF and that neither Mother nor AF should engage in obscenities or foul language to each other. Children and Youth was specifically directed to contact the child's Guardian ad Litem in the event of any reports of physical violence in the home.

Judge Brown issued two other orders that date, the first being filed in both the dependency and custody action directing that AF's records for school, cyber school, psychiatric, drug and alcohol, medical or counseling were to made available to Father's counsel. The final order issued by Judge Brown that day was issued in the custody action

directing that the case be scheduled for custody trial on June 4, 2008 with exhibit and witness lists to be filed one week before trial.

In May, Mother requested a continuance of the custody trial date in order to obtain a psychological evaluation and allow AF to complete Cyber School. Father opposed the request because Judge Brown had specifically requested the early trial date. This Court denied the continuance request by an order dated May 20, 2008 (filed June 2, 2008). Although the written order does not specify the Court's reasons, the custody and dependency orders herein were reviewed and as further stated in opposition, Judge Brown's determining the case should promptly proceed to trial. Judge Brown had not directed any need for psychological evaluations. The trial date would have no impact on AF's Cyber Schooling. Shortly before the June 4, 2008 trial date, Mother again sought a continuance in the custody trial as scheduled by Judge Brown asking for time to obtain counsel as an indigent and to prepare for trial. This request was opposed by Father. This Court denied the continuance request because of the lateness in filing as well as the urgency with which the trial had been scheduled when Judge Brown had held his dependency review and review of custody in April. Further, Mother's continuance request did not make any specific reference to when and how she would be able to obtain counsel at a later date nor did it contain any specific information as to what additional information she would need to gather prior to trial.

The trial was held on June 4, 2008. The Father was represented by counsel, John Pietrovito, Esquire and Mother represented herself. The Court heard testimony from both parents and the child as well as by the child's Children and Youth caseworker, Mark Longenberger. Father also called JM, DM and JM, neighbors of the Mother, as witnesses.

Prior to the trial, the custody arrangement that had been followed for several years by the parents provided that Mother would have physical custody during the school year with the Father having partial physical custody on every Wednesday from after school until Thursday morning and two successive weekends out of every three; during the summer school vacation, AF's physical custody was alternated weekly between the parties. N.T., 6/4/2008, pp. 11-12. Father sought a reversal of the school year physical custody arrangements; Mother desired that the physical custody arrangements would remain the same. *Id.* at 12, 13.

The testimony of Mr. Longenberger of Lycoming County Children and Youth established that the Agency began to provide voluntary services in September of 2007 do to ongoing conflicts between the Mother and Child which included physical aggressiveness. *Id.* at 25-28. The Mother had been charged by Hughesville Police with harassment and disorderly conduct over a physical conflict with AF in October 2007, prompting the Agency's involvement. *Id.* at 27. There were also reported events of AF throwing temper tantrums that resulted in physical conflicts when Mother would do such things such as taking cigarettes away from AF, AF not going to school or complying with her Cyber School requirements and AF refusing to do household chores; Mother's disciplining or attempts to discipline AF, such as by taking her cell phone, also led to serious conflicts. *Id.* at 27-34. Mother had considered voluntary placement of AF with the Agency. *Id.* at 36.

Following Judge Brown's April 17, 2008 dependency review, there had been an incident where AF was charged with criminal harassment on May 7, 2008 in a fight with Mother and Mother asked AF to then go to the Father's home apparently on her recognition that Father was better able to enforce some discipline upon AF. Father was then successful in

seeing that she did her Cyber Schooling at the library. *Id.* at 36; 42-44. On the weekend prior to the custody trial, when AF was with her Father, she snuck out of his house and was arrested for marijuana possession, underage drinking and curfew violations. *Id.* at 34; 37, 38. The Agency had also been concerned about AF being withdrawn from school and being placed in a Cyber School because of AF spending increased time with Mother in her home. *Id.* at 37.

The Mother presently resides with her fiancé with whom she has lived since 2001 and her two children ages 1 ½ and 3 years. *Id.* at 73. The Mother acknowledges that AF is defiant and that she can not even be made to get up out of bed and go to school. *Id.* at 8, 9, 74, 75. Generally, the Mother acknowledged the accuracy of the testimony related by Mr. Longenberger concerning the reasons for dependency, confirming the significant history of parental/child conflicts including physical altercations between she and AF. Even in the Cyber School which Mother had enrolled AF in, AF did not participate as required. *Id.* at 99, 100.

The Father lives alone and is employed as a part-time painter and owns some rental properties. *Id.* at 108. He is able to provide adequate supervision and generally has AF under his control. *Id.* at 113-126. Despite the authority he is able to exhibit over AF she still is disobedient about times and becomes involved in inappropriate activities against her Father (as well as her Mother's) wishes, including the sneaking out and alcohol and drug usage activities. *Id.* at 126.

The Court conducted a lengthy inquiry of the child, AF in the formality of the courtroom, in the presence of both parents. *Id.* at 177-205; *Id.* at 174-175. AF confirmed the facts relating to her mental health issues, including consideration of suicide (*Id.* at 185-187). AF voiced significant difficulties with her relationship with her Mother (for example, *Id.* at

193-195). She also acknowledged putting off her Mother upon Mother's requests to do tasks. *Id.* at 197. AF also acknowledged her drinking and doing drugs and sneaking out. *Id.* at 202. AF confirmed she had a long standing desire to be removed from her Mother's home since at least age 13, if not earlier. *Id.* at 199. She also expressed a willingness to "change" as well as to work along with her Father in his painting business during the summer. *Id.* at 200-203.

Following this testimony, this Court dictated the primary reasons for its custody order. *Id.* at 209-219.

DISCUSSION

Mother's errors complained of on appeal contends this Court misapplied the law and erred in entering its custody order can generally be grouped into the following three basic contentions, as to why the order should be ascertained: (1) the procedural process by which the case was called to trial, (2) Mother was required to proceed to trial without appointed legal counsel, and (3) the evidence did not warrant the custody change. As to the evidence sufficiency and weight Mother specifically has raised that the Court erred by failing to have mental health evaluations and misjudging the evidence she asserts as she did at trial giving Father the amount of physical custody time as provided by the order, which Mother refers to as "primary custody" would encourage problematic behavior and misconduct by AF and the alienation of AF from Mother. Mother also believes AF will not have medical insurance coverage for mental health coverages, medical prescriptions, doctors visits, drug and alcohol counseling and psychological and therefore AF's special needs would not be met. Finally,

Mother believes we ignored the evidence of the effect of the separation of AF from her maternal siblings.

For the most part, this Court relies in support of its decision upon the reasoning as set forth at the conclusion of the trial on the record in front of the parties. N.T., 6/4/2008, pp. 208-219. Although this court's oral statement as to its reasoning did not comment upon all of the relevant custody factors at issue in this case, they were nevertheless considered and more importantly considered as being secondary to the Mother/Daughter conflict issues as to their impact upon AF's best interests. This discussion will elaborate upon this Court's on the record statement of its reasoning and especially address the factors Mother now asserts we ignored.

This Court considered it to be of great significance that the Mother/Daughter conflict had been ongoing for a great deal of time and had clearly exceeded what might be expected in a typical teenage daughter/mother conflict situation; AF's disobedience was extreme. The physical altercations between AF and her Mother had caused both of them to be charged at different times with harassment and disorderly conduct offenses, created a danger to both of them and others. It was also quite apparent that AF was running wild, perhaps while at the home of both parents but most significantly while under her Mother's control. The evidence was not disputed that AF was abusing drugs, engaging in criminal activities and sexual activities, and creating a danger to herself as would relate to her safety as well as physical and emotional development. It was this type of conduct which had occurred in Mother's home that led to AF being found dependent. The Lycoming County Children and Youth Office did not have significant concerns about AF's conduct while with the Father despite the episode of her sneaking out from Father's home the weekend before the custody trial. This Court concluded

that for AF to continue primarily in Mother's home would place her in physical and emotional jeopardy.

There was no specific testimony presented as to the nature of AF's relationship with the maternal siblings who were respectively 12 and 13 ½ years younger than she. AF did, however, state her love for these two children and a concern that Mother would yell and swear at them. *Id.* at 198. AF was also at the same time able to voice that despite Mother's yelling and swearing at her and her sisters that she loved her Mother but the fighting between them made her have a strong desire to want to get out of her Mother's home. *Id.* at 199. This Court likewise believes the fighting between Mother and AF is the significant reason for a change in the previous custody arrangement although we recognize first, that much of the fighting is attributed to AF's rebellious nature as opposed to Mother's misconduct and secondly, that the change will reduce AF's involvement with the two younger siblings. Nevertheless, the partial physical custody the Court does provide for Mother under our order assures that this sibling relationship will be adequately preserved just as it does compel Mother and AF to remain in and hopefully improve their relationship. Both parents have the ability to procure medical coverage and medial access for AF. Despite Mother's assertions on appeal, Father does have a medical access card and has been involved in the process of obtaining an appropriate neuropsychological follow-up examination. *Id.* at 173, 174. Father's many mental health service issues are being addressed by Children and Youth programming.

Mother is correct that a pre-trial conference schedule, as announced at the original custody conference held in April, was not made but rather the case was moved to an expedited basis. This resulted from the finding made by Judge Brown in dependency proceedings that an

urgent custody trial date was needed to address issues concerning AF's home in relation to the dependency matter. While it may have been possible for Judge Brown to move forward in the dependency proceedings with determining the appropriate household for AF to primarily remain in, nevertheless the obvious thought of Judge Brown, that the custody court would provide the better alternative since Children and Youth was not looking to placement but was looking for a home to be provided for AF that would provide her appropriate stability and safety, was suitable. Mother has not been prejudiced by the advancement of the trial to June instead of waiting until a pre-trial custody date in July which may have resulted in a trial as late as September or October. Judge Brown's orders of April 17, 2008 reflect common provisions of a custody pre-trial order and also show that the dependency hearings served the purpose of a custody pre-trial conference. AF's needs certainly mandated the need for a prompt custody trial in this matter. Mother does not specifically assert what information in the way of documents or exhibits she might have been able to produce that would have impacted on the custody trial had there been a continuance.

In fact, the exhibits introduced by Father (see list of exhibits filed May 28, 2008) appeared to contain both favorable and unfavorable documentation as would relate to Father and provided a relatively complete documentary history of AF that was pertinent to our decision. Mother also has not indicated an ability to obtain counsel to represent her. She sought the appointment of free counsel which was not available through this Court's services, although she was given referrals and was otherwise directed to Legal Services and pro bono services. Mother has had a long standing acquaintanceship with the custody process and in the past, as reflected by the docket entries, has been represented by counsel.

There is no question that AF has many issues. Some of those are directly related to parenting and some are AF's personal difficulties. Some will no doubt be dealt with by the Court in the dependency and/or delinquency proceedings. Nevertheless, the record is clear that the Father has been more consistent in being able to provide structure and discipline and control over AF and that in that home AF feels that she is free from the hollering and other non-caring conduct by Mother – which we recognize AF no doubt overstates – but which she uses as an excuse to react inappropriately to Mother and cause disruption in their lives. This Court's custody order assures appropriate telephone contact to the out of custody parent and spells out the obligations of both parents to work together in exercising shared legal custody as well as in their general obligations in dealing with AF. The order also assures and directs that both parents will cooperate and comply with the Children and Youth programming which is necessary to benefit AF. The Court believes that AF will be more compliant with that programming, which is very important to her well being if she primarily resides in the house of Father during the school year.

CONCLUSION

The Court, in order to assure AF's best interests, particularly as to her physical safety from physical conflict with Mother as well as to promote her emotional stability by reducing the opportunity for conflict and arguments with Mother and to impose more stringent household discipline which will at least result in AF getting out of bed and going to school, has

entered a custody order which directs that Father will have primary physical custody during the school year. Therefore, this Court's order should be affirmed and the appeal dismissed.

BY THE COURT,

William S. Kieser, Judge