

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

SK		:	NO. 98-1793
	Plaintiff	:	
		:	CIVIL ACTION - LAW
vs.		:	CUSTODY
		:	
TO		:	
	Defendant	:	

Date: November 21, 2011

**OPINION IN SUPPORT OF THE ORDER OF SEPTEMBER 12, 2011 IN
COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

SK, (hereinafter “Mother”) has appealed this Court’s September 12, 2011 Order. Mother filed her appeal on October 24, 2011 and the appeal is docketed to 1846 MDA 2011. This Opinion is submitted in regard to the pending appeal.

Mother’s appeal should be denied and the Order of September 12, 2011 affirmed. The Court relies on the reasoning stated on the record on September 12, 2011 but will additionally address its reasoning in the foregoing opinion.

On July 9, 2009 Father filed a Petition for Modification of Custody. In response to Father’s petition a trial to determine the joint issues of custody and schooling was held on July 26, 2011¹ and September 12, 2011. As a result of the reviewing all of the evidence presented and completing a best interests analysis the Court awarded to Father legal and physical custody of the minor child and mandated Mother to enroll the minor

¹ On July 26, 2011 only the issue of schooling was heard. The issue was then continued and finished during the September 12, 2011 trial.

child into the Shamokin Area School District until Father returned from overseas and took over custody of the child. This appeal followed.

The Court would first like to note that this is a fast track appeal. *Pennsylvania Rules of Civil Procedure* Rule 905 (a) (2) and Rule 1925 (a)(2)(i) mandate the filing of the concise statement of errors complained of (hereafter “concise statement”) on appeal in conjunction with the notice of appeal. Mother failed to file her concise statement at the time of filing her appeal. The Court realizes that failure to file the concise statement is not an automatic bar to the appeal and is determined on a case by case basis. ***In Re: K.T.E.L.***, 983 A.2d 745, 747 (Pa. Super. 2009). In light of this the Court issued a quasi 1925(b) Order on October 20, 2011 in which the Court ordered Mother to submit her concise statement by October 28, 2011. It should be noted that Mother did comply with the October 20, 2011 order. Her issues on appeal are as follows:

1. Whether the Court lacked jurisdiction over the subject matter in this action.
2. Whether the Court violated the plaintiff’s and the minor child’s Constitutional rights (including but not limited to due process and equal protection) in this action.
3. Whether the Court erred when it limited the Plaintiff’s choices as to the disabled minor’s education to enrollment in the Shamokin Area School District and denied Plaintiff and the minor other education options otherwise provided by state and federal law.
4. Whether the Court erred when it failed to make findings of fact in its final order regarding the credible testimony of Ms. Patricia Herrick (The minor’s school teacher at Shamokin Elementary) which clearly showed the minor’s behavior both impeded her educational progress and served as a danger to herself and others.
5. Whether the Court discriminated against the minor child on the basis of her disability.
6. Whether the Court erred when it made dependency findings in a custody case in which Children and Youth was not a party to the action, and without notice and an opportunity to be heard by plaintiff on these matters.

Discussion

1. Whether the Court lacked jurisdiction over the subject matter in this action.

The origin of this case dates back to December 31, 1998 when Mother filed a Petition for Special Relief in which she requested this Court to take over jurisdiction of the custody matter that was scheduled before a Colorado Court. Subsequently, Mother filed a complaint for custody with this Court on December 31, 1998. Bringing us to present day, on July 9, 2009 Father filed a Petition for Modification of Custody. Pursuant to 23 Pa. C.S. § 5421 the Court had jurisdiction over the custody case in 1998 and issued the initial custody order. The Court retains continuing and exclusive jurisdiction over this case due to the fact that no other court has claimed jurisdiction over the case and Mother and child continue to reside in Northumberland County and have for at least the last six months². 23 Pa. C.S. § 5423; 23 Pa. C.S. § 5421. In addition, no other county in this commonwealth or state have jurisdiction because Father has been stationed overseas in Germany for purposes of work.

Therefore, this Court had jurisdiction to enter the order of September 12, 2011.

² This case was filed in Northumberland County, Pennsylvania and remains in Northumberland County however Judge Joy Reynolds McCoy from Lycoming County Court of Common Pleas is specially presiding over the case pursuant to the February 3, 2011 Court Order.

2. Whether the Court violated the Plaintiff's and the minor child's Constitutional rights (including but not limited to due process and equal protection) in this action.

"No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

"Due process requires that the litigants receive notice of the issues before the court and an opportunity to present their case in relation to those issues." *Fallaro v. Yeager*, 364 Pa. Super 408, 412 (1987). "Before a child custody determination is made notice and an opportunity to be heard must be given to all persons entitled to notice under the laws of this Commonwealth. . . ." 23 Pa. C.S. § 5425. There is no violation of due process in this case. Mother had notice of the hearing, in fact the day of the hearing Mother contacted the Court's secretary to indicate that she was without a babysitter and would be unable to attend the hearing. (N.T. 9/12/11 pp. 3). At the commencement of the custody trial on the record the Court contacted Mother via telephone. (N.T. 9/12/11 pp. 12). At that time Mother again stated that she was without a babysitter; she asked for a continuance or to be permitted to participate through telephonic testimony. (N.T. 9/12/11 pp. 12-13, 15). Both requests were denied.

While telephonic testimony is permitted by *Pennsylvania Rules of Civil Procedure* Rule 1930.3 the rule states that with good cause and court approval. Mother did not have the Court's approval to participate via telephone. The Court had told Father that his physical presence at the trial was mandatory. This order required Father to fly in from Germany. To grant either of Mother's requests would have been unfair and burdensome

on Father. In addition the trial had been scheduled since July 27, 2011 therefore Mother had sufficient time to make arrangements for sitters and back up sitters. The Court gave Mother adequate notice of the hearing; Mother chose not to come appear in court that day. In essence Mother chose not to participate. Mother's due process rights were not violated.

As for the issue of equal protection, in a custody case the role of the Court is to determine the best interests of the child. **Clapper v. Harvey, 716 A.2d 1271, 1273** (Pa. Super. 1998). Inevitably the decision of the Court may affect a parent's "fundamental right to make decisions regarding the upbringing of his or her children," *Schmehl v. Schmehl*, 927 A.2d 183, 185 (2007), however in this case Mother and Father were treated equally and the focus of the Court was the needs and welfare of the minor child. There was no equal protection violation.

It is noted that in her concise statement Mother did not limit herself to just a violation of the Equal Protection and Due Process clauses. However, the requirement of Mother was to issue a concise statement, for the Court to analyze the entire Constitution to ascertain Mother's issues would be exhaustive. The Court used the least restrictive means necessary to provide for the best interests of the minor child involved in this case.

3. Whether the Court erred when it limited the Plaintiff's choices as to the disabled minor's education to enrollment in the Shamokin area school district and denied the Plaintiff and the minor other education options otherwise provided by state and federal law.

Mother and Father could not agree on the education type the minor child should be receiving. When two parents who share legal custody of a minor child cannot reach an

agreement the Court may grant appropriate special relief. Pa. R.C.P. 1915.13. The Court heard the school issue on July 26, 2011 and September 12, 2011 and weighed the pros and cons of each educational platform that the parties presented. Mother did not present any education platform other than homeschooling for the Court to evaluate.

While in Mother's primary care, the child has been homeschooled. She has not been enrolled in a formal school setting since September 2007. (N.T. 9/12/11 pp. 26). While Mother did submit a home schooling portfolio for the past academic year, 2010-2011, the Shamokin Area School District had concerns about the portfolio and requested the child to undergo a re-evaluation. (N.T. 9/12/11 pp. 29-30). A child with special needs should be evaluated every two years; the child in this case has not been evaluated since 2006 and has not received any type of services for her special needs since 2007 when she was last enrolled in school. (N.T. 9/12/11 pp. 28-31).

The Shamokin Area School District has a continuum of services that includes programs for special needs students. (N.T. 9/12/11 pp. 31). The school is also equipped with individuals trained to work with children with special needs and trained with handling behavioral issues. (N.T. 9/12/11 pp. 32). Due to the fact that the record is deplete with the services that Mother has provided for the minor child while the child has been in the home school setting coupled with the fact that the educational portfolio lacked evidence of education training and learning the Court found that it was in the best interests of the child to attend a formal school setting. (N.T. 9/12/11 pp. 36).

The Court is not against the option of homeschooling and looks at every situation on a case by case basis. *Staub v. Staub*, 960 A.2d 848, 849 (Pa. Super. 2008). In this

instance the best educational option for the minor child that was presented to the Court was the Shamokin Area School District. The Shamokin Area School District has trained professionals and services that the Court believes will benefit the minor child.

4. Whether the Court erred when it failed to make findings of fact in its final order regarding the credible testimony of Patricia Herrick (the minor's school teacher at Shamokin elementary) which clearly showed the minor's behavior both impeded her educational progress and served as a danger to herself and others.

The Court looked at the totality of the circumstances and considered the best interests of the minor child when evaluating the school issue. While Ms. Herrick did testify regarding some issues that the minor child had while enrolled at school she also relayed that many of the children with the same ailments of this minor child had the same or similar behavioral issues and it was something that the teachers and aides were trained to handle and could overcome. (N.T. 7/26/11 pp. 25, 66). Ms. Herrick went on to testify that the child's behavioral issues were handled with the necessary means and that restraint was only used one time. (N.T. 7/26/11 pp. 28-29). She further testified that she herself was scratched by the minor child and that is what necessitated the physical restraint used. (N.T. 7/26/11 pp. 32-33). The Court will note that Ms. Herrick also testified that the minor child was making progress during her enrollment in school. (N.T. 7/26/11 pp. 27).

Ms. Herrick's testimony highlighted the minor child's issues and progress. Repeatedly Ms. Herrick spoke to the fact that the behaviors that the minor child displayed were common behaviors among the other autistic children in the classroom. The Court

determined that it was in the best interest of the minor child to be in a school setting with trained individuals and other similarly situated students despite her outbursts.

5. *Whether the Court discriminated against the minor child on the basis of her disability.*

The Court did not discriminate against the minor child in this case. In every custody trial the Court focuses on the best interests of the child. *Schmehl* at 185. In determining the best interests of the child there are factors that the Court looks at for guidance; one factor is “[w]hich party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.” 23 Pa. C.S. 5328 (a) (10). In order to determine which party was more likely to attend to the needs of the child the Court needed to be apprised of all of the child’s needs. It is in the best interest of the child to get all of the services afforded to her for needs that in no way parlays into discrimination. Father displayed a willingness and readiness to care for the physical and educational needs of his daughter. (N.T. 9/12/11 pp. 21, 70).

6. *Whether the Court erred when it made dependency findings in a custody case in which Children and Youth was not a party to the action, and without notice and an opportunity to be heard by Plaintiff on these matters.*

This Court and the order of September 12, 2011 in no way made dependency findings in a custody case. What the Court did was held that it was in the best interest of the minor child to attend public school and get the services that the school would provide to her. Because the Court had valid concerns regarding Mother’s compliance with the Court Order, since February 2011 Mother has had a history of failing to comply with Court

orders and directive, the Court put Northumberland County Children and Youth Services on notice of the Court directive and empowered them to take whatever steps the Agency deemed necessary for the interests of the child if Mother failed to comply.³ The order of September 12, 2011 clearly states that Father has been awarded custody of the minor child.

Conclusion

The Court does not take child custody determination lightly. The Court utilizes the factors afforded to them and analyzes the best interests of the child. “It is well-established that ‘the paramount concern in a child custody case is the best interests of the child, based on a consideration of all factors that legitimately affect the child’s physical, intellectual, moral and spiritual well-being and is to be made on a case-by-case basis.’” *Staub* at 853 (Pa. Super. 2008) (citing *A.J.B.*, 945 A.2d 744, 747 (Pa. Super. 2008.)). The Court heard testimony that while under Mother’s control and care the child sits in front of a television for hours a day eating junk food and displaying ritualistic behaviors. (N.T. 9/12/11 pp. 42, 61, 67). It is documented that the child is autistic and severely mentally retarded and instead of getting the child the services that are specialized for her needs the Mother remains inactive. That inactivity is not in the best interests of the child.

³ Northumberland County Children and Youth Services did petition for a dependency hearing before another court and dependency was found and the Agency was given custody of the child effective October 26, 2011.

This Court did not err in determining that full physical and legal custody should be vested in Father. It is in the best interests of the minor child to be enrolled in a structured school environment and then to be under the physical and legal custody of her father. The Court's decision of September 12, 2011 should be affirmed and Mother's appeal dismissed.

BY THE COURT,

Joy Reynolds McCoy, Judge
Specially Presiding