

COMMONWEALTH OF PENNSYLVANIA ex. rel. HURD v.
EBERSOLE, C.P. FRANKLIN COUNTY BRANCH, No. 66
AUGUST TERM, 1976

Habeas Corpus - Illegitimate Child - Visitation Rights of Natural Father -
Termination

1. It is proper for the courts, in appropriate circumstances, to grant visitation privileges to a natural father of an illegitimate child where the natural mother marries another man.
2. In a proceeding for involuntary termination of parental visitation rights, the question of whether the visits would be beneficial to the child must be weighed against whether they would be a disruptive influence on the child's growth and development.
3. The primary concern of the court in determining whether to grant visitation rights to a putative parent is not the illegitimacy of the child or the relationship of the parties, but the welfare and best interests of the child, which must be determined in light of his or her own particular needs and circumstances.
4. To sustain its burden of proof in a proceeding for involuntary termination of parental visitation rights, the petitioner must show that the respondent's activities are repeated or have become a course of conduct which has adversely affected the child.

William F. Kaminski, Esq., Attorney for Petitioner

Donald L. Kornfield, Esq., Attorney for Respondent

OPINION AND ORDER

EPPINGER, P. J., November 23, 1976

Kenneth Hurd (Kenneth) is the natural father of James Allen Wishard (James), born out of wedlock to Deborah A. Wishard (Deborah) on May 16, 1975. As the natural father of the child, Kenneth is asking the Court to grant him weekly or bi-weekly visitations with the child in this habeas corpus proceedings.

The stipulations filed by the parties and the evidence shows that beginning in July, 1975, and continuing up to and including May 16, 1976, Kenneth made regular weekly

payments of \$15.00 for the support of James after an action to require him to make such payments was filed before a Justice of the Peace.

While James lived with his mother and maternal grandmother, Kenneth visited the child regularly and continued such visitations after Deborah married Donald Eugene Ebersole (Donald) on January 2, 1974.

It is also clear that Kenneth furnished James with many necessities; that he gave the child gifts from time to time, including Christmas presents in 1975, bought him various articles of clothing, purchased a high chair, furnished the child's playpen, and supplied him with a wagon.

It was in November of 1975 that Kenneth, who is a civilian employee at Letterkenny Army Depot, converted from an individual Blue Cross/Blue Shield policy to a Family Plan with his son James as a beneficiary. To do this his premiums were tripled. The policy remains in effect. Also in 1975, Kenneth claimed the child as a dependent on his 1975 Federal Income Tax Return, and has and demonstrated strong feelings of love and concern for his child.

At the hearing there was limited testimony in which it was shown that the petitioner was involved in an "incident" or "scuffel" at a tavern on January 19, 1976. As a consequence he was barred from the premises. Thereafter, he was allegedly involved in a hit and run motor vehicle violation.

It is clear that a father of an illegitimate child has an interest in that child. In *Stanley v. Illinois*, 405 U.S. 645 (1972), an act of the State of Illinois finding that a father of an illegitimate child was presumptively unfit to exercise control or dominion over the child was found to be unconstitutional. It follows that whether a parent is unfit or not must be determined in every case since the Legislature may not enact a law to deal with all situations.

In Pennsylvania, *Commonwealth v. Gwiszcz*, 206 Pa. Super. 397, 213 A.2d 155 (1965), marks a shift in our law regarding visitation privileges of a father of an illegitimate child. That case overruled the earlier case of *Commonwealth ex rel. Golembewski v. Stanley*, 205 Pa. Super. 101, 208 A.2d 49 (1965), and held that it is proper for the courts, in appropriate circumstances, to grant visitation privileges to a father of an illegitimate child. We are required, however, in each instance, to examine the circumstances to determine whether it is appropriate that such visitation rights be granted.

In this connection, *Gwiszcz* gives us some guidelines which may be summarized as follows:

1. The primary concern of the court should not be the illegitimacy of the child or the relationship of the parties but, instead, the child's welfare and best interests.
2. In deciding whether visitation rights should be granted to a putative father, the welfare and best interests of the child must be determined in light of his or her own particular needs and circumstances.
3. Whenever visitation rights are granted to a father of an illegitimate child, they are a matter for supervision of courts and may be withdrawn at any time if the father's presence should have an adverse effect on the child's welfare.

The difference between *Gwiszcz* and this case is that in the former the natural mother had not entered into marriage with a third party, although she claimed the intention to do so in the near future. Otherwise, in both cases, the child involved is a male of tender years for whom the putative father has shown love and concern in the form of gifts, visitation and financial support. There is, however, another difference and that is the putative father in this case has a history of being involved in a tavern fight and charged with hit and run.

Criminal activity is certainly a factor to be taken into account in determining the visitation rights of a putative father. It is difficult to imagine, however, how these isolated incidents could have an effect upon a child not yet eighteen months old. Unless the activities are repeated or become a course of conduct or some other circumstances develop which may affect the child, courts have generally refused to deny visitations. Annotation 88 A.L.R.2d 148, 199 (1963). Cf. *Radford v. Matczuk*, 223 Md. 483, 164 A.2d 904 (1960).

Were it not for an additional factor in this case, it would seem that the answer to James' situation would be clear. Kenneth should have the right to visit with the child. However, in this case, the situation has been changed by the fact that Deborah married Donald Ebersole and the Ebersoles are anxious to provide a "normal" homelife for the child and in so doing, they argue, the child's best interest will be fostered.

The matter was mentioned in *Gwiszcz*, where it was indicated that the natural mother contemplated marriage in the near future. The court held that a new husband might extend a

guiding hand of a responsible older male which is often crucial in a boy's development. However, because the marriage was purely conjectural, the court dealt with what it considered the immediate needs of the child and granted a temporary order of visitation rights, holding that as the circumstances change, the court should be sensitive to the child's best interest and withdraw such privileges in the future if such actions were warranted.

We could find no case dealing precisely with our situation except one decided before *Gwiszcz*. In that case, the court denied visitation privileges to a divorced father finding that it would be in the best interest of the child to do so because the mother had remarried and wanted the child to consider her stepfather to be her father. The mother felt the natural father's visitation would be a disruptive influence on her marriage, and the stepfather opposed the resulting divided allegiance and authority which would develop from the natural father's visits. *Commonwealth ex rel. v. Fazio*, 95 Pitts. L.J. 376 (1947). See also Annot. 88 A.L.R.2d 148 (1963) and Annot. 43 A.L.R.2d 363 (1955).

We conclude that the best interest of the child must remain the test. In this connection, the following excerpt from an article based on a speech given to the Family Law Section of the American Bar Association at its annual meeting in 1974 is appropriate:

"... there are very strong considerations that suggest that courts should be chary of permitting visitation by an unwed father when custody has been vested in the mother. First, the father's visits may create a situation which encourages a renewal of a meretricious relationship. While such a relationship might be quite acceptable to some segments of society, it is still not the equivalent of marriage under the law of any state. Second, and more importantly, visits emphasize and remind neighbors and acquaintances that the child was born illegitimate. Third, and most importantly the father's visits can be a factor that reduces the mother's likelihood of adjustment and formulation of a legal marriage and normal family relationship. As family lawyers know well, visitation can create extraordinary problems between once married parents of legitimate children. Clearly, the potential conflicts are even greater when the parents were never married at all. Schwartz, "Rights of a Father with regard to his illegitimate Child," 36 Ohio S.L.J. 1, 12 (1975).

In addition, in the case of *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152 cert. den. 385 U.S. 949, 87 S. Ct. 317, 17 L.Ed. 2d 227 (1967), Dr. Glenn R. Hawks, a nationally recognized child development specialist from the Iowa State University forwarded his opinion that much greater emphasis should be placed on the "father figure," thus discounting the importance of the biological father. Dr. Hawks stated that the "... father figure is a figure that the child sees as an authority figure, as a helper, he is a nutrient figure, and one who typifies maleness and stands as maleness as far as the child is concerned." *Id.* at 157. The Iowa court was influenced by the psychologist's opinion but did not go so far as to deny the value of the role of the natural father. Cf. Goldstein A. Freud and A. Solnit, *Beyond the Best Interests of the Child* (1973) was emphasized that primary consideration should be placed upon continuity in the child's relationships as well as its psychological well-being i.e. mental and emotional health and the normal growth and development of its personality.

Realistically, in this case, we are not dealing with custody. It is only for visitation rights that the natural father has asked. In the circumstances, it is a question of how much dominion or control he will have over James, except for his safety, during visitation periods. Since custody remains with Deborah, she has the primary right to exercise control over the child. In addition, the policy of the law is to encourage the development of a "father figure", hopefully to be assumed by one involved in the daily activities of the child.

Therefore, to the extent that Deborah's husband is going to care for and love the child as his own, the law should be primed to grant such a relationship protection as it appears to be in the child's best interests.

So, we have the question of balancing the policy of fostering one "father figure" and seeking to accommodate visitation privileges to the natural father. In doing this, we have to consider whether the natural father should have any visitation rights at all, whether they would be beneficial to the child, or whether they would be a disruptive influence on the child's growth and development.

We can conceive of cases where the natural father's visitation will greatly enrich a child's understanding and appreciation of himself and his ancestry as well as provide an added dimension to the child's maturity and development. There are repeated incidents where children who are placed for adoption, and have been brought up in an adoptive home, after

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SEE ORDER OF COURT at beginning of this issue as to requirements of advertising legal notices in this journal.

BAR NEWS ITEM

Rain or Shine, the annual summer picnic of the Franklin County Bar Association will be held at the Waynesboro Country Club on Thursday, July 28, 1977. Members should contact John Sharpe or Tom Painter as to attendance.

AUDITOR'S NOTICE

Notice is hereby given that David W. Rahauer has been appointed Auditor in the Estate of Roy C. Raifsnider, late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased. The First and Final Account in said estate filed April 29, 1977, reveals a balance for distribution for the Accountant is unable to file therewith a statement of proposed distribution. The time and place of the Auditor's hearing is Thursday, July 28, 1977, in the office of David W. Rahauer, Rooms 206-208 Chambersburg Trust Company Building, Chambersburg, Pennsylvania. The Auditor will sit for the performance of his duties at 1:30 o'clock p.m., prevailing time and will hear all claims upon the funds of the estate which are to be distributed. Any persons having claims who do not present and prove them before the Auditor will be forever barred from participating in the fund for distribution.

David W. Rahauer, Auditor
Rooms 206-208 Chambersburg Trust
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Chambersburg, Pennsylvania 17201

(7-1, 7-8, 7-15)

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they have learned of their status have thought themselves shortchanged for not knowing their exact identities.

On the other hand, we can see the cases where a natural father would seek to exercise his influence over the child during his periods of visitation and thereby trespass upon the rights of the custodial parents and thus impede the growth of the child's relationship with his or her's "father figure". It would be in this latter kind of situation where the visitation would be a disruptive influence on the child. We acknowledge, however, that in no case should it be presumed that such visitation will inevitably lead to a disruption of the family without some evidence to substantiate that conclusion. It would follow, therefore, that reasonable visitations in the natural father should be permitted.

We have only one more case we want to discuss and that is *In Re Adoption of Walker*, Pa. , 360 A.2d 603 (1976). In that case, our Supreme Court held that the equal rights amendment to the Constitution prohibiting a denial or abridgement of rights based on sex required that Section 411 of the Adoption Act, the Act of 1970, PL620, L.P.S. sec. 411 be declared unconstitutional, since Section 411 required only the consent of the mother. The Court held that this distinction between unwed mothers and unwed fathers is patently invalid. It is Kenneth's contention that *Walker* prohibits any presumption of unfitness for the father of a child born out of wedlock to have custody or to obtain visitation rights.

If such presumption ever existed, *Gwiszcz* destroyed it because the test is "what is in the best interests of the child". Furthermore, we do not believe that *Walker* is involved here since the question is whether granting visitation to a noncustodial parent will be a disruptive influence on the child under these circumstances and not whether a noncustodial father is presumptively fit or unfit to exercise such privileges. *Walker* was the case primarily designed to fix the rights of the putative father with regard to consent to adoption.

After careful consideration of the factors involved in this case, we came to the conclusion that it was in the child's "best interests" not to have the putative father visit with the child. In reaching this conclusion, we were perhaps too concerned about what we consider the "finality" of our order. We now perceive that the language of *Gwiszcz* makes it clear that any visitation granted to a father of an illegitimate child must be done with the supervision of the Court recognizing that should it be proven that the best interests of the child are not thereby served, such visitation rights will have to be terminated. Therefore, considering the great interests

that the father has demonstrated in the child, his willingness to support the child, to provide it with necessities, to provide for the child's medical care and other evidences of his concern, we now feel that he should be granted some visitation rights. We will retain jurisdiction in the case for the making of such additional orders as may be required from time to time.

ORDER OF COURT

NOW, November 23, 1976, the order heretofore made is annulled and it is ordered that Kenneth Hurd, petitioner, shall have the right to visit with James Allen Wishard on Saturday, December 4, 1976 from 9:00 o'clock a.m. until 6:00 o'clock p.m., and every second Saturday thereafter. The said Kenneth Hurd shall provide the noon and evening meals and all transportation in effecting such visitation rights.

The Court retains jurisdiction for the making of such further orders as may be required. The parties shall each pay their own costs. Exceptions granted to both parties.

PUGH v. HOLMES, C.P. FRANKLIN COUNTY BRANCH, NO. 16 AUGUST TERM, 1976; HOLMES V. PUGH, C.P. FRANKLIN COUNTY BRANCH, NO. 15 NOVEMBER TERM, 1976

Landlord and Tenant - Warranty of Habitability

1. A landlord's failure to maintain leased premises in a safe, sanitary and healthful condition fit for human habitation is not a valid defense to a suit by a landlord against a tenant for rent due or for possession.
2. There is no implied warranty of habitability in the common law of Pennsylvania and caveat emptor in landlord-tenant matters remains the law in Pennsylvania.

Stephen E. Patterson, Esq., Attorney for Plaintiff

David Woodward, Esq., Legal Services, Inc., Attorney for Defendant

OPINION AND ORDER

Keller, J.:

J. C. Pugh commenced an action in assumpsit before Justice of the Peace Joseph W. Gotwals to recover rent due on

an oral month-to-month lease for the balance of rent due for the month of September 1975, and for additional full months at the rate of Sixty (\$60.00) Dollars per month. Judgement was entered in favor of the plaintiff on April 20, 1976. On May 10, 1976, the Court on petition of the defendant entered an order relieving the defendant from the payment of any costs of appeal from the judgement in assumpsit and ordered that the costs be advanced by the County of Franklin by reason of the indigency and inability of the defendant to pay any part of the costs of appeal. Pursuant to the rule to file a complaint, the plaintiff on June 4, 1976 filed his complaint in assumpsit alleging that the plaintiff is the owner of the real estate located at 15 Spruce Street, Chambersburg, Franklin County, Penna.; that the defendant resides in the said premises pursuant to an oral month-to-month, lease under the terms of which the defendant agreed to pay to the plaintiff rent in the amount of Sixty (\$60.00) Dollars per month, payable in advance the first day of the month. The complaint further alleges that rent remains due and unpaid in the amount of Thirty-six (\$36.00) Dollars for the month of September 1975, and for the total amount of rent due for the months of October 1975 through June 1976. The complaint was served by counsel for the plaintiff upon Legal Services, Inc., counsel for the defendant, by mail on June 7, 1976. On July 2, 1976, the defendant filed her answer containing new matter. The answer admits essentially all of the allegations of the plaintiff's complaint, including the fact that the rent remains unpaid. However, the defendant avers that the rent is not due and her obligation to pay rent was and continues to be abated due to the plaintiff's failure to maintain the leased premises occupied by her in a safe, sanitary and healthful condition fit for human habitation. Under new matter the defendant alleges that there is inherent in the oral lease between the parties an implied warranty of habitability, which imposes upon the plaintiff a legal duty to maintain the leased premises in a habitable condition and to promptly repair all conditions that render the premises hazardous, unsafe, unsanitary or otherwise unfit for human habitation; and that the leased premises have been in a defective, unsafe and unsanitary condition unfit for human habitation since on or about September 1975, and remain in such condition. By way of amplification, the defendant alleges the defective conditions include inter alia a leaking roof, a non-functioning hot water heater, malfunctioning plumbing facilities, a cockroach infestation, cracked interior walls of certain rooms, broken, defective and hazardous steps leading to the rear entrance, a defective and damaged front porch floor