SCHEELER v. RUDY, C. P. Franklin County Branch, Misc. Docket Volume W, Page 461

Petition to Confirm Custody - Tender Years Doctrine - Illegitimate Children - Child's Preference - Separation of Children

1. In custody considerations, an unwed father who admits and asserts his paternity of illegitimate children shall have equal standing under the law with the mother of such children.

2. Absent compelling reasons, the care and custody of a child of tender years, especially if the child is a girl, should be committed to the mother.

3. Whenever possible, it is highly preferable that brothers and sisters be raised together and not split up, particularly where other factors are in reasonable balance.

4. The wishes of children in custody suits preferring one parent to the other are not controlling; the Court may properly give weight to the child's views depending upon the age of the child and the extent to which the child's views are well-founded.

5. The paramount and controlling concern in every child custody case is the best interest and welfare of the child. A party, therefore, should not be deprived of custody merely because a better home in physical aspects or a higher standard of living can be provided elsewhere.

William H. Kaye, Esq. Counsel for Petitioner

Thomas M. Painter, Esq., Counsel for Respondent

OPINION AND ORDER

KELLER, J.:, July 28, 1977.

The petition of Donna L. Scheeler for the custody of her two minor children was presented to the court on May 9, 1977. An order was entered directing that a rule issue upon Monte E. Rudy, respondent and father, to show cause why custody of the two children of the unmarried parties should not be confirmed in the petitioner. Pending confirmation of the rule, temporary custody of the children was placed in the petitioner. An answer was filed on June 9, 1977 by the respondent. Hearing was held on June 13, 1977. Briefs were submitted by counsel on June 20, 1977, and the matter is ripe for adjudication.

FINDINGS OF FACT

1. The petitioner is Donna Lee Scheeler, who is the mother of Monica Rudy Scheeler, born January 5, 1971, and Monte Edward Scheeler, born September 12, 1972.

2. At the time of the filing of the petition, the petitioner resided at 11 South Carlisle Street, Greencastle, Pa. in a one bedroom, livingroom, kitchen and bath apartment. The petitioner terminated her lease on the apartment effective June 30, 1977. She will reside with her mother at the home of her mother, 244 W. Second Street, Waynesboro, Penna. for the foreseeable future.

3. Monte E. Rudy is the respondent and the father of the two minor children. He resides at 35 Cottage Street, Waynesboro, Pennsylvania.

4. The petitioner and respondent have never been married.

5. Both the petitioner and respondent were previously married and divorced. Both of the parties have children by their prior marriages.

6. The petitioner and respondent entered into a sexual relationship in 1969, and they began to live together at 35 Cottage Street, Waynesboro, Penna. on November 1, 1972.

7. The petitioner, respondent, petitioner's daughter, Beth Ann Scheeler, and the two children of the parties, Monica and Monte, lived in the home at Cottage Street. The petitioner's twelve-year old daughter, Joanne, lived with the petitioner's mother, who had been granted custody of her years ago.

8. The respondent had been employed at the A&P Store in Waynesboro, and in February 1976 his hours were substantially cut and his income reduced.

9. The petitioner during that period had been employed at the Waynesboro Hospital on varying shifts from 6:00 to 9:00 A.M. until 3:30 to 5:30 P.M., and alternating weekends. The petitioner also worked as a barmaid at Rosenberry's Tavern in the evenings.

10. The petitioner left her employment at the hospital and Rosenberry's and took a job at Hartman's Cafe in Greencastle, Penna., where she worked sixty to eighty hours per week.

11. Both the petitioner and the respondent regularly applied their incomes to the expense of maintenance of the home and the family.

12. The respondent did use part of his income to purchase alcoholic beverages.

13. The respondent objected to the petitioner's being employed at Hartman's Cafe and in September 1976 gave her the choice of giving up her work or taking her daughter, Beth Ann, and leaving the home.

14. The petitioner was unable to find an apartment large enough for herself and her three children, which she could afford.

15. The petitioner was not aware of the fact that she was entitled to receive support from the respondent for their two children.

16. The petitioner's mother was unwilling to have the petitioner and her three children come to live with her in September of 1976, because the mother did not want to be responsible for the separation of the petitioner and respondent, and further, felt that the respondent should be responsible for his children.

17. Several weeks after the respondent's ultimatum the petitioner left the Cottage Street home with her daughter, Beth Ann, and for several months lived in the home of a Myrtle Carver, who also worked at Hartman's Cafe.

18. The petitioner moved from her co-employee's home to the Carlisle Street apartment in Greencastle, where she and Beth Ann lived together.

19. The petitioner returned to the Cottage Street home one or more times a week, after the separation, to clean, wash, iron, prepare meals and check on the two children.

20. Subsequent to the separation the respondent secured full-time employment at the Super Thrift Store in Thurmont, Md. He also works an average of one or two nights a week as a bartender on an "on call" basis.

21. Due to the full-time and part-time employment of both parents, the children spent a great deal of their time prior to the September 1976 separation either at the Waynesboro Day Care Center or in the company of babysitters. After the separation the respondent took the children to the Day Care Center before leaving for work and the babysitter, a Mrs. Viola Wolford, picked them up at the end of the day and took them home where she prepared the evening meal. Mrs. Wolford also babysat for the children every other weekend.

22. The respondent testified that he left the religious education of the children to Mrs. Wolford.

23. Another babysitter cared for the children on the evenings when the respondent worked as a bartender, and on the weekends when Mrs. Wolford was not on duty.

24. The petitioner is dating another man, but has no firm plans for marriage.

25. The respondent objected to the children seeing the petitioner in the company of the other man, when the children were taken by Mrs. Wolford to visit the petitioner's mother.

26. Prior to the separation the respondent frequently over-indulged in intoxicating beverages. The petitioner believed that the respondent would discontinue his drinking when he was solely responsible for the care of the children. However, Mrs. Wolford on two occasions was concerned over the respondent's condition from drinking, and the petitioner some three weeks before she acquired custody of the children observed the respondent return home in an intoxicated condition and pass out on the couch.

27. The petitioner's mother agreed in late April 1977 that the petitioner, her daughter, Beth Ann, and the children of the petitioner and respondent could live in her home, 244 W. Second Street, Waynesboro, Pennsylvania. On or about May 4, 1977 the petitioner removed the children from the custody of the respondent and moved with them into her mother's home.

28. The home of the petitioner's mother is an adequate shelter with sufficient space for the family. There are three bedrooms on the second floor occupied by the petitioner and her four children. The petitioner's mother sleeps on the first floor.

29. The petitioner's oldest daughter, Joanne, sleeps in one bedroom; Monte in a single bed in the small bedroom; half sisters, Monica and Beth Ann in one double bed and the petitioner in the other in the third bedroom.

30. When the petitioner is not working, she spends most of her time with her children.

31. The father's home on Cottage Street is an adequate home and the children had separate bedrooms.

32. Monica, age 5, was very explicit in her expression of desire to live with her mother at her grandmother's home because her mother does things with her and because her two older sisters are there, and she likes to be with them.

33. Monte, age 3, also expressed a desire to live with his mother, but his reasons were vague; except that he lived with Daddy a long time.

34. Both the petitioner and the respondent love their children.

DISCUSSION

The law of parental rights in regard to actions for custody of children has recently undergone dramatic changes in Pennsylvania. The long-established and time-honored "tender years doctrine," which states that the right of the mother to the custody of the child, in the absence of a showing that she is unfit to be entrusted with the child's care, is superior to that of all others, including the father, has now been laid to rest. The Pennsylvania Supreme Court, in *Commonwealth ex rel. Spriggs v. Carson*, Pa. , 368 A. 2d 635, 639-640 (1977), concluded that the tender years doctrine is:

> "offensive to the concept of the equality of the sexes which we have embraced as a constitutional principle within this

CONGRATULATIONS

to J. Glenn Benedict, Esquire, on his 50th anniversary, Saturday, August 27, 1977, as a member of the Franklin County Bar. He has had a distinguished career and is still among the most active attorneys in our county. Glenn, we wish you many more years of the same.

FRANKLIN COUNTY LEGAL JOURNAL

Supervisors of Montgomery Township, Franklin County, Pennsylvania, on April 5, 1976, a copy of which, with said municipal subdivision approvals thereon is attached to the hereinafter recited deed.

The above described real estate is the same real estate which Reginald R. Miller and Dora C. Miller, his wife, by their deed dated April 30, 1976 and recorded in the Recorder's Office of Franklin County, Pennsylvania in Deed Book Volume 725, Page 607, conveyed to Raymond Ellis Lee and Judith Linn Lee, his wife, Mortgagor herein.

SUBJECT TO the reservation of a portion of said real estate at the corner of Legislative Route 28047 and the aforementioned 50 foot street, shown on said subdivision plan as lying outside of a curve having a radius of 40 feet in width, for use as part of said 50 foot street.

And having erected thereon a Trailer with a 12 ft. by 44 feet addition.

Seized and taken in Execution as the real estate of Raymond Ellis Lee and Judith Linn Lee, his wief, under Judgement No. A.D. 1977-296.

TERMS: The successful bidder shall pay 20% of the purchase price immediately after the property is struck down, and shall pay the balance within ten days following the sale. If the bidder fails to do so, the real estate shall be re-sold at the next Sheriff's sale and the defaulting bidder shall be liable for any deficiency including additional costs. Any deposit made by the bidder shall be applied to the same. In addition the bidder shall pay $20.00 for preparation, acknowledgement and recording of the deed. A Return of Sale and Proposed Schedule of Distribution shall be filed in the Sheriff's Office on October 12, 1977, and when a lien creditor's receipt is given, the same shall be read in open court at 9:30 A.M. on said date. Unless objections be filed to such return and schedule on or before October 21, 1977, distribution will be made in accord therewith.

September 2, 1977

FRANK H. BENDER, Sheriff of Franklin County, Pennsylvania

(9-9, 9-16, 9-23)

> jurisdiction . . . Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of 'presumptions.' Instead, we believe that our courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case then before the court."

More specifically, recent decisions dictate that we re-evaluate the law regarding parental rights to custody of illegitimate children. The old rules were clearly stated in several cases.

> "A father of an illegitimate child is not legally related to it and the law recognizes the right of the mother to its custody."

Commonwealth ex rel. Kevitch v. McCue, 165 Pa. Super. 49, 51, 67 A. 2d 582, (1949).

> "The general rule has been that the right of the mother to the custody of an illegitimate child, is superior to that of all other persons for, ordinarily, the best interests of the child can be served by maternal care."

Latney's Appeal 146 Pa. Super. 20, 21, 21 A. 2d 521, (1941). See also *Davis v. Bennet*, 34 Del. 136 (1946); *Commonwealth ex rel. Gifford v. Miller*, 213 Pa. Super. 269, 248 A. 2d 63 (1968).

In *Adoption of Walker*, Pa. , 360 A. 2d 603 (9176), Justice Roberts found that, since the adoption of the Equal Rights Amendment, (Article I, Sec. 28 of the Pennsylvania Constitution.), the provision of Section 411 of the Adoption Act of July 24, 1970, P.L. 620, that the consent of the natural father of an illegitimate child shall not be required for the child's adoption, is constitutionally invalid.

> "Thus, Section 411 of the act denies unwed fathers important substantive and procedural rights because his consent to adoption is not statutorily required. This distinction between unwed mothers and unwed fathers is patently invalid under the Pennsylvania Constitution."

Walker, Supra, at p. 605. See also *Stark Adoption* (O.C. Div. Lyc.), 75 D&C 2d 733 (1976).

The court in *Walker*, supra, cites, at p. 606, N. 11, a United States Supreme Court case which further bolsters and upholds the rights of natural fathers of illegitimate children. In *Stanley v. Illinois*, 405 U.S. 645, 649, 92 S. Ct. 1211, 31 L. Ed. 2d 551, (1972), the court held:

> "that, as a matter of due process of law, [an unmarried father] was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying [the unwed father]a hearing and extending it to all other parents whose custody of their children is challenged, the State denied [the unwed father] the equal protection of the laws guaranteed by the Fourteenth Amendment."

After careful consideration of these recent changes in the law, we now find that, where an unwed father admits and asserts his paternity of the illegitimate child or children in question, he shall have equal standing in the eyes of the law with the mother of such children to be considered for custody of them. As stated by Justice Nix in *Spriggs*, supra, at p. 637,

> "It is now beyond dispute that the sole issue to be decided in a custody proceeding between contending parents is the best interests and welfare of the child." (citations omitted.)

We note, at the outset of this opinion and order, that the evidence shows that both parties are loving parents devoted to their children. Both are hard workers quite willing to apply their income to the maintenance of the children and their homes. Both could provide adequate housing for the children. Therefore, neither are disqualified as a person unfit to be entrusted with the care of the children.

There are several factors, of varying importance, to be considered in the case at bar. None of them is, in itself, controlling; instead the cumulative weight will be determinative of which party is to be awarded custody of the subject children.

While the tender years doctrine has with justification been laid to rest, *(Spriggs v. Carson*, supra), there remains another guideline for custody proceedings which is frequently confused or intermingled with the discredited tender years doctrine. This guideline is well described by Judge Hoffman in his dissenting opinion in *Commonwealth ex rel. Zeedick v. Zeedick*, 213 Pa. Super. 114, 118-119, 245 A. 2d 663 (1968):

> "The age and sex of the child is a keystone factor in any custody determination. In this case, we are dealing with young daughters. Our court has, in such cases, followed a time honored rule that the care and custody of a child of tender years, especially if the child is a girl, should be committed to the mother. *Urbani v. Bates*, 395 Pa. 187, 149 A. 2d 644 (1959); *Commonwealth ex rel. Horton v. Burke*, 190 Pa. Super. 392, 154 A. 2d 255 (1959). Our court affords great credence to this concept because experience has taught us that young girls need maternal care and affection. A mother can explain the processes of maturation and sexual knowledge to growing daughters better than a father. Experience has also taught us that a girl's psychological and social adjustments to her environment are more easily made through the confidence of a mother-daughter relationship. As a result of this knowledge, we have often reiterated that, absent compelling reasons, the needs of a daughter of tender years are best served by awarding custody to the mother. *Commonwealth ex rel. Keller v. Keller*, 90 Pa. Super. 357 (1927); *Commonwealth ex rel. Blatt v. Blatt*, 168 Pa. Super. 427, 79 A. 2d 126 (1951)."

We believe that this guideline remains viable, regardless of the demise of the tender years doctrine, by reason of its logic and the weight of experience.

It might be argued that the converse of the above-stated rule is also true, i. e., that a young boy's maturation and adjustment would best be furthered by a father's care and guidance. This may well be at least partially true, but we feel that it is outweighed by other considerations. First, it has been our experience that boys adjust more easily to the processes of physical maturation than do their female counterparts. This would seem to be true chiefly because boys generally mature at a slower pace.

Second, and most important, is the general rule that, whenever possible, it is highly preferable that brothers and sisters be raised together and not split up.

> "The argument that children of the same family should not be separated has natural appeal and is entitled to considerable weight, particularly where other factors are in reasonable balance. See *Commonwealth ex rel. Reese v. Mellors*, 152 Pa. Super. 596, 598, 33 A. 2d 516, (1943)."

Commonwealth ex rel. McKee v. Reitz, 193 Pa. Super. 125, 129, 163 A. 2d 908 (1960). Mr. Justice Musmanno, in *Urbani v. Bates*, 395 Pa. 187, 189, 149 A. 2d 644, (1959), states his thoughts on the issue as follows:

> **"One improvement on the historical Solomonic decision would be to divide the children, one to each parent, but that would be an expediency as unjust as the threatened division by sword."**

Monica and Little Monte appear to enjoy a close relationship, and we believe it would do them a great disservice to separate them. Their home and family life has, unfortunately, been severely disrupted by the change in the relationship of their parents and we will attempt to further disrupt their lives no more than necessary.

Also to be considered is the fact that the petitioner's two older daughters live with her at her mother's house. Monica explicitly expressed her desire to live with her mother at her grandmother's house because she likes to be with her two half-sisters. The presence of other older children, to whom the subject children feel close, in the home provides another needed stabilizing factor for the children in their period of adjustment.

We note that the grandmother, Mrs. Potts, is a mature, good-natured widow experienced in handling children and who has a good relationship with the petitioner, her daughter and the subject children. She has made them all welcome in her home indefinitely. She testified that the children have adjusted well and are not like strangers in the home. She is available to care for the children during the petitioner's working hours.

The fact that both children indicated that they wished to live with their mother is a point to be weighed by the Court, but is not controlling. In a case from this county, Judge Depuy stated the law as follows:

> **"This Court has never taken the view that the wishes of children in custody suits preferring one parent to the other are controlling. Depending upon the age of the child and the extent to which the child's views are well-founded, the Court may properly give weight to them."**

Commonwealth ex rel. Humphreys v. Hess, 11 Cumb. 33, 40 (1960). Representative cases have held that five years old (*Common. ex rel. Johnson v. Johnson*, 195 Pa. Super. 262, 171 A. 2d 627 (1961)), and four years old *Common ex rel. Maines v. McCandless*, 175 Pa. Super. 157, 103 A. 2d 480 (1954)), are too young to be entitled to much weight. In the case at bar, Monica is 6-1/2 and Little Monte is nearly 5.

As to whether the children's views were well-founded, and so entitled to consideration, little Monte's views were vague and his primary reason for wanting to live with his mother, the petitioner, was because he had lived with his father, the respondent, "for a long time." He testified that he would like to live with both of them. His preference can be largely discounted, but the same is not true of Monica's wishes. She was very explicit in her desire to live with her mother. In addition to the fact that her two half-sisters are there, as discussed above, Monica wants to live with the petitioner because the petitioner has evenings free to be with her and Little Monte, the petitioner takes her to the carnival, and the respondent did not have time to take them away. Monica also stated that she didn't like it as much with her father because she was the only girl there.

Monica's testimony and preference are important because they point out the fact that the petitioner has arranged her work schedule so that she has evenings free to be with the children. The same is not true of the respondent, who works an average of one or two nights a week as a bartender on an "on call" basis. If the children were placed in the father's custody, they would be placed more often in the care of a babysitter. The respondent's industriousness is, in nearly alll respects, a most admirable trait. However, in the situation here being considered, it is carried to the point at which it would quite possibly work to his children's detriment.

The respondent's drinking habits are also a factor to be considered. There was conflicting testimony as to the extent of his drinking, and we do not find that the respondent is a "heavy drinker," or that he has a "drinking problem." However, the fact that he admitted that there were occasions on which he came home intoxicated is given some weight in our determination.

A more important consideration is the religious training of the children. The respondent stated that he left the religious

education of the children to Mrs. Wolford, the babysitter. Mrs. Wolford testified that she has seen the petitioner in church at times, and that the petitioner sends the children even when she does not herself attend. There was also testimony that the respondent said he was too busy to get to church.

This Court has often noted the absence of any regular church attendance in the pre-sentence reports of those who have been convicted of some crime, which appear on our desk. We believe that a religious education and upbringing can have a substantial affect upon the outlook and attitudes of a child, and in turn upon the life of the adult he or she will become. This point was noted in *Commonwealth ex rel. Bordlemay v. Bordlemay*, 31 D&C 2d 46, 51 (1963), in which it was said,

> "One final consideration worthy of note is the husband's attention to the child's spiritual training. He attends church regularly and takes the child to Sunday School. On the other hand the wife does not attend church. While religious considerations are not necessarily controlling, they should be given consideration. *Commonwealth ex rel. Shamaneck v. Allen*, 179 Pa. Super. 169."

This point was again noted by the court on appeal, where it was held that the law had been properly applied to the facts, and the award of custody to the father was affirmed. *Commonwealth ex rel. Bordlemay v. Bordlemay*, 201 Pa. Super. 435, 193 A. 2d 845 (1963).

That the home which would be provided by the mother is not as large and the children would not each have his or her own bedroom is of little importance. It is settled law that a party should not be deprived of custody merely because a better home in physical aspects or a higher standard of living can be provided elsewhere. *Commonwealth ex rel. Holschuh v. Holland-Moritz*, 448 Pa. 437, 292 A. 2d 380 (1972); *Commonwealth ex rel. George v. George*, 167 Pa. Super. 563, 76 A. 2d 459 (1950). Likewise, the fact that the respondent has a higher income than the petitioner is not deserving of much weight; both are able to financially provide adequate support for the children. *Commonwealth ex rel. Andresky v. Andresky*, 40 Wash. 101 (1960).

The considerations that must be made in a custody case were well summarized by Mr. Justice Bell in *Shoemaker Appeal*, 396 Pa. 378, 301, 152 A. 2d 666, 668 (1959), when he wrote,

"You cannot make a cheap palace."
— Ralph Waldo Emerson, Journals 1857

"It is well settled that the paramount and controlling concern - the polestar - in every child custody case is the best interests and welfare of the child . . . (citations omitted.) In determining what are the best interests and welfare of the child, all the circumstances which may affect the determination are admissible, including, inter alia, the character and fitness of the petitioners, their respective homes, their ability to take adequate care of as well as to financially provide for the child, their church affiliations, and every factor which may affect the physical, mental, moral, and spiritual well-being of the child."

After weighing and analyzing the facts in the case at bar, we conclude that the best interests and welfare of Monica Rudy Scheeler and Monte Edward Scheeler require us to award custody to the petitioner, Donna Lee Scheeler. Where both parents love the subject children and are capable of providing them with a home, our determination and decision is made much more difficult. We find that the facts show that the petitioner offers a more stable home atmosphere, and for that reason she is awarded custody.

Since neither party introduced any evidence concerning visitation, and it appears the parties have been able to work out satisfactory visitation arrangements in the past, we will not at this time include in the Order of Court any provisions for visitation rights. It has long been the policy of this Court to favor reasonable visitation rights for the parent out of custody, and we do urge the parties and their counsel to seek to work out a reasonable and realistic visitation schedule for the benefit of their children. If the parties are unable to reach an amicable agreement on visitation, the Court will entertain an application for hearing as promptly as possible and enter an appropriate order.

ORDER

NOW, this 28th day of July, 1977, the petition of Donna L. Scheeler is granted. Primary custody of Monica Rudy Scheeler and Monte Edward Scheeler is granted to their mother, Donna L. Scheeler.

Exceptions are granted the respondent.

KOONTZ v. PARMER, C. P. Fulton County Branch, No. 31 January Term, 1974

Equity - Pre-Trial Conference Memorandum - Adequacy of Consideration - Mental Incapacity

1. Where defendant did not plead additional consideration for a deed, defendant was permitted to present evidence on that issue due to its inclusion in the court's Pre-Trial Conference Memorandum.

2. A pre-trial conference memorandum, when based on stipulation of counsel, is a binding order which may serve to fix the issue even though not pleaded, and affect the admissibility of evidence.

3. The Court will overturn a transaction due to inadequacy of consideration only when the presence of undue influence is an issue.

4. Mental competence to do business is presumed and evidence to the contrary must be clear and compelling before a transaction will be overturned.

5. Mental incapacity must be shown to exist at the time the transaction was consummated and not only at some time in the past or future.

Stewart L. Kurtz, Esq., Counsel for Plaintiff
Merrill W. Kerlin, Esq., Counsel for Plaintiff

Lawrence C. Zeger, Esq., Counsel for Defendant
Dennis A. Zeger, Esq., Counsel for Defendant

ADJUDICATION AND DECREE

KELLER, J., July 20, 1977:

This action in equity was tried on March 25 and 26, 1976, and the Adjudication and Decree Nisi filed on June 22, 1976. Exceptions were filed by the plaintiff on July 10, 1976; the official transcript was certified on March 11, 1977; and the matter was argued before the Court en banc on April 19, 1977. It is now ripe for disposition.

I

WHETHER THE COURT ERRED IN PERMITTING DEFENDANT TO INTRODUCE EVIDENCE THAT