1. Herbert W. Kurtz, defendant, shall file an account and proposed schedule of distribution pursuant to the within Opinion, and in compliance with the applicable Orphans' Court Rules of the Supreme Court of Pennsylvania and this Judicial District within twenty (20) days of date hereof.

2. The Prothonotary is directed to enter a judgment in favor of Frank A. Kurtz, plaintiff, and against Herbert W. Kurtz, defendant, in the amount of $2,734.45 with interest from June 28, 1979.

Exceptions are granted the defendant.

CLUGSTON AND WIFE v. CLUGSTON AND WIFE, C.P. Franklin County Branch, No. F.R. 1981 - 68

Civil Action - Law - Custody - Parent v. Grandparents

1. In a custody dispute between a parent and a third party, while the question remains what is the best interest of the child, the parent has a prima facie right to custody which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to the third party.

2. While the courts have often held that it is best to keep siblings together, the best interests of the child may dictate otherwise.

3. Where a 7 year old child is placed with her grandparents by her parents since birth and thereafter the parents showed little interest in her, continued custody by the grandparents is in the best interest of the child.

Kenneth E. Hankins, Jr., Esq., Attorney for Petitioners

Barbara B. Johnson, Esq., Attorney for Respondent, Joyce D.B. Clugston

Patrick J. Redding, Esq., Attorney for Respondent, Charles R. Clugston

OPINION AND ORDER

EPPINGER, P.J., June 25, 1981:

The Court is in accord with the views expressed by the Court's Custody Mediation Officer, Richard B. Mason, M.S.W.,

A.C.S.W., psychiatric social worker at the Cumberland Valley Mental Health Center, that the custody of Tanya Darlene Clugston, born July 15, 1974, the child of Charles R. Clugston and Joyce D.B. Clugston, should remain with William R. and Pearl E. Clugston. If this was a case where the contest was between two parents, one who had been doing all of the parenting for nearly seven years and the other who had done very little of it, the case would be simple. But that is not so. William and Pearl Clugston are the child's grandparents.

The confusion now visited upon Tanya Clugston started at her birth when her parents were living with the elder Clugstons. Then the parents moved away but Tanya objected to staying overnight at her family's new residence and her parents acquiesced, leaving the child to be raised by the grandparents. The father still approves of this arrangement. But when the grandparents filed this petition to confirm custody, the mother resisted. She and the father, married about 7 years, separated in January. There are two other children, Jenny, 4, and Crystal, 3, who are living with her and she is making a new start in nearby Huntingdon County. She wants Tanya to be with them. To this Tanya says, "No!"

The elder Clugstons have done a good job. They have seen to the child's needs, physical, mental and spiritual. They have been her parents for nearly seven years and she has done well in their home. The mother has maintained minimal contact with the child and the child has enjoyed this but she has always demanded that she be returned to her grandparents and never be required to stay overnight with her mother. She knows and likes her siblings but, in the words of Mr. Mason, views them more as cousins than as sisters.

After this action was filed, the stipulation of the parties to institute Joyce's visitation privileges recognized this problem. Joyce sees the child Saturday and Sunday during the day time, returning her to the grandparents Saturday night.

Because it involved the kind of situation we have in this case, *Ellerbe v. Hooks*, 490 Pa. 363, 416 A.2d 512 (1980), is the most instructive authority. In that case a father sought the custody of his daughter who had been living with her grandmother. The Common Pleas Court denied the petition, the Superior Court reversed and the Supreme Court reinstated the Common Pleas order, saying:

> At the time of the hearing in this case, Carla, then eleven years old, had been living with her grandmother since she was less then two years old. Carla had developed stable and happy

> relationships with her grandmother, with neighborhood friends and, importantly, at school. In these circumstances we are unwilling now to disturb the trial court's order granting custody of Carla to her grandmother.

490 Pa. at 371, 416 A.2d at 515.

The *Ellerbe* decision of the Superior Court is found at 257 Pa. Super. 219, 390 A.2d 791 (1978). The facts are discussed at greater length in the Superior Court decision. The grandmother was 66 years old. There was convenient proximity between the homes of the protagonists, circumstances were such that after school the child could go to her grandmother's to await her father's return from work. The court hoped that they could work out a satisfactory visitation schedule with ultimate recourse to the lower court if they could not agree and concluded that such an arrangement would avoid uprooting and severance of ties with the grandparent, "so properly feared by the lower court," but would allow the child and her father to develop a relationship they never had and might never have unless the lower court was reversed.

In reaching its decision in the case, the Superior Court relied on principles stated in *In re Hernandez*, 249 Pa. Super. 274, 376 A.2d 648 (1977), that in a custody dispute between a parent and a third party, while the question remains what is in the best interest of the child, the parent has a prima facie right to custody which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to the third party. The Supreme Court acknowledged that this is the correct rule but was convinced in applying the rule that the trial court's determination should stand. [1]

In our approach to this case we have applied the doctrine and are persuaded that there are convincing reasons that Tanya's best interest will be served by not uprooting her and by awarding custody to her grandparents. [2]

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[1] In a concurring opinion, Mr. Justice Flaherty joined by Mr. Justice Nix opined that all presumptions in custody cases should be eliminated and that custody should be determined by a preponderence of the evidence, *weighing parenthood as a strong factor for consideration.* 490 Pa. at 374, 416 A.2d at 517 (emphasis original).

[2] Though for the purposes of these kinds of cases, grandparents like the elder Clugstons and Mrs. Ellerbe are called "third parties," in the lives of the children involved they are in fact the primary persons.

feet to an iron pin; thence still along the same, South 53 degrees 14 minutes East, 200 feet to an iron pin; thence still along the same, South 36 degrees 14 minutes West, 171.05 feet to a point in the center of Township Road No. 642; thence along the latter, North 15 degrees 25 minutes West, 43.25 feet to a point; thence still along the latter by a curve to the left with a radius of 195.86 feet, 178.9 feet to a point, the place of beginning.

According to a survey of John Howard McClellan, dated February 21, 1968.

BEING the same real estate which Paul K. Culbertson and Minerva A. Culbertson, his wife, by deed dated August 23, 1968 and recorded in the Office of the Recorder of Deeds of Franklin County, Pennsylvania, in Deed Book Volume 629, Page 595 conveyed to Wayne A. Culbertson and Esther L. Culbertson, his wife.

BEING sold as the property of Wayne A. Culbertson and Esther L. Culbertson, Writ No. DSB 1980-20.

SALE NO. 5
Writ No. AD 1981-161 Civil 1981
Judg. No. AD 1981-161 Civil 1981
Waynesboro Savings Association
— vs —
Harland L. Garrison and Vittoria M. Garrison, his wife
Atty: Robert P. Shoemaker

ALL THAT CERTAIN following described real estate on which is erected dwelling 416 West Main Street in Waynesboro, Franklin County, Pennsylvania, said lot being bounded and described as follows, to wit:

BEGINNING at a point on the south side of West Main Street (it being the northeast corner of the lot herein described); thence with a 12 foot alley, south 27-½ degrees West 240 feet to the southeast corner of the lot herein described; thence by another 12 foot alley 56 ¼ degrees West 45 feet to the southwest corner of the lot herein described; thence by lands now or formerly of J. Howard Layman and Mary Catherine McFerren Layman, his wife, North 27-½ degrees East 240 feet to said Main Street, the northwest corner of the lot herein described; thence with said West Main Street in an easterly direction 40 feet to the place of beginning.

BEING sold as the property of Harland L. Garrison and Vittoria M. Garrison, his wife, Writ No. AD 1981-161.

SALE NO. 6
Writ No. DSB 1981-851 Civil 1981
Judg. No. DSB 1981-851 Civil 1981
Citizens National Bank and Trust Company
— vs —
Gerald E. Mitchell
Atty: Donald L. Kornfield

ALL THAT CERTAIN following described real estate situate in the Borough of Waynesboro, Franklin County, Pennsylvania, improved by a frame dwelling known as 209 West Fourth Street, bounded and described as follows:

BEGINNING at a point on the north side of John Street, now West Fourth Street, at the southwest corner of Lot No. 47, as per plan of lots of Edward Lynch; thence by said West Fourth Street, north 50-¼ degrees west 40 feet to the corner of Lot No. 45; thence by said lot, north 39-¼ degrees east 160 feet to an alley; thence by said alley, south 50-¼ degrees east 40 feet to a corner of Lot No. 47; thence by said lot, south 39-¼ degrees west 160 feet to the place of beginning. It being Lot No. 46 as per said plan of lots.

BEING the same real estate conveyed to Gerald E. Mitchell by Deed of Betty J. Hassler, single, dated March 26, 1981, and recorded in Franklin County Deed Book Vol. 832, Page 146.

BEING sold as the property of Gerald E. Mitchell, Writ No. DSB 1981-851.

SALE NO. 7
Writ No. DSB 1981-701 Civil 1981
Judg. No. DSB 1981-701 Civil 1981
D & S Orchard Supply Company
— vs —
Richard I. Rotz
Atty: Kenneth Lee Rotz

ALL those two tracts of real estate, together with the improvements thereon, lying and being situate in Green Township, Franklin County, Pennsylvania, and which are more particularly described in that certain deed recorded in the Office of the Recorder of Deeds of Franklin County, Pennsylvania in Deed Book Volume 802, at page 536, and being the same which Harry D. Harvie and Mildred B. Harvie, his wife, by their deed dated November 5, 1979, granted and conveyed unto Defendant, Richard I. Rotz, containing 224.42 acres more or less.

ALL that certain tract of real estate, together with the improvements thereon, lying and being situate in Greene Township, Franklin County, Pennsylvania and which is more particularly described in that certain deed recorded in the Office of the Recorder of Deeds of Franklin County, Pennsylvania in Deed Book 680 at page 147 and being the same which Richard I. Rotz and Betty L. Rotz, his wife, by their deed dated September 19, 1972, granted and conveyed unto Defendant, Richard I. Rotz, containing 5 acres and 105 perches, more or less.

BEING sold as the property of Richard I. Rotz, Writ No. DSB 1981-701.

TERMS

As soon as the property is knocked down to a purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, September 21, 1981 at 4:00 P.M. E.S.T. Otherwise, all money previously paid will be forfeited and the property will be resold at the hour at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

RAYMOND Z. HUSSACK, Sheriff
Franklin County
Chambersburg, Pa.

(8-21-81, 8-28-21, 9-4-81)

A consideration in this case is how Tanya started to live with the elder Clugstons. It was not as in *Ellerbe*, where mother and father separated and then the child went with her mother to live with grandmother Ellerbe. Then after the mother died the child continued to live with her grandmother. In that situation for a period of about 10 years, Carla, the child, was living with both mother and grandmother. In this case, the parents left Tanya with her grandparents and there is some authority that it is in the best interest of children to leave them where their parents have placed them. *Commonwealth ex rel. Tims v. Tims*, 21 Som.L.J. 101 (1962).

Under our decision in the case, Tanya will not be living in the same household with her sisters. Our courts have held that in many cases the best situation is to keep the siblings together. In this case we are not really separating the children; that has already occurred. And to place Tanya with her sisters (whom she regards more as cousins than sisters) solely to keep them together would be, as was suggested in *Commonwealth ex rel. Barbara M. v. Joseph M.*, Pa. Super. , 428 A.2d 567 (April 3, 1981), as abdication of our responsibility to decide the issue according to the child's best interests.

Grandfather and Grandmother Clugston are 55 years and 52 years old respectively and show no signs of having difficulties because of age in raising Tanya. While in their charge, Tanya had been (until the visitation order) a perfect attender at Sunday School and Vacation Bible School. She started kindergarten at the Fannett-Metal School near where she lives. Occasionally the parents would take turns picking her up at the school bus stop near the grandparents' home, though this was a chore most frequently completed by the elder Clugstons.

While living with the elder Clugstons, who both work, they made the baby-sitting arrangements and they saw that she got there and was returned. The home in which the grandparents are now living is the same home in which all of the parties at one time resided and that is entirely suitable to Tanya's needs. It is in surroundings she is familiar with. Living there would continue her in school with classmates who are her friends and acquaintances.

We regarded the testimony of the grandparents as being credible and where it was in conflict with that of the mother, we relied on their testimony. There were a few points where this occurred. The mother claimed to have a great deal more contact with the child during the past years than the credible testimony shows. This is important because it reflects not only the mother's interest in the child but also indicates the extent

to which Tanya has relied on her grandparents. It also supports the report that at one time the mother was going to agree to Tanya's continued residence with the grandparents but then changed her mind.

An issue was made of two occasions when the grandparents refused to abide by the visitation schedule approved by the court in anticipation of a resolution of this case. On one occasion, the child was said to be too ill to visit her mother and we accept that. On the other occasion the grandparents had made arrangements for the child to go to the dentist. There was testimony that the mother offered to take her but the grandparents insisted on doing it. We think this proper since the grandparents had been primarily responsible for her dental and other health.

Tanya is happy in her school situation. Should she be placed in the custody of her mother, the school would change. Since the mother is working, arrangements for getting to the bus and for necessary baby-sitting would be made by the mother's mother, Mrs. Burdge. This arrangement is yet untested.

Joyce Clugston, who now had the child on Sunday, is taking her to church and this fact was affirmed by the Pastor of the church. It was this new arrangement which interrupted the consistent religious education of the child which the grandparents had instituted. Joyce now has the child every Sunday. We are pleased that the child is attending her mother's church when on visitations because in making the visitation schedule to be incorporated in our final order we are anticipating that that will continue to occur.

Decisions of our Superior Court like *Jones v. Floyd*, Pa. Super. , 419 A.2d 102 (1980), instruct us in the value of professional assistance in helping determine where a child would best adjust. All parties may of course obtain their own professional witnesses, but the services of the court mediation officer have been relied upon to a great extent since the program was instituted. In this case Mr. Mason not only filed a report, but he was present at the hearing and testified. It is his opinion that custody of Tanya should remain with the maternal grandparents, that Joyce have visitation provileges every other weekend with at least one overnight and an extended period of time in the summer.

In his report, which is a part of the record, Mr. Mason reviews the situation of the contending parties, notes Joyce's feeling that she has been pushed out and not permitted to

develop a positive relationship with Tanya and that she is working at Letterkenny Army Depot, intending to move into a new trailer. That hadn't occurred at the time of the hearing, and it was pretty evident that where she had been living with her other two children was rather crowded.

Mr. Mason regarded Tanya as estranged from both of her parents. She relates to her grandparents in a daughter-parent fashion. She would regard any move at the present time as being unjustified. The condition that the parents permitted to develop is regrettable, Mr. Mason says. The result is, as noted earlier, that Tanya has been raised separately. Mr. Mason feels that the parents should have made the effort to bring her into the family. Having failed to do so, there is no need to disrupt the child now.

In speaking about the attitudes of the parties toward custody of the child, Mr. Mason reported that Joyce has always been rather ambivalent, while her in-laws have been quite unequivocal in their desire to keep and care for Tanya. This has resulted in some overprotection by the grandparents, with both positive and negative effects, the negative ones to be attacked by the required overnight visitation that is recommended to be included in the visitation order where she would be in a family situation without direct influence of the grandparents.

Tanya is certain that she is loved, cared for and accepted where she is now. She would not be able to understand a change in her situation and would not regard it as being fair. This is true because Tanya has been with her grandparents for 7 years and that is all of her life. They have been and are the authority in her life, they have decided what is best for her, paid the bills, let her do things and have done things for her. It was Mr. Mason's opinion that if required to go with her mother she would adjust, but probably with ill effects and that it is best to leave will enough alone.

As is well known, all custody orders are temporary. At this moment, Tanya's best interest requires that she remain with her grandparents with weekend, summer and holiday visitation with her mother, including overnight visits.

ORDER OF COURT

June 25, 1981, custody of Tanya Darlene Clugston is awarded to William R. and Pearl E. Clugston, the child's grandparents. Joyce D.B. Clugston, the child's mother, shall have visitation custody with her daughter from Friday, July 3, 1981 at 6:00 P.M. until Sunday, July 5, 1981 at 6:00 P.M. and each

second week-end thereafter. She shall also have visitation custody on alternate holidays beginning with Labor Day, 1981, from 6:00 P.M. on the eve of the holiday until 6:00 P.M. on the holiday. The holidays shall include in addition to Labor Day, Thanksgiving Day, New Year's Day, Memorial Day and Independence Day.

In addition the mother shall have visitation custody for an uninterrupted week in the summer of 1981 and for an uninterrupted month in the summer of 1982. Notice of the intention to exercise this visitation custody shall be given the grandparents at least two weeks prior to the time of such visitation.

The mother shall have visitation custody of the child each Christmas holiday from 2:00 P.M. on Christmas day until 6:00 P.M. on the fourth day after Christmas.

The parties shall each pay their own costs.

THOMAS v. THOMAS, C.P. Franklin County Branch, No. A.D. 1977 -647

Divorce - Application to Proceed Under Divorce Code

1. The legal propriety of transferring an action in divorce commenced under the prior divorce law to the new divorce code must be determined by the court on a case by case basis.

2. In determining whether to grant an application to proceed under the Divorce Code, the Court must balance the competing interests and equities of the parties.

3. The policy of the Commonwealth as enunciated in Sec. 102(a) of the Divorce Code must weigh heavily in favor of the transfer.

4. Where the plaintiff allows a divorce action begun under the old divorce act to be delayed by taking no action, he cannot then deny the defendant the rights provided under the Divorce Code of 1980.

Edward I. Steckel, Esq., Counsel for Plaintiff

J. Dennis Guyer, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., July 29, 1981: