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IN RE: CUSTODY BARNHART CHILDREN, C.P. Franklin County Branch, F.R. 1979 - 962

Custody - Joint Custody - Mediation Officer's Report

1. The Court will, when it is in the best interest of the children and where the parties reside in the same community and the children attend schools in the same school system, consider awarding joint custody.
2. Although the Court considers the Mediation Officer's Report in making its determination, it will not adhere to the Officer's recommendations if it finds the best interests of the children require a contrary result than that recommended by the Officer.

Robert E. Graham, Jr., Esq., Attorney for Petitioner

Thomas J. Finucane, Esq., Attorney for Respondent

OPINION AND ORDER

EPPINGER, P.J., September 4, 1980:

Janice McCardel is the mother and Jerry Barnhart is the father of Tina and Cindy Barnhart. Tina, born July 13, 1971, is now living with her mother and her mother's second husband, Joseph McCardel, at State Line, Pennsylvania. Cindy, born January 15, 1973, is with her father and his second wife, Bonnie, at 305 North Franklin Street, Chambersburg, Pennsylvania. Both the mother and the father would like to have primary custody of the two children, acknowledging that the other party should have visitation rights.

Some of the testimony the court heard in this case is irrelevant history because the circumstances changed dramatically just after the first hearing. At that time, their divorce having been granted ten days earlier, both parties were contemplating marriage. Shortly thereafter they did marry and both children moved to new homes.

This problem started when Janice and Jerry split up. Janice left and went to the home of her parents, Mr. and Mrs. Gilbert Cramer, taking Tina with her. Cindy stayed with Jerry. But then Janice moved in with Joseph McCardel and left Tina with her parents in a rural setting where she received excellent care. In the meantime Cindy was living with Jerry's mother, Betty Bricker, and because she worked, the child was well cared for by her great grandmother, Edna Kauffman.

While Cindy was at Jerry's mother's home, he did not

spend much time with the child. He had moved in with Bonnie Carbaugh who was living in Barclay Village Chambersburg. Janice did not get home very often to see Tina either. So the picture presented to the court as of this time was of two children happily living with grandparents receiving very little attention from their parents. The maternal grandparents made exceptional efforts to see that the two children were together as much as possible by making regular and frequent visits with Tina at the Bricker home on Garfield Street in Chambersburg. The families had mutual respect for each other and it seemed, whether by accident or design, for about five years the parties had achieved an excellent disposition of the custody problem for the children of this broken marriage.

But then things changed. Jerry started a divorce action against Janice and wanted to take over custody of Tina. The Cramers resisted. They did allow him to take the child on a camping trip, after which he refused to return her to the Cramers. But the Cramers wanted badly to see her, so they signed a paper that they would return her to Jerry after a short visit and then didn't. What was a cordial and friendly relationship between the families suddenly erupted into an acrimonious situation with both sides accusing the other of perfidy.

Even during these seemingly ideal times there were gray patches. Both of the children were exposed to their parents living out of wedlock with another person. As indicated earlier, the parties didn't pay as much attention to the children as they should and seemed to put their own individual interests ahead of the children. There was some problem between the Cramers and Jerry over a loan and Jerry often missed his support payments.

The first time Tina and Cindy talked to the court they indicated that they wanted to live together. Tina said she wanted to go wherever Cindy went; that Joe and her mother sometimes fight and that Joe sometimes gets drunk. (It was stipulated that he spend over a month in jail in Washington County, Maryland, on a driving under the influence charge.) Tina however expressed a desire to be with her mother but was under some pressure because she understood that if she went with her father she'd never get to see her grandmother Cramer again. Cindy stated a preference not to live with her mother. She had seen Janice and Joe fight.

Now to more recent experiences. Jerry is employed at the Moose Lodge in Chambersburg as Steward and Manager. He, Cindy, Bonnie and Bonnie's three children are living together. The home seems compatible, with Cindy getting along

well with the other children. From the evidence it is difficult to figure out what Jerry's working hours are, but he does seem to be frequently at the Moose Lodge and often takes the family with him. Jerry and Bonnie attend the dances at the Moose Lodge every Saturday night and the children are not there then.

Bonnie doesn't work outside the home regularly. She generally takes care of the children but occasionally goes to the Moose Lodge to fill in on a part-time basis. Her household seems well run. The children all have chores to do and there doesn't seem to be any difference in the way her children are treated and the way Cindy is treated. The children are all in good health, she sees that they go to the municipal swim pool and have swim lessons. She plays with the children and the whole family goes to races together. There was an episode when the children were pulling pants down, but we do not regard that as a problem because when Bonnie and Jerry discovered what had gone on, they immediately took corrective measures.

On occasions, Chris, the oldest of Bonnie's children, baby sits for short periods of time. His ability to do this was questioned. He seems to do it well and there is no reason why he can't look after the other children when his mother is temporarily absent from the home.

When Tina visits in the Barnhart home she also has chores to do, though they are mostly taking care of her own things, make her own bed and picking her clothes up - also helping to set the table.

The two girls, Tina and Cindy, are still spending each weekend together. Generally the exchanges of the children have gone well. There was one episode when Janice, instead of having the two children at her house took them to Jerry's mother. This incensed Jerry. He swore at Janice for doing this, saying that if Janice didn't want the children, he would have been glad to keep them. This strikes us as a strange reaction. When he was so dependent on his mother and grandmother for the care of Cindy and knew of their affection for both of the girls, how he could be upset or offended if Janice decides to take the children there for a weekend, for whatever reason, is puzzling.

The McCardels now live in a two story two bedroom house on a three-quarter acre lot. Joe and Janice have one bedroom, the children, when both are there use the other. There are children in the area and Tina who is there most of the time has them for companions and playmates. They enjoy family activi-

ties, including, in the summer, swimming in a neighbor's pool.

Joe works at Corning. Janice does not work outside the home. Tina, with the McCardels, has chores she must do and seems to get along well with her step-father. She goes to the Greencastle Elementary School. The situation now seems like a good one.

Tina, speaking to us the second time, said she liked living at State Line, and likes it at her school. She said she didn't like going to the Moose Lodge so much when she is with her father on weekends. Generally she says, there are no other children at the Moose Lodge. Asked how she liked visiting with her father on weekends, she responded that it would be OK if they stopped going to the Moose Lodge.

She reiterated that she would like to live with Cindy but doesn't want to go live with her father, saying among other things that it is not the truth when he says he only works two hours a day. She said also that she gets along well enough with Bonnie but that she is hardly ever home on the weekend visits.

Cindy says she enjoys the visits with her mother and Joe, and plays with the children in the area. She said that Tina has some problems when she visits them Corey; one of Bonnie's boys fights her a lot. She added that during the weekend immediately before the hearing, they went to the Moose Lodge four times, "to enjoy the air conditioning."

The parties filed a stipulation in the case, saying that the physical accommodations at the residence of Janice McCardel and at the residence of Jerry Barnhart are both satisfactory and shall not be deemed an issue in this case. Since Tina is living at State Line she entered the fourth grade in the Greencastle Elementary School, while Cindy is going into the second grade in a Chambersburg school. Tina is a better than average student while Cindy qualifies as an average student. The health of both children appears to be good.

After the first hearing and after the circumstances had changed materially and the court ordered a second hearing, the court also referred the case for a mediation conference to Richard B. Mason, M.S.W., A.C.S.W., Court Child Custody Mediation Officer to determine whether the issues could be resolved without the further hearing and if that was not possible to make a recommendation to the Court as to the suitability of each of the parents to exercise custody over their two children.

Mr. Mason spoke to the parties and the children, obtained

a history of the circumstances leading to the present situation and made his report and recommendations. The parties each understood that Mr. Mason was available for cross examination at the hearing but neither party opted to call him and under the procedure in effect in the 39th Judicial District the parties agree the court may consider that report in reaching its conclusions in this case.

Mr. Mason's conclusion was that the parties had generally arrived at a pretty good arrangement for the custody of their children when one went with the mother's parents and the other essentially stayed with the father's mother and grandmother. Had the situation not changed and if Tina was still with her grandparents, the Cramers, it was Mr. Mason's recommendation that each child remain in the placement where the parents left them. He says: "It is widely held by professionals that every attempt should be made to keep family and siblings together if at all possible.", This is in accord with the legal doctrine that in the absence of compelling reasons to the contrary, children should be raised together. *Commonwealth ex. rel. Bowser v. Bowser*, 224 Pa. Super 1, 302 A.2d 450 (1973).

However Mrs. Mason opined:

"It is important the children have consistent, dependable care from their parents in order to establish a trusting relationship with the world and build confidence in themselves. Both Tina and Cindy seem to have developed this type of trust in their respective homes and at this point in time I would not feel it would be advantageous to disrupt them."

He noted they are together every weekend and during these periods they are able to learn to care for and love each other. So he viewed it as being in the best interest of the children for Tina to stay with the Cramers and for Cindy to stay with her father. His opinion was that the benefits to be gained by having the children together would be outweighed by what might be done in the process of moving one or the other of them.

After the report was filed, the Cramers withdrew as parties so the contest is now between the parents. As if anticipating that this might come to pass, Mr. Mason had recommended that Tina join her sister with Jerry and his wife and added, ". . . [b]ut I would hope that that would not become the issue."

With Mr. Mason, we conclude that Tina and Cindy have known a good bit of confusion in their lives, while at the same

time both have been loved, cared for and received a great deal of nurturing. The confusion continues down to the present time. This very case has been confusing to them, and to the court as well, beset as it was by a constantly changing milieu.

The court's concern in custody cases is with the children's physical, intellectual, moral and spiritual well-being. *Commonwealth ex rel. Holschuh v. Holland-Moritz*, 448 Pa. 437, 292 A.2d 380 (1972). The sole issue to be decided in a custody proceeding between contending parents is the best interests and welfare of the children. *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 294, 368 A.2d 635; 637 (1977).

In a custody dispute between parents, the Court must consider the fitness of each parent in determining the best interest and permanent welfare of the children. The burden of proof is shared equally by the parents; custody is awarded on the basis of a preponderance of the evidence, so the hearing judge awards custody according to what the preponderance of the evidence shows. *In re Custody of Hernandez*, 249 Pa. Super. 274, 376 A.2d 648, 651 (1977).

As we said earlier, much of the evidence we heard was irrelevant history for the Court must award custody on present conditions, *McGowan v. McGowan*, 248 Pa. Super. 41, 374 A.2d 1306 (1977); *Commonwealth ex rel. Tucker v. Salinger*, 244 Pa. Super. 1, 366 A.2d 286 (1976). At this time we are concerned with the parents' present fitness, not the nature or extent of their past misconduct. *Commonwealth ex rel. Jacobson v. Jacobson*, 181 Pa. Super. 369, 124 A.2d 462 (1956); *Kerr v. Cress*, 194 Pa. Super. 529, 168 A.2d 788 (1961). We mention this because there was testimony regarding both parents which we were asked to balance which did not bear on their present fitness to have custody of the children.

We have concluded that either home, with Janice and her husband or with Jerry and his wife, is a suitable home for both of the children. Here Tina wants to remain with her mother and Cindy wants to remain with her father. Where a child wants to stay is a factor which should be considered but is not controlling. *In re Leskovich*, 253 Pa. Super. 349, 385 A.2d 373 (1978). Any benefit derived from forcing a child to reside with one parent solely to keep the children together can be outweighed by the detrimental effects on the child who prefers not to live with that particular parent. *Sykora v. Sykora*, 259 Pa. Super. 400, 393 A.2d 888 (1978); *In re Russo*, 237 Pa. Super. 80, 346 A.2d 355 (1975).

We conclude that it is in the best interest for both of these

children to remain where they are. We say this despite Mr. Mason's feelings that they should both be with their father if the Cramers did not continue to look after Tina. Actually we are preserving what has evolved through the parents own actions and what the girls want. Cindy likes her father's home and enjoys her relationship with her step brothers and sister. The life style may be a little over-oriented to the Moose Lodge which we do not necessarily consider unsuitable for the child to frequent, but neither is it a child's playground; being there could be very boring. But Tina does not get along as well with Bonnie's children and is not as comfortable with her father and step-mother as she is with her mother and step-father. Moreover it appears to us she feels more confident that her relationship with the Cramers will continue if her closer ties are with her mother and at this time, that is very important to her.

Actually we do not feel we are separating the children. The doctrine that suggests the children should be raised together is like all the others, subject to the best interests of the children. As we contemplate this case, Tina and Cindy will be spending a considerable time together, being separated only during the week, together on the weekends and during vacation periods. If the parties resided in the same community and the children were in the same school system, this might be a proper case for joint custody with virtually equal time spent with each parent. But that is not available under the circumstances.

So we will permit the children to reside where they are, spend their weekends together and share their Christmas and summer vacations, realizing that if circumstances change, we can always make a change in this arrangement.

ORDER OF COURT

September 4, 1980, it is ordered that Tina Barnhart and Cindy Barnhart shall be in the joint custody of their parents, Jerry Barnhart and Janice McCardel; that Cindy shall have her primary home with Jerry Barnhart and Tina shall have her primary home with Janice McCardel.

The parents shall arrange for the children to be together each weekend from Friday evening until Sunday evening, alternating between the homes, with the parent who is to have custody of the child on a particular weekend picking the child up at the other parent's home and returning her.

For the Christmas vacation in 1980, the children shall be with Janice until two o'clock p.m. on Christmas Day and with Jerry from that time until 6:00 p.m. on the day prior to the

LEGAL NOTICES, cont.

HUBER First and final account, statement of proposed distribution and notice to the creditors of Dorothy Rock and Ronald Rock, executors of the estate of Ethel V. Huber, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

JAMISON First and final account, statement of proposed distribution and notice to the creditors of John W. Jamison, Jr. and Howard D. Jamison, executors of the estate of John W. Jamison, late of Guilford Township, Franklin County, Pennsylvania, deceased.

KNEPPER First and final account, statement of proposed distribution and notice to the creditors of Grace Knepper and Virginia K. Shetron, executrices of the estate of A. A. Knepper, a/k/a Archie A. Knepper, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

PHIPPS First and final account, statement of proposed distribution and notice to the creditors of John R. Walker, administrator of the estate of Clayton S. Phipps, late of the Borough of Greencastle, Franklin County, Pennsylvania, deceased.

PIPER First and final account, statement of proposed distribution and notice to the creditors of John R. Piper, Sr., administrator of the estate of Wayne L. Piper, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

PEIFFER First and final account, statement of proposed distribution and notice to the creditors of the Farmers & Merchants Trust Company, administrator of the estate of Charles V. Peiffer, late of St. Thomas Township, Franklin County, Pennsylvania, deceased.

STOOPS First and final account, statement of proposed distribution and notice to the creditors of Nellie M. Hess, Charles F. Stoops, Mary Jane Cordell and John A. Stoops, Jr., executors of the estate of John Alfred Stoops, Sr., late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of Orphans' Court
Franklin County, Pennsylvania

(10-10, 10-17, 10-24, 10-31)

Marshall C. Gearhart : In the Court of Com-
and **Mary K. Gearhart** : mon Pleas of the
: hart, his wife, : 39th Judicial District
: Plaintiffs : of Pennsylvania

vs.

James Poe McMullen, : Franklin County
his heirs and assigns, : Branch
Elliott T. Lane, his :
heirs and assigns, :
John Bup, his heirs :
and assigns and **John Doe**, his heirs and : Civil Action - Law
assigns, : A. D. 1980 - 289
: Action to Quiet
: Defendants : Title

TO: James Poe McMullen, Elliott T. Lane,
John Bup and John Doe, their heirs,
executors, administrators and assigns,
Defendants:

LEGAL NOTICES, cont.

You are notified that the plaintiffs have commenced an Action to Quiet Title against you by a Complaint filed on October 6, 1980 in the Office of the Prothonotary in Franklin County, Pennsylvania, to the above number and term.

If you wish to defend against claims set forth in this Complaint you must take action within 20 days after service of the Complaint and notice has been completed by publication by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any other claims or relief requested by the plaintiffs. You may lose money or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Legal Reference Service
Franklin-Fulton Counties
Court House
Chambersburg, Pennsylvania 17201
Telephone No.: Chambersburg
1-717-264-4125, Ext. 13

The Action concerns land in Montgomery Township, Franklin County, Pennsylvania, described as follows:

BEGINNING at a corner of a garage on lands owned by the Plaintiffs, and running thence by lands of the Plaintiffs, north 43 degrees 4 minutes 26 seconds west 41.01 feet to a steel axle; thence still by lands of the Plaintiffs, north 70 degrees 57 minutes 32 seconds west 137.05 feet to an iron pin, a corner of lands of the heirs of James Reidout; thence following a stone wall and by lands of the heirs of James Reidout, north 10 degrees 34 minutes 55 seconds east 347.64 feet to an iron pin at lands of Koppers Company, Inc.; thence by lands of Koppers Company, Inc., south 59 degrees, 56 minutes 49 seconds east 252.15 feet to an iron pin at corner of lands formerly of the Plaintiffs now of James C. Gearhart and Anna G. Gearhart, his wife; thence by same, south 23 degrees 13 minutes 59 seconds west 315.72 feet to the corner of the garage, the place of beginning. **CONTAINING** 1.55 acres as shown on a plan by Melvin O. Gladhill, R.S., dated April 5, 1979.

By **Thomas B. Steiger, Jr.**
Attorney for Plaintiffs
56 South Main Street
Mercersburg, PA 17236

(10-17, 10-24, 10-31)

commencement of school in January. In 1981, the sequence shall be reversed and alternating each year thereafter.

For the summer of 1981, the children shall be with Janice from the close of school until July 15th at 6:00 p.m. and with Jerry from July 15th at 6:00 p.m. until 6:00 p.m. the day before the opening of school. For the summer of 1982 the sequence shall be reversed and alternating each year thereafter.

The parties may make such other arrangements for the children to be together as may be agreeable to them, which should include some opportunities for the children to be together on other holidays.

If the parties cannot work out the arrangements for the children to be together at times contemplated by this order but not specifically scheduled, the Court will make an appropriate order.

It is the intention of the Court in placing the children in the joint custody of the parents that they shall confer and attempt to reach agreement in decisions that significantly affect the lives of the children. Both parents are responsible for knowing how each child is doing in school, and in formulating a significant program for the physical, moral and spiritual well being of the children by cooperating in seeing that the children are given opportunities to develop in these areas.

The parties shall each pay their own costs.

SMITH and MANNING v. GLAZER, C.P. Franklin County Branch, A.D. 1980 - 148

Assumpsit - Oral Contract - Brokers Commission - Break in Negotiations

1. If the actions of a real estate broker constitute the efficient cause of the production of a buyer, the broker is entitled to a commission even though the sale is finally concluded by the seller.

2. An exception to the general rule occurs when there is a break in negotiations between the parties.

3. A broker is entitled to his commission if he procured a person with whom a bargain is made upon any term unless there is something special in the contract of employment.

4. An allegation of an oral contract in which it is said the owners secured the brokers to procure a purchaser is not sufficiently specific in that an