

conducted by verbal interview and testing. The plaintiff's attorney is authorized to be present at the examination and to record the proceedings.

KIRK v. KIRK, C.P. Franklin County Branch, F.R. 1979 - 275-C

Custody - Shared Custody - Two School Districts - Educational Responsibility - Children's preference

1. A child's preference for one parent over another is a factor to be carefully considered when based on good reasons, but it is not controlling.
2. Where a mother is the primary caretaker of a child of tender years throughout most of the child's life, the Court considers this a substantial factor in a custody matter.
3. Where parents reside in different school districts and they share custody of a child, there will be no tuition charge for the time the child resides outside the district providing the child's schooling, if the court charges one parent with the educational responsibility of the child and the child enrolls in that parent's district.

David C. Cleaver, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., August 11, 1983:

This action was commenced with the filing of a complaint for custody by the plaintiff on July 16, 1982, and an order was entered on the same date scheduling a meeting of the parties and children with the Court's Child Custody Mediation Officer, Dr. James W. Nutter, on August 11, 1982 at 1:00 o'clock p.m., and scheduling a hearing on the matter for September 2, 1982 at 1:30 o'clock p.m. The parties met with Dr. Nutter pursuant to the court order and the Child Custody Mediation Officer's report of July 16, 1982 was forwarded to the Court. On September 2, 1982 the parties stipulated to the entry of an order that the parties should have shared custody of their children, Robert L. Kirk, Jr., born May 8, 1978, and Luene R. Kirk, born September 22, 1979, and providing for physical custody:

(a) With Minta L. Kirk, except as hereinafter provided.

(b) Robert L. Kirk shall pick up the children at the Trinity Lutheran Church Day Care Center, Commerce Street, Chambersburg, Pennsylvania, on Thursday afternoon, September 9, 1982, and shall have custody of them until 7:00 o'clock p.m., on Sunday, September 12, 1982, and alternating weekends thereafter.

(c) The parents shall alternate the following national holidays they being Labor Day, Thanksgiving, New Year's Day, President's Day, Easter Day, Memorial Day, and July 4th from 9:00 o'clock a.m., until 7:00 o'clock p.m. with Robert L. Kirk commencing with Labor Day 1982.

(d) Robert L. Kirk shall have in even numbered years custody of the children from Noon on December 23 until Noon December 25, and in odd numbered years from Noon on December 25 until Noon December 27.

The order also provided that the father should provide transportation for the children; that the order would remain in effect for six months and thereafter either party might move for a hearing on the merits, and neither party should exercise overnight custody of the children in the presence of a member of the opposite sex not related by blood or marriage.

On April 22, 1983, counsel for the defendant presented a motion for hearing, and an order was signed setting June 6, 1983 at 1:30 o'clock p.m. as the date and time set for hearing on the matter. A hearing was held as scheduled on June 6, 1983, and at the conclusion of the hearing an order was entered which provided:

"Minta L. Kirk, mother and Robert L. Kirk, father, shall have shared physical custody of their children, Robert L. Kirk, Jr., born May 8, 1978, and Luene R. Kirk, born September 22, 1979, on the basis of Robert L. Kirk, father, receiving the children at the Trinity Lutheran Church Day Care Center on Friday, June 10, 1983, at 3:00 p.m. or close to that approximate time, and he shall have the children until Friday, June 24, 1983, when Minta L. Kirk, mother, shall pick up the children and have them for the following two weeks and like two-week periods thereafter until further order of court.

"During the summer of 1983 the provisions for holiday visitations and for weekend visitations will be cancelled until further order of court.

"The rule remains in effect that neither party shall exercise

overnight custody of the children in the presence of a member of the opposite sex not related by blood or marriage, and each party shall bear their own costs."

On August 4, 1983, a continued hearing was held in the matter and at the conclusion the evidence was marked closed. The case is now ripe for disposition.

We make the following Findings of Fact:

1. Minta L. Kirk, hereinafter mother, resides at 413 Park Circle, Chambersburg, Pa.

2. Robert L. Kirk, hereinafter father, resides at 4479 St. Thomas Lane, St. Thomas, Pa.

3. Mother and father were married March 17, 1978; finally separated in late November 1979 and were divorced on July 30, 1980.

4. Two children were born of the marriage; Robert L. Kirk, Jr., on May 8, 1978, and Luene R. Kirk on September 22, 1979.

5. Pursuant to the court order of July 16, 1982, Dr. James W. Nutter, Child Custody Mediation Officer, met with mother and father on August 11, 1982, to attempt to resolve the custody issues for the parties.

6. Dr. Nutter's written report of August 16, 1982 concludes:

"Summary and Recommendations: It seems it has taken Mr. Kirk almost three years to realize that Mrs. Kirk may not be the 'best parent' for his children. It was also Mrs. Kirk who petitioned for legal custody and Mr. Kirk's preference for custody even now is a *response* to her petition. This examiner believes that Mrs. Kirk's immaturity, ignorance or naivete may very well be limitations in making good judgments about the care of her children. The court may have to be very *specific* and almost parent-like in its directions to Mrs. Kirk about the care of her children. It is also this examiner's opinion that Mr. Kirk needs to establish himself as an involved, consistent, and genuine nurturing parent for both of his children before he should be considered as the custodial parent. In the meantime, Mr. Kirk should be offered regular, structured visitation hours that will enable him to establish this credibility. Special attention should be given to the exact place and time of visitation. Mr. Kirk apparently is not allowed to 'trespass on his mother-in-law's property' and it may have been difficult for him to arrange 'pick up and drop off' arrangements for his children."

7. Father married Kathy Kirk (hereafter stepmother) on August 9, 1982. They had dated for two years prior to their marriage.

8. Father and mother are both employed at Letterkenny Army Depot. Stepmother is employed at the Cumberland Valley Mental Health Center.

9. The stepmother has two children from a prior marriage. A daughter aged 7 and a son aged 13. The thirteen-year-old son resides with stepmother and father.

10. Father, stepmother and her thirteen-year-old son reside in a 12 x 65 foot mobile home improved with a 12 x 35 foot addition. The mobile home has 3-bedrooms. When Robert, Jr. and Luene visit with father, they share a bedroom. He testified if he had more time with children he would construct another bedroom so each child would have his or her own room.

11. Despite the provisions of the order of September 2, 1982, mother did not make the children available to father at Noon on December 25, 1982, and it was necessary to secure the intervention of the State Police and instructions from the Honorable George C. Eppinger before the children were made available at 10:00 p.m. on Christmas night.

12. Father feels that he appropriately disciplines the children and has no problem with them when he has them in his custody.

13. Father objects to mother permitting the children to ride in the back of her pickup truck because he feels it is a very unsafe practice.

14. Mother has on one or more occasions left Robert, Jr., Luene and her son by a prior marriage with father purportedly for several hours to go shopping, and has not retrieved them until the next day because she has gone to a bar.

15. Mother has arrangements with the Trinity Lutheran Church Day Care Center for the care of both of the children while she is at work. She plans to continue those arrangements in the future, and Robert, who will commence kindergarten in September 1983, will be taken from the Day Care Center to the Mary B. Sharpe Elementary School and return to the Center at the end of kindergarten there to remain with Luene until they are picked up by mother.

16. Father seeks equal shared custody with mother and indicated that it was his intention to also use the Day Care Center.

17. Mother testified that the Day Care Center is limited to low income families, and it would not be available for the children during any time they were in the custody of father.

18. Father introduced no evidence as to what alternative babysitting arrangements he had made or would be available.

19. Father testified that Robert, Jr. is not toilet-trained and defecates in his pants, and Luene wets her bed. He expressed the opinion that he could help the children overcome these problems if he had more time with them.

20. Mother conceded that the children do have toilet-training problems, and they occur before they go to visit father and after they return. Since father and mother have had alternating bi-weekly custody periods since June 6, 1983, the toilet-training problems related by father have not improved.

21. Mother testified from a diary she maintained that from September 2, 1982 until June 2, 1983, father had had 23 opportunities under the September 2, 1982 order for visitation/custody with the children and had failed to exercise it on six separate occasions, which upset the children who had been prepared to be picked-up by him. Father admitted missing two opportunities to be with the children because he and stepmother had to work, but denied he had missed six visitations. Stepmother testified that she did not believe they had missed six visits.

22. Mother lives in an apartment which has a kitchen, livingroom, two bedrooms and bath and storage room. She and Luene sleep in one bedroom and Robert, Jr. sleeps in the other bedroom.

23. Mother denies that any male is living in her home.

24. The Court attempted to interview both children in chambers in the presence of counsel and the court reporter. Robert, Jr. refused to speak to anyone. Luene could only state that she wanted to be "with Daddy." She declined to give any reason or explanation.

25. Stepmother testified that she is well acquainted with both children, likes them, gets along well with them, and would be happy to have them in her home. She indicated that alternating months of shared custody would be fine.

26. The homes of mother and father are both adequate and appropriate for both children.

27. Mother is a proper person to have custody of the children.

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28. Father and stepmother are proper persons to have custody of the children.

29. Mother testified at the August 4, 1983 hearing that the children become very upset, cry and tell her they do not want to go visit with father when his two-week period approaches.

30. No evidence was introduced by or on behalf of father as to how the two weeks alternating custody has worked out since June 6, 1983.

31. Edwin H. Sponseller, Assistant Superintendent of the Chambersburg Area School District, testified that he had been advised by the Department of Education that in a shared custody situation where one parent resides within the school district and the other outside that school district, if the Court charges the parent living within the school district with the educational responsibility for the child, and the child is enrolled in that district there will be no tuition charge made even if the child resides with the other parent on a joint custody basis for part of the school year.

DISCUSSION

As in all custody cases, the standard of review to be employed by this Court is the best interests and permanent welfare of the two children involved. While proper regard must be given to the fitness of the parents, all considerations are subordinate to the children's physical, intellectual, moral, spiritual, and emotional well-being. *Jon M. W. v. Brenda K.*, 279 Pa. Super. 50, 420 A. 2d 738 (1980); *Commonwealth ex rel. Husack v. Husack*, 273 Pa. Super. 192, 417 A. 2d 233 (1979); *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 368 A. 2d 635 (1977). Since this custody dispute is between the two natural parents, neither side is dealt the burden of proof and no presumptions may be resorted to; rather, the Court must determine what will serve the children's best interests. *In re Custody of Temos*, Pa. Super. , 450 A. 2d 111 (1982).

The evidence as presented reveals that mother and father separated in the latter part of 1979 when Bobby was one-and-a-half years old and Luene was just two-months-old. Almost three years later, the parties entered into a stipulated custody agreement on September 2, 1982, as a result of mother filing a petition for custody wherein the parents were awarded shared legal custody of their children. Primary residential custody was placed in mother with father receiving three-day custody periods every other weekend; alternating holiday custody was also awarded. The Court order provided that either party could move for a hearing

on the merits after a six-month period, and this is what father chose to do.

Mother testified that from the time the order was entered in September of 1982 until the date of the hearing, father had twenty-three opportunities for visitation and had failed to come for the children on six of those occasions. While father and step-mother admitted to missing a few visitation periods with the children, neither felt they had missed six. However, they were unable to convincingly rebut mother's testimony. Mother testified that she maintained a diary for the purpose of recording the amount of time the children spent with their father. Also included in the diary was a brief notation as to the children's behavior on their return from each visit. We have no reason to doubt the accuracy of mother's records and find it disturbing that approximately one-fourth of the time specifically granted father to develop a meaningful relationship with his children resulted in missed opportunities of his own making.

As observed by Dr. Nutter, Child Custody Mediation Officer, father's interest in custody was in response to mother's petition rather than his own initiative. When this factor is considered together with his failure to exercise custody twenty-five percent of his allotted time, father's commitment to his children and sincerity in requesting custody of the children becomes suspect.

Clearly mother has played the role of primary caretaker throughout most of the children's lives. This is a substantial factor to be weighed by the Court in adjudicating a custody matter where the children are of tender years. *Commonwealth ex rel. Jordan v. Jordan*, Pa. Super. , 448 A. 2d 1113 (1982). We recognize that each parent's ability to care for the children must be determined as of the time of the custody hearing and not as of an earlier time. *In re Custody of Frank*, 283 Pa. Super. 229, 422 A. 2d 572 (1980). However, if in the past the primary caretaker has tended to the child's physical needs and has exhibited love, affection, concern, tolerance, discipline and a willingness to sacrifice, we may rightfully conclude that those qualities will continue into the future. *Commonwealth ex rel. Jordan v. Jordan*, supra.

Mother has demonstrated her concern for the children by providing for supervision of Bobby and Luene at a day-care center while she works. Since father's income apparently would not permit him to avail himself of the same day-care center, mother expressed her genuine concern about the care of the children during the time periods they are in the residential custody of father and step-mother. No evidence was presented by father concerning his plans for the children through the day while he and

his present wife are at work.

Mother testified that since the Court modified its original order following the first day of hearing in this matter on June 6, 1983, and awarded the parents alternating two-week periods with the children, both Bobby and Luene become quite upset when mother packs their clothes for them to stay with their father. Father presented no evidence as to how his two-week alternating custody periods have worked out.

When the Court attempted to talk to the children, Bobby refused to speak to anyone. Luene said that she wanted to live with her Daddy but would give no reason for her choice. We recognize that a child's preference for one parent over the other is a factor to be carefully considered although it is not controlling. Such a preference must be based on good reasons. *Shoup v. Shoup*, 257 Pa. Super. 263, 390 A. 2d 814 (1978). In this case where Luene is not yet four-years-old and could give no reason whatsoever for her choice, we have given very little weight to her preference. We recognize the realities of custody situations wherein the environment offered by the parent out of custody often appears more exciting than the routine experienced with the primary caretaker.

After considering all factors involved in this case, we conclude that at this time the best interests of the children require that a larger portion of their time continue in the stable environment customarily provided by their mother. Recognizing the importance of developing a good and viable relationship with their father, the children should spend a substantial amount of time with their father. Therefore, shared custody of the two children shall be awarded to the parents with mother exercising residential custody for a three-week period followed by one week with the father and step-mother. At the end of father's one week with the children, the four-week cycle shall begin again. Mother, who resides in the Chambersburg Area School District, will have educational responsibility for the children. Father will be responsible for transporting or arranging for the transporting of the children to their assigned school in the Chambersburg Area School District.

ORDER OF COURT

NOW, this 11th day of August, 1983, shared physical custody of Robert L. Kirk, Jr., born May 8, 1978, and Luene R. Kirk, born September 22, 1979, is awarded to Minta L. Kirk,

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mother, and Robert L. Kirk, father. The shared physical custody shall be exercised by the parents in manner following:

1. Residential custody of the children shall be exercised by Robert L. Kirk and Kathy Kirk, his wife, at their home from 4:00 o'clock p.m. on Friday, August 19, 1983 until Friday, August 26, 1983.

2. Residential custody of the children shall be exercised by Minta L. Kirk at her home from 4:00 o'clock p.m. on Friday, August 26, 1983 until Friday, September 16, 1983.

3. Thereafter residential custody on alternating periods of the week for father and stepmother and three weeks for mother.

4. Alternating the following national holidays: Labor Day, Thanksgiving, New Year's Day, President's Day, Easter, Memorial Day and July 4th from 9:00 o'clock a.m. until 7:00 o'clock p.m. Minta L. Kirk shall commence with Labor Day 1983.

5. Robert L. Kirk shall have custody of the children in even-numbered years from Noon on December 23 until Noon on December 25, and in odd-numbered years from Noon on December 25 until Noon on December 27.

6. The children shall be enrolled in and attend public school in the Chambersburg Area School District, and Minta L. Kirk, who resides in the said District, shall have educational responsibility for the children.

7. Unless the parents agree in writing to the contrary, Robert L. Kirk shall be responsible for arranging for the transportation of the children from the Trinity Lutheran Church Day-Care Center to his home on those Friday afternoons when his week of residential custody begins, and returning them to the same place on the Friday mornings when his week ends.

8. Unless the parents agree in writing to the contrary Robert L. Kirk shall pick up and return the children at the home of Minta L. Kirk when exercising holiday custody as above provided.

9. Neither party shall exercise overnight custody of the children in the presence of a member of the opposite sex not related by blood or marriage.

Robert L. Kirk shall pay the costs of this proceeding.

CALECO V. WILSON COLLEGE AND SQUIRES APPLIANCES,
C.P. Franklin County Branch, No. A.D. 1982 - 79

Breach of Contract - Damages - Attorneys fees - Disqualification of Counsel

1. The usual and ordinary consequence of a breach of contract is lost profits and any value realized as a result of defendant entering into a more advantageous agreement with a third party is not an appropriate measure of damages.

2. The award of counsel fees as costs is not appropriate until it is determined who will ultimately prevail and upon proof by the prevailing party of his right to such fees.

3. Disciplinary Rules 5-105 (B) and 5-105 (C) do not bar one law firm from representing both defendants at the preliminary objection stage where there is a community of interest in requiring the plaintiff to properly plead its claim.

Benson Zion, Esquire, Counsel for Plaintiff

Allen Cech, Esquire, Counsel for Plaintiff

Robert C. Schollaert, Esquire, Counsel for Defendants

OPINION AND ORDER

KELLER, J., January 10, 1983:

This action in assumpsit and trespass was commenced by the filing of a complaint on March 17, 1982. In Count I in Assumpsit, the plaintiff alleges and incorporates by attachment a written agreement with defendant Wilson College for the supplying to defendant of certain coin automatic washing machines and drying machines; the performance of its obligations under the agreement; notice of the defendant's termination of the contract due to dissatisfaction with the service provided by plaintiff by Philip S. Cosentino of Black & Davison, Counsel for Defendant; communications exchanged which included notice from Robert C. Schollaert of Black & Davison that plaintiff breached its contract and the washers, dryers and other equipment should be removed or the defendant College would remove them and store them at plaintiff's expense; the disconnection, removal and secreting of plaintiff's appliances and the installation of other appliances under an agreement with a third party. In Count II in Trespass against defendant Wilson College and defendant Squires Appliances, the plaintiff alleges the defendants acted covertly and willfully in a conspiracy to disrupt, interfere and destroy the