

BAR NEWS ITEM

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Middle District of Pennsylvania
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Scranton, Pennsylvania

The United States District Court for the Middle District of Pennsylvania is seeking qualified candidates for the position of Pro Se Law Clerk. The Pro Se Law Clerk provides legal assistance to the Court in connection with prisoner petitions and complaints. General responsibilities include substantive screening after filing of all prisoner and inmate petitions and motions, including state habeas corpus petitions, motions to vacate sentence, and civil rights complaints. The position involves drafting appropriate recommendations and orders for Court's approval.

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ALBERT WILLIAM GRASSLEY VS. DEBORAH A. SPIDLE-GRASSLEY, C.P., Franklin County Branch, F.R. 1992-683

Civil Action-Law-Custody

1. Child custody disputes are governed by several well-established principles. The primary consideration is the best interest of the child.
2. The court must determine which parent is more likely to provide the child with physical, emotional and spiritual care.
3. The court must consider the importance of continuity in the child's life by maintaining a stable relationship with an established parental figure in a known physical environment.
4. The court must also consider which parent is more likely to encourage regular contact between the non-custodial parent and child.
5. A parent's persistent disobedience of court orders demonstrates a disrespect for the legal process and raises doubts as to his right to be awarded custody.
6. Legal custody is defined as the legal right to make major decisions affecting the best interest of a minor child, including but not limited to, medical, religious and educational decision.
7. Shared custody is shared legal or shared physical custody, or both, of a child in such a way as to assure the child of frequent and continuing contact with and physical access to both parents.
23 P.S. Section 5302
8. It is well-established that a mere showing that an alleged contemtor failed to comply with an order does not in itself establish contempt. The party must be shown to have willfully, knowingly and intentionally disobeyed a court order or decree.

James K. Reed, Esquire, Counsel for Plaintiff

Michael B. Firmucane, Esquire, Counsel for Defendant

OPINION AND ORDER OF COURT

HERMAN, J., August 29, 1994:

The plaintiff, Albert Grassley commenced this action on August 11, 1992, against the defendant, Deborah Spidle-Grassley, seeking custody of the parties' son, Seth Uriel Grassley. The parties were directed to meet with the court mediation officer, but an agreement could not be reached and the officer prepared a homestudies report on November 5, 1992. On November 9, 1992, the court entered a Temporary Custody Order granting Deborah

primary residential custody of Seth with partial custody/visitation to Albert.

On September 23, 1993, the court held the first of three custody hearings. Also at issue was a contempt petition filed by Deborah alleging that Albert had disobeyed the terms of the November 9, 1992 Temporary Custody Order. At the second hearing on December 14, 1993, Albert presented a petition for emergency relief requesting that he be granted primary residential custody of Seth pending the final custody determination. The petition was denied and the November 9, 1992 Temporary Custody Order remained in effect until the last hearing on April 4, 1994. At the close of the evidence, Albert stipulated on the record that he no longer intended to pursue primary residential custody, but only liberal partial custody while retaining shared legal custody. Deborah sought primary residential as well as sole legal custody of Seth.

Pending our final determinations, we modified the Temporary Custody Order to grant Albert partial custody of Seth beginning August 2, 1994, until August 30, 1994. Upon a later informal request by both parties, the summer visitation was changed to June 24, 1994, through July 22, 1994¹. We directed counsel to submit legal memoranda on the defendant's Plaintiff's counsel did not submit an Order of Court embodying this agreement between the parties contempt petition and the custody issue. We received the memoranda on or about May 6, 1994, and therefore this matter is ready for decision.

The parties were married on October 23, 1982. Seth was born on March 9, 1985, and was eight years old when the custody hearing began. Albert left the marital home for fifteen months after Seth's birth, and until Seth was three years old, was absent for periods of time. Beginning in July of 1990, Albert was stationed at Fort Drum military base in Watertown, New York. He came home for weekends once a month, but gradually came home approximately once every seven weeks and for major holidays. Deborah and Albert's final separation occurred in July of 1992. On July 29, 1992, a final order was entered pursuant to

¹ Plaintiff's Counsel did not submit an Order of Court Embodying this Agreement between the parties.

a protection from abuse petition filed by Deborah against Albert. The order granted Deborah legal and primary residential custody of Seth and Albert was granted visitation. On August 11, 1992, Albert filed this action seeking shared legal and residential custody.

Albert is employed by the United States military. In the fall of 1993, he was transferred from Fort Drum to a military facility in Ohio, where he now lives in a three-bedroom home with his girlfriend, Nancy Waters, a registered nurse and her fifteen year old daughter. Deborah is a Certified Public Accountant who works from her home in Chambersburg on Siloam Road. This home was the marital residence since August of 1989.

Seth Grassley, currently nine years old, has a history of emotional and behavioral problems, including hyperactivity, irritability, temper tantrums, and defiant and destructive behavior. In the spring of 1991 at age six, he was diagnosed by his psychologist-counselor, Sally Rooney, of the Carlisle Barracks as having Attention Deficit Disorder (hereinafter "A.D.D."). His pediatrician confirmed this diagnosis and in September of 1991, prescribed Ritalin. In October of 1991, Seth's medication was changed to Cylert, which he still takes on an irregular basis. During the 1992-1993 school year, Seth's behavior became more manageable, particularly in structured settings. Less structured environments, such as the playground, the cafeteria, and riding the bus, still presented problems for him, but he worked well with his guidance counselor and showed improvement academically.

The November 9, 1992 Temporary Custody Order granted Albert summer custody of Seth and Seth lived with him at Fort Drum between June 20, 1993, and August 3, 1993. For approximately two weeks, Albert was off work and he and Seth engaged in various activities together, such as fishing, swimming, camping and trips to amusement parks and carnivals. Nancy Waters joined them on some of these occasions. During the rest of the summer, Seth attended a day camp on the base with other children while Albert was at work during the day.

Deborah contacted Albert's supervisors at Fort Drum several times during the summer to complain about the living accommodations there, believing that the communal barracks

arrangements placed Seth at risk for sexual abuse. Albert perceived her involvement as interference with his summer custody of Seth.

At the day camp, Seth committed numerous acts of aggression against other children. (Defendant's Exhibits #1-9). This behavior included hitting, pushing, choking, cursing, kicking, beating with a pool stick, giving nosebleeds, and destroying other children's projects.

On several occasions, Albert had to leave work in order to remove Seth from the camp because the staff could not physically control him. In his testimony, Albert downplayed the seriousness of these incidents, maintaining that Seth's behavior does not differ significantly from that of other boys his age.

One of the major areas of disagreement between the parties is whether Seth has A.D.D. and requires medication. Although the November 9, 1992, Temporary Custody Order required Albert to insure that Seth receive his medication, Albert admitted that he did not do so for at least ten days during the summer in an effort to wean him from it. Albert's failure to regularly medicate Seth is one of the bases for Deborah's contempt petition. While acknowledging that Seth is an angry and aggressive child, Albert attributes this more to Deborah's negative influence than to A.D.D.

When Seth first arrived at Fort Drum, he would wince and hide his head whenever anyone came near, but relaxed after approximately two weeks. Pursuant to the Temporary Custody Order, Deborah visited Seth at the base for a weekend in July. After a phone call with Deborah prior to her arrival, Seth became distressed and fearful. He cried and complained to Albert that Deborah beats him all the time and hits him frequently with a wooden spoon. The call aroused intense anger in Seth, which he manifested by throwing objects off a table onto the floor.

Albert returned Seth to Deborah on August 3, 1993. In her contempt petition, she argues that Albert did not adhere to the visitation schedule set forth in the order. The order provided that Albert was to have visitation custody "Seven weeks each summer commencing at 7:00 p.m. on the third Friday in June through 5:00

p.m. on the first Sunday in August." Albert indicated at the hearing that the order is ambiguous; the dates specified total six weeks, but the actual language grants him seven weeks. Although he believed that he was in fact entitled to seven full weeks with Seth, he returned Seth to Deborah after six and one-half weeks.

In addition to partial custody in the summer, the November 9, 1992 Temporary Custody Order granted Albert custody of Seth every third weekend. However, the evidence indicates that Albert was not consistent in exercising his weekend custody rights. When asked how often he had done so since the entry of the Temporary Custody Order, he could not recall many dates with precision. He testified that he had custody of Seth for one full week in December of 1992, but could not recall visiting in January, February, March or May of 1993. He attributed this infrequent exercise of custody to unpredictable job responsibilities, coupled with the fact that Fort Drum was a seven hour drive from Chambersburg.

There was sharp disagreement between the parties regarding Albert's weekend custody schedule. Deborah maintained that she would have Seth packed and waiting by the door for Albert's arrival, and that when he did not come, Seth would be angry and disappointed. After one such incident, she wrote Albert a letter stating that he should notify her one week in advance if he intended to exercise his custody rights to avoid needlessly raising Seth's expectations. (Plaintiff's Exhibit #24). Albert maintains that he has always notified Deborah in advance as to when he intended to come for a particular weekend. He testified that Deborah would tell Seth that he was coming in a deliberate effort to manipulate the boy's emotions against him.

The mediation officer's report indicates that Albert was twice previously married, first between 1965-1970, and then from 1972-1980. His son, Aaron, now approximately 21 years old, was in the primary residential custody of his mother, although Albert maintained contact through phone calls, visitation and summertime vacation. He also has a son, Robert, now approximately 28 years old, who remained in his mother's custody. Between 1970 and 1973, Albert was stationed in Germany, and Robert was adopted by his stepfather in 1973.

Upon returning to school in September to begin third grade, Seth's behavior became dramatically worse. During a one-month period, he was temporarily suspended following several incidents of aggression against teachers and classmates. Both in and out of the classroom, Seth's behavior was uncontrollably belligerent and disruptive. On the school bus, he constantly punched, choked and spit on other children. He behaved wildly in the cafeteria, throwing food and pushing other children onto the ground. Without provocation, he would overturn desks, throw books and chairs, choke, punch, scream and spit at his classmates and teachers. He pulled a chair out from under a girl who fell backward and hit her head. During one violent outburst, the classroom had to be evacuated and three adults were needed to forcibly restrain him.

Seth was assigned a teacher's aide to work one-on-one with him. At one point, he became angry at her, kicking her and hitting her on the lip with his head. When the school principal, Jeffrey Lucas, attempted to assist her in restraining Seth, the boy kicked him in the leg. Both she and Mr. Lucas filed charges of aggravated assault with the state police. Mr. Lucas, who has been a teacher for approximately six years, testified that Seth is the most incorrigibly violent and aggressive child he has ever seen. He stated that Seth is completely indifferent to the pain he causes, has no sympathy to appeal to and blames others for his destructive behavior.

Mr. Lucas testified that Deborah was always available to come to the school to remove Seth following such assaults and cooperated to some extent with school authorities in their attempts to control Seth's behavior. She would not grant the school officials permission to paddle Seth, however, and did not always agree with their suggestions. Mr. Lucas wanted to have Seth examined by a school evaluator to determine the root causes of his aggression, but Deborah resisted such efforts and no evaluation was performed. Albert testified that Deborah did not send him the school reports and he had to contact the school to obtain these records. He acknowledged that he has not visited the school or directly spoken with Seth's teachers and counselors for several years.

At the end of September, Seth was indefinitely suspended from school because he posed a significant danger to the other children. Beginning on October 14, 1993, and continuing until the middle of November 1993, Diane Karper was employed by the school district as Seth's home-bound instructor. She was to teach him at home until the school determined he was able to return to a normal classroom setting.

Ms. Karper has been a teacher for almost twenty years and has experience working with children who have behavior problems. She initially came to Seth's home five days a week. She testified that Seth was very bright and had no trouble keeping pace scholastically. He particularly enjoyed science, but resisted testing unless she made the tests into games. At times, Seth became angry, throwing his pencil and workbooks off the table. Once he threatened to kill her, but she did not take his threats seriously because she felt they had developed a good rapport. She was usually able to persuade him to cooperate.

Deborah is a self-employed C.P.A. and operates her business from her home. She would be in the house when Ms. Karper came to instruct Seth. Ms. Karper gradually became concerned about the effect Deborah's presence was having on Seth. Deborah would walk through the living room where Seth was being instructed approximately twenty times per session, and he found her presence disturbing. As she walked past, she would give him what Ms. Karper called "the evil eye", a threatening look used to control him if he became uncooperative. Seth would stiffen and withdraw, refusing to participate in his lessons until Deborah left the room.

Deborah's primary method of disciplining Seth was to use a one-inch wide belt. She kept it wrapped around her hand as she walked through the living room, and would sit next to Seth at the instruction table with the belt in her hand if he was resisting Ms. Karper's teaching. Seth would not respond to Ms. Karper with his mother present. On numerous occasions, Deborah beat him with the belt with all her strength until he curled up in a ball and attempted to cover himself from the beating. Ms. Karper stated that it was not unusual for each session to be punctuated by three to four such beatings. On one occasion, Deborah slapped Seth

hard across the face. Once she began whipping him, he became progressively angrier to the point where further instruction was impossible and Ms. Karper would have to leave for the day.

Ms. Karper testified that there was one particularly disrespectful remark for which Seth deserved a light beating, but that Deborah's reliance on the belt was excessive, and she appeared on the verge of losing emotional control. Ms. Karper told her that she would contact Children and Youth Services if the over-disciplining continued. Deborah became calmer and promised "I won't do it again when you're here." Ms. Karper worried about what occurred when she was not there to observe Deborah and Seth. When Ms. Karper asked if Deborah knew how to control her temper, Deborah acknowledged that her patience is often pushed to its limits, and she sometimes must lock Seth in his room to avoid over-disciplining him. Deborah said that she often cannot get Seth into bed until 2:00 a.m., and frequently he refuses to take his A.D.D. medication. She stated: "You have no idea what goes on here when you are not here. I cannot control him."

Although there were times when Seth responded positively to Deborah and she encouraged his good performances, Ms. Karper sensed that he was fearful of his mother and under constant pressure. He once told her that Deborah beats him all the time, and that he does not want to live with her. When Ms. Karper first began teaching Seth, he would wince and duck his head at her slightest movement. Seth told Ms. Karper that Deborah whipped him for not completing his homework. Eventually, Ms. Karper left him no homework to do in order to eliminate that source of friction. She testified that she felt sick at the end of each teaching session for fear of what Deborah would do to Seth that evening.

In August of 1993, upon learning that Albert was to be transferred to Ohio, Deborah wrote to Albert's future supervisor requesting that Albert be transferred to a military base with better facilities for Seth. (Plaintiff's Exhibit #23). She had also previously written to Albert's supervisors at Fort Drum, stating that he was in arrears in child support. She spoke openly to Ms. Karper about these actions. She explained that Albert was the abuser in the family and that she knew many people in the prison

system who could "take care of" the situation. Ms. Karper interpreted these comments as a threat against Albert and felt that Deborah was asking her to participate in a vendetta on her behalf.

In mid-November of 1993, Ms. Karper ended her home instruction of Seth and testified that she would not return because witnessing Deborah's mistreatment of him was deeply disturbing to her. She believes that Seth is being mentally abused and possibly physically abused as well. She appeared uneasy about having to testify against Deborah and stated that she was worried about what Deborah might do to Seth now that she has spoken openly about her observations.

Between November 16, 1993, and December 9, 1993, Albert, Deborah and Seth participated in an evaluation and treatment program at the Philadelphia Child Guidance Clinic. The goals of the program were two-fold. The first was to get Seth to stop his defiance and physical aggression by employing behavior modification techniques. The other goal was to obtain some insight into the roots of Seth's problems. Albert and Deborah were asked by the clinic staff to sign a "contract" indicating their willingness to cooperate in achieving these goals. Albert signed the contract, but Deborah would not, believing that the emphasis on behavior modification was too narrow, and would only address the symptoms rather than the causes of Seth's problems.

Albert testified that Deborah argued frequently with the staff psychiatrists and counselors and resisted many of their suggestions and approaches. He testified that the staff asked her to stop interrupting others during discussion sessions and that she should stop telling them how to run their program. These arguments often occurred in Seth's presence. At one point, a staffer told Deborah that she herself needed therapy.

Because the program was a stressful situation for the parties, the staff suggested that both Deborah and Albert take a short break over the Thanksgiving holiday. Albert did so, but Deborah would not, and complained in Seth's presence that Albert was going home "just to get laid."

After Seth and the parties were discharged from the program, the attending psychiatrists and clinicians prepared a report

outlining their observations and treatment recommendations. (Plaintiff's Exhibit #2). The report indicates that Seth is a bright child able to relate in an open and affectionate way to both his parents on an individual basis, but cannot control his anger and aggression when interacting with both parents simultaneously. In family sessions, he was extremely uncooperative and defiant, exhibiting severe temper tantrums featuring spitting, kicking and cursing. He was particularly uncooperative during the first week at the clinic, but continued to have tantrums throughout the course of the program.

Because of Seth's violent outbursts, the initial therapy consisted of attempts to set strategies for controlling his aggression. Deborah was unable to enforce clear behavioral limits, and the parties' inability to work together exacerbated his angry reactions. Seth indicated feeling abandoned by Albert over the Thanksgiving break, and refused to take his medication regularly. However, once Albert returned, Seth became generally more compliant with parental expectations. During Albert's absence, the therapy focused on encouraging Seth to verbalize his feelings and to play various games with Deborah in a relaxed, quiet manner. Eventually, he was able to openly express feelings of sadness at his father's repeated absences and his parents' intense fighting over him.

The clinical staff confirmed the A.D.D. diagnosis and advised that Seth continue to take appropriate medication. They concluded that his problems are caused in part by several inter-related factors: an over-involved mother, and under-involved father, and a high degree of animosity between Albert and Deborah making cooperation on even minor issues virtually impossible. The staff recommended that Seth continue to see his psychologist/counselor, Sally Rooney, in Carlisle, and that he also begin sessions with a child psychiatrist.

Deborah acknowledged that she has hit Seth with a belt, but denied that she uses all her strength. She stated that Seth's behavior has improved since their stay at the Philadelphia Child Guidance Clinic to the point where the belt is no longer necessary. Deborah now uses a method of physical discipline recommended by the clinic staff, she sits on his backside and pins his hands

behind him until he calms down. She testified that this method is effective in controlling Seth's more intense outbursts of aggression. She denied ever abusing Seth, and stated that she did not know why he ducks his head and recoils whenever an adult comes near. She indicated that although the Philadelphia Child Guidance Clinic program helped control Seth's aggression to some extent, he exhibits contrariness on an hourly basis and occasionally resists taking his medication. As of the last hearing, he was still being taught by a home-bound instructor who indicated that he is very intelligent but is not emotionally ready to return to the classroom.

Deborah testified that Albert loses his temper easily when Seth is disobedient. During an incident at the clinic, Albert dragged Seth by the hair into a separate room and threw him against the wall and onto the bed. Although he denied ever abusing Seth, Albert's demeanor on the witness stand demonstrated that he has a short emotional fuse on the subject of his relationship with Deborah. He displayed intense animosity toward her, and the negative dynamic between them most likely undermines his ability to control his frustrations when Seth becomes disruptive.

At the April 4, 1994, hearing, Albert stipulated on the record that Deborah should retain primary residential custody of Seth. He seeks extensive summertime custody, as well as holidays and the third weekend of each month. The Temporary Custody Order of November 9, 1992, granted him telephone access between 7:00-7:30 p.m., but there is evidence that Deborah has made it difficult for him to reach Seth during this narrow time frame. Albert therefore requests unlimited phone contact, which Deborah opposes as too emotionally stimulating for Seth, particularly late in the evening.

Albert testified to having thirty days of vacation each year. Deborah believes that he should use that time when Seth is in his custody during the summer so that Seth would not need to be placed in day care while Albert is at work. Albert opposes having to use all thirty days in the summer because he would then have no days available for emergencies during the rest of the year.

Deborah expressed concern over the moral impact Nancy Waters' presence might have on Seth, and objects to her being in Albert's home overnight when Seth visits.

Deborah seeks sole legal custody of Seth so that she can pursue whatever education and medical guidance he requires without interference from Albert, whom she says opposes her simply for the sake of opposition. Albert initially opposed Seth's admittance into the Philadelphia Child Guidance Clinic program and Deborah had to obtain a court order to override his opposition. Albert expressed contrary views about the program. At first he stated that he would oppose Seth's re-admittance, but later conceded that the program was beneficial to a degree. He has not granted much credence to the A.D.D. diagnosis and has resisted medicating Seth despite indications that the medication helps control Seth's aggression. His final position on this issue was that he does not know whether or not Seth needs medication, but reluctantly agreed to administer it if the court so ordered.

Despite Deborah's claim that Albert's past abandonment of Seth requires that his contact be minimized to avoid further trauma, there is strong evidence that Seth loves his father and wants to maintain that relationship. The school principal, Mr. Lucas, testified that Seth told him he enjoyed being with Albert during the summer. Deborah's 19-year old son Dorian², who has lived with Seth all his life, stated that although Seth is angry and hurt when Albert does not visit on the weekends, he greatly enjoyed the summer vacation at Fort Drum. The Philadelphia Child Guidance Clinic staff as well as court mediation officer, Eugene Stecher, indicated that Seth relates well to Albert, and is generally more compliant with adult expectations when his father is present.

The court interviewed Seth in chambers during the December 1993 hearing. He appeared to be a very intelligent child, but was reluctant to speak. Contrary to the statement he made to Diane Karper, he expressed a preference to live with his mother, and stated that she does not hit him with a belt. He indicated that everything was fine at home between himself and his mother. He also said that he had felt upset when his father left the clinic

² Dorian is Deborah's son from a prior relationship and is Seth's half-brother.

program to go hunting over Thanksgiving and that it hurt when Albert threw him across the room by his hair. He expressed a desire not to return to school, but to have Diane Karper as his teacher because she made learning fun. He appeared tired and withdrawn after only brief questioning.

DISCUSSION

Child custody disputes are governed by several well-established principles. The primary consideration is the best interests of the child. *Boylan v. Boylan*, 395 Pa. Super. 280, 577 A.2d 218 (1990). The court must determine which parent is more likely to provide the child with physical, emotional and spiritual care. *Blew v. Verta*, 420 Pa. Super. 528, 617 A.2d 31 (1992). The court must consider the importance of continuity in the child's life by maintaining a stable relationship with an established parental figure in a known physical environment. *Gerber v. Gerber*, 337 Pa. Super. 580, 487 A.2d 413 (1985).

The court must also consider which parent is more likely to encourage regular contact between the non-custodial parent and child. 23 P.S. §5303(a). The court must not sanction the estrangement of a child from either parent. *Niadna v. Niadna* 343 Pa. Super. 298, 494 A.2d 856 (1985). A parent's attempt to undermine the development of a normal parent-child bond may reflect negatively on his or her maturity level and parenting capabilities. *Plowman v. Plowman*, 409 Pa. Super. 143, 597 A.2d 701 (1991). A parent's persistent disobedience of court orders demonstrates, a disrespect for the legal process and raises doubts as to his right to be awarded custody. *Commonwealth ex rel. E.H.T. v. E.R.T.*, 285 Pa. Super. 444, 427 A.2d 1370 (1981).

There are three issues before the court for decision. The first is whether Deborah should be granted sole legal custody of Seth or whether the parties should continue to share legal custody. The second concerns the specific parameters of Albert's partial physical custody. Because these issues are inter-related, we will address them together. The final issue is whether Albert should be held in contempt for violating the 1992 Temporary Order.

"Legal custody" is defined as "the legal right to make major decisions affecting the best interests of a minor child, including,

but not limited to, medical, religious and educational decision." "Shared custody" is "shared legal or shared physical custody, or both, of a child in such a way as to assure the child of frequent and continuing contact with and physical access to both parents." 23 P.S. §5302.

After a careful examination of all of the evidence, we must conclude that Seth's overall best interest lies in having both his parents retain legal and physical custody. Although such an arrangement has drawbacks, we believe that under the unique circumstances of this case it is one that will be most beneficial to Seth over the long term.

As is common in custody disputes, Seth has become a reservoir for all the sadness and resentment harbored by the parties over the failure of their relationship. His aggressive behavior is simply a reflection of his parents' battle for control over each other. While it is clear that both Deborah and Albert genuinely love Seth, their unresolved bitterness has caused them, generally unwittingly, to use him as a weapon to punish each other.

Although the evidence indicates that Seth suffers from A.D.D., we agree with the report from the Philadelphia Child Guidance Clinic that a large portion of his rage and disobedience can be attributed to a combination of three factors; an over-involved mother, an under-involved father and a high level of animosity between the parties. Both Deborah and Albert have engaged in conduct designed to antagonize each other, which has had a direct effect on Seth. The more intense their conflict, the more contrary Seth's behavior has become. This in turn has lead them into further conflict, creating a "vicious circle" dynamic.

Albert has been less than an active participant in Seth's life than Deborah for several years. He was absent from the marital home with increasing frequency, partly due to the problems between himself and Deborah, and partly because of employment duties in the military. Because his contact with Seth occurred mostly on weekends and holidays, he did not visit the school to meet with teachers and counselors. However, he certainly could have maintained written and telephone contact with school officials to keep informed on Seth's progress. Although Deborah has been Seth's primary caretaker throughout most of his life, Albert did

desire to retain as much legal and physical custody as possible given the geographical limits imposed by his military career. This is demonstrated by his filing of the custody complaint almost immediately after the final separation.

Albert did not take full advantage of his right to have custody of Seth on the third weekend of each month as provided by the Temporary Custody Order. Although the evidence was conflicting, there were indications that Albert was not always clear as to whether he intended to visit Seth on a particular weekend and his failure to arrive was upsetting and disappointing to Seth. Some of the missed visits were due to job responsibilities, but Albert also indicated that he wanted to avoid giving Deborah opportunities to argue with him about other aspects of their relationship.

There are strong indications in the record that Seth feels sadness over his father's repeated absences and looks forward to spending time with him. The father/son bond remains surprisingly solid despite these absences. Seth clearly enjoys his summer with Albert and is generally more compliant in his presence.

Deborah contends that Seth's best interests would be served by granting her sole legal custody. This arrangement would give her exclusive power to make all decisions regarding every aspect of Seth's life including educational, medical and religious matters. She points to Albert's abandonment of Seth at various times as the reason for Seth's anger and disobedience. She contends that minimizing contact between Albert and Seth will result in Seth retaining a greater degree of emotional stability. She contends that Albert resists her plans for Seth's care for his own sake. He opposed Seth's admittance into the Philadelphia Child Guidance Clinic and has resisted the diagnosis of A.D.D. She cites these instances as examples of the fact that she and Albert are not good candidates for shared legal custody because they have trouble communicating and cooperating over numerous aspects of Seth's life.

Although Albert initially opposed Seth being admitted to the Philadelphia Child Guidance Clinic program, we note that Deborah herself was often argumentative with the staff of the clinic and resisted many of their suggestions for controlling Seth's

outbursts. Many of her arguments with the staff and with Albert occurred in Seth's presence, during which time she made inappropriate remarks, particularly regarding Albert taking the advice of the clinic staff about taking a break over Thanksgiving. Such confrontations must have had a negative impact on Seth.

Deborah bears equal responsibility for the struggles between herself and Albert. Although she claims that at certain times she was acting in order to protect Seth from being hurt by Albert, it was inappropriate for her to contact Albert's superior at Fort Drum in New York over the summer to express her concern about the communal barracks living accommodations. We agree with Albert's perception that she unduly interfered with his summertime period of custody. Likewise, we cannot condone her writing to his superiors at the Ohio military facility even before his arrival there to request that he be reassigned to a different facility. Although she contends that she was acting in Seth's best interests in seeking to have Seth placed at a facility with appropriate psychological services, we conclude she was partly motivated by a desire to lash out at Albert and fuel the conflict that has been so destructive to Seth.

Deborah has also not been flexible in handling Albert's visitation and custody requests. According to the Temporary Custody Order, Albert was to have telephone contact with Seth between 7:00 and 7:30 p.m. We suspect that Deborah has made Seth unavailable during this narrow time frame to discourage phone contact. Similarly, she refused to allow Albert an alternative weekend custody period if he was unable to make the assigned third weekend. Despite her belief that she was simply trying to shield Seth from being hurt and disappointed when Albert did not come, her actions resulted in Seth having less contact with Albert than he should have had.

While both parties generally agreed with the Philadelphia Child Guidance Clinic's conclusion that the war between them is at the root of Seth's emotional problems, each proposed a different solution for how to end this war. In Albert's view, Deborah seeks to punish him for not always being the ideal father, and it is her tendency to argue with him extensively about their past relationship which keeps him from contacting Seth on a more

regular basis. He indicated feeling harassed by her, making it distasteful to him to have much contact with her. Deborah, on the other hand, argues that the way to end the war is to minimize contact between Albert and Seth. She believes that it is Albert's abandonment of Seth which is at the root of the problem, and that the less contact Seth has with Albert the more emotionally stable he will become. In the support of her position that she should be awarded sole legal custody, Deborah points to the difficulties in social adjustment Seth displayed during the summer visitation with Albert in New York and the subsequent increase in his aggressive behavior at the beginning of the school year. Given that Seth has a history of aggressive behavior in unstructured settings and was unmedicated during some of the day camp episodes, his outbursts are not particularly surprising. Furthermore, there is evidence that when Albert was not at work and he and Seth engaged in camping, fishing and other activities together, Seth's behavior was controllable.

Deborah contends Seth's contact with Albert is emotionally disruptive to Seth and was the direct cause of his increasingly aggressive behavior in the fall of 1993. It is more likely that Seth's violent behavior is the manifestation of his sadness and anger at having to be separated from his father after enjoying the summer with him. While transferring physical custody between the parties at the end of the summer creates some emotional turmoil in Seth, the alternative, granting Deborah sole legal custody, would serve only to drive a deeper wedge between father and son than already exists. As noted above, that relationship is surprisingly solid and would be needlessly jeopardized by awarding her sole legal custody. While allowing Albert to retain shared legal custody may result in less than total emotional equilibrium for Seth, if Albert's right to participate in major aspects of Seth's life is removed, in the long run Seth would continue to express rage, anger, disobedience and aggression because his need to have contact with his father would remain unsatisfied.

Furthermore, we must deny Deborah's claim for sole legal custody because the record indicates that at times her physical disciplining of Seth has bordered on abuse. We are gravely concerned about the testimony of Diane Karper, whom we found

to be a credible witness, concerned for Seth's welfare. While we recognize that Deborah has had to cope with Seth's aggressive, defiant and sometimes uncontrollable behavior, we cannot condone her excessive use of a belt as the primary disciplining method, particularly when Ms. Karper indicated that Seth generally could be persuaded to cooperate using non-physical means. Although we understand Deborah's frustration, we frown upon her methods, and have misgivings about her ability to control her own temper.

If we were to grant Deborah sole legal custody, Albert would have more difficulty intervening in her disciplining of Seth. Although she testified Seth's aggressive behavior has been somewhat curbed since attendance at the clinic and she has not needed to use the belt as much as she did before, as of the writing of this opinion, we do not know to what extent Seth's behavioral improvements have remained constant. We also have no information about this summer's visit with Albert. We must make our decision solely on the evidence presented at the three hearings.

Shared custody arrangements may be appropriate under several circumstances. Under the guidelines set forth in the case of *In re: Wesley J. K.*, 299 Pa. Super. 504, 445 A.2d 1243 (1982), "Shared custody may be awarded when both parents are fit, both desire continuing involvement with their child, both are seen by the child as sources of security and love and both parents are able to communicate and cooperate in promoting the child's best interest". *Id.* 515 A minimal degree of cooperation between the parents does not mean that the parents must have an amicable relationship. The parents must be able to isolate their personal conflicts from their roles as parents and spare the child whatever rancor they may feel.

While shared legal custody requires the parents to maintain contact with each other in order to discuss aspects of the child's life, this does not necessarily mean that, over the long term, they will continue to display a high level of acrimony and bitterness toward each other. In this case, it is Albert's feeling that Deborah is trying to drive a wedge between himself and Seth which creates his resistance to her. "Giving both parents legal and physical responsibility for the child should attenuate the animosity and the

"have not" feeling that so often existed in the non-custodial parent which caused the non-custodial parent to petition regularly for custody. If shared custody proves unworkable because the parents cannot agree and seek frequent court intervention, then the court may have to consider withdrawing the shared custody status." *Wesley, supra* at 517.

Although we are presented with a situation in which the parties have had extreme difficulty cooperating with each other, we believe they have demonstrated the minimal amount of cooperation needed to permit shared legal custody of Seth.

Since the entry of the Temporary Custody Order in November of 1992, Albert has been able to gain telephone access to Seth at least some of the time. Deborah did not resist the order in allowing Seth to spend a week with Albert during Christmas of that year. She also complied with the court order for summer visitation. Although Albert and Deborah disagreed about the terms of the Temporary Custody Order pertaining to the length of time Seth was to be with his father, Albert returned Seth several days earlier than he believed he was required to under the order as a compromise to avoid further confrontation. While Albert admits that he only reluctantly accepts the diagnosis of A.D.D. and failed to administer Seth's medication for ten full days, during most of the summer Seth was indeed medicated. Furthermore, Albert agreed that he would administer the medication should we so order. Albert has not opposed Seth's visits with Sally Rooney at the Carlisle Barracks and does not object to Deborah's choice of a pediatrician for Seth.

An indication that the war between Albert and Deborah may not be indefinitely sustained is his willingness to take the advice of the Philadelphia Child Guidance Clinic and minimize conflicts with Deborah over Seth by ending his quest to obtain primary residential custody. We believe that Albert has conceded primary residential custody to Deborah also based on a realistic assessment of the constraints placed upon him by his military career. However, we will not punish Albert for his willingness to forego this particular battle by depriving him of legal custody.

Having determined that the parties should continue to share legal custody of Seth with Albert retaining partial physical

custody, we must now determine the extent of Albert's partial physical custody. Albert has requested extensive summer custody of Seth according to military scheduling which varies each year. He is entitled to at least seven consecutive weeks of custody during the summer, free from interference from Deborah. During that time, Deborah will not be permitted to come to Ohio for a visit, but may maintain telephone contact.

Albert should retain the right to exercise custody of Seth on the third weekend of every month. However, given that he may miss some weekends due to job responsibilities, we also grant him the option to exercise visitation on an alternate weekend. Telephone access should be increased to the more flexible time frame of between 5:30 p.m. and 8:30 p.m. Albert should also be able to have Seth for one full week over the Christmas holiday.

Deborah contends that Albert should be required to use all of his thirty days annual vacation during the summer when Seth is in his custody so that Seth is not placed in daycare. However, it is unduly burdensome to force Albert to use all thirty days vacation at one time because then he would not have any left over for emergencies during the rest of the year. However, we would urge Albert to use as many of his thirty days leave as he is able to during the time Seth is with him to minimize the possibility of problems at a daycare facility.

The final issue is whether Albert should be held in contempt for failure to abide by certain provisions of the Temporary Custody Order of November 9, 1992. According to Deborah, Albert should be held in contempt for failing to medicate Seth during ten days of the summertime custody, for failing to obtain a doctor's evaluation and for failing to notify her of the name and address of the daycare provider. While Albert certainly had the right to question the A.D.D. diagnosis, the order was specific and should not have been deliberately ignored pending our final determinations. The primary importance of this issue is that this conduct exposes Seth to increased dangers that is not in his best interest. However, a secondary importance cannot be overlooked. This is a type of behavior that will continue to fuel and escalate the war between the parents and cannot be tolerated on the part of either parent. We also note that the court cannot overlook

Deborah's argument that even though the issue raised in the contempt petition is of utmost importance to the best interests of Seth, there is nonetheless a certain amount of bad faith gamesmanship in the actions of Deborah throughout this proceeding. The court will not condone this conduct on the part of either parent.

As to the issue of Albert's failure to obtain a doctor's evaluation pursuant to the Temporary Custody Order of November 9, 1992, the court cannot find that this would be a basis for contemptuous conduct. Deborah argues that this requirement is implicit in the Temporary Custody Order of November 9, 1992, however, this court was not the author of that order and cannot compute that requirement in reading the Temporary Custody Order of November 9, 1992.

Our examination of the terms of the Temporary Custody Order indicates that it contains an inherent ambiguity as to the exact length of the time that Albert was to have Seth over the summer. The order stated that he was to have custody of Seth for seven weeks, but the dates set forth constituted only six weeks. Albert returned Seth to Deborah after six and one-half weeks. It is well-established that a mere showing that an alleged contemtor failed to comply with an order does not in itself establish contempt. The party must be shown to have willfully, knowingly and intentionally disobeyed a court order or decree. *Grubb v. Grubb*, 326 Pa. Super. 218, 473 A.2d 1060 (1984); *Barrett v. Barrett*, 470 Pa. 253, 368 A.2d 616 (1977); *Mellott v. Mellott*, 328 Pa. Super. 200, 476 A.2d 961 (1984). Albert cannot be held in contempt for failing to obey an order which is vague and ambiguous, and therefore we deny that aspect of Deborah's petition.

To summarize this issue, the court finds that Albert was in contempt of the Temporary Custody Order of November 9, 1992, to the extent that he did not provide the prescribed medication to Seth during the summertime Custody. As a result of this finding, we will award Deborah \$150.00 in counsel fees and direct that Albert pay the costs related to the contempt proceedings.

ORDER OF COURT

NOW this 29th day of August, 1994, IT IS ORDERED AND DECREED THAT:

- (1) Deborah A. Spidle-Grassley and Albert William Grassley shall retain shared legal custody of Seth Uriel Grassley born March 9, 1985.
- (2) Deborah will retain primary residential custody of Seth.
- (3) Albert will retain partial physical custody as follows:
 - (a) Every third weekend of each month from Friday at 7:00 p.m. until Sunday at 8:00 p.m. If he cannot come to Deborah's house on the designated weekend, he should inform her 24 hours in advance. If he cannot exercise custody on the third weekend of the month, he should be entitled to an alternate weekend within two weeks' time.
 - (b) Telephone access to Seth between 5:30 p.m. and 8:30 p.m.
 - (c) Summertime custody for nine weeks. Because his summertime work duties vary from year to year, Albert shall inform Deborah of which nine weeks he intends to use one month in advance. During his summer custody, Deborah will be permitted phone and mail access only except in the event that she is entitled to exercise custody during a holiday as provided below.
 - (d) And at such other times as the parties may agree to from time to time.
 - (e) *Holidays*: The following are considered "holidays": July 4th, Labor Day, Thanksgiving, Christmas, New Years, Easter and Memorial Day. These holidays will alternate each year. Deborah will begin the alternating holiday schedule with Labor Day 1994, and every even year thereafter. On Labor Day 1995, Albert will begin the alternating holiday schedule and every odd year thereafter.
 - (i) If the holiday falls on a Monday after Albert's weekend of partial physical custody, he will keep Seth through Monday evening at 8:00 p.m.

- (ii) If the holiday falls on a week day, Albert shall have partial physical custody of Seth the day before the holiday and the day after in sufficient time to travel so that he can have the entire day of the holiday with Seth.

- (iii) Albert shall have one week of partial physical custody of Seth during Christmas vacation.

- (iv) If Deborah's July 4th holiday should fall during Albert's summertime custody, Deborah shall have partial physical custody of Seth the day before the holiday and the day after in sufficient time to travel so that she can have the entire day of the holiday with Seth.

- (4) Seth will continue to take A.D.D. medication under the care of his pediatrician or psychiatrist. The medication will be consistently administered.

- (5) Neither party shall attempt to undermine the mutual love and affection that Seth has for the other parent, and neither party shall, in the presence of Seth, make any disparaging or negative remarks concerning the other party or the other party's family.

- (6) Transportation shall be provided by the party beginning physical custody.

- (7) Albert will pay \$150.00 in counsel fees and the court costs related to the contempt proceeding as a result of the finding of contempt of court.

- (8) Both parents will abide by the spirit and detail of the recommendations presented in the discharge summary of the Philadelphia Child Guidance Clinic admitted to the court as Plaintiff's Exhibit #2. More specifically, the parents will:

- (a) Insure that Seth has unimpeded access to the other parent and will not interfere with the other parent's relationship.

- (b) Deborah, having been awarded primary physical custody of Seth, will refrain from the use of harsh physical discipline such as described by Ms. Karper and rely on the discipline techniques recommended by the Philadelphia Child Guidance Clinic. She will also provide clear and consistent limits so that Seth can better regulate his own behavior. She will follow the clinic's recommendations in this regard as well.

(c) Make an effort to follow the clinic's recommendation on consistent collaboration with regard to Seth's therapy and school progress. Albert will become involved in Seth's out-patient therapy and should do so directly with the service providers.

(d) Insure that Seth is monitored and supervised by a qualified child psychiatrist for management of his medication and for on-going therapeutic objectives as recommended by the clinic.

(9) This order may be modified by the court upon written stipulation by both parties to modify its terms.

(10) Albert will provide Deborah the telephone number and address where Seth will be staying whenever he exercises partial physical custody.

(11) The parties will cooperate with each other in the exchange of custody and shall not interfere while the other is exercising their custody.

(12) The parties shall consult one another regarding matters of major importance in Seth's life, this to include, medical, educational and religious concerns. The parties are directed to share information about these matters without the necessity of a request by the other party. Should a request for information be made, the parties are further directed to make this information available as soon as possible.

(13) The provisions of this order will supersede all prior orders entered in this matter.

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