

[J-124-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: M.L., BORN 2/6/95 : No. 28 W.D. Appeal Docket 1999
: :
: Appeal from the Order of the Superior
: Court entered August 14, 1998 at No. 664
: PGH 1997 affirming the Order of the Court
: of Common Pleas of Cambria County
: entered March 25, 1997 at No. CY97-14.
APPEAL OF: K.L., NATURAL MOTHER :
: 716 A.2d 658 (Pa. Super. 1998)
: :
: ARGUED: September 15, 1999
: :

DISSENTING OPINION

MR. JUSTICE CAPPY

I respectfully dissent. I agree with the majority's ultimate result that the child should remain with her non-custodial parent; however, I believe that the majority has fundamentally misapprehended the nature of dependency proceedings and, in reversing the decision of the Superior Court, has violated both the clear language and the intent of the Juvenile Act, 42 Pa.C.S. §6301 et seq.

Initially, this case involved a private custody action between M.L.'s mother, who had primary physical custody of M.L., and M.L.'s father, who sought more liberal visitation rights with his daughter. Cambria County Children and Youth Services (CYS) only became involved after M.L.'s mother raised numerous allegations charging the father with sexually abusing M.L. Upon further investigation, CYS determined that M.L.'s father was not abusing his daughter. To the contrary, CYS became concerned that the child was in

danger of being emotionally harmed by her mother's obsessive behavior. CYS then initiated dependency proceedings to intervene and protect the child from any further mistreatment.¹ The court adjudicated the child to be dependent, and transferred custody to her father, the non-custodial parent.² We granted allocatur to resolve whether a court may adjudge a child to be dependent when a non-custodial parent is ready, willing and able to provide the child with proper parental care and control.³

In a dependency proceeding, a child protective services agency seeks court intervention to obtain a disposition that is consistent with the child's best interests. A dependency proceeding primarily involves two issues: (1) whether the agency can establish that the child is dependent under the existing custody arrangement, 42 Pa.C.S.

¹ These proceedings should be distinguished from "shelter" proceedings. See 23 Pa.C.S. §6315.

² In this case, the trial court determined that M.L.'s mother was unable to provide proper parental care and control because the mother's behavior placed the child in imminent risk of emotional and mental harm; that if the behavior continues, the father will not be able to enjoy a normal relationship with his daughter; that M.L. will be at an emotional and mental disadvantage when attempting to develop relationships with men in general and her father in particular; that this behavior creates unnecessary invasions into M.L.'s childhood and her parents' lives; and that CYS would have to investigate these allegations which would cause an unnecessary strain on the agency. Tr. Ct. Opin. at 8.

³ Neither the majority opinion nor the parties' briefs set forth the applicable standard and scope of review. On the legal issue of whether a court may adjudge a child to be dependent when the non-custodial parent is ready, willing and able to provide the child with proper parental care and control, the standard of review is error of law. See Morrison v. Dept. of Public Welfare, 646 A.2d 565, 571 (Pa. 1994). The scope of review of a question of law is plenary, Phillips v. A-Best Products Co., 665 A.2d 1167, 1170 (Pa. 1995), i.e., a broad scope of review. As to the trial court's finding of dependency, the issue involves a mixed question of fact and law, so we review that finding for an abuse of discretion and an error of law. See Morrison, 646 A.2d at 571. With regard to the scope of review, the trial court cited several reasons for its decision, and thus our scope of review is limited to those reasons. See id. at 570.

§6341(a), and if such a finding is made, then (2) which disposition is “best suited to the protection and physical, mental, and moral welfare of the child.” 42 Pa.C.S. §6351(a).

The fundamental flaw in the majority’s approach is that it authorizes an automatic transfer of custody to the non-custodial parent without requiring a finding of dependency. In so doing, the majority ignores the purpose of a dependency finding and perpetuates the same procedural error committed by the Superior Court in In re: Justin S., 543 A.2d 1192 (Pa. Super. 1988), wherein the Superior Court stated:

If the court determines that the custodial parent is unable to provide proper parental care and control “at this moment” and that the non-custodial parent is “immediately available” to provide such care, the child is not dependent under the provisions of the Juvenile Act. Consequently, the court must grant custody of the allegedly dependent child to the non-custodial parent.

Id. at 1200.

As Judge Tamilya accurately observed in his dissent in Justin S., “[n]owhere in the Juvenile Act is there authority in the court to act without a finding of dependency.” 543 A.2d at 1201 (Tamilya, J., dissenting). The Juvenile Act clearly provides that “[i]f the court finds that the child is not a dependent child or that the allegations of delinquency have not been established it shall dismiss the petition” 42 Pa.C.S. §6341(a) (emphasis added); see In re Davis, 465 A.2d 614, 619 (Pa. 1983) (opinion announcing the judgment of the court) (lower court had no authority to enter a disposition under section 6351 of the Juvenile Act if the child was not “dependent”). Thus, it is only after a court makes a finding of dependency that it possesses the ability to evaluate whether a transfer of custody to the non-custodial parent is in the best interests of the child, and if so, to interfere in the present

custodial arrangement by transferring custody to that parent. The majority opinion fails to recognize this limitation on the court's authority to act.⁴

In addition to ignoring the statutory restrictions on the court's jurisdiction, the majority's resolution is problematic for two other reasons. First, the majority opinion muddles the statutory definitions of dependency, and thereby unnecessarily circumscribes the definition of a "dependent" child. Second, by requiring an automatic transfer of custody to the non-custodial parent, the majority improperly limits the statutory authority of the court and eliminates options which may be in the best interests of the child.

Initially, I believe that the majority has misinterpreted the provisions of 42 Pa.C.S. §6302, which defines "dependent child". From the several definitions set forth in this section, the majority distills the following result: "a child must lack a parent, guardian or other custodian who can provide appropriate care to the child." Slip Opin. at 3. The majority's definition is not one of those enumerated in section 6302. The definitions in 42

⁴ In footnote 3 of the majority opinion, the majority attempts to cure the defect by relying on the definition of "custody proceeding" in the provisions relating to the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S. § 5341 *et seq.* Reliance on this definition is misplaced for two reasons. First, these provisions address interstate, intrastate and international jurisdictional conflicts, none of which are implicated in this case. Second, the definition is not a legislative grant that confers jurisdiction over the child in an action brought under the Juvenile Act.

Nor can the majority *sua sponte* expand this court's jurisdiction by asserting that in custody matters, the court should consider the best interests of the child. Clearly, the court must evaluate the best interests of the child, but only after the court has jurisdiction to do so, as the legislature has provided. 42 Pa.C.S. §6351(a) (if the court determines that the child is dependent, then the court may make a disposition best suited to the child's welfare). Prior to that time, the only relevant inquiry is whether the child is dependent. 42 Pa.C.S. §6341(a).

Pa.C.S. §6302 are set forth in the disjunctive.⁵ Each definition provides a separate and independent basis for determining whether a child may be deemed to be “dependent.” Therefore, a child may be deemed to be dependent if she is either “without a parent” (42 Pa.C.S. §6302(4)) or “without proper parental care or control” 42 Pa.C.S. §6302(1). However, the majority has improperly combined these definitions into a single statement which presupposes the result the majority seeks to reach. I cannot agree with this analysis, as I do not believe that the legislature would expend the effort to set forth nine

⁵ The version of section 6302 which was in effect at the time of the trial court hearing provides:

“Dependent child.” A child who:

(1) is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals;

(2) has been placed for care or adoption in violation of law;

(3) has been abandoned by his parents, guardian, or other custodian;

(4) is without a parent, guardian, or legal custodian;

(5) while subject to compulsory school attendance is habitually and without justification truant from school;

(6) has committed a specific act or acts of habitual disobedience of the reasonable and lawful commands of his parent, guardian or other custodian and who is ungovernable and found to be in need of care, treatment or supervision;

(7) is under the age of ten years and has committed a delinquent act;

(8) has been formerly adjudicated dependent, and is under the jurisdiction of the court, subject to its conditions or placements and who commits an act which is defined as ungovernable in paragraph (6); or

(9) has been referred pursuant to section 6323 (relating to informal adjustment), and who commits an act which is defined as ungovernable in paragraph (6).

All subsequent references in this opinion refer to the current version of the Juvenile Act.

different definitions, only to have them be commingled by the courts. In my view, when the custodial parent who is primarily responsible for the child's safety and well-being fails to provide proper parental care or control, the child may be deemed to be a "dependent child" pursuant to 42 Pa.C.S. §6302(1), regardless of whether the child's non-custodial parent is ready, willing and able to care for the child.⁶

The second problem that I discern in the majority opinion is its requirement of an automatic transfer of custody to the non-custodial parent. Under the Juvenile Act, if the court finds clear and convincing evidence that the child is dependent under the existing custody arrangement, the court shall "make a proper disposition of the case". 42 Pa.C.S. §6341(c). The court may make any order of disposition that is "best suited to the protection and physical, mental, and moral welfare of the child." 42 Pa.C.S. §6351(a). The Act provides the court with several options, including, but not limited to, the following: the court may "[p]ermit the child to remain with his parents, guardian, or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child", 42 Pa.C.S. §6351(a)(1); the court might transfer temporary legal custody, subject to conditions and limitations as the court prescribes, to any individual resident within the Commonwealth, "including any relative, who, after study . . . is found by the court to be qualified to receive and care for the child", 42 Pa.C.S. §6351(a)(2)(i); or the court may transfer permanent legal custody, subject to conditions and limitations as the court prescribes, to an individual resident within the Commonwealth,

⁶ This interpretation is further supported by 42 Pa.C.S. §6351(b), which requires certain pre-placement findings prior to the removal of a dependent child "from his home". This language indicates that proper parental care or control must be lacking in the child's home, regardless of whether one or both parents reside there.

“including any relative, who after study . . . is found by the court to be qualified to receive and care for the child.” 42 Pa.C.S. §6351(a)(2.1). The latter section also permits the court to set forth temporary visitation rights of the parents. Id.

Despite these several options, the majority requires the juvenile court judge, without any consideration of whether such a transfer is consistent with the best interests of the child, to implement only one: transfer the child to the non-custodial parent. This mechanical approach precludes a judge from keeping the child with her custodial parent, subject to monitoring by CYS.⁷ See 42 Pa.C.S. §6351(a)(1). The judge is also denied the option of transferring the child to the father, subject to protective services to assist the child and father in adjusting to the transfer of custody and for monitoring visitation with the

⁷ Such a result is often in the best interests of the child. For example, consider the case in which a mother, who takes medication for her bipolar condition, has primary physical custody of her six-year-old son. Assume that the father has had almost no involvement with his son, although he seems to be a suitable caretaker as he is raising two other children with his current wife. On two occasions, the mother stopped taking her medication, which resulted in the child being placed in dangerous situations. The child’s school alerted CYS, which initiated an investigation and then filed a dependency petition, arguing that the child should be deemed to be dependent because of the possibility that the mother may again cease taking her medication. If the Juvenile Court judge believes that the mother may stop taking her medication, then the Juvenile Act intends that the judge be allowed to enter a finding of dependency and order that given the father’s absence in the child’s life, it is in the best interests of the child that he stays with his mother with supervision and monitoring.

As in the above example, the mere fact that a non-custodial parent is ready, willing and even able to take custody of the child does not necessarily mean that custody with that person is in the best interests of the child. Life is replete with examples of non-custodial parents, who may be fine citizens in all other respects, but who have not had any contact, or at least have had only minimal contact, with their child over the course of that child’s life. The fact that this “complete stranger” is a biological parent is certainly a factor to be taken into consideration by the court when making a decision in a dependency proceeding. Yet, the biological connection alone cannot suffice as an unassailable determining factor; it is only one factor in determining the best disposition for the child in the situation presented.

mother. See 42 Pa.C.S. §6351(a)(2)(i), (2.1). Custody courts do not have at their disposition the investigative resources of CYS. Nor can a court require that a parent accept child protective services and supervision without a finding of dependency. The juvenile court judge should be entrusted with the discretion to fashion a remedy that is least disruptive to the child and which considers the child's best interests.⁸

The purpose of the Child Protective Services Law (CPSL), 23 P.S. §6301 et seq. is to promote swift investigation of suspected child abuse, and provide protective services for children and rehabilitative services for their parents in order to ensure the well-being of the child and to preserve and stabilize family life wherever appropriate. 23 P.S. §6302(b). The Juvenile Act seeks to promote similar goals. See 42 Pa.C.S. §6301(b) (provisions of chapter should be construed, inter alia, “[t]o preserve the unity of the family whenever possible” and “[t]o provide for the care, protection, safety and wholesome mental and physical development of children . . .”).

In the instant case, M.L. was in imminent risk of harm from her mother, who caused M.L. to undergo several unnecessary physical examinations. Pursuant to its obligations

⁸ Additionally, the majority's decision invites several procedural difficulties. Presumably, to ensure that a finding of dependency is made when a child is endangered, CYS must now include in the petition specific allegations that will support a finding that the non-custodial parent is not ready, willing and able to provide the child with proper parental care and control. This will necessitate additional investigation into the availability and fitness of the non-custodial parent, which may cause undue delay when the child is endangered. Then, there is the unresolved question as to what standard should apply: should the court use the “best interests” standard, or need the court merely determine that the non-custodial parent is ready, willing and able to care for the child? If the latter standard applies (as the majority implies), does CYS bear the burden of proving that the non-custodial parent is not ready, willing and able to care for the child, or does the non-custodial parent have to prove those elements to the satisfaction of the court? The majority opinion fails to address these concerns, or provide any guidance to the lower courts.

under the CPSL and the Juvenile Act, CYS intervened to prevent further harm to the child. The trial court gave proper deference to the goals of the CPSL and the Juvenile Act, and rendered an appropriate order within its authority under the Juvenile Act:

To stay true to the mandates of the Juvenile Act, the Child Protective Services Law, and society, which maintain that it is necessary to preserve the integrity of the family and only interfere in the family unit when the welfare of the child is at stake, this Court placed the child with her natural father. Further, by this disposition, [M.L.], her mother and her father may receive the rehabilitative services and supervision now available to them.

Tr. Ct. Opin. at 16. Under the majority opinion, this option would have been foreclosed to the court.

I believe that the majority's concern about a court's unwarranted intrusion into the family is tempered by the Commonwealth's obligation to protect endangered children, and is alleviated by the statutory mandate to preserve the integrity of the family and promote the best interests of the child. If, as determined by the trial court, the non-custodial parent is ready, willing and able to provide proper parental care and support, and placement with that parent is in the best interests of the child, the court should place the child with that parent, consistent with the goal of preserving the family unit, as was done in this case.

I also recognize that a dependency hearing should not be used as a vehicle by a malcontent parent to obtain a transfer of custody from the custodial parent. However, that danger is not present in this case, since the dependency proceedings were initiated by CYS, which realized the danger that M.L. posed to her child.

The trial court's finding of dependency and placement of M.L. with her father allows for the implementation of rehabilitative services which can prevent permanent damage to M.L., while protecting the integrity of her family. Without a finding of dependency, the court is powerless to act. Accordingly, I would affirm the Superior Court's holding that the trial

court acted properly in adjudicating the child dependent and transferring custody to the father, subject to the supervision of CYS.

Mr. Justice Saylor joins this Dissenting Opinion.