

[J-124-1999]
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)
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: ARGUED: September 15, 1999
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OPINION OF THE COURT

MR. JUSTICE CASTILLE

DECIDED: AUGUST 22, 2000

Allowance of appeal was granted in this matter limited to the issue of whether a court may properly adjudge a child to be dependent where the non-custodial parent is ready, willing and able to provide the child with proper parental care and control. The Superior Court affirmed the trial court's finding of dependency in the instant case even though the child's father was available and willing to provide adequate care for the child. We hold that a child, whose non-custodial parent is ready, willing and able to provide adequate care to the child, cannot be found dependent and, therefore, reverse.

Appellant is the natural mother of the child, born February 6, 1995, and R. G. is the child's natural father. The child's parents never married but shared custody of the child

from the time of her birth. A January 1997 custody dispute ended with appellant having primary physical custody and the father having partial custody every other weekend. In May of 1996, appellant contacted Cambria County Children and Youth Service (CYS) to complain that the father did not care for the child properly during her weekends with him in that he lacked supplies for the child and did not feed her appropriately.

Then, in August of 1996, appellant began alleging that the father was sexually abusing the child. Between August 1996 and January 1997, appellant subjected the child to six separate physical examinations for possible sexual abuse at either the hospital emergency room or the child's pediatrician's office. Each examining physician reported that the child had diaper rash or normal redness for a child of her age wearing diapers; no signs of sexual abuse were found in any of the examinations. Despite the lack of evidence, appellant continued to allege that the father was sexually abusing the child, leading CYS to file a petition for dependency. Following two evidentiary hearings on February 24 and March 19, 1997, the trial court found, on March 25, 1997, that the child was a dependent child and awarded custody to her father.¹

The sole issue for our determination is whether the trial court erred in finding that the child was a dependent child when her father was ready, willing and able to provide adequate care to her. Two earlier panels of the Superior Court reached conflicting decisions as to whether a child can be found dependent and then placed in the custody of the non-custodial parent. In In the interest of Justin S., 375 Pa. Super. 88, 543 A.2d 1192

¹ The trial court's decision was based upon a finding that appellant suffers from factitious disorder by proxy, that she had repeatedly subjected the child to physical examinations which revealed nothing more than diaper rash, and that appellant's mental illness had the strong potential to escalate to the point where appellant would actually harm the child physically in order to provide substantiation of her abuse allegations against the child's father. Factitious disorder by proxy means, in this case, that appellant transferred to the child her own psychological difficulties such that she claimed that the child was experiencing symptoms of abuse that the child did not actually experience.

(1988), a panel of the Superior Court held that a trial court cannot adjudge a child dependent where the non-custodial parent is ready, willing and able to provide proper care; while in In re Barclay, 321 Pa. Super. 417, 468 A.2d 778 (1983), a second panel affirmed a finding of dependency with placement of the child with the non-custodial parent. This Court must resolve this conflict between the two Superior Court decisions.

A dependent child is defined in pertinent part at 42 Pa.C.S. § 6302 as:

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
- (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 parent, guardian, or legal custodian;

* * * *

A court is empowered by 42 Pa.C.S. § 6341(a) and (c) to make a finding that a child is dependent if the child meets the statutory definition by clear and convincing evidence. If the court finds that the child is dependent, then the court may make an appropriate disposition of the child to protect the child's physical, mental and moral welfare, including allowing the child to remain with the parents subject to supervision, transferring temporary legal custody to a relative or a private or public agency, or transferring custody to the juvenile court of another state. 42 Pa.C.S. § 6351(a).

² The quoted language comes from the version of 42 Pa.C.S. § 6302 in effect at the time of the entry of the trial court's 1997 order finding the child dependent. In 1998, a second sentence was added to subsection (1) of the definition of a delinquent child. The added language is irrelevant to the issue before this Court and is therefore not included.

The definition of a dependent child contained in section 6302 clearly states that a child must lack a parent, guardian or other legal custodian who can provide appropriate care to the child. A child whose non-custodial parent is ready, willing and able to provide such care does not meet this definition. In Justin S., 375 Pa. Super. at 104, 543 A.2d at 1200, the Superior Court stated:

[I]t is the duty of the trial court to determine whether the non-custodial parent is capable and willing to render proper parental control prior to adjudicating a child dependent. 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. Once custody is granted to the non-custodial parent, “the care, protection, and wholesome mental and physical development of the child” can occur in a family environment as the purpose of the Juvenile Act directs. 42 Pa.C.S. § 6301(b).

We are in accord with the Superior Court’s decision in Justin S. The plain language of the statutory definition of a dependent child compels the conclusion that a child is not dependent if the child has a parent who is willing and able to provide proper care to the child. When a court adjudges a child dependent, that court then possesses the authority to place the child in the custody of a relative or a public or private agency. Where a non-custodial parent is available and willing to provide care to the child, such power in the hands of the court is an unwarranted intrusion into the family. Only where a child is truly lacking a parent, guardian or legal custodian who can provide adequate care should we allow our courts to exercise such authority. Accordingly, we hold that where a non-custodial parent is ready, willing and able to provide adequate care to a child, a court may not adjudge that child dependent.

In the instant case, there is no dispute that the child's father was available, capable and willing to provide care to the child. Therefore, she does not meet the statutory definition of a dependent child, and the trial court erred in adjudging her dependent. Therefore, the decision of the Superior Court affirming the trial court's finding that the child is a dependent child is reversed.³

Madame Justice Newman files a concurring opinion joined by Mr. Justice Zappala, who also joins the majority opinion.

Mr. Justice Cappy files a dissenting opinion in which Mr. Justice Saylor joins.

³ In his dissent, Justice Cappy states his belief that, absent a finding of dependency, the trial court lacks the authority to transfer custody of the child to the father in this case. We disagree. Judges in custody matters have broad powers to fashion remedies to meet the best interests of the children involved. For example, a custody judge may modify any existing custody order to a shared custody order *sua sponte* (23 Pa.C.S. § 5304) or may decline to enter a custody order as agreed to by the parents (23 Pa.C.S. § 5307). As a general rule, a judge making a custody determination must consider a number of factors, including any abusive conduct by any adult member of the child's household. 23 Pa.C.S. § 5303. A dependency hearing is a form of custody proceeding. 23 Pa.C.S. § 5343. Thus, a judge in a dependency proceeding has authority to modify the existing custody arrangement whether or not the judge makes a finding of dependency. Indeed, recently in Charles v. Stehlik, 560 Pa. 334, 340, 744 A.2d 1255, 1258 (2000), we stated: "It is axiomatic that in custody disputes, 'the fundamental issue is the best interest of the child.'" In order for courts in custody disputes to accommodate the best interests of the child, the judge must have broad discretion to act in terms of modifying custody. Custody orders, unlike orders in other civil matters, are inherently mutable when the circumstances dictate a change or modification. Therefore, granting custody judges broad discretion to act when the court deems it appropriate is necessary to meet the best interests of children.