

[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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CONCURRING OPINION

MADAME JUSTICE NEWMAN

I join the majority's opinion and agree with its conclusion that a child is not dependent if a non-custodial parent is ready, willing and able to provide adequate parental care. I write separately to note that this holding does not restrict either the non-custodial parent or the State from responding to allegations of child abuse because both the Protection from Abuse Act¹ and the Child Protective Services Law (CPSL)² provide a mechanism to respond.

¹ 23 Pa.C.S.A. §§ 6103 - 6117.

² 23 Pa.C.S.A. §§ 6301 - 6384.

The Protection from Abuse Act, relevant to the facts as existed here, allows a non-custodial parent to file a petition in court alleging abuse by the custodial parent. 23 Pa.C.S.A. § 6106 (a).³ Within ten days, the court must hold a hearing, or if the matter involves “immediate and present danger of abuse” to the child or children, the court “shall conduct an ex parte proceeding.” 23 Pa.C.S.A. § 6107. If the non-custodial parent proves by a preponderance of the evidence that the custodial parent has abused the child, the court can fashion an appropriate order to implement custodial and support issues, which could include, but do not necessarily require, transfer of temporary custody or supervised visitation. E.g., 23 Pa.C.S.A. § 6108 (a) (4).⁴ The permanent custody issues between parents then could continue through Chapter 53 of Title 23.

The CPSL provides the mechanism for state involvement in a family unit where child abuse is alleged. I agree with the Dissent’s discussion that the purpose of the CPSL 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). However, that does not mean that the State may declare a child dependent because of

³ I would note that if the Agency investigating the abuse determined that the non-custodial parent were unwilling to file a petition regarding the abuse, then this could be evidence that the non-custodial parent was not ready, willing and able to assume custody and might be, in an appropriate case, supportive of a finding that the abused child is “dependent.” However, that is not the case here, as more fully discussed in the ensuing discussion.

⁴ The Dissent’s concerns that by holding that the child here is not “dependent” our decision today in some way limits the options of a trial court to order only an automatic transfer of custody to the non-custodial parent are unfounded. 23 Pa.C.S.A. § 6108, in addition to allowing various forms of custodial arrangements, allows the court to grant “any other appropriate relief” requested by the non-custodial parent. Further, an assessment of what permanent custody arrangement is in the best interest of the child will be made in the custody hearing pursuant to Title 23, Chapter 53.

alleged abuse if a non-custodial parent is involved in the child's life, and is in no way connected with the alleged abuse, and has not evidenced a lack of parental control or care.

The determination that a child can not be declared "dependent" if a non-custodial parent is ready, willing and able to assume parental care and control does not restrict the State from addressing the abuse because it can act through the CPSL without declaring the child dependent. The CPSL mandates that certain classes of people must report suspicions of child abuse. 23 Pa.C.S.A. § 6311. When a report of abuse is made, a county agency is directed to investigate. 23 Pa.C.S.A. §§ 6334 - 6338, 6368. If a child is in imminent risk of harm because of abuse, the county agency may seek a judicial order to take the child into protective custody, such as temporary foster care or other "shelter" care, pursuant to 23 Pa.C.S.A. § 6315, 23 Pa.C.S.A. § 6369.⁵ While Section 6315 states that a child may be taken into protective custody as provided for in 42 Pa.C.S.A. § 6324, a child does not have to be declared "dependent" before removal is authorized. 23 Pa.C.S.A. § 6315(d); 42 Pa.C.S.A. 6324(c). Moreover, pursuant to Section 6315(d) of the CPSL, the child is not declared "dependent" before the court conducts an informal hearing regarding the appropriateness of the protective custody within twenty-four hours of assuming custody. See 23 Pa.C.S.A. § 6315 (b),(c) and (d) and 42 Pa.C.S.A. § 6332. The CPSL at Section 6315 does allow the county agency to initiate dependency proceedings, but it does so only after the county agency has notified the parents of the child's whereabouts and only if a dependency hearing is "appropriate." 23 Pa.C.S.A. § 6315 (c), (d). It seems to me that if, at the informal hearing, a non-custodial parent were "ready, willing and able" to assume care of the child and the non-custodial parent was not implicated in the abuse, a dependency hearing would not be "appropriate." Moreover, if a non-custodial parent did

⁵ Section 6315 states that a child may be taken into protective custody as provided for in 42 Pa.C.S.A. § 6324.

not come forward at the informal hearing to assume custody or the non-custodial parent's involvement in the abuse was unclear, then no "ready, willing and able" parent exists and the child would be therefore "dependent."

Further, in situations where the county agency does not have reason to believe that a child is in imminent risk of harm, but is concerned that abuse might continue, the agency can implement appropriate social services for the child and family. 23 Pa.C.S.A. § 6370(a). In cases where the child's parents do not live together, social services should be offered to the family, including custodial and non-custodial parents, to address the abuse of the child. If either parent refuses these social services, then the county agency may initiate "the appropriate court proceeding" pursuant to Section 6370(b). Thus, in some circumstances, even though a child has both a custodial and non-custodial parent willing to assume care for the child, neither parent is willing to accept social services in order to exercise proper parental care and control, and thereby prevent the abuse and, again, the child would be declared "dependent." It could also be that after social services are offered, they do not achieve their goal and protective services are required to avoid continued abuse and neglect. In these circumstances, the county agency of course could file a petition in accordance with 23 Pa.C.S.A. § 6315 or § 6370(b), as discussed above. However, that was not the case here.

The record indicates that Mother and Father were involved in custody proceedings that began in the summer of 1996. The county agency conducted home study evaluations of the parties and submitted these to the family court judge. (R. 30a). In the fall of 1996, during the pendency of this custody matter, Mother filed reports regarding harassment and child abuse by Father. The county agency conducted an investigation and had Mother, Father and child evaluated by a psychiatrist in November of 1996. Mother was in counseling during this time, but continued to make increasingly more outrageous claims of abuse against Father, which could not be substantiated. On January 17, 1997, the

family court held another custody hearing and, even following the evaluations of November 1997, the court continued custody with the Mother, and visitation with Father. (R. 32a). The County Agency then on February 5, 1997, filed a petition pursuant to 42 Pa.C.S.A. § 6302 on the basis that the child was “dependent,” not that protective services were required pursuant to 23 Pa.C.S.A. § 6315.

This is where the county agency exceeded its authority. If some event of abuse occurred between the time of the court’s custody hearing on January 17, 1997 and February 5, 1997, which caused the county agency to fear that the child was in imminent risk of harm, then the appropriate course of action was to file a petition for protective services as discussed above.⁶ At that time, the child would be temporarily placed in appropriate “shelter” care and an immediate informal hearing could take place where the court could place the child with Father or in another protective placement, as appropriate. Father could also then petition to modify the custody order in the ongoing dispute, before the family court judge who was already adjudicating and overseeing the matter.⁷ Indeed, it appears from the record, that Father did exactly that on or about February 10, 1997. (R. 33a). Thus, it was the decision of the family court judge, through the modification petition, to determine issues of custody and what custody arrangement was in the best interests of the child. Accordingly, it was inappropriate for the county agency to turn this matter into a dependency matter before the juvenile court.

⁶ The petition for dependency did not specifically outline a particular event occurring within this time frame, but referred to Mother’s behavior throughout the agency contact with her. (R. 1a - 2a). We must assume that the agency reported the conduct to the family court judge during the custody proceeding.

⁷ Of course, if Father failed to file for custody or otherwise assert his custodial rights, the child would remain in protective services and the county agency could petition to declare the child dependent as set forth in the discussion above.

Mr. Justice Zappala joins this Concurring Opinion.