Recent Custody Decisions

By: Amy J. Phillips, Esquire
Senior Associate
Reviewed by: David C. Schanbacher, Esquire

Summer is often a time of the year when parents consider modifying an existing Order for Custody as children are out of school and such changes may not be as disruptive as it would be when school is in session. However, as many of you know, there are no guarantees when custody is at issue and, once the door is open, the court, in reliance upon public policy, may change the existing Order for Custody as he or she determines is in the children's best interest even if that change was not contemplated by the parent seeking the change.[1] The following represent just a few of the latest appellate court decisions pertaining to the unpredictable nature of custody disputes:

Gates v. Gates, No. 2009 Pa. Super. 40 (Pa. Super. Ct. filed March 10, 2009).

In the *Gates* case, mother and father were married on May 13, 1995 and separated on August 19, 2005 after more than ten (10) years of marriage. During the course of their marriage, mother and father had one child, Jonathan, on October 12, 1999. On October 13, 2006, the trial court awarded primary physical custody of Jonathan to father subject to mother's rights of partial physical custody. Thereafter, on February 5, 2008 father sought to modify the parties' existing Order for Custody because mother had received in-patient mental health services from December 12, 2007 through December 27, 2007. Father's petition for modification also sought the release of mother's mental health records. Mother strenuously objected to the release of her mental health records.

On March 28, 2008, the court conducted an *in camera* interview wherein mother acknowledged the court could compel her to undergo a physical and/or mental examination as a result of the pending custody proceedings but continued to object to the release of her mental health records.[2] Following the *in camera* interview, the court permitted father to "cross-examine" mother as to her December 2007 hospitalization. Mother testified that she went to the hospital because she believed there was a problem with her medication, which required an in-patient stay for observation, but continued to object to father's request for copies of her mental health records even though she did not object to her own testimony about her hospitalization. On April 8, 2008, the court directed mother to execute a consent to release her mental health records to father. Mother appealed this order on April 30, 2008 and, in response, father filed a petition for contempt on May 1, 2008. On May 16, 2009, following a hearing, the court found mother in contempt of its April 8, 2008 order, suspended her custodial rights to Jonathan and awarded father counsel fees of $625.00. Mother timely appealed this order on June 16, 2008. Pending the outcome of the appeal, the Superior Court stayed both the order compelling her to execute a consent for the release of her mental health records to father as well as the suspension of her custodial rights of Jonathan.

The focus of mother's appeal to the Superior Court of Pennsylvania centered on whether she could be compelled to authorize the release of her mental health records to father as part of the pending custody proceedings. Mother first relied on § 7111(a) of the Mental Health Procedures Act ("MHPA")[3] claiming that the statutory privilege that protected confidential communications between psychiatrists (or psychologists) and their patients extended to documents in the patient's file. Rejecting the trial court's finding that mother waived the right to claim this privilege when she testified on March 28, 2008, the Superior Court found that § 7111(a) was a broad provision

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[1] Section 5301 of the Custody Act is the Pennsylvania General Assembly's "Declaration of Policy" with regard to custody actions. Specifically, the public policy as it pertains to custody actions directs the court to adhere to the following standard: "when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the rights and responsibilities of child rearing by both parents and continuing contact of the child or children with grandparents when a parent is deceased, divorced or separated." *See* 23 Pa. C.S. § 5301.

[2] Pursuant to Pennsylvania Rule of Civil Procedure 1915.8, the parties and/or the child(ren) may be compelled to undergo a physical and/or mental health examination when a party or child's physical or mental health is at issue in a custody proceeding. *See* Pa. R.C.P. 1915.8.

[3] 50 Pa. C.S. § 7111(a).

and applied *to all records concerning mother's mental health treatment.* The Superior Court further discarded the trial court's reasons as to why mother had waived the privilege set forth in § 7111(a) and concluded that her mental health records were protected by the MHPA even in a custody proceeding.

Father also argued that mother waived the privilege of confidentiality in her mental health records by testifying on March 28, 2008 about the reasons for her hospitalization. The Superior Court, in assessing the validity of Father's argument was reluctant to find that mother did waive her right to confidentiality. Rather, the Superior Court noted that mother emphatically and repeatedly objected to the release of her mental health records to father including both before and after her testimony on March 28, 2008. The Superior Court further noted that the expectation of confidentiality in one's mental health records to be critical to mental health treatment. Thus, the Superior Court concluded that there were less intrusive means than the release of mother's mental health records to father to demonstrate whether mother's mental health influenced her ability to care for Jonathan such that modification of the existing schedule was in Jonathan's best interest.

In light of their decision concerning the confidentiality of mother's mental health records, the Superior Court also vacated the finding of contempt lodged against mother. In doing so, the Superior Court noted that mother would have suffered irreparable harm if she had been forced to release her mental health records before the Superior Court could issue a ruling on that particular issue.

The lesson to be gleaned from the Gates case is that even though a party's mental health may be a relevant issue in a custody proceeding if it affects that party's ability to parent the minor child(ren), this does not mean that the other party is necessarily entitled to that parent's mental health records, which are otherwise protected from disclosure. This is particularly true where there are other avenues to be explored to ascertain if that parent's mental health is impacting his or her ability to parent the child(ren) and is affecting the best interest of the children.

Cramer v. Zgela, No. 2009 Pa. Super. 60 (Pa. Super. Ct. filed April 1, 2009).

In the *Cramer* case, father sought visitation with his son even though he is serving a life sentence for first-degree murder at the Pennsylvania State Correctional Institution in Huntingdon, Pennsylvania ("Huntingdon"). Specifically, father first filed a complaint for partial physical custody in York County to compel visitation with his son at Huntingdon on February 19, 2004. Mother opposed father's request at that time, as the child was only 10 months old when father was first incarcerated in May 2003. Mother further requested that the child be permitted to make an informed decision about visitation with his father when he was old enough to make a mature decision.

The York County Court transferred this custody action to Perry County, which is where mother was residing with the child at the time father commenced this action. On July 6, 2005, the Perry County Court denied father's request. Father filed a timely appeal seeking to have the Perry County order vacated and remanded for further proceedings, which appeal was granted on April 25, 2006 in a non-precedential decision.[4] Upon remand, the Perry County Court discovered that mother was once again residing in York County and transferred this matter back to the York County Court. The York County Court conducted a pre-trial conference on April 16, 2007 at which time the York County Court entered an order directing father to present evidence pursuant to 23 Pa. C.S. § 5303(b) and (c) demonstrating that he was not a grave threat of harm to the child.[5] This same order awarded sole legal and physical custody to mother and stayed further proceedings until further order of court. On May 17, 2007, father

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[4] The remand was necessary because the Superior Court had stated in *Sullivan v. Shaw,* 650 A.2d 882, 884 (Pa. Super. Ct. 1994) that "[i]ncarcerated prisoners who petition the court for visitation rights are entitled to a hearing, to notice of this hearing, and to notice of their request that they be present at the hearing by means of a writ of *habeas corpus ad testificandum." See Cramer v. Zgela,* 902 A.2d 985 (Pa. Super. 2006) (unpublished memorandum).

[5] Section 5303(b), (b.1) and (b.2) require the trial court to consider certain criminal convictions and criminal charges when determining whether it would be appropriate to award a parent custody, partial physical custody and/or visitation. Section 5303(c) requires the trial court to appoint a qualified professional to provide counseling to a parent who has been convicted or charged with one of the offenses enumerated in § 5303(b), (b.1) and (b.2) and to take testimony from that professional prior to entering an order for custody, partial physical custody and/or visitation of a child. *See* 23 Pa. C.S. § 5303(b), (b.1), (b.2) and (c).

filed a Motion of Prima Facie Showing that Plaintiff [Father] Does Not Pose a Grave Threat of Harm to His Child. The York County Court also made several telephone calls to Huntingdon to determine the appropriate personnel who would have information on whether father was a grave threat of harm to his son and to determine what counseling, if any, father had in compliance with 23 Pa. C.S. § 5303(c). The York County Court conducted a hearing on June 26, 2008 to determine if father had received any counseling pursuant to § 5303(c). Both mother and father attended the hearing via speaker phone and, at which, the York County Court took testimony from two individuals at Huntingdon. Following the hearing, the York County Court dismissed father's petition for custody and father subsequently filed this appeal.

Despite recognizing the applicability of § 5303(c) to the instant matter, the York County Court felt that the directives contained within that provision of the Custody Act to be insurmountable. The York County Court further found that it lacked the authority to direct the Department of Corrections to undertake an inmate's counseling in accordance with § 5303(c) or to permit an outside, qualified professional into the institution to provide the necessary counseling. On appeal, the Superior Court emphasized that the paramount and polestar concern in a custody action is the best interests and welfare of the children involved but further noted that there was no appellate case law or statutory provisions in effect that would deny a parent visitation with a child because of incarceration alone. Declining to state whether such a visitation arrangement would or would not be in a child's best interest, the Superior Court concluded that the York County Court erred in failing to appoint a qualified professional to evaluate father in accordance with §§ 5303(b) and (c). Noting that the right to visit with one's child is a constitutionally protected liberty, the Superior Court found that there was no way the York County Court could rule upon the merits of father's request for visitation without the testimony of a qualified professional as to whether he was a grave threat of harm to the child. Rejecting all of the York County Court's reasoning as to why it could not comply with § 5303(c), the Superior Court vacated the order dismissing father's petition for visitation with his son and remanded this matter to the York County Court for further proceedings. The Superior Court also noted that action on father's petition was long overdue in light of the fact that five years had passed since father initially filed his petition.

While the focus of this decision centers on the appointment of a qualified professional to provide counseling to father and assistance to the York County Court, this case also demonstrates the court's adherence to the dictates of public policy to ensure a continuing relationship between the child(ren) and both parents even when one is incarcerated. Further, the court should not deny a parent's right to custody, partial physical custody and/or visitation absent the exhaustion of all avenues to ensure that the child would benefit from a relationship with that parent, even in situations where the parent is incarcerated for life.

Gianvito v. Gianvito, No. 2009 Pa. Super. 18 (Pa. Super. Ct. filed June 4, 2009).

In this case, mother and father were high school sweethearts and married on September 12, 1998. On February 5, 2002, mother and father had a daughter. During the first 2½ years of the child's life, mother was a stay-at-home parent but father and his parents (the paternal grandparents) were actively involved in the child's life. Father was a very hands-on parent and was involved in all of child's care from infancy onward. In June 2004, mother returned to work while father became "Mr. Mom" as he had lost his job. Father continued to act in this role until the parties' separation in April 2006. At the initial custody trial, father testified to his daily role as the child's primary caretaker since June 2004 and to the close relationship and significant involvement of the paternal grandparents in the child's life.

From April 2006 to January 2007, mother remained in the marital residence with the child while father resided with the paternal grandparents and provided care for the child during daylight hours while mother was at work and prior to father working the midnight shift as a part-time police officer. In February 2007, mother relocated with the child but father continued to provide much of the child's care. Mother filed for custody in January 2007 and, in March 2007, the trial court recommended that mother have primary physical custody of the child subject to father's rights of partial physical custody, which was modified slightly on June 21, 2007. Thereafter, the parties entered into an agreement on October 16, 2007 maintaining mother as the child's primary physical custodian subject to father's rights of partial physical custody. On March 5, 2008, mother filed a Motion for Special Relief requesting the right to relocate with the child from Moon Township, Pennsylvania to Greentree City, Pennsylvania. Father filed a petition on March 17, 2008 requesting modification of the parties' October 16, 2007 agreement and opposing mother's request for relocation. Following a trial on May 27 & May 29, 2008, the trial court awarded father primary physical custody of the child subject to mother's rights of partial physical custody. Mother filed a timely appeal.

On appeal, the Superior Court noted that "a party that seeks to modify an existing custody order must demonstrate a substantial change in circumstances that would justify a trial court's reconsideration of the custody disposition and that [o]nce a substantial change in circumstances has been shown, the trial court must then consider the best interests of the child." *See Gianvito, supra.* Finding that there was a substantial change in circumstances as a result of mother's impending remarriage and relocation as well as father's remarriage, the Superior Court confined its analysis to whether the trial court's order modifying the parties' October 16, 2007 agreement was in the child's best interests.

The Superior Court ultimately agreed with the trial court and its modification of the parties' October 2007 agreement. The Superior Court found that father had been substantially involved in the child's life since birth and that he had structured his work schedule around the child and that he and his new wife had moved their residence to be closer to the child in Moon Township even though this was farther from both father and stepmother's places of employment. The Superior Court further found that father and stepmother generally put the child ahead of all other aspects of their life. The Superior Court further noted that while mother was a fit and loving parent, the child's best interests were not paramount to her own. Therefore, the trial court did not abuse its discretion in awarding father primary physical custody of the child subject to mother's rights of partial physical custody contrary to the October 2007 agreement.

This decision is significant in that ***the Superior Court specifically states that a party must demonstrate a substantial change in circumstances to justify a trial court's reconsideration of a custody disposition.*** *This is not the case. Rather, § 5310 of the Custody Act provides as follows: "any order for the custody of the child . . . may . . . be modified at any time to an order of shared custody in accordance with this subchapter." There is no mention that there must be a change in circumstances before an order may be modified. Historically, a party was required to demonstrate that a change in circumstances had occurred to justify a modification to an Order for Custody but this requirement was subsequently eliminated from the Custody Act in favor of the standard requiring the court to consider and decide custody disputes in the best interests of the children.*

Conclusion: The above cases represent only a sampling of appellate custody decisions and demonstrate the ever-evolving schools of thought pertaining to child custody disputes.

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