COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA

LOU ANN (KEARNS) FREDERICK,	:	**NO. 96 CP 2139**
Plaintiff.	:	
	:	
vs.	:	**CIVIL-LAW**
	:	
ROBERT G. KEARNS, JR.,	:	
Defendant.	:	**CUSTODY**

MEMORANDUM OF LAW

Parties to this action, **LOU ANN FREDERICK** and **ROBERT KEARNS, JR.** were married the 2nd day of December, 1986 in Winchester, Virginia.

One child was born to this marriage, **STEPHANIE JEAN KEARNS** born the 30th day of July, 1987 although the Plaintiff, Lou Ann Frederick, also has a daughter Jandora Frederick born the _____ day of _____, _____. Up until Monday, the 25th day of November, 1996 the parties resided together in a mobile home located on property owned by the parents Robert G. Kearns, Jr. located at R.R. #3, Hollidaysburg, Pennsylvania 16648.

On November 25, 1996 the Defendant returned to the trailer to find that his wife had taken the two children and moved from the home. He subsequently determined that she had moved to her mother's home in the Lakemont Area of Altoona. Defendant made several attempts to contact his daughter in the following days including phone calls on

November 28 and November 29 of 1996 but he was not permitted to talk to his daughter on the phone.

Subsequent testimony presented in this matter showed that Ms. Frederick virtually kidnapped the minor child, Stephanie Kearns, and Stephanie, in fact, drew a picture of the incident in which Mrs. Frederick is shown holding Stephanie and pulling her from the residence while her daughter Jandora stands behind the door with a knife, allegedly to prevent any interference from Mr. Kearns should he enter the trailer while Ms. Frederick was removing Stephanie.

Numerous petitions and hearings were thereafter scheduled and held culminating in a "full custody testimonial hearing" held on the dates set forth in the Master's Report.

During the course of this hearing various witnesses testified on behalf of the Defendant Robert G. Kearns, Jr. as to the minor child's statements that it was her desire to reside with her father, the problems which existed in the marriage, the difficulties the father had obtaining contact with the minor child as result of the actions of the Plaintiff and various "providers" which became involved in the matter and their thoughts relative to Stephanie's difficulties and Defendant's abilities to care for the child.

During the course of these proceedings Dr. Nancy Baker, a psychologist appointed by the Court, made a report to Blair County Children Services alleging that the father had committed "severe emotional abuse" toward the minor child. This allegation resulted from a hearing in which Dr. Baker testified that, to the best of her recollection, the minor child "may have" indicated on one occasion that she desired to live with her father. The minor child later told her father that she told Dr. Baker that "every time" she saw her. In

response to this exchange the father, in frustration and anger, stated "then Nancy Baker is a liar". When this exchange was related to Dr. Baker (apparently by the minor child) the previously referenced child abuse report was made to the Child Abuse Hotline.

Dr. Baker admitted, during a phone conversation which is apparently "off the record", that she never followed up with a written report as required by the Act.

During the course of this investigation (which greatly exceeded the time limits established by the Legislature for such investigations) the focus of the investigation somehow "switched", without any new notification to the father or his counsel, to an allegation of abuse based upon "failure to provide proper medical care". This is- apparently, since very little information has been provided even to this date- based upon the allegation that the father "refused to give the child the prescribed medication for her psychiatric, psychological condition". The record in this matter is extremely unclear as to that allegation by virtue of the fact that the psychiatrist in question was never brought to Court and never testified as to exactly what occurred; nor has any evidence been produced that, once prescribed, the medication was ever denied to the child by the father. In fact, once a second opinion was obtained from a psychiatrist at the Meadows Psychiatric Hospital the father agreed to the use of medication and has consistently provided it.

At the close of Defendant's case counsel for the Plaintiff indicated that they would be presenting no testimony and no witnesses were called on Plaintiff's behalf.

Counsel then indicated that they would "rely on" various reports which had been provided during the course of various other proceedings such as Petitions for Emergency Relief, Petitions for Special Relief, Conciliation Conferences, etc. In only one instance

was the individual that prepared these reports in Court, under oath and subject to cross examination.-i.e. Dr. Baker.

In spite of objection by counsel for Defendant, the Master permitted the introduction of these various reports even though they were not part of this proceeding nor had any of the individuals involved been called to testify. Additionally, the Master received and made various correspondences after the record was closed a part of this record.

It is for these reasons and from the recommendation entered thereafter that these exceptions were filed:

Finding No. 8:

Defendant excepts to Finding No. 8 of the Master for the reason that the Master, as set forth in that finding, has introduced numerous items into the record of this case which were not made a part of the record prior to the closing of the testimony and none of which has been subject cross-examination. This writer has been unable to find any rule of procedure or any case law which indicates that the rules of procedure or the rules of evidence of the Commonwealth of Pennsylvania are suspended in their entirety in custody matters.

In fact, the Superior Court has consistently stated that:

"In child custody matters, the Trial Court must ensure that a **full and complete record** is created when a decision as important as the welfare of a child is at issue **Costello v. Costello 668 A 2nd 1096. 446 Pa. Super. 371(1995)**".

The entire recommendation made in this matter is highly improper and is based on information which should not have been permitted into the record of this case. As previously indicated, Plaintiff presented no testimony or evidence in this case and simply incorporated reports which had been received in other related proceedings which were not part of the actual custody hearing. It is respectfully submitted that not only is the introduction of such matters improper and without any basis in the judicial system in the Commonwealth of Pennsylvania or the evidentiary rules in the Commonwealth of Pennsylvania but the same renders the custody procedures established by the Supreme Court a mere sham. If the Court accept this method of proceeding the Court has, in effect, dictated that every custody case will be won by that individual who has sufficient means and assets to seek out "professionals" to have them submit reports to the Court which are not subject to cross-examination or attack in any way and the Court will blindly accept and rely upon those reports. Clearly such a procedure flies in the face of the dictates of the Superior Court in **Costello, Super** as well as prior cases which addressed the same issues, such as: **Harner v. Harner, 330 Pa. Super. 343, 479 A2nd 583(1984): English v. English, 322 Pa. Super. 234, 469 A2nd 270(1983) Com. Ex Rel Bowers v. Widrig 318 Pa. Super. 198, 464 A2nd 1299(1983);** and, in particular, **JFG v. KAG, 278 Pa. Super. 25, 419 A2nd 1387(1980)** wherein the Superior Court stated:

"The lower Court failed in its duty to ensure that the record in a child custody proceeding was complete, in that the father's parents and the mother's new husband failed to testify. It was crucial that they testify since the girls would have to share the house with one or the other, and without such testimony the lower Court could not make a valid

comparison of those persons respective attitudes towards the girls and their abilities to care for them, and the lower Court received no testimony from any disinterested source nor did it have any testimony from any social worker or other investigator concerning the living conditions of the parties and their respective homes."

To put it bluntly and more suscinetly, the proceeding in this case constitutes the worse abuse of process this writer has seen in over 24 years of practicing family law.

Finding No. 10:

While it is true that Dr. Baker first met with the child on March 28, 1997, the conclusions reached in the following paragraphs are, for the most part, erroneous. There is no question that the child has emotional problems and the same or probably exacerbated by the additional stress of the separation of her parents and the custodial situation in which she finds herself. Dr. Baker testified, however, that she had no idea how long many of the outward manifestations of this child's problems existed prior to the parties separation. In fact, Dr. Baker testified that is was irrelevant to her and it did not matter to her whether or not a transfer of custody to the father may alleviate or eliminate some or all of those manifestations.

There is nothing in this record to indicate that this child was biting, pulling her hair out or pulling her eyebrows prior to the separation to the parties. Regardless, the Master concludes that the "the same pre-dates the parties separation." This writer is at a loss to determine exactly where that determination came from or what evidence it was based upon.

Finding No. 15:

The reference to the father's ". . . need for her (the minor child) to care for him" is totally unsubstantiated in this record and apparently arises from a comment allegedly made by the child to Dr. Baker to the effect that her father needed her to care for him. I am extremely curious to hear some expert tell this writer that there is something wrong with a father crying to some extent in front of his child when he sees that child being torn apart finds himself being prevented by the mother from having meaningful contact with the child and sees his contact with the child being limited more and more every time he appears before the Court.

Once again it is respectfully submitted that nothing in this record establishes that the emotional difficulties-at least to the extent they exist at the present time and existed at the time of these hearings-have ". . .existed for years".

Finding No. 16:

This is the grossest distortion of the testimony that could possibly exist. Once again, father has indicated on several occasions during the course of the hearings that, based upon a comment by Dr. Hill to the effect that the most severe problems may be resolved or substantially helped by something other than medication, has indicated that it is his belief that the Courts should grant him primary custody to determine whether or not such a change in custody would alleviate and assist the child with her emotional difficulties. Once again, this writer defies anyone to show me, or this Court, in the record where Defendant Father testified that "all the difficulties involving the child will be eliminated by simply granting him primary custody."

Clearly, as previously indicated, Dr. Baker indicated that the father's actions could possibly rise to the level of emotional abuse. It is totally untrue that the statement was made relative to "the actions the father exhibits to his daughter...". Said allegations was related to only one item, the reference to Dr. Nancy Baker as being a "liar".

In fact, the findings of every provider do **NOT** substantiate Dr. Baker. For example, Lynn Kasgarise specifically stated that the actions reported by Dr. Nancy Baker were **NOT** emotional abuse.

Mr. Kasgarise emphasizes that the child is suffering from major depressive disorder, **single episode.** He goes on to state that the child's physco-social stresses as the parents divorce and subsequent dispute.

Mr. Kagarise then went on as pointed out by the Master, to state that "it is abundantly clear that for him to deny or to interfere with the treatment that Stephanie requires, specifically for him to deny prescribed psychiatric medications or to deny or to interfere with psychotherapy does constitutes a clear act of neglect." Once again, this writer defies anyone to show in this record where the evidence which shows that Defendant/Father ever denied medication to the child once it was prescribed. The record, in fact, clearly establishes that the father indicated that he desired a second opinion prior to agreeing to the use of medication and that once that second opinion obtained and the medication was actually prescribed, the father has never denied that medication or refused to provide that medication.

It would be fascinating to know exactly where Mr. Kagarise obtained the information on which he has based his conclusions. Apparently this is not important to anyone but this writer since everyone else merely accepted it as fact.

The only testimony presented in this case relative to "over-indulging" the minor child with material gifts was that the **mother** was the one constantly bringing home new toys for Stephanie. Since the Court system in this County does not deem it necessary to bring individuals into Court to explain their conclusions or to provide information as to exactly where they got their information we are at a loss to know on what this opinion is based.

Finding No. 17:

This writer, and I am sure this Court, are well aware of numerous situations in which children will refer to extended family members as being a cousin but we are "like brothers" or "like sisters". While it is certainly true that Stephanie Kearns has a very close relationship with her cousins and indicates a desire to spend more time with her cousins, this writer is, again, at a loss as to why that is bad. In fact, this Court system has gone to the extent of inferring with that relationship by providing in an Order of Court that the father **must** spend time alone with Stephanie. If the minor child has a close relationship with extended family members and is in the middle of an emotional crisis as a result of the situation it would seem to this writer that placing such restrictions on the child do more harm than good. Once again, this writer is at a loss to understand where it is written that "quality time" means that the parent must be alone with the child. If the child is happy in

the presence of extended family it would appear that gathering those family members around her at a time of crisis would be very helpful and provide emotional support to her.

Once again the Master's statement that both Defendant/Father and his sister said that the child "needs the father's family more than him" would appear to this writer to be playing fast and loose with the truth.

Finding No. 18:

Again, the testimony in this matter clearly indicates that **BOTH** parties refused to talk to the other and that they have had no relationship for years. It further indicates that **BOTH** wrote letters to the other and left notes when communication was necessary between them. In an effort to justify the recommendation which it was clear would be made before these hearings were ever completed-the Master has chosen to ignore the testimony in the matter and the evidence actually presented in the matter and slant his conclusions to make it appear that only one of these parties engaged in such conduct.

Finding No. 20:

Once again, the Master comes to the conclusion that "the paternal side of the family would not promote and/or encourage a reasonable relationship between the subject minor child and the Plaintiff/Mother."

One need only look at the record in this case and the pleadings which have been filed and by whom to know that the only party in this matter who has attempted to restrict or eliminate contact with the parent is the Plaintiff/Mother. In fact, Plaintiff/Mother voiced her objection to Defendant/Father receiving one additional period of temporary custody during the week for a couple of hours.

Findings No. 21-25:

The Master frequently refers to the animosity which exists between the Defendant/Father and the court appointed counselor. The Master then makes the statement "said feelings appear to be based on the facts said counselor does not agree with his position." This is, once again, the Master's "spin" on matters to justify the predetermined position.

Perhaps this attitude, if it exists, results from a call to the child abuse hotline which appears to have been done to create a basis for restricting father's contact. Frankly, this writer is appalled that the counselor would testify that she did not care when the symptoms she referred to began and it was not important to her whether or not they began when the mother removed the child from the marital home and began restricting and/or refusing contact between the minor child and her father. It would appear to this writer that any caring parent would be upset and disagree with any counselor who made such a statement and without any consideration of the possibility of a transfer of custody having a beneficial effect on the child.

It is well established in the Commonwealth of Pennsylvania that the ultimate consideration in custody matters is to determine what is in the best interest of the child and that such determinations must be made on a case by case basis. **See Moore v. Moore , 393 Pa. Super. 256, 634A.2d163(1993): Hockenberry v. Thompson, 428 Pa. Super. 403,631A 2nd 204(1993); McMillen v. McMillen, 529 Pa. 198, 602A 2nd(1992).**

"It is also well established that, while the expressed wishes of a child are not controlling in a custody decision, those wishes do constitute an important factor that must

be carefully considered in determining the child's best interest." **See McMillen v. McMillen, Super.**

It is also true that the child's preference must be based on good reasons and the child's maturity and intelligence must be taken into account. Id. Further, the weight to be attributed to the child's testimony can best be determined by the Judge before whom the child appears. Id.

Furthermore, where a mother's and father's respective households constitutes equally suitable environments in which the children can be properly raised, then the children's preference to live with one or the other can not help but tip the evidentiary scale in favor of that parent. **See McMillen v. McMillen, Super. and Myers v. DiDomenico Pa. Super. , A 2nd ,(1995).**

It is further noted that, during the course of these proceedings from November of 1996 and continuing even after the testimony closed in the case and the record was closed various improper matters occurred which have been totally ignored by the Blair County Court System in general including Ex-Parte communications between the physiologist and the counsel for the Plaintiff. A hearing was held on the 18th day of July, 1997 and a recommended order was entered by the custody master. On July 20, 1997 a letter was prepared by the psychologist directed only to Plaintiff's counsel, totally ignoring Defendant's counsel and, more importantly, the Guardian Ad Litem appointed for the minor child Stephanie Kearns, in which she re-iterated exactly what she had told the Master in a conference call on July 18, 1997.

Immediately thereafter on or about the 21st day of July, 1997 a petition was filed by counsel for the Plaintiff attaching, as an exhibit, the previously stated letter.

Nothing in this letter constitutes any new revelation on behalf of this physiologist but simply reiterates exactly what she told the master in the conference call.

The master, by his own admission, received, made a part of the record and obviously considered various correspondences after the date that the testimony was closed and has marked the same and made them part of the exhibits of this case. See Paragraph 8, Page 4 in the Master's Finding wherein he lists these specific items.

In summary, it is respectfully submitted that, in a matter as important as child custody, and especially in a case in which the minor child has been so severely emotionally effected by the separation of the parties, it is incumbent upon the Courts to make very careful examinations of the opinions of providers and to delve into all aspects of the case as it may effect the minor child or, at the very least, to afford counsel the opportunity to do so. If an "expert" is not brought to Court to be subject to cross-examination, their opinions and reports should not be admissible absent a stipulation or agreement by counsel. The proceeding in this matter has been with all due respect to the court system, a farce.

RESPECTFULLY SUBMITTED:

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