

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

MARGARET C. SHAMEL,
Plaintiff,

vs

File No. 91-8616-DC
HON. PHILIP E. RODGERS

RICHARD LEE GUSTAFSON,
Defendant

Gary R. Bergstrom (P36918)
Attorney for Plaintiff

Richard Lee Gustafson
Defendant in Pro Per

DECISION AND ORDER

The Plaintiff and Defendant resided together from 1978 through 1985. They were not married; and, during the course of their relationship, they had three children, Richard Lee Gustafson, Jr., dob: 10/13/79; Christopher Lee Aaron Shamel, dob: 2/21/81; and Matthew Lee Lester Gustafson, dob: 4/13/83. The Defendant acknowledged paternity for these children. In 1985, citing complaints of physical, emotional and sexual abuse, Plaintiff and her children left the Defendant and they have been separated ever since. In December, 1990, Plaintiff married Rod Shamel.

Thereafter, on January 21, 1991, Plaintiff filed a Petition for Custody. The Defendant had been imprisoned after pleading guilty to Criminal Sexual Conduct in the Second Degree and was due to be released in the spring of 1991. The Defendant answered Plaintiff's complaint and denied many of Plaintiff's allegations and filed a counter-claim seeking extensive visitation privileges until such time as the Court could conduct a custody hearing.

On March 5, 1991, the Court issued an Interim Order for Custody to Plaintiff-Mother and reserved the issues of visitation, child support and medical insurance due to the then present prison incarceration of the Defendant.

The Defendant filed timely objections and a Motion to Modify the Court's Interim Order and, in accordance with MCR 3.206(F), a demand for a custody hearing within 56 days. A hearing on Defendant's Motion was scheduled for April 24, 1991, at 9:00 a.m. and notice of the hearing was provided to the parties in a

mailing from the Court Administrator, dated April 3, 1991.

The Plaintiff, her counsel, and witnesses appeared for the hearing as noticed. The Defendant neither appeared nor contacted the Court in writing or by telephone to explain his failure to appear. The Court then proceeded to hear Plaintiff's proofs on the issues of custody, support and visitation. The Court will now provide its findings of fact and conclusions of law. MCR 2.517.

CUSTODY

It is well established that a trial court may not modify or change custody orders where there is an established custodial environment absent clear and convincing evidence that such modification or changes are in the best interests of the child. MCLA 722.27(1)(C). In an Interim Order for custody, support and visitation, dated March 5, 1991, custody of the parties' three minor children was awarded solely to Plaintiff, Margaret Celeste Shamel. As noted above, issues regarding visitation, support and medical insurance were reserved due to the Defendant's then current incarceration.

The Child Custody Act of 1970 defines an established custodial environment as follows:

"The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life and parental comfort. The age of the child, the physical environment and the inclination of the custodian and the child as to permanency of

the relationship shall also be considered."
MCLA 722.27(1)(c); MSA 25.312(7)(1)(c).

The proofs presented at trial clearly established the existence of an established custodial environment with the children's mother. She has been the primary care giver since the children were born and has been solely responsible for their care and upbringing since she and the Defendant separated in 1985. The proofs indicated not only that the children look to their mother for guidance, discipline, the necessities of life and parental comfort, but that she has gone to extreme efforts to break the cycle of chemical dependency and physical abuse which characterized her relationship with the Defendant and which was

beginning to manifest itself in inappropriate behavior by her oldest child.

Towards this end, the proofs established that both Plaintiff and Defendant suffered from chemical dependency. In addition, the Defendant also abused drugs, including marijuana, cocaine and LSD. The Defendant was physically, emotionally and sexually abusive to Plaintiff, which led her to seek counseling and, ultimately, to separate from the Defendant.

Thereafter, the Plaintiff testified that she sought to deal with her chemical dependency and completed a program of in-patient residential alcohol treatment at Munson Medical Center. Upon her successful discharge from this program in February, 1989, she completed two successive ten-week parenting sessions and enrolled her children in programs designed to counsel children of alcoholic parents. Plaintiff has maintained her sobriety since entering the Munson program in January of 1989 through a combination of out-patient counseling and continuous attendance at Alcoholics Anonymous meetings.

The Plaintiff and her children have also benefited from counseling provided by the Department of Social Services. Plaintiff testified about the positive impact that John Vanderlind, M.S.W., has had on the family and especially on her oldest son, Richard. Richard exhibited behavioral problems at school, including violent and aggressive tendencies and a poor attitude towards women in positions of authority, such as his own mother and teachers. The combination of the counseling Richard has received, with the Plaintiff's successful efforts to maintain her sobriety and the strong positive relationship which the children have formed with the Plaintiff's new husband, has resulted in a dramatic improvement in Richard over the past year.

The Plaintiff testified that she has a morally strong, hard working husband who provides a positive role model to her children. She stated that the children like Mr. Shamel and that he provides stability in the household. Unlike the Defendant, Mr. Shamel exhibits a sincere emotional interest in the children and has involved them in bowling and soccer leagues, attends their parent-teacher conferences and generally involves himself in their lives. He provides the children with physical, financial and emotional support in a non-violent setting and has indicated his interest in adopting the children.

The Court interviewed each of the children separately in

camera. During those interviews, it became clear that the children resent their father and his lack of contact with them, are disappointed and ashamed by his behavior, are not presently interested in exercising visitation with him, sincerely like Mr. Shamel, and are excited about the prospect of his adopting them. Each child indicated satisfaction with his present home life and enjoyment of school and a desire to continue to be involved in the extracurricular activities which Mr. Shamel has made available to them, including bowling and soccer. The oldest child, Richard, indicated that his grades have improved and he would like to do better and perhaps make it on the honor roll.

Christopher, the ten-year old, is an honor student and would like to pursue a career in science or police work. The youngest boy, Matthew, also enjoys school and states that his favorite subjects are reading and math. Given the tremendous pressures which this family has lived under for most of their existence, the children are doing remarkably well. Certainly, for the past two years, they have lived in an emotionally stable and secure environment in which they have made tremendous strides to recover from the atmosphere of chemical dependency and abuse which permeated the household.

Having determined that an established custodial environmental exists with the Plaintiff, the Defendant must establish any claim to custody by clear and convincing evidence that an alternate arrangement is otherwise in the best interest of the children. MCLA 722.25; MSA 25.312(5). The Act defines the best interest of the child as the sum total of eleven specific factors:

- (a) The love, affection and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this State in place of medical

care and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school and community record of the child.

(i) The reasonable preference of the child, if the Court deems the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

(k) Any other factor considered by the Court to be relevant to a particular child custody dispute.

While a discussion of the foregoing factors is implicit in the preceding discussion, the Court will further comment upon each. MCR 2.517.

As noted above, the parties were never married but did reside together for approximately seven years. Unfortunately, the testimony indicates that the relationship was permeated by chemical dependency and physical, sexual and emotional abuse. There was no emotional stability within the home, nor was there any significant financial stability. The Defendant worked for a carnival company based in Ionia, Michigan, and traveled with the carnival from April through October. In the off-season, he would live off a \$5,000.00 bonus and income from odd jobs. After the parties separated, he would take the bonus and go with his

friends to Florida and also pick up money from odd jobs. He spent one winter in Grand Rapids living in a shelter and earning extra money by selling plasma and collecting pop bottles.

The Defendant's alcoholism and inability to make proper choices ultimately led to an incident with a woman where he was charged with Criminal Sexual Conduct in the First Degree and later entered a guilty plea to the charge of Criminal Sexual Conduct in the Second Degree. He was sentenced to a term of imprisonment and recently released.

As noted above, the Plaintiff's history during the last six years is far different. She has undergone counseling to deal with both her chemical dependency and the abuse which she suffered; she has also sought out counseling for her children in an effort to break the cycle of chemical dependency and physical abuse. She has entered into a stable and supportive relationship with her new husband and the children are doing well at school and are emerging from the cloud of despair which previously shrouded their lives.

There is no doubt that the children love their mother and are developing a strong attachment to her new husband. Clearly, they care little for their father, are disturbed by his behavior and indicate no real desire to see him, let alone express any affection for him. The Plaintiff is the only party who has love, affection and other emotional ties with the children. Plaintiff also exhibits a dramatically superior capacity and disposition to give her children love, affection and guidance. Her efforts to seek counseling for them and to give them an opportunity to grow and prosper is laudable.

The Plaintiff has been solely responsible for providing the children with food, clothing and medical care. The Defendant has a minimal support obligation for which he is in arrears. There is no indication that he has any disposition to provide the children with the necessities of life.

The children have lived their entire lives with their mother as the primary care giver and for the last six years they have not resided in a home with the Defendant. During that six years, the Defendant exercised only minimal visitation and did not see them more than three times a year. For the past two years, he has been in prison. During this time, the Defendant sent minimal correspondence and did not otherwise acknowledge the children on holidays or their birthdays. Indeed, the last gift which he

provided to the children was a folding knife with a four-inch blade which he presented to his oldest son, Richard, when he was nine years old. The children are now in an emotionally stable and nurturing environment with a new father who cares very much for them and who has indicated his desire to adopt them. For the first time in their lives, the children now live in a family unit with some degree of permanence and stability.

While neither of the parties presented examples of moral fitness at the beginning of their relationship, the Plaintiff has made tremendous strides over the last few years. She has acknowledged and dealt with her chemical dependency, sought counseling for herself and her children, taken classes to develop her parenting skills, and developed a stable and supportive relationship with a new husband who cares very much for her children. At this time, the Plaintiff's moral fitness is clearly superior to that of the Defendant, who has recently been released from prison following a sentence in excess of two years for Criminal Sexual Conduct in the Second Degree.

Due to the on-going counseling and successful efforts to deal with her chemical dependency, Plaintiff enjoys good mental and physical health. Her only lingering problems are from a traumatic back injury which she relates to physical abuse she received from the Defendant. There is no current evidence before the Court regarding the Defendant's physical or mental health other than the opinion of John Vanderlind, based upon a review of the Defendant's letters, which indicate that he has made no positive strides in dealing with the problems that ultimately led to his incarceration.

The children do enjoy a stable home and are doing well in school. This is directly attributable to the efforts of the Plaintiff, her new husband, and the supportive network of counselors who are assisting them.

The Court did meet with each of the children in camera. The children are currently 8, 10 and 11 1/2 years old. The older children expressed a clear and reasoned preference to reside with

their mother and indicated no desire to spend time with their father or otherwise indicated any affection for him at all. He continues to be a source of embarrassment and disappointment for them. The oldest child indicates resentment at the way he treated his mother, having witnessed his father physically abuse her on numerous occasions.

The Court has not considered the willingness or ability of the parents to facilitate and encourage a close and continuing parent-child relationship between the children and the other parent for reasons that will be more fully discussed ahead. Suffice it to say, it is the Court's current concern that the progress which the children have made in the last two years is tenuous and fragile. The issue is whether the children should have any contact with the Defendant whatsoever, let alone that he be granted custody.

Having reviewed the foregoing factors, it is the opinion of the Court that the Plaintiff should be awarded sole custody of the parties' minor children.

VISITATION AND SUPPORT

Based upon a review of the same factors which have caused this Court to make a determination that the Plaintiff should have sole custody of the parties' minor children, it is the Court's further opinion that the Defendant's rights of visitation be severely limited. Based upon the testimony of John Vanderlind, a board-certified clinical social worker with 38 years of experience in dealing with dysfunctional families and children, and an individual who has counseled the family extensively, current visitation with the children's father would have a negative impact on their recovery and be detrimental to the oldest child's current positive adjustment.

In Mr. Vanderlind's opinion, Plaintiff's new husband has a stabilizing influence on the family and his warm and emotionally supportive parental role should be encouraged. At this time, the family is moving through the stages associated with the recovery from chemical dependency and are in the last stage where it is necessary to make changes to their style of life that support their recovery.

With regard to recovery from the physical abuse, Mr. Vanderlind testified that the cycle of abuse continues as children who are exposed to it are frightened, are fearful of becoming victims themselves, and tend to transfer their fear to others by themselves becoming aggressive, dominant personalities. This was the problem he saw with Richard, and Richard has made a remarkable recovery over the last year. Unsupervised or frequent visitation with the Defendant could severely affect his recovery.

Based upon the analysis of the foregoing criteria, it is this Court's order that the Defendant may not have any visitation with his children until he first completes a psychological assessment to determine the extent of his addiction, if any, to alcohol or other drugs, the danger, if any, which his children might face in the form of physical, sexual or emotional abuse, and his ability to spend time with his children in a manner that will not negatively affect their recovery. Once such a psychological assessment is complete! the Court will review it and order visitation consistent with the conclusions and recommendations contained therein. Certainly, this will involve a period of supervised visitation before any unsupervised or overnight visitation will be allowed.

As to support, Plaintiff testified that during her relationship with the Defendant, he would make \$500.00 or \$600.00 a weekend while working with the carnival and received a \$5,000.00 bonus at the end of the season if he stayed with the carnival for the entire season and otherwise performed acceptably. This is vastly different than the income information which the Defendant provided to the Friend of the Court earlier. For these reasons, it is this Court's determination that the matter of support be remanded to the Friend of the Court for further investigation regarding the Defendant's income and further receipt of an updated recommendation. Upon receipt of this recommendation, the Court will make a final determination of appropriate support in view of the Michigan Child Support

Guidelines. Any change in the level of support will be retroactive to the date of the April 24, 1991, hearing.

JUDGMENT

A Judgment in the usual form for practice before this Court which comports with the foregoing Decision shall be presented to the Court for signature pursuant to MCR 2.602

HON. PHILIP E. RODGERS, JR.
Circuit Judge
Dated: 5/02/91