

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

August 19, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

FAYE GENTRY,) C/ A NO. 03A01-9604-JV-00120
)
Petitioner - Appellee,) COCKE JUVENILE
)
v.) HON. C. PHILIP OWENS,
) JUDGE
JENNIFER MGAHA,)
) VACATED AND
Respondent - Appellant.) REMANDED

THOMAS V. TESTERMAN, Newport, for Petitioner - Appellee.

WILLIAM LEI BROCK, Newport, for Respondent - Appellant.

O P I N I O N

Franks. J.

In this action to enforce visitation rights by the paternal grandparents, the Trial Judge ordered visitation and the mother has appealed.

The child was born on April 3, 1993, and on June 20, 1994, the paternal grandmother filed a petition for visitation. On September 20, 1994, the Trial Judge entered an order following an evidentiary hearing, wherein he determined:

that the minor child, Emily G. Phillips, dob 4-3-93, suffers from particular and severe medical problems, and is not a child that can be removed from the home of the respondent and her grandmother, Ms. Ransom

Hall. However, the Court does find that the petitioners, being the fraternal grandmother and father of the child should be granted one hour of visitation each week at the home of Ms. Hall in order to attempt to establish a relationship with the child.

On July 13, 1995, the appellants' brief informs us that the Court "reheard the matter" and a "final order" was entered on July 19, 1995, and provided, *inter alia* "that the petitioner should be awarded visitation of the minor child, Emily G. Phillips, dob 4-3-93 from 9:00 a.m until 1:00 p.m on Saturday, every other week." This order was stayed by the Trial Court, pending an appeal, and the mother insists the evidence preponderates against the Court's finding that visitation with the paternal grandmother is in the best interest of the minor child.

T.C.A. §36-6-302 establishes the right for grandparents to visit with grandchildren upon finding by a court of competent jurisdiction "that such visitation rights would be in the best interest of the minor child."¹

At the trial on July 13, and during the direct examination of the grandmother, the Court interposed:

I didn't see we had any need to sit here and rehash everything we had gone through before and we had, and all the testimony that was started here was everything that I had heard and, you know, absent anything to the contrary I just didn't see the need to do it all over again.

I understand the respective positions of both sides. I know after we heard this the last time I talked to Dr. Puckett about the child's medical condition and he informed me that there was nothing about the shunt that would prevent the other grandmother from having the child with her just as

¹This case does not involve married parents. See *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

long [sic] the child was taken care of, and he couldn't see any harm in that.

The evidence in this record preponderates against the Trial Judge's decision, and we vacate. T. R. A. P. Rule 13(d).

It was highly irregular and improper for the Trial Court to consult an expert witness *ex parte*, and rely on that information in making his judgment. The basis to authorize the Court to consult an expert is found in Rule 706, Tennessee Rules of Evidence, and the Court must scrupulously follow that rule. *Also see Dover v. Dover*, 821 S.W2d 593 (Tenn. App. 1991).

The parties are entitled to make an orderly presentation of all of their evidence and it is the Court's duty to decide the factual issues from the evidence presented in Court.

Accordingly, the judgment of the Trial Court is vacated and the cause remanded for a new trial. In view of the circumstances presented, we believe this is an appropriate case for a guardian ad litem to be appointed for the minor child before there are further proceedings in the Trial Court. Accordingly, upon remand, the Trial Judge will appoint a guardian ad litem for the child and proceed in accordance with this opinion.

The cost of the appeal is assessed to the appellant.

Herschel P. Franks, J.

CONCUR:

Houston M Goddard, P. J.

Charles D. Susano, Jr., J.