

## **GUARDIANSHIP OF ESTELLE**

The recent Appeals Court decision, Guardianship of Estelle, decided on October 29, 2007, underscores the importance of a finding of parental fitness (or unfitness) of the biological parent in the context of custody disputes, guardianship actions and adoption actions. Justice Cowin's opinion is particularly instructive as it spells out the meaning of 'parental fitness or unfitness' and its relationship to the standard of the 'best interests of the child'. It is also instructive as to how a temporary guardian or foster parent may be able to claim successfully the status of de facto parent where the biological parent is found fit and therefore entitled to custody of the child in question.

### **The Facts:**

Estelle was born in December, 1997. By the time of Estelle's birth, the relationship between her mother and father had ended. In April, 1998, Estelle's mother died and the mother's brother and sister immediately assumed her care; they sought and received temporary guardianship of Estelle in May, 1998. Estelle's father had not been active in Estelle's life during her infancy and did not protest the temporary guardianship until July 24<sup>th</sup>, 1998, when he filed a motion to terminate the guardianship. On March 9, 1999 a guardian ad litem was appointed. In the opinion of the Court, 'This ushered in an inexplicable period of an additional six and one-half years during which the case was 'investigated''. Also in March of 1999, the biological father was ordered to pay \$50/wk as child support to the temporary guardians. The father failed to do so for five weeks and only commenced his support payments after he was found in contempt.

The case was finally tried in September, 2005. During the intervening years between the death of Estelle's mother and the trial, Estelle lived most happily with her aunt and uncle and their two children. She called her aunt and uncle "Mom" and "Dad" and her biological father, whom she saw on a regular basis but who played an insignificant role in her life, "Daddy Sam".

The trial judge found "that totally separating the Child from (the uncle's and aunt's) home would be damaging," and that "continued role of all the adults in her life would be in the child's best interest until she was older and better able to cope with more significant change." At the same time, he concluded that there was "insufficient evidence to establish that the (Father) was completely unfit as a parent in order to prevent him from having continuing contact with the Child." In accordance with these findings and rulings, the trial judge created a co-guardianship, and relieved the father of the obligation to make child support payments. The biological father appealed the decision.

#### **Outcome and Reasoning:**

The Appeals Court remanded Guardianship of Estelle to the trial court because as a matter of law a fit biological parent has the absolute right to custody of his child. There is no statutory or case law basis to award co-guardianship where there exists a fit biological parent – irrespective of the extent of the bonding of the child and his temporary caregivers. While the Appeals Court recognized the trial judge's conundrum, the judge's solution was wrong as a matter of law. Furthermore the trial court's findings with respect to the behavior of the father did not support the trial court's conclusion. The Appeals Court commented that judge's findings and conclusion were, at best, "ambiguous".

Of note is the Appeals Court's discussion of the meaning of parental fitness. In the instant case – as in every case – fitness is very fact specific. The issue is whether this father is fit to parent this particular child in these particular circumstances, even where he may be unfit or fit with regard to his parenting of another child in a different circumstance. In the instant case, one must ask whether the child would be measurably harmed by removal from her aunt and uncle's home and would this father do what was necessary to parent the child coming to him under these circumstances. According to the Appeals Court, the correct approach is not to balance the 'child's best interests' against the fitness of the parent, but rather the fitness of the parent must be measured and calibrated in the particular context of the child and parent involved. Fitness of a parent should not be considered in the abstract and the determination of 'unfitness' must be based on clear and convincing evidence. Harm to the child should not be considered in the abstract but must be demonstrated by the evidence presented.

Once a parent is determined not to be unfit, custody of the child belongs to the parent. If the parent is determined to be unfit, then custody cannot be awarded to such parent. The trial judge attempted to straddle this determination in a manner that was impermissible. On remand, the trial judge was invited by the Appeals Court to hear further evidence on the issue of fitness and further evidence regarding events which may have occurred subsequent to the trial.

Sui sponte, Judge Cowin further set forth the possibility that the aunt and uncle of Estelle, as former temporary guardians, may have standing as de facto parents in the event that the biological parent is found fit to parent Estelle. The aunt and uncle certainly

performed all the day to day parenting functions and made the important decisions in Estelle's life for the past seven years.

**Lessons to be learned from Guardianship of Estelle:**

1. Absent contrary evidence, there is a presumption that the biological parent is fit to be the custodian of his or her child. The party contesting the biological parent's fitness has the burden of proof to establish unfitness.

2. Where fitness of the biological parent is in issue, that parent must demonstrate his fitness to parent the particular child whose custody he seeks. Parental fitness is not an abstract concept but is fact specific.

3. Fitness, or unfitness, to parent a particular child must be determined by clear and convincing evidence.

4. The quality of parenting must be measured after consideration of the harm to the child of removal from his/her current residence.

5. The trial judge must make findings regarding fitness – or lack thereof -- that are thorough and support the judge's conclusion.

6. Critical facts in determining parental fitness are the following:

a.) the history of the relationship between the child and the biological parent, including circumstances of birth, causes for estrangement, frequency of visits, reasons for such frequency, communications (and efforts to communicate) between parent and child outside of visits, geographical distance, economic circumstances of the biological parent.;

b.) the conduct and concerns expressed by the biological parent about the welfare of his child, including his relationship to the caregivers, the extent of his involvement in

the child's school life or extracurricular activities; the biological parent's involvement with other family members or families;

c.) financial support paid by the biological father and the circumstances of such payment;

d.) the history of parenting that the child has received in the prior years from her caretakers, including the continuity and quality of such care;

e.) evidence of the nature and scope of potential harm to the child if she were removed from the current living arrangement;

f.) the ability of this particular parent to cope successfully with the added parenting skills that this child may require after she has been removed from her home environment.

7. An award of custody to the biological parent does not preclude the existence of de facto parents.

8. In proper circumstances, temporary guardians should be counseled to plead not only that the biological parent is unfit, but also that if the biological parent is found 'fit', the temporary guardians be awarded visitation (and/or ongoing contact) based on their status as de facto parents.