

Svea Court of Appeal Decision 2012-12-10
Christer and Annie Johansson v. Gotland Social Welfare Board
[Unofficial Translation]

The Appeals Court's Decision

1. Amending the district court's decision, the Appeals Court appoints attorney Margaretha Dufvenmark as specially appointed custodian to exercise custody over Dominic Johansson 010909-6792.
2. The Appeals Court confirms the district court's privacy decree with the exception that 1 Chapter 36. 1 § second paragraph of the Public Access to Information and Secrecy Act (2009:400) shall no longer be applied to the data contained in the forensic psychiatric report (District Court Attachment 49).
3. Appeals Court rules that the confidentiality provision in Chapter 36. 1 § second paragraph of the Public Access to Information and Secrecy Act shall continue to apply to information about an individual's personal and financial circumstances presented at the hearing *in camera* and in the district court attachments 12-18, 127 and 128, the Court of Appeals attachment 6 and the recording [transcript?] of the testimony of Henry Pelling.
4. Appeals Court sets Ruby Harrold-Claesson's compensation under the Legal Aid Act at 125,299 SEK, 60,250 for work, 27,349 SEK for lost time, 12,640 SEK expenses and 25,060 SEK Value Added Tax. The remuneration is attributable 35 percent to Annie Johansson and 65 percent to Christer Johansson.

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Motions before the Appeals Court

The Gotland Social Welfare Board asks that its request to the District Court be granted. Christer Johansson and Annie Johansson object.

Basis for the Appeals Court's Decision

Before the Appeals Court, the parties relied on the same grounds and developed their arguments in essentially the same way as they did in the District Court.

Recordings were played of the testimony in the district court of Christer Johansson, Annie Johansson, Gunvor Allqvist, Ove Lindstedt, Rune Johansson, Mikael Johansson, Stocky Johansson, Bertil Johansson, Trevor Archer, Cornelia Adolfsson, Artur Niczko, Bengt Sprowede and Eva Ernstson. Additional questions were put to Christer Johansson. Written evidence has been presented. Photographs and videos were viewed.

Gotland Social Welfare Board presented as new evidence before the Appeals Court a child psychiatric report, dated 9 August 2012. The statement was prepared by chief physician Henry Pelling and certified psychologist Anneli Sandqvist Wiklund, Department of Psychiatry, Child and Adolescent Psychiatry clinic Visby. Henry Pelling has also been heard as a witness before the Appeals Court.

The Appeals Court has to decide in this case whether the custody of Domenic should be transferred to a specially appointed custodian and, if so, whether the assignment should be given to the lawyer Margaretha Dufvenmark.

According to Chapter 6. 2 a § first paragraph of the Parental Code, the best interests of the child should be determinative in any decision on custody. This means that in the determination of a question of custody no other interests - the wishes of parents, general equity grounds or other factors - can take precedence over the best interests of the child. If a parent in the exercise of custody of a child is guilty of abuse or neglect or other deficiencies in the care of the child in a way that brings lasting risk to the child's health or development, the court shall decide to modify custody under Chapter 6. § 7 first paragraph, Parental Code.

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If the child is in custody of both parents and the provisions of the first paragraph apply to both parents, the court shall, under the second paragraph, transfer custody to one or two specially appointed custodians. A transfer of custody under the first paragraph requires that the custodian is deficient in the care of the child so that it is exposed to a specific risk with respect to health or development (cf. prop. 1989/90: 28 p 60 f). As the district court points out, the possibility of transferring custody to a specially appointed custodian should be used sparingly. When a matter of change in custody is considered, Article 8 of the European Convention [on Human Rights – ECHR] should also be respected. This provision grants a parent both a legal and actual family relationship with their biological children, as well as protection against intervention by government authorities without a reasonable basis.

Domenic, who turned 11 years old since the district court's decision, has been looked after under the Act (1990:52), with special provisions for the care of the young (LVU) since 24 June 2009. From the inquiry presented in the case, it appears that the underlying reason for the taking Domenic into custody is that he is deemed to have been exposed to both physical and mental care deficiencies at home, a judgment that the Appeals Court joins. Particularly serious, in the view of the Appeals Court, are the psychological care deficiencies described in the child psychiatric report dated 2 October 2009 that, among other things, resulted in Domenic being deprived of the opportunity to go to school and subjected to social isolation from other children of the same age.

From what later came to light about the parents' conduct after the initial decision, such as Christer Johansson's illegal restraint of Domenic, the parents' activities on the Internet

regarding Domenic and their way of talking to him about the LVU process during visitation occasions, it can be concluded that they were not afraid to interfere, if possible, in the ongoing care of Domenic. At the hearing in the Appeals Court it also emerged that the parents still dispute that there were any care deficiencies for Domenic and they do not believe that the two child psychiatric reports brought in by Social Welfare Board provide a fair description of his physical and mental condition. It appeared clear at the hearing in the Appeals Court that Domenic's parents put their own interests and rights before their son's. Furthermore, it has emerged that they lack insight into their care deficiencies and therefore have not been receptive to the help and support that they would otherwise have been offered by the social authorities. Overall, the Court finds it clearly shown that both Annie Johansson and Christer Johansson are deficient in the care of Domenic in a way that brings lasting danger to his health and development. Under these circumstances, the Court *shall* under Chapter 6. § 7, first paragraph, Parental Code, decide to modify the custody. Although the ECHR-enshrined right to family life carries heavy weight, society's responsibility for children who are maltreated in their home environment weighs more heavily. What is now said also applies when considering that Domenic is looked after under the LVU and that a transfer of legal custody thus will not result in any significant changes in his actual custody.

The Social Welfare Board has requested that custody of Domenic be entrusted to a lawyer as specially appointed custodian. The question is whether this solution is the best for Domenic.

According to the latest child psychological report, on which chief physician Henry Pelling has commented during the hearing in the Appeals Court, Domenic is in great need of developing in peace and tranquility in the foster home. It has become apparent that the foster home is a safe environment for Domenic, where his basic needs for care and support are provided for, and that he has developed very favorably during the placement. Furthermore, it has become evident that a move from the foster home to the parents would be unfortunate for Domenic's mental health and wellbeing. Domenic himself has made it clear that not want to meet his parents or even talk about them.

The Social Welfare Board has stated that the so-called LVU custody must continue for a long time. However, according to the LVU, the custody should last no longer than necessary. A starting premise is that custody shall be limited in time and, if necessary, turn into voluntary agreements. If custody of Domenic is entrusted to a specially appointed custodian, the Appeals Court finds that there ought to be circumstances under which LVU custody eventually ought to cease and be replaced by voluntary agreements, including the foster home.

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One alternative could be to award custody to a person in the home where Domenic is permanently cared for and brought up in the manner described in Chapter 6.8 § of the Parental Code. Domenic has not stayed so long in the foster home that it can reasonably

be argued that he has been permanently cared for and brought up there. Through the findings of the investigation into Mrs Johansson's behavior, including Eva Ernst's testimony at the district court, it may also result in an unreasonable extra burden on the foster home if they would also have to deal with issues about Domenic's visitation with his biological parents. An experienced family law attorney such as Margaretha Dufvenmark reasonably ought to be better able to resolve visitation issues in a way favorable to both the child and the biological parents. Appointments of this kind have also previously been accepted in practice (see RH 2001:50).

An additional alternative would be to allow an official within the social services to become specially appointed custodian. Given spouses Johanssons' attitude towards the Gotland Social Welfare Board, this appears not to be a particularly suitable solution for Domenic.

Under the Social Welfare Board's proposed solution, visitation issues could probably eventually be resolved in a good way. A specially appointed custodian could also prevent confidential information regarding Domenic's person being posted on the Internet. Whether it is Domenic who sees such information, or for example his classmates, the very existence of this data on the net may affect Domenic's development, especially when he becomes a teenager. Appointing a specially appointed custodian should also limit the court proceedings relating to Domenic, which should increase security for him. The Social Welfare Board's proposed solution thus appears to limit the parents' interference in the care and upbringing provided Domenic in a way that is beneficial to him.

There is no other alternative solution of the custody issue in this situation as a result of the biological parents' care deficiencies and the significant risk that they pose to Domenic's health and development. The Social Welfare Board's proposed solution

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is the one which is best for Domenic. The Appeals Court therefore finds that the Social Welfare Board's request must be approved and the [legal] custody of Domenic be transferred from spouses Johansson to attorney Margaretha Dufvenmark as specially appointed custodian. The District Court's judgment should be amended accordingly.

Privacy

Christer Johansson accepts that the information about him contained in the forensic psychiatric report cited in the case should no longer be confidential. Otherwise there are grounds to order confidentiality in the manner stated by the Appeals Court's [*sic*, but perhaps this refers to the District Court's] decision.

Compensation for Ruby Harrold-Claesson

Ruby Harrold-Claesson seeks compensation for 94 hours of work in the Appeals Court. The Court believes that Ruby Harrold-Claesson has put in considerably more work than

what was required in order to exercise Annie Johansson's and Christer Johansson's right of appeal. Ruby Harrold-Claesson's representation has also included much time and study devoted to issues not directly relevant to the examination of the custody issue. Even considering the issues of exclusion of evidence etc. treated prior to the trial and that the main trial amounted to approximately 16 hours, the court finds that Ruby Harrold-Claesson is reasonably compensated with a total remuneration by its two principals corresponding to 50 hours of work.

How to Appeal

See attachment B.

Deadline for appeal: 7 January 2013.

Participating in the decision were Appeals Counsel Lars Borg, Rapporteur, *dissenting*, former Appeals Court Judge Richard Ljungqvist, tf. Court of Appeals Assessor Emil Karlsson and jurors Bo Gustafsson Grip and Asta Holm..

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Dissenting Opinion

I share the majority's opinion that Domenic, before he was taken into custody in summer 2009, was subject to severe physical and mental care failures at home. The investigation of the case also shows that parents in various ways put their own interests and rights ahead of their son's, and that they have not been receptive to the help and support that they would otherwise have been offered. The question is whether, despite these care gaps, it is in accordance with Domenic's best interests to transfer custody of him to a specially appointed custodian, in this case a lawyer who will have legal custody of him while actual custody will continue to be exercised by the foster parents.

Regardless of whether LVU custody continues or whether custody under the proposed solution can eventually be discontinued and replaced by voluntary agreements with the foster home, Domenic will in fact be taken care of through society's auspices. The parents under the proposed solution will not have the right to influence decisions affecting Domenic. They will not have the right of scrutiny of Domenic's life, other than to the extent that the custodian permits. Since a specially appointed custodian would not be as responsible as the social welfare board to work out a visitation arrangement, there is a risk that the possibility of establish visitation between Domenic and his parents will diminish. Despite the parents' care deficiencies and their activities after Domenic was taken into custody, including on the Internet, I believe, in an overall assessment of what has emerged in the case, that it is not compatible with Domenic's best interests to now transfer custody from the parents to a specially appointed custodian, whose role will only be to be the legal guardian. The District Court's judgment should therefore, in my opinion, be upheld.

Otherwise, I agree with the majority.

