

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

T.D.P.	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
R.L.P.	:	
	:	
Appellant	:	No. 1134 MDA 2012

Appeal from the Order entered June 8, 2012,
in the Court of Common Pleas of Dauphin County
Civil Division, at No. 2010-CV-1366-CU

BEFORE: PANELLA, OTT, and STRASSBURGER*, JJ.

MEMORANDUM BY PANELLA, J.:

Filed: January 31, 2013

R.L.P. ("Father") appeals from the order granting permission for T.D.P. ("Mother") to relocate from Dauphin County, Pennsylvania, to the State of Arkansas, with the parties' male child, E.P., born out-of-wedlock in August of 2009, and entering a revised custody schedule. We reverse.

The record reveals the following relevant facts and procedural history. Mother initiated the underlying custody action in February of 2010, when Child was six months old. The trial court, upon agreement of the parties, granted Mother primary physical custody and Father partial custody. **See** Order, 4/9/10, at ¶ 3. In October of 2010, Father filed a petition to modify the custody order, wherein he requested equally shared physical custody. **See** Father's petition, 10/5/10. Following a custody trial, by order dated February 28, 2011, the court granted Mother primary physical custody and

*Retired Senior Judge assigned to the Superior Court.

Father partial custody on alternating weekends from Friday after work until Monday when Child is taken to daycare. In addition, when Father is not working, the court granted him custody every Monday and/or Tuesday from 7:30 a.m. until 7:30 p.m. When Father is working, the court granted him custody one evening every week after work until 7:30 p.m.¹ **See** Order, 2/28/11, at ¶ 4(b).

In July of 2011, Father filed a petition to modify the order of February 18, 2011, wherein he again requested equally shared physical custody. Following a custody conference, by order dated September 13, 2011, the court, upon agreement of the parties, amended the existing order by granting Father an additional hour during his custodial weeknights, and from Thursday after work until Friday morning prior to Mother's custodial weekends. **See** Order, 9/13/11, at ¶ 1-2.

On April 12, 2012, when Child was more than two and one-half years old, Mother notified Father she intended to relocate with Child to the State of Arkansas to participate in a three-year Ph.D. program at the University of Arkansas at Little Rock ("UALR"). Father filed a counter-affidavit on May 3, 2012, wherein he objected to the relocation and to the modification of the custody order. On June 7, 2012, the trial court held a hearing on the

¹ Shortly thereafter, in March of 2011, Mother filed a petition to relocate from Lebanon County to Middletown, Dauphin County, which the court granted by order dated April 5, 2011. Throughout the pendency of this action, Father has resided in Lebanon County, where he works for a local union involving gas pipelines.

relocation request, and the following witnesses testified:² Mother; B.S., Child's maternal grandmother, who lives in Hummelstown, Pennsylvania; Father; and Steven Lindenberg, Ph.D., who provided counseling to Father pursuant to court order.

When Mother provided her relocation notice, Father exercised custody, at minimum, eight overnights per month pursuant to the existing custody order dated February 18, 2011, as amended by the order dated September 13, 2011. **See** N.T., 6/7/12, at 4-5, 68. Father testified he is an active part of Child's life and attends Child's daycare evaluations and doctor appointments. **See id.**, at 71, 88-89. In addition, Father testified his mother, Child's paternal grandmother, who lives approximately ten minutes from Father, is an active part of Child's life. She assists him with retrieving Child from daycare during his custodial times. **See id.**, at 89-90, 102. Likewise, Father's brother lives nearby with his wife and child, and they regularly see Child. **See id.**, at 90, 102. Further, Child's maternal grandmother ("Maternal Grandmother") resides in the area and is an active part of Child's life, as well as Child's maternal uncle. **See id.**, at 72.

Father resides with his fiancée, whom he intended to marry in August of 2012, and her son, who was nearly age four. **See id.**, at 67-68, 90-91. Father testified Child and his future stepson "get along very well." **Id.**, at

² The trial court explained that "[p]ortions of witness testimony were made by offer of proof which the witnesses then adopted as their testimony." Trial Court Opinion, 7/20/12, at n. 2.

90. Father testified he is willing and able to assume primary physical custody of Child if Mother relocates. *See id.*, at 68-69. Father testified, in part, regarding Child's best interest on direct examination as follows:

Q. How do you believe [Mother's] relocation to Arkansas, if it is approved by the Court, how do you feel that will affect your . . . relationship with your son?

A. It's going to completely devastate him. [Child] is not going to have his father there like he does now to be raised with a father figure in his life like he does now. . . . He is going to have no family where he lives. . . . So it's going to completely change his life in a way that he is going to . . . grow up knowing that I lived here with mommy in Arkansas but all the rest of my family lives in Pennsylvania.

Id., at 95.

The trial court aptly set forth the testimony in Mother's case-in-chief as follows, in pertinent part:

As of the relocation hearing, Mother . . . was completing her Master's degree at Penn State University and working part-time as a waitress. She testified that she believes a doctorate in criminal justice will make her more employable at a higher income and will ensure more financial stability for herself and enhance her ability to support her son E.P. . . .

Mother wants to attend UALR because it offered her full tuition, a graduate assistantship, \$19,000 per year living stipend, \$1,000 towards her travel expenses and health care coverage for both her and E.P.[,] and is only three years. . . .

Mother testified that she investigated other schools' doctoral programs [in criminal justice] including Temple, IUP, University of Maryland, Penn State and Shippensburg. She discovered that those schools either had no doctorate level programs, offered only four-year programs, and/or offered no stipends or health benefits comparable to UALR's. [Grandmother], who is a professor at Penn State, looked into the Penn State program for Mother but she did not qualify. . . .

Mother conceded that her investigation of the other programs was generally limited to internet searches and she did not directly speak with representatives to see if program modifications were available. . . .

[Maternal Grandmother] testified that she received her Master's Degree from UALR and was recently awarded an outstanding alumni award for criminal justice by the school. She explained that her daughter obtained the graduate assistantship offer partially as a legacy but also because she met the academic requirements. [Maternal Grandmother] testified that based upon her knowledge, criminal justice is a growing field and would provide Mother secure future employment. [Maternal Grandmother] believed the UALR offer of free tuition, stipend, three-year completion and health insurance was a package that could not be duplicated by other schools. Mother conceded that she formally applied only to UALR. . . .

In addition to the free lucrative PhD package offered by UAL[R], Mother considered the school a good fit since she has ties to the area. She lived in Arkansas for eight years as a child and has several friends who have offered to support and help her and E.P., if needed. [Maternal Grandmother] also has friends in Arkansas who have offered their support. In addition, Mother will be only a three hours' [sic] drive from numerous relatives including a brother and sister-in-law, nieces and nephews, grandmother, aunts, uncles and cousins. She would be a five hours' [sic] drive from her father, stepmother, two other brothers and a niece and nephew (in Dallas). . . .

The promise of health care coverage by UAL[R] was an important factor. Mother lost health benefits for both herself and E.P. when she was terminated from her employment with Dauphin County Juvenile Probation as the result of criminal charges filed in Lebanon County due to Father's unfounded criminal complaints. . . .⁴ As a result of the charges, Mother has been unable to find employment in similar fields in the Central Pennsylvania area and has been working the waitressing job while completing the Penn State Master's program in this area.[³]

³ To further clarify, in 2011, Father filed a criminal charge in Lebanon County against Mother for harassment, for which she was found not guilty, and on two separate occasions Father filed criminal charges against Mother

Mother testified that she had sent out almost thirty applications since her termination and could not find comparable work in this area. She claimed she could no longer afford to earn only \$8 per hour and that the UALR assistantship offer was too good to pass up. Mother agreed upon completion of her three-year doctoral program in Arkansas[] she would return to Pennsylvania if ordered.

. . .

⁴ Coverage for E.P. was later picked up under Father's health care plan.

Trial Court Opinion, 7/20/12, at 2-5 (citations to record and footnotes omitted).

By order dated June 7, 2012, and entered on June 8, 2012, the trial court granted Mother's relocation request. Further, the trial court stated it "will permit relocation for a period of three years under the condition that after Mother obtains her Ph.D., or 3 years, whichever shall first occur, she will use highest best efforts to locate employment to return to the Central Pennsylvania area [by] May 15, 2015." Order, 6/8/12.

By separate order dated and entered on June 8, 2012, the trial court set forth a modified custody order granting Father partial custody as follows: (1) once per month in Arkansas for a maximum of four overnights; (2) four overnights at his home in Pennsylvania three times per year, at Mother's expense; (3) no less than seven days in Pennsylvania during Mother's winter

involving intimidation of a witness or victim, all of which Father subsequently withdrew. The charges arose from communication by Mother to Father involving the custody litigation.

break; (4) if Mother returns to Pennsylvania during her summer recess, Father will have alternating weekly custody; (5) if Mother does not return to Pennsylvania during her summer recess, Father will have nine overnights during each month of June, July, and August, all at Mother's expense. In addition, the court provided that Father and Child shall be permitted to communicate using Skype up to three times per week, *inter alia*. **See** Order, 6/8/12, at ¶ 10(b). The trial court granted Mother and Father shared legal custody. Father timely filed a notice of appeal and a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

Father presents one question for our review:

Whether the lower court committed an error of law or abused its discretion in determining that it was in the Child's best interest that [Mother] be permitted to relocate to Arkansas with the Child.

Father's Brief, at 4.

Our standard of review is as follows:

In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law,

or are unreasonable in light of the sustainable findings of the trial court.

C.R.F., III v. S.E.F., 45 A.3d 441, 443 (Pa. Super. 2012) (citation omitted).

The primary concern in any custody case is the best interests of the child. The best-interests standard, decided on a case-by-case basis, considers all factors that legitimately have an effect upon the child's physical, intellectual, moral, and spiritual well-being. **See Saintz v. Rinker**, 902 A.2d 509, 512 (Pa. Super. 2006).

Our Legislature adopted a new Child Custody Act ("Act"), 23 Pa.C.S.A. §§ 5321-5340, which became effective on January 24, 2011. Because the proceedings in this matter occurred after the effective date of the Act, the Act is applicable. **See C.R.F., III** (discussing the applicability of the Act).

Section 5337 applies to relocation requests, and provides as follows, in relevant part:

(h) Relocation factors.--In determining whether to grant a proposed relocation, the court shall consider the following factors, giving weighted consideration to those factors which affect the safety of the child:

(1) The nature, quality, extent of involvement and duration of the child's relationship with the party proposing to relocate and with the nonrelocating party, siblings and other significant persons in the child's life.

(2) The age, developmental stage, needs of the child and the likely impact the relocation will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child.

(3) The feasibility of preserving the relationship between the nonrelocating party and the child through suitable custody

arrangements, considering the logistics and financial circumstances of the parties.

(4) The child's preference, taking into consideration the age and maturity of the child.

(5) Whether there is an established pattern of conduct of either party to promote or thwart the relationship of the child and the other party.

(6) Whether the relocation will enhance the general quality of life for the party seeking the relocation, including, but not limited to, financial or emotional benefit or educational opportunity.

(7) Whether the relocation will enhance the general quality of life for the child, including, but not limited to, financial or emotional benefit or educational opportunity.

(8) The reasons and motivation of each party for seeking or opposing the relocation.

(9) The present and past abuse committed by a party or member of the party's household and whether there is a continued risk of harm to the child or an abused party.

(10) Any other factor affecting the best interest of the child.

23 Pa.C.S.A. § 5337(h).

In addition, the trial court in this case was required to consider the best interest factors set forth in section 5328, as follows:

§ 5328. Factors to consider when awarding custody.

(a) *Factors.* – In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:

(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.

(2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.

(3) The parental duties performed by each party on behalf of the child.

(4) The need for stability and continuity in the child's education, family life and community life.

(5) The availability of extended family.

(6) The child's sibling relationships.

(7) The well-reasoned preference of the child, based on the child's maturity and judgment.

(8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.

(9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.

(10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.

(11) The proximity of the residences of the parties.

(12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.

(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from

abuse by another party is not evidence of unwillingness or inability to cooperate with that party.

(14) The history of drug or alcohol abuse of a party or member of a party's household.

(15) The mental and physical condition of a party or member of a party's household.

(16) Any other relevant factor.

23 Pa.C.S.A. § 5328(a).

As the party proposing relocation, Mother has the burden of proving that relocation will serve Child's best interest as set forth under section 5337(h). **See** 23 Pa.C.S.A. § 5337(i)(1). In addition, "[e]ach party has the burden of establishing the integrity of that party's motives in either seeking the relocation or seeking to prevent the relocation." 23 Pa.C.S.A. § 5337(i)(2).

In evaluating the integrity of Mother's motive in this case, the trial court found Mother did not desire to remove Child from Father, but to pursue an educational opportunity that could not be duplicated by other schools. **See** N.T., 6/7/12, at 124; **see also** Trial Court Opinion, 7/20/12, at 15. The trial court weighed the statutory relocation and best interest factors on the record at the conclusion of the hearing and found that Child's best interest is served by Mother's temporary three-year relocation because if Mother gains "a doctorate, it certainly will increase her financial and emotional health which will increase and benefit [C]hild's financial and emotional health." **Id.**; Trial Court Opinion, 7/20/12, at 10-11, 13. The

court further stated on the record, "I need to impress upon mother that this is based upon you using your highest, best, beyond belief efforts that you will, once you get this doctorate which is very important for every woman to have today as a mother if possible, that you return to Central Pennsylvania." N.T., 6/7/12, at 126.

The court found "this three year interim arrangement will not detrimentally affect the child's relationship with [F]ather. . . . As we know based on studies of two and a half year olds, their memories are short and real bonds, lifetime bonds are created more as they attain the ages two and a half years from now will be most important." *Id.*; Trial Court Opinion, 7/20/12, at 11. The court supports its finding "particularly given that Mother has been [Child's] primary caregiver since his birth and where [Father] will have physical custody on a regular basis and will otherwise have verbal, auditory and visual contact several times every week throughout the entire year." Trial Court Opinion, 7/20/12, at 13.

On appeal, Father argues that Mother presented no evidence that the relocation would improve Child's life at present, but only speculated a Ph.D. from UALR would provide her with greater economic opportunity that would benefit her and Child in the future. As such, Father argues the trial court abused its discretion to the extent it based its decision on Child's future best interest. Further, Father argues the trial court erred to the extent it based

its decision on Mother returning to Central Pennsylvania in three years. We are constrained to agree.

For the following reasons, we conclude the testimonial evidence does not support the trial court's conclusion that Child's best interest is served by relocating with Mother to the State of Arkansas. Father has consistently been active in Child's life, and it will not be feasible for him to visit Child in Arkansas for the monthly custodial periods set forth in the subject order. There is no record evidence to support the trial court's finding that Child is not old enough to form bonds, and, therefore, the relocation will not be harmful to his relationship with Father. Rather, Mother testified Child and Father have a bond. **See** N.T., 6/7/12, at 12-13. In addition, Child has relationships with his maternal grandmother, paternal grandmother, uncles on both sides of his family, and his stepbrother. In Arkansas, the closest maternal relatives are a driving distance of three hours in northeast Louisiana and five hours in Dallas, Texas. Although Mother and Maternal Grandmother testified they have friends in Arkansas who are willing to assist Mother if necessary, Mother did not establish a support network will exist like that of Child's family in Pennsylvania.

Moreover, in light of Father's objection to Mother's relocation, the trial court was to focus upon which parent could provide a familial setting that would serve Child's best interest. **See E.D. v. M.P.**, 33 A.3d 73, 82, n. 6 (Pa. Super. 2011); **see also Marshall v. Marshall**, 814 A.2d 1226, 1234

(Pa. Super. 2002). The relevant statutory factors indicate, as prior case law emphasized, that which party functioned as primary caregiver is one of many factors for trial courts to consider in determining the best interest of a child. **See** 23 Pa.C.S.A. § 5328(a), 5337(h); **see also Marshall, supra** at 1231. Therefore, to the extent the court decided Mother's relocation was in Child's best interest because she has functioned as his primary caregiver, we conclude the court failed to properly consider Child's best interests pursuant to section 5328(a). **E.D., supra; Marshall, supra.**

In addition, we conclude the trial court granted Mother's relocation request based upon improper speculation that she will obtain a doctorate degree in criminal justice in three years from UALR, which will result in greater economic advantage. Indeed, Mother testified that the criminal justice doctorate program at UALR is "brand new"; thus, it was not yet ranked among similar programs at other schools. **See** N.T., 6/7/12, at 25. Further, Mother adopted her counsel's offer of proof that "[s]he doesn't know what her future holds to be honest. . . ." **Id.**, at 13. Accordingly, we conclude the trial court abused its discretion in granting Mother's relocation request.

Based on the foregoing, we reverse the trial court's order granting Mother's relocation and revising the custody schedule.

Order reversed. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.