

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

J.S.S.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
R.A.S.	:	
	:	
Appellant	:	No. 1213 MDA 2012

Appeal from the Order entered June 4, 2012  
In the Court of Common Pleas for the 26<sup>th</sup> Judicial District  
Columbia County Branch, Civil Division, No. 1739 of 2011

BEFORE: FORD ELLIOTT, P.J.E., PANELLA, and ALLEN, JJ.

MEMORANDUM BY PER CURIAM: Filed: January 31, 2013

R.A.S. ("Father") appeals from the custody order entered in the Court of Common Pleas of the 26<sup>th</sup> Judicial District, Columbia County Branch, granting him and J.S.S. ("Mother") shared physical and legal custody of their children, D.S., a male, born in September of 2006, and P.S., a female, born in March of 2008. We affirm.

On November 21, 2011, Mother initiated the underlying custody action simultaneously with a divorce action, wherein she requested primary physical custody. Following a custody conciliation conference, the custody master recommended Mother be granted primary physical custody and Father partial custody on alternating weekends from Friday at 3:00 p.m. to Sunday at 6:00 p.m., every Tuesday and Wednesday from 3:00 p.m. to 6:00 p.m., and every Thursday from 3:00 p.m. until Friday morning when he takes the children to daycare. The master set forth a holiday schedule and

recommended two nonconsecutive weeks of custody for the parties during the summer. In addition, the master recommended the parties share legal custody.

By order dated January 18, 2012, the trial court adopted the master's recommendations as an *interim* custody order and decreed that, if the parents filed no exceptions to the master's report and recommendations within twenty days, the master's recommendations would become a final order. On January 31, 2012, Father filed exceptions to the order, wherein he alleged that the master erred in failing to grant the parties equal shared physical custody.

The trial court held a custody trial on May 31, 2012, during which the following witnesses testified: Father; R.A.S., Sr., the children's paternal grandfather; T.S., the children's paternal grandmother; S.L., the children's paternal aunt; George Flick, Jr., a friend of Mother and Father; J.S., the children's maternal grandmother; and Mother. The testimonial evidence revealed, in relevant part, the following.

At the time of the custody trial, D.S. was age five, and P.S. was age four. D.S. would be starting kindergarten in the fall of 2012. N.T., 5/31/12, at 90. Father and Mother had separated approximately six months before the trial,<sup>1</sup> when Mother moved with the children to an apartment complex located in the Central Columbia School District, with a driving time of five

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<sup>1</sup> The parties' divorce action remained pending.

minutes from Father. *Id.* at 5, 89-90, 105. Father remained living in the marital home, which was located in the Bloomsburg Area School District.<sup>2</sup> The parties listed the marital home for sale before their separation. *Id.* at 91-92. Father testified he has not paid the mortgage on the marital home since November of 2011, and, therefore, the marital home is subject to foreclosure. *Id.* at 40.

Father is employed as a nuclear electrical drafter at PPL. *Id.* at 17. He works eight hours per day, and his job allows flexible starting and ending times. *Id.* at 17-18. Father testified that, when he has the children overnight during the workweek, he wakes them at 5:30 a.m. so that they can be at daycare by 6:00 a.m. *Id.* at 44. He testified that the children eat breakfast at daycare on the mornings that he takes them. *Id.*

Father has a large, close-knit extended family. *Id.* at 15. Prior to the marital separation, he testified the children did many activities with his parents and extended family. Father explained that his parents have a small farm where they raise cattle. *Id.* at 16. He testified the activities with his parents included, but was not limited to, allowing the children to grow their own pumpkins on their farm, swimming, picking apples in the apple orchard, and playing with farm animals. *Id.* Father testified that, due to his partial custody schedule, the children have no time to participate in activities with the extended family. *Id.*

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<sup>2</sup> Mother testified Father lives in the "Bloom" school district. N.T., 5/31/12, at 91.

Father testified he wants an equal amount of physical custody with the children for the following reason:

I'm their dad. They like being with me. We have fun together[,] and I don't think they should not be allowed to be with me for the same amount of time that they're with [Mother]. I provide them with a safe environment, I'm willing to do whatever I have to for them. . . .

*Id.* at 25. With respect to the temporary custody schedule, Father testified:

Q. The current schedule, what is the problem with that in terms of the times you have [the children]?

A. It's a huge inconvenience. I get them on Tuesdays and Wednesdays right after work til[] like 6:00, I'm not able to have dinner with them, barely have time to do anything. I try to teach them how to ride their bikes and stuff like that and play with them but it only gives me limited time to do so.

*Id.*

Mother is employed at the Susquehanna Valley Medical Specialty, which is located seven minutes from her home. *Id.* at 97. Her employer offers a daycare service on its premises, which Mother utilizes for the children every Thursday and Friday. *Id.* at 97-98. The children's maternal grandmother cares for the children while Mother works every Monday, Tuesday, and Wednesday. *Id.* at 93. Mother delivers the children to their grandmother's home between 8:15 a.m. to 8:45 a.m. on those mornings. *Id.* at 93. With respect to how the children have adapted to the custody schedule, Mother testified, "[t]hey're doing very well." *Id.* at 106. She continued,

Q. Do you want [the children] to see lots of both of you?

J. S78019/12

A. Yes.

***Id.***

By order dated June 4, 2012, and entered on the same date, the trial court granted, in part, and denied, in part, Father's exceptions. The court amended the order dated January 18, 2012, by granting Father one hour more of custody per week, from 3:00 p.m. to 7:00 p.m. every Tuesday and Wednesday. The order set forth a schedule for Christmas Eve and Christmas Day. Finally, the order directed that, in all other respects, the order dated January 18, 2012, is affirmed. Father timely filed a notice of appeal and concise statement of errors complained of on appeal.

On appeal, Father presents the following questions for our review:

- A. Did the lower court err in failing to provide [Father] equal time with the minor children?
- B. Did the lower court err in failing to properly consider the factors set forth in 23 Pa.C.S.A. § 5328?
- C. Did the lower court err in failing to consider the equal sharing of time between the parents to be the rebuttable presumption given the circumstances of this case as more fully set forth above and the legislature's enactment of 23 Pa.C.S.A. § 5327(a) and 23 Pa.C.S.A. § 5328(b)?

Father's Brief, at 5.

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. **Saintz v. Rinker**, 902 A.2d 509, 512 (Pa. Super. 2006), citing **Arnold v. Arnold**, 847 A.2d 674, 677 (Pa. Super. 2004).

Relevant to this case are the best interest factors set forth in Section 5328(a) of the Child Custody Act ("Act"), 23 Pa.C.S.A. §§ 5321-5340,<sup>3</sup> which provides:

§ 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

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<sup>3</sup> The Act became effective on January 24, 2011.

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).

Instantly, in its opinion pursuant to Pa.R.A.P. 1925(a), the trial court made eight factual findings, which are supported by competent testimonial evidence. **See** Trial Court Opinion, 7/18/12, at 3-4. The court found that both parties have the best interests of the children at heart. **Id.** at Finding of Fact #8. In addition, the court analyzed the relevant statutory factors. With respect to the first factor, the court found Mother "somewhat more likely to cooperate" in encouraging frequent contact between the children and Father. **Id.** at 5. With respect to the third factor, the court found both parties have been active with the children during their lives. **Id.** With respect to the fourth factor, the court found that Mother will better meet the children's need for stability and continuity in their education, family life and community life because the marital home, where Father resides, is subject to foreclosure. **Id.** at 5-6. With respect to the fifth factor, the court found "[b]oth parties have extended families. Father's family is particularly involved." **Id.** at 6. With respect to the ninth factor, the court found both parties "are good, interested, and nurturing parents." **Id.** The court found, with respect to the twelfth factor, that both parties have the ability to make appropriate child-care arrangements. **Id.** The court found the remaining factors not relevant to this case.



The trial court concluded that a shared custody arrangement serves the best interests of the children. The court stated that subject custody order “gives the children plenty of time with both parents, which is in their best interests.” *Id.* at 8. The court stated, “Mother’s house is now the home base. Her house is stable.” *Id.* The court further explained the custody schedule as follows:

Father will have about one-half of the children’s waking hours (when he’s not working) with him. Although he has four nights overnight out of fourteen, he has, *additionally*, six days out of fourteen with four hour blocks after work and before the children’s bedtime. Thus, he has significant contact with the children on ten of fourteen days. Mother has contact on thirteen of fourteen days, albeit not much during the children’s waking hours on several of those days, particularly *every* Tuesday, Wednesday, and Thursday.

*Id.* at 7-8 (emphasis in original). Upon careful review, we discern no abuse of discretion by the court.

In his first issue on appeal, Father argues the trial court abused its discretion in failing to grant him equal shared physical custody with Mother. In essence, Father argues that, contrary to the court’s belief, the custody order does not establish shared physical custody. **See** Father’s brief, at 17. Pursuant to Section 5322 of the Act, “shared physical custody” is defined as “[t]he right of more than one individual to assume physical custody of the child, each having significant periods of physical custodial time with the child.” 23 Pa.C.S.A. § 5322. In this case, we conclude the trial court granted shared physical custody as defined by the Act.

In support of his argument, Father cites case law holding that trial courts must consider four separate factors in determining whether shared custody is appropriate.<sup>4</sup> We conclude the case law cited by Father is inapposite to this matter because it predates the effective date of the Act. Instantly, the relevant considerations for the trial court are the factors set forth in Section 5328(a). Moreover, even if the case law cited by Father was relevant to this case, we would reject his argument because the trial court indeed granted shared custody.

In addition, to the extent Father argues that failing to grant equal shared physical custody is contrary to the children's best interest, we will not disturb the order. Upon review, we conclude the testimonial evidence establishes that the children are doing "very well" with the custodial arrangement in effect since January of 2012. Therefore, Father's first issue fails.

In his second issue, Father argues the court failed to properly consider the factors set forth in Section 5328(a). Specifically, Father argues the court

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<sup>4</sup> The four factors include:

- 1) both parents must be fit, capable of making rational child-rearing decisions and willing and able to provide love and care for their children;
- 2) both parents must evidence a continuing desire for active involvement in the child's life;
- 3) both parents must be recognized by the child as a source of security and love;
- 4) a minimal degree of cooperation between the parents must be possible.

***B.C.S. v. J.A.S.***, 994 A.2d 600, 602-603 (Pa. Super. 2010), *citing Wiseman v. Wall*, 718 A.2d 844, 848 (Pa. Super. 1998).

abused its discretion with respect to the first factor by finding that Mother is “somewhat more likely to cooperate” in encouraging frequent contact between the children and the other parent. The trial court fails to provide record evidence for this finding in its opinion. Upon review, we conclude the finding is not supported by competent record evidence. Nevertheless, the court’s finding in this regard was not the determining factor for the custody decision. Rather, the court based its decision to grant Father slightly less than equal shared custody because the marital home, where he resides, is the subject of foreclosure proceedings, and, as a result, Father will need to relocate. Therefore, we will not disturb the custody order on this basis.

In addition, Father argues the testimonial evidence does not support the court’s finding with respect to the fourth factor, that Mother can provide more stability than Father can in the children’s education, family, and community life. Father argues Mother’s home has stability issues as well because it has been “robbed more than once.”<sup>5</sup> Father’s Brief, at 22. Further, Father argues he should not be denied equal shared custody on the basis that the marital home is in foreclosure proceedings because the mortgage on the home is not his sole responsibility, but Mother’s as well.

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<sup>5</sup> Mother acknowledged on cross-examination that her apartment was “robbed” a “couple times.” N.T., 5/31/12, at 113. Mother went on to testify that, despite the “robberies,” she believes the apartment is fine for the children because she has “had locks changed [and] a whole bunch of stuff done. . . .” *Id.* at 114.

Moreover, Father argues he will move in the future and will be able to provide stability and continuity for the children at that time.<sup>6</sup>

We reject Father's arguments. We discern no abuse of discretion by the court in finding that Mother, at the time of trial, is best able to provide the children with stability due to the financial situation of the marital home resulting in Father having to relocate in the future.

Finally, Father argues the testimonial evidence does not support the court's finding with respect to the fifth factor, that "both parties have extended families. Father's family is particularly involved." Trial Court Opinion, 7/18/12, at 6. Father argues the court's finding "minimizes" the testimony from the trial that Father's family has been restricted in their involvement with the children since the parties' separation due to Father's unequal physical custody schedule. **See** Father's Brief, at 24. Upon review,

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<sup>6</sup> On cross-examination, Father testified as follows:

Q. Are you making plans to move?

A. No, not as of right now.

N.T., 5/31/12, at 41. Father continued to testify on cross-examination that he has been looking for residences. When he does move, he testified it will be in the vicinity of the Berwick, Bloomsburg area. **Id.** at 42. Father testified,

Q. So you're not really sure what school district you're going to be living in in the near future?

A. Not entirely, no.

**Id.**

we discern no abuse of discretion. Father has physical custody on alternating weekends, which provides the children with sufficient opportunity to foster their relationships with the paternal side of their family. Father's second issue fails.

In his last issue on appeal, Father argues that, in failing to grant him equal shared physical custody, the trial court operated under a presumption in favor of Mother in contravention of Sections 5328(b) and 5327(a), which provide, in relevant part:

§ 5328. Factors to consider when awarding custody.

...

(b) *Gender neutral.* --In making a determination under subsection (a), no party shall receive preference based upon gender in any award granted under this chapter.

...

23 Pa.C.S.A. § 5328(b).

§ 5327. Presumption in cases concerning primary physical custody.

(a) *Between parents.* --In any action regarding the custody of the child between the parents of the child, there shall be no presumption that custody should be awarded to a particular parent.

...

23 Pa.C.S.A. § 5327(a).<sup>7</sup>

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<sup>7</sup> Because we conclude the trial court granted the parties "shared physical custody" as defined by Section 5322, we deem Section 5327(a) inapplicable to this matter.

Specifically, Father argues the referenced statutory provisions mandate that the trial court “should have started with the presumption both parties are entitled to equal time with the children.” Father’s Brief, at 29. Father argues it follows that, because the testimonial evidence demonstrated he and Mother are both “capable, loving, and caring parents” pursuant to a consideration of statutory best interest factors, the trial court erred in failing to grant him equal shared physical custody. *Id.* at 29, 31. We disagree.

Upon review, we discern no application of a presumption in favor of Mother by the trial court in its custody decision. Rather, competent testimonial evidence supports the court’s decision to grant Father slightly less than equal shared physical custody. In addition, Father fails to provide legal authority, nor are we aware of any, for his argument that the referenced statutory provisions mandate a presumption in favor of equal shared physical custody. As such, Father’s third issue fails.

Based on the trial court’s sustainable findings, we conclude the custody decision is reasonable. Accordingly, we affirm the order granting, in part, and denying, in part, Father’s exceptions.

Order affirmed.