

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

T.J.F.

Appellee

v.

T.L.F.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1575 WDA 2012

Appeal from the Order September 21, 2012
In the Court of Common Pleas of Erie County
Domestic Relations at No(s): 11193-2000

BEFORE: BOWES, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J.

Filed: March 19, 2013

T.L.F. (Mother) appeals from the trial court's order denying her request for relocation and granting Appellee T.J.F.'s (Father) request for primary physical custody of the parties' minor children, K.F. and A.F. After careful review of Mother's brief,¹ relevant case law and the record on appeal, we conclude that the Honorable Elizabeth E. Kelly has properly disposed of Mother's issues on appeal, as set forth in her Pa.R.A.P. 1925(a) opinion. Therefore, we affirm the trial court's order based on Judge Kelly's decision.

On appeal, Mother raises the following issues for our consideration:

(1) Whether the court abused its discretion in treating Appellant's move from one county to another as a relocation

* Retired Senior Judge assigned to the Superior Court.

¹ Father has not filed a brief on appeal.

when the purported [sic] move would not “significantly impair the ability of [the] nonrelocating party to exercise their custodial rights.”

(2) Whether the court abused its discretion by not considering all of the factors it is obligated to consider under the Pennsylvania statutes when awarding custody² and determining what is in the best interests of the children.

The parties were married in 1997; they divorced in October 2000. The parties have two children, K.F. (born 8/96) and A.F. (born 4/99) (Children).³ After meeting with a custody conciliation supervisor, the court entered an order, based upon a consent agreement, and awarded the parents shared physical and legal custody of Children, with Mother having primary physical custody and Father partial visitation on alternating week/end days and holidays. Consent Agreement, 2/3/2003. In October 2005, Father filed a

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The scope of review of an appellate court reviewing a child custody order is of the broadest type; the appellate court is not bound by the deductions or inferences made by the trial court from its findings of fact, nor must the reviewing court accept a finding that has no competent evidence to support it[.] However, this broad scope of review does not vest in the reviewing court the duty or the privilege of making its own independent determination[.] Thus, an appellate court is empowered to determine whether the trial court's incontrovertible factual findings support its factual conclusions, but it may not interfere with those conclusions unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion.

Kaneski v. Kaneski, 604 A.2d 1075 (Pa. Super. 1992) (citing ***McMillen v. McMillen***, 602 A.2d 845 (Pa. 1992)).

³ K.F. was born out of wedlock to Mother and Father, while A.F. was born of the marriage.

petition for custody modification, seeking primary physical custody of Children. After a modification conference, the trial court entered an order giving Father increased visitation; however, Mother retained primary physical custody. Order of Court, 11/17/2005.

In April 2007, Mother filed a petition to modify the parties' existing custody schedule, seeking more weekend time with Children. In response, the parties entered into another consent agreement that slightly increased mother's custodial time; the agreement was made an order of court on May 29, 2007. This 2007 order was in effect until May 2012, when Mother sent notice to Father indicating that she planned to move from her Girard, Pennsylvania (Erie County) home to Guys Mills, Pennsylvania (Crawford County). Father filed a timely counter affidavit, *see* 23 Pa.C.S.A. §5337(d), objecting to Mother's relocation request as well as a petition to modify the existing custody order. Despite Father's objection, Mother moved to Guys Mills with Children in June, enrolling them in the Maplewood School District just two weeks prior to the start of the school year.⁴ On September 20, 2012, the trial court held a relocation/custody hearing, *see* 23 Pa.C.S.A. § 5337(g), after which it denied Mother's request to relocate to Guys Mills, ordered that the Children be returned to Erie County to live with Father,

⁴ Pursuant to section 5337(l) of the Act, "[i]f a party relocates with the child prior to a full expedited hearing, the court shall not confer any presumption in favor of the relocation."

where they shall be enrolled in the Millcreek School District, and granted Father primary physical custody.

Relocation

The provisions of our Commonwealth's new Child Custody Act (Act), 23 Pa.C.S.A. §§ 5321-40, apply to Mother's inter-county relocation matter. In *E.D. v. M.P.*, 33 A.3d 73 (Pa. Super. 2011), our Court held that the Act applied to any proceeding, including a petition for relocation, initiated by a filing made after the effective date of the Act, January 24, 2011. Here, Mother's petition for relocation was filed in May 2012. Thus, the Act, specifically section 5337⁵ which addresses any proposed relocation, controls the trial court's analysis in this case.

Mother's issue on appeal concerns the trial court's substantive⁶ analysis of her request to relocate. Specifically, Mother contends that

⁵ We note that section 5337 of the Act also alters the legal standards that a trial court must consider when ruling on a request to relocate. Under prior practice, trial courts considered relocation requests based upon the three-factor test set forth in *Gruber v. Gruber*, 583 A.2d 434, 439 (Pa. Super. 1990). Under the Child Custody Act, however, trial courts must consider the ten factors listed in subsection 5337(h). In particular, while the *Gruber* test required consideration generally of the "potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children," *Id.* at 439, subsection 5337(h) sets forth a number of specific factors intended to isolate and focus this important inquiry. *See E.D. v. M.P.*, 33 A.3d 73, 79 (Pa. Super. 2011).

⁶ The parties have complied with the procedural requirements for relocation under section 5337.

because her move to Guys Mills would add only 30⁷ miles to the distance between the parties' homes, the court improperly considered this a traditional "relocation" case. As we have already determined, because Mother's relocation notice was sent after the effective date of the Act, the relocation factors set forth in section 5337 shall control the court's relocation determination. Moreover, the trial court notes in its Pa.R.A.P. 1925(a) opinion, that it considered the statutory definition of relocation in the Act and applied the appropriate section 5337 factors before making its final decision.

Relocation is defined in the Child Custody Act as "[a] change in a residence of the child which significantly impairs the ability of a nonrelocating party to exercise custodial rights." 23 Pa.C.S.A. § 5322(a). Under section 5337, the court must consider the following factors when determining whether relocation is warranted:

(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.

⁷ Father moved from his home in Erie to Millcreek, Pennsylvania, which further increased the distance between his home and Mother's Guys Mills' residence.

(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 to considering the section 5337(h) factors, a trial court must also give "weighted consideration to those factors which affect the safety of the child." *Id.*

The trial court noted that because Mother's Guys Mills' residence is approximately 60 miles from Father's new Erie County home in Millcreek,

Pennsylvania, the total driving distance between the two residences is roughly one hour and fifteen minutes. In fact, the court commented that on one occasion, Father spent almost three hours, round-trip, taking K.F. to school. The court concluded that this increased distance significantly impairs Father's ability to exercise his custodial rights, where he is extremely involved in Children's school events, social activities and sport outings. Overall, Mother failed to prove that living in Guys Mills will serve the best interest of the children, as shown under the factors set forth in section 5337.⁸ **See** 23 Pa.C.S. §5337(i)(1).

Because Mother's relocation would affect Father's ability to effectively co-parent Children and be a daily source of support (beyond his periods of partial custody), the trial court's order denying Mother's relocation request should be affirmed. **See C.M.K. v. K.E.M.**, 45 A.3d 417 (Pa. Super. 2012) (even where proposed custody schedule would increase nonrelocating parent's custodial time, Mother's 68-mile relocation request denied because

⁸ The trial court questions Mother's judgment in relocating to Guys Mills so that she could move in with her boyfriend after she had only been dating him for four months. Mother testified that she has had five live-in boyfriends in the past five years. N.T. Relocation/Custody Hearing, 09/21/2012, at 132-34. One of those boyfriends raped Mother's oldest daughter, resulting in an unplanned pregnancy.

it would “break continuity and frequency of [Father’s] parental involvement” with child).⁹

Custody

Mother further claims that that court abused its discretion by not reviewing all of the factors outlined in section 5328(a) of the Act when it decided to grant Father primary physical custody of Children.

In any analysis of a change in custody, the paramount concern must be the best interest of the children. *Zoccole v. Zoccole*, 751 A.2d 248 (Pa. Super. 2000). Furthermore, the court must consider the 16 factors set forth in section 5328(a) of the Act. It is evident from the record and the trial court’s opinion that it considered all relevant factors in arriving at its decision to award Father primary physical custody of Children. The court’s decision was well-reasoned and in the best interest of the Children.

First, the court noted that Mother’s new residence in Guys Mills is cramped – eight individuals (including one infant) living in a three-bedroom home, with a converted basement and one functioning bathroom. When Mother’s boyfriend has custody of his two other children, there are up to 10

⁹ We recognize that the trial court may have overestimated the driving distance between the parties’ residences (Guys Mills to Millcreek). Although Father testified, and the court chose to credit his testimony, that the travel distance between his and Mother’s Guys Mills’ residence is 60-70 miles, it appears that the driving distance is actually closer to 40-44 miles. By the same token, Mother’s estimate that the relocation would only increase the parties’ travel time by 30 miles is on the low end.

individuals living in the house. In Father's home, each child has her own bedroom. Furthermore, the school district where Mother has Children enrolled offers many fewer electives than the schools in Father's Erie County School District. Children have a good relationship with Father's new wife; Father and stepmother have an active role in Children's educational, extracurricular and spiritual development. Their home provides necessary structure for Children. Finally, because Mother's Girard home is in foreclosure, her moving back to Erie County with Children was not an option; therefore, the court determined that her periods of partial custody would be determined by mutual agreement of the parties, especially where she works exclusively on weekends.¹⁰

We conclude that the trial court did not abuse its discretion in either denying Mother's request to relocate or awarding Father primary custody of Children. The decision is clearly in their best interests. *C.M.K., supra; Zoccole, supra*. We rely upon Judge Kelly's opinion in support of our decision to affirm the underlying order. We instruct the parties to attach a copy that opinion in the event of further proceedings in the matter.

Order affirmed.

¹⁰ While Mother's job may permit her to make approximately \$8.00 more per hour by working weekend nights, the court noted that she can change her work schedule to accommodate the new custody arrangement. Moreover, when weighing the other section 5328(a) custody factors, the scales tip in favor of Father having primary physical custody of Children.

T. J. F. Plaintiff

vs.

T. L. F. Defendant

IN THE COURT OF COMMON PLEAS OF ERIE COUNTY PENNSYLVANIA

NO. 11193-2000

COMMON PLEAS COURT ERIE, PA 2012 NOV -2 PM 1:31 CLERK OF RECORDS PROthonotary

OPINION

November 2, 2012: Before the Court is T. L. F.'s (hereinafter "Mother") appeal from this Court's September 21, 2012 Order denying her request to relocate K. F., born August 22, 1996, and A. F., born April 13, 1999 (hereinafter "Children") to the Crawford County Pennsylvania town of Guys Mills and granting T. J. F. (hereinafter "Father") primary physical custody of the Children.

PROCEDURAL AND FACTUAL HISTORY

Mother and Father were divorced on October 30, 2000. Since that time, they have consistently shared legal and physical custody of the Children, with Mother serving as the primary physical custodian. For the past five years, the Children have resided with Mother in Girard, Pennsylvania while Father exercised his periods of custody at his home in Erie, Pennsylvania.

In December of 2011, Mother met Christopher Tatters, online. See N.T. at 109. Mother began dating Mr. Tatters, who lives in Guys Mills, in January of 2012. See N.T. at 109. At the time that Mother met Mr. Tatters, she was living in her Girard, Pennsylvania home with Alan Smith, her boyfriend of two years. See N.T. at 131-32. Mr. Tatters is Mother's fifth live-in

boyfriend since 2007. *See* N.T. at 134. Mr. Tatters testified that his relationship with Mother is something that is “possibly” long term. *See* N.T. at 148.

On May 7, 2012, Mother told Father that she intended to move to Guys Mills to live with Mr. Tatters. *See* N.T. at 39. Mother and Mr. Tatters decided to live together in Mr. Tatters’ home because Mr. Tatters already drove one hour to his job in Hermitage and it would add an extra hour to his work commute to move to Girard.¹ *See* N.T. at 129 and 149-50. As Father objected to the move, Mother served Father with a Relocation Notice. Father, on May 22, 2012, filed a Counter-Affidavit Regarding Relocation objecting to relocation and to modification of the custody order. Also on May 22, 2012, Father filed a Complaint for Modification of an Existing Order requesting primary custody of the Children.

Despite Father’s objection to relocation, Mother, in June of 2012, moved the Children to Mr. Tatters’ Guys Mills home. *See* N.T. at 102, 109-110, and 130-31; *see also* Defendant’s Exhibits 2, 3. At the time of the move, Mother informed Father that she was willing to keep the Children in the Girard School District, where they had been for five years, or allow them to attend school in Father’s school district. *See* N.T. at 26, 69-70 and 113. After Mother found out that the Girard School District would not allow her to reside in Guys Mills and send the children to Girard, she, just two weeks prior to the start of the school year, enrolled them in the Maplewood School District. *See* N.T. at 113 and 135.

Mr. Tatters’ home has four bedrooms and two bathrooms. *See* N.T. at 104. There are eight people regularly living in the home, including Mother, Mr. Tatters, Christopher Tatters Jr.,

¹ Mother testified that she also wished to move because her daughter from another relationship was raped by one of Mother’s boyfriends in Mother’s Girard home. *See* N.T. at 111-12. Mother’s logic is difficult to follow, however, since Mother remained in the home for four years after the rape.

Brittany Young, Colton Waldron, Rayden Waldron and the Children.² See N.T. at 102-103.

When Mr. Tatters has custody of his two additional children, ages 8 and 10, there are ten people in the home. See N.T. at 145. When all ten people are in the home, Mr. Tatters' two sons share a room and his daughter sleeps with "whoever she buddies up with." See N.T. at 146. When Mr. Tatters does not have custody of his daughter, the Children each have their own bedroom. See N.T. at 106-07 and 143; see also Defendant's Exhibits 4 and 5. Nevertheless, the home is crowded. See N.T. at 5. K[REDACTED] is very uncomfortable in the home. See N.T. at 5-8 and 144.

✓ Despite living in Guys Mills, Mother retained her employment with Millcreek Community Hospital, her employer for almost five years. See N.T. at 73 and 140. Mother works Friday through Monday from 7:00 p.m. until 7:30 a.m.³ See N.T. at 126.

Father lives in Millcreek with Jennifer F[REDACTED], his wife of eight years. See N.T. at 36. Father's Millcreek home is within a mile of Mother's job. See N.T. at 68 and 73. His residence is within walking distance of the Millcreek Mall and multiple stores, which he believes will allow K[REDACTED] the opportunity to get a job. See N.T. at 75. The Children each have their own room in Father's home and they are both comfortable in his home. See N.T. at 6, 12, 28, and 31. Moreover, the Children have a good relationship with Father's wife. See N.T. at 6, 37 and 54.

At the time that Mother's relocation became an issue, the parties were governed by a May 16, 2007 Order of Court. Pursuant to the Order, Father exercised custody every weekend, as follows, with additional time on holidays:

- a) Week 1: The children shall be with their father on Thursday at 5:00 p.m. until Monday morning when the children return to school or daycare.

² Christopher Tatters, Jr. is Mr. Tatters's fourteen year old son. Brittany Young is Mother's daughter. Colton Waldron is Ms. Young's boyfriend. Rayden Waldron is the infant son of Brittany and Colton.

³ Mother chose to have a weekend schedule because she makes eight dollars more per hour on a weekend shift and it is during the time period when Father is not working, eliminating the need for child care. See N.T. at 126. Mother testified that she can change her work schedule, however, she financially needs the extra money of the weekend hours. See N.T. at 126-27 and 130. Mother knew that moving to Guys Mills could result in a change of custody causing her to adjust her work schedule, but, she chose to move anyway. See N.T. at 130.

- b) Week 2: The children shall be with their father on Friday at 5:00 p.m. until Monday morning when the children return to school or daycare.
- c) Week 3: The children shall be with their father on Thursday at 5:00 p.m. until Monday morning when the children return to school or daycare.
- d) Week 4: Beginning May 25, 2007, the children shall be with their father on Sunday from 4:30 p.m. until Monday morning when the children return to school or daycare.

Following the September 20, 2012 Custody Trial, this Court issued a September 21, 2012 Order denying Mother's request to relocate the Children and granting Father primary physical custody. Mother, on October 10, 2012 filed her appeal from the September 21, 2012 Order. In her Statement of Matters Complained of on Appeal, Mother asserts the following allegations of error:

- a) [Mother] alleges the Court abused its discretion in treating the matter as a relocation case when the proposed move would not "significantly impair the ability of a nonrelocating party to exercise custodial rights."
- b) [Mother] alleges the Court abused its discretion by not considering all of the factors it is obliged by statute to consider when awarding custody. Such as the following: that [Mother] is "more likely to encourage and permit frequent and continuing contact between the children and the other party"; that [Mother] "performed the majority of the parental duties on behalf of the minor children"; that the minor children's "need for stability and continuity in the child's family life"; "the availability of extended family" such as grandparents, aunts, uncles, etc.; the minor children's "sibling relationships"; "the well-reasoned preference of the minor child", Alyssa; "the attempts made by one parent to turn the minor children against the other parent"; "which party is likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs"; "which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the children"; "the proximity of the residences of the parties"; "the level of conflict between the parties and the willingness and ability of the parties to cooperate with one another"; and most particularly "each parties' availability to care for the children or make appropriate childcare arrangements."
- c) Further, [Mother] alleges the Court abused its discretion by not making a proper determination as to what is in the children's best interests.

For the following reasons, Mother's allegations of error are without merit and this Court's September 21, 2012 Order should be affirmed.

DISCUSSION

The paramount concern of the Court in a child custody case is the best interests of the child. *See C.M.K. v. K.E.M.*, 45 A.3d 417 (Pa. Super. 2012).

A. Relocation

Relocation is “a change in a residence of the child which significantly impairs the ability of a nonrelocating party to exercise custodial rights.” 23 Pa.C.S. 5322(a). When a custody case involves a proposed relocation, the Court must consider, with weighted consideration given to factors affecting the child’s safety, the following:

- (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).

The Court's reasons for its decision to deny relocation appear of record in the notes of testimony. *See* N.T. at 155-163. Mother does not challenge the Court's reasoning but instead alleges that this Court abused its discretion by treating the matter as a relocation case. Contrary to Mother's assertions, moving the Children to Guys Mills significantly impairs Father's ability to exercise custodial rights.

For Father, Mother's new residence is approximately 60 miles from his Erie County home in Millcreek, Pennsylvania and it is approximately a one hour and fifteen minute drive. *See* N.T. at 73 and 85. On the one occasion when Father took K[redacted] to school, it was a three hour round trip. *See* N.T. at 85-86.

Meanwhile, despite Mother's role as primary residential custodian of the Children, Father has played an integral role in performing parental duties. Father and his wife attend the Children's parent/teacher conferences, maintain contact with the teachers, and attend events with the Children such as "meet the teacher night." *See* N.T. at 49 and 81. When A[redacted] failed her seventh grade math class, Father is the parent who made all of the arrangements for summer school and worked with A[redacted] to help her successfully pass seventh grade. *See* N.T. at 43-44 and 78-79. Father and his wife help the Children with their homework, make dinner with them, bake with them, play games with them, and take them to the zoo, out to eat and to museums. *See* N.T. at 12, 33 and 54. Father and his wife also attend the Children's sporting events. *See* N.T. at

95. Father supported their participation in sporting and youth group activities and paid for the children to attend the summer retreat affiliated with the youth group⁴. See N.T. at 55. Father and his wife are also helping K█████ prepare to get her driver's license. See N.T. at 58. In addition to Driver's Ed through the school, they intend to send K█████ to Transportation Solutions to learn her driving skills. See N.T. at 58 and 84.

In the recent case of *C.M.K. v. K.E.M.*, 45 A.3d 417 (Pa. Super. 2012), the Superior Court determined that a 68 mile move from Grove City, Mercer County, Pennsylvania to Albion, Erie County, Pennsylvania was a relocation. Even though the proposed custody schedule granted the nonrelocating party in *C.M.K.* additional custodial time, the move threatened significant impairment of the nonrelocating parent's ability to exercise his custodial rights because the relocation would break the continuity and frequency of the nonrelocating parent's involvement with the child. See *C.M.K.*, 45 A.3d at 426. The nonrelocating parent in *C.M.K.*, who exercised custody every other weekend plus two hours on Wednesday evenings, was actively involved in co-parenting the child in a manner beyond his periods of physical custody. See *id.* Specifically, he was involved in the child's sporting events and school activities, including meetings with the child's teachers. See *id.*

Like the nonrelocating parent in *C.M.K.*, Father is actively involved in co-parenting the Children. He is a consistent resource and source of support to the Children in aspects which go beyond his periods of physical custody. For example, Father regularly attends the Children's sporting events. Moreover, Father meets with the Children's teachers for parent/teacher conferences and he has even attended the Children's "Meet the Teacher" night with the Children. Furthermore, Father is the parent who stepped up and helped A█████ enroll in and accomplish the

⁴ When the children attended school in Girard, they played softball. See N.T. at 55. They were also involved in a religious based youth group called "The Element." See N.T. at 55 and 75. They are not engaged in any extracurricular activities since their move to Guys Mills.

work necessary to complete summer school. In addition, Father is the parent working with K█████ to get her driver's license. Moreover, prior to Mother's move and at the Children's request, Father even drove to Mother's house to assist the Children while they were in Mother's custody because they got into a fistfight in Mother's home while she was sleeping and A█████ was complaining of being dizzy and having a headache. *See* N.T. at 38 and 118.

Father testified that if the Children reside in Guys Mills, he will not be able to see them on a weekday and the distance will infringe upon his ability to maintain his Sunday night custody. *See* N.T. at 86. With a round trip of two hours or more, this Court agrees that the consistency and frequency of Father's involvement would be broken, threatening significant impairment of Father's ability to exercise his custodial rights.

Accordingly, Mother's first allegation of error is without merit.

B. Father's Complaint for Modification

In ordering any form of custody, the Court must consider all relevant factors regarding the best interest of the child, with weighted consideration given to factors which affect the child's safety. *See* 23 Pa.C.S. 5328. The factors for consideration include⁵:

- (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.

⁵ "Where the nonrelocating party merely objects to modification of the existing custody order in his/her section 5337(d) counter-affidavit (i.e., in response to the proposed revised custody schedule in the section 5337(c) notice, see subsection 5337(c)(3)(vii), the trial court will not perform a best interests of the child analysis pursuant to the section 5328(a) factors, but will instead decide whether the existing custody order should be modified pursuant to the section 5337(h) factors." *See E.D. v. M.P.*, 33 A.3d 73, 82 n.6, (Pa Super 2011). In the present case, Father, in addition to objecting to Mother's relocation request, requested primary residential custody of the Children. Accordingly, the Section 5328(a) analysis is applicable.

- (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).

In her second and third allegations of error, Mother alleges that this Court abused its discretion by not considering the best interest factors detailed in Section 5328. While the Court did not specifically detail the Section 5328 factors at the hearing in the same manner that it detailed the Section 5337 factors, it considered the same.

Upon consideration of the Section 5328 factors, it was clear that several factors simply were not applicable in this case. First, neither party presented evidence of the availability of extended family.⁶ Similarly, sibling relationships were not a persuasive factor in this case. Specifically, the Children have an older sister who lives with Mother, however, there was no testimony as to any sort of interaction between the Children and their sister. To the contrary, K█████ did not even have an interest in being present at the very recent birth of her sister's baby. *See* N.T. at 116. Third, despite the clear communication problems between the parties, there was no evidence that either party has attempted to turn the Children against the other parent. Fourth, there was no evidence of a history of drug or alcohol abuse by either a party or a household member. Furthermore, there was no evidence that either party or a household member had a mental or physical condition that should impact the custody determination.

Moreover, many of the Section 5328 and 5337 factors overlap. Specifically, the Court addressed each child's preference on the record. *See* N.T. at 157-58. With regard to the second Section 5328 factor, abuse by a party or member of the party's household, the only evidence of record was that Mr. Tatters plead no contest to a simple assault charge in 2007 which resulted from a domestic dispute between him and his ex-wife. *See* N.T. at 110, 146-47. This Court considered this and determined that there was not a risk of harm to the Children. *See* N.T. at 161.

Similarly, with regard to which party is more likely to encourage and permit frequent and continuing contact between the Children and the other party, there is no evidence of record to

⁶ The only evidence potentially relevant to this factor was that Father presented the testimony of Christian Sedziak, a family friend who the kids treat like an uncle, and he presented the testimony of Mary Ellen Newlin, who is married to Father's stepfather and who describes herself as a grandmother to the Children. Both individuals testified to their observations of Father's very positive relationship with the Children and the Children's excitement about their living arrangements in Father's home. *See* N.T. at 25-28 and 30-34.

indicate that either party is more likely than the other to encourage and permit frequent and continuing contact between the Children and the other party. Instead, as the Court noted when considering whether the conduct of either party promoted or thwarted the Children's relationships with the other party, the parties have communication problems which pit the parents against each other and put the children in the middle. *See* N.T. at 16-18 and 158-59. Father attempts to communicate by phone. *See* N.T. at 45. Mother sometimes responds to Father's text messages. *See* N.T. at 45 and 115. Mother communicates to Father through the children. *See* N.T. at 45. Their attempts at communication often fail the children, resulting in the children not having the clothing that they need or miscommunication regarding transportation. *See* N.T. at 46-47. Nevertheless, the parties have been able to communicate sufficiently to arrange for custodial exchanges, including periods of time outside of the custody schedule. *See* N.T. at 95-96 and 114-115. In that respect, this factor did not weigh in either party's favor and the Court further believed that the level of conflict between the parties would not prevent their cooperation to allow periods of custody with the other.

While the Court did not detail the remaining factors at the hearing in the same manner that it detailed the Section 5337 factors, it considered the same. First, with regard to the parental duties performed by each party on behalf of the child, it is clear that Father is actively involved with the Children. As detailed in Section A above, he attends parent/teacher conferences, attends sporting events, and handles enrollment in activities such as summer school, summer youth group camp and drivers education. Moreover, he and his wife help the Children with their homework, make dinner with them, play games with them and take them to the zoo, out to eat, and to museums. *See* N.T. at 12, 33, and 54. Mother also attends parent/teacher conferences and

sporting events, however, based on the evidence presented, Father plays a greater role in performing parental duties.

With regard to the need for stability and continuity in the Children's education, family life and community life, it is clear that both Children are in need of stability and structure. For example, but for Father's intervention, A█████ would have failed seventh grade. Meanwhile, K█████ has set a college goal for herself and she is really trying to focus on reaching her goal. Regardless of whether the Children reside with Mother or with Father, it requires a change in schools and a change in physical residence. Nevertheless, Father's home provides greater stability in family and community life, as well as greater structure with regard to education to help the Children adjust to the Change. First, both of the Children testified that Father's home has greater structure than Mother's home. *See* N.T. at 4 and 11. He makes homework a priority in his home. *See* N.T. at 60 and 81. Moreover, Father testified to his intent to drive the Children to Girard so that they can continue their involvement with their youth group and the close relationships with their Girard friends. *See* N.T. at 56. Moreover, Father's home is an environment in which both children are comfortable and it offers the stability of a familiar family unit which includes just Father and his wife of eight years. Mother's situation, on the other hand, is very precarious. Specifically, just five months after meeting Mr. Tatters, she abandoned her home and allowed it to go into foreclosure to move in with him—her fifth live-in boyfriend in five years who states his relationship with Mother is "possibly" long term. *See* N.T. at 113, 134, 148. Accordingly, this factor also weighs in Father's favor.

With regard to which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the Children adequate for each child's emotional needs, the factor does not weigh in favor of either party. Instead, it is clear from the testimony of the Children

and from each of the parties that the Children have an equally loving and nurturing relationship with each parent.

With regard to which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child, Father is currently in a better situation to do the same. As the Court noted at the time of hearing, Mother made a unilateral decision to uproot the children to live more than an hour away from their Father, their friends, and their established activities to live in a crowded home simply so she could satisfy her own desire to live with a man she had just met. Apparently without regard to how the Children might react, Mother moved the Children's belongings to Guys Mills while they were at their youth group retreat. *See* N.T. at 77-78. Contrary to Mother's approach, Father wishes to have the Children engaged in counseling so they will have someone that they see as non-biased to help them get through the adjustments in their lives, including the changes in custody. *See* N.T. at 49-50 and 71.

With regard to the proximity of the parties' residences and each party's availability to care for the Children, Father goes to work between 5:15 and 6:30 a.m. Monday through Friday and is home by 1:00 or 2:00 p.m. every day. *See* N.T. at 41. Moreover, both Father and his wife are able to adjust their schedules so that one of them will be available for the Children when they are not in school. *See* N.T. at 41-42 and 86. Mother works weekends, however, she can change her work schedule in the event of a custody change. *See* N.T. at 129-30. Father's only tie to Guys Mills is the Children. Mother's work, however, is within one mile of Father's home. Mother can, and has, been able to facilitate custodial exchanges. *See* N.T. at 64-65. Mother was unable to provide a schedule in order for the Court to impose specific periods of partial custody and, therefore, the Court made the arrangement by mutual agreement. *See* N.T. at 137-39 and 162.

Accordingly, this Court determined that it was in the best interests of the Children to deny relocation and grant Father's request for primary physical custody.

BY THE COURT:



ELIZABETH K. KELLY, JUDGE

Joan M. Fairchild, Esq.
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cc: Custody Office