

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

S.C.S.,

Appellee

v.

J.E.S.,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1654 EDA 2012

Appeal from the Order Entered June 6, 2012  
In the Court of Common Pleas of Montgomery County  
Civil Division at No(s): 2011-17944

BEFORE: STEVENS, P.J., BOWES, J., and PLATT, J.\*

MEMORANDUM BY STEVENS, P.J.

Filed: January 2, 2013

J.E.S. ("Father") appeals from the order entered on June 6, 2012, in the Court of Common Pleas of Montgomery County, awarding S.C.S. ("Mother") primary physical custody of J.E.S., born December 2002, J.B.S., born June 2005, and J.K.S., born May 2009 (collectively "the Children"), awarding Father partial physical custody of the Children, and granting the parties' petitions for relocation, pursuant to 23 Pa.C.S.A. § 5337(h). After careful review, we affirm.

Mother and Father were married on October 22, 2001. N.T. Termination Hr'g, 6/5/12, at 6. During their marriage, Mother and Father had three children, who are the subject of this appeal. *Id.* at 5-6. Mother

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\* Retired Senior Judge assigned to the Superior Court.

also has a daughter, J.W., from a prior relationship. *Id.* Both Mother and Father are enlisted in the United States Navy. *Id.* at 5, 108. In 2009, Mother, Father, Children, and J.W. resided in Chestnut Hill, Philadelphia County, Pennsylvania, while Mother and Father were stationed at Willow Grove Naval Air Station. *Id.* at 7. The parties separated on October 31, 2009, when Mother moved to Horsham, Montgomery County, Pennsylvania and filed for custody of the Children. *Id.* at 6, 105. On September 22, 2010, the Court of Common Pleas of Philadelphia County granted Mother and Father shared legal and physical custody of the Children. The parties' divorce action is pending in Philadelphia County.

When the Willow Grove Base closed in March 2011, Mother and Father were relocated to McGuire Air Force Base in New Jersey. Mother and Father had participated in a co-location program, which allows married military couples to transfer to the same base to keep their family together. *Id.* at 69, 133-35. In 2011, Mother cancelled the parties' participation in the co-location program. *Id.* at 69, 133-36. Believing the parties would both live in New Jersey after the relocation, Father moved to Brownsville, New Jersey. However, Mother remained in Horsham with the Children. *Id.* at 7. On August 25, 2011, the Court of Common Pleas of Philadelphia County transferred the parties' custody action to Montgomery County.

On March 5, 2012, Father filed a petition in the Court of Common Pleas of Montgomery County to relocate to Middletown, Rhode Island as the Navy

had transferred him to Rhode Island, effective in March 2012. Father sent Mother a Notice of Proposed Relocation in which he proposed moving to Rhode Island with the Children. On March 26, 2012, Mother filed an answer and counterclaim to Father's petition to relocate. Mother requested primary physical custody of the Children and permission to relocate to Louisiana with the Children because she received military orders to transfer to Louisiana in July 2012. On March 29, 2012, Father filed an answer to Mother's counterclaim to his petition to relocate.

On June 5, 2012, a custody and relocation hearing was held during which Mother and Father testified. At the conclusion of the hearing, the trial judge took the matter under advisement as she repeatedly commented on the difficulty of her decision and stated the "scales of justice... [were] equally balanced." N.T., 6/5/12, at 181. On June 6, 2012, the trial court entered an order granting Mother's petition for relocation, awarding Mother primary physical custody during the school year, and awarding Father partial physical custody during the summer and holiday breaks. On June 19, 2012, Father filed his notice of appeal and his concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

On appeal, Father raises three questions for our review:

I. Did the trial court erroneously exhibit an abuse of discretion in awarding primary custody to Mother by failing to give appropriate consideration to the unrefuted testimony by both Mother and Father regarding the facts and circumstances of the respective relocation circumstances of the parents and current and anticipated custody arrangements, which, when considered

in the light of 23 Pa.C.S.A. § 5337 and 23 Pa.C.S.A. § 5328, weigh in favor of Father rather than the trial court's analysis on the record that found in favor of neither Mother nor Father?

II. Did the trial court erroneously exhibit an abuse of discretion by specifically noting personal gender biases regarding a belief that mothers typically perform daily parental responsibilities, while also noting that there was no reason, based on the testimony, to believe that Father did not and could not properly perform parental duties, and gender bias appears to have been the sole reason that the trial court awarded Mother primary custody, as no other significant or compelling reasons were provided by the trial court in its analysis?

III. Did the trial court erroneously exhibit a gross abuse of discretion when flippantly asking the litigants who wanted to flip a coin to decide with which parent the [C]hildren should primarily reside, in essence ignoring its duty to carefully weigh the statutory factors?

Father's Brief at 5.

Our scope and standard of review for a custody order 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 paramount concern of every custody case is the best interests of the child.<sup>1</sup> When reviewing a request to modify a custody order, the trial court must consider the following factors to determine the best interest of the child:

**§ 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.

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<sup>1</sup> The recently enacted Child Custody Act (23 Pa.C.S.A. §§ 5321–5340) is applicable in this case as it governs all proceedings commenced after January 24, 2011. 23 Pa.C.S.A. § 5321.

(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.

In addition, the trial court is required to consider the following ten factors when presented with a parent's request to relocate:

**§ 5337. Relocation**

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**(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 his first issue on appeal, Father claims the trial court failed to give proper consideration to each of the mandatory factors under Sections 5328 and 5337 as it should have been “clear to the trial court that that totality of the evidence based on all the factors considered together weighed in favor of allowing the minor children to relocate with Father.” Father’s Brief at 20-21. Specifically, Father contends that Mother’s cancellation of the co-location program “was motivated by Mother’s desire to create significant distance between Father and the Children and impede the possibility of continuing a shared custody arrangement.” Father’s Brief, at 22.

At the relocation hearing, the trial court analyzed each factor required by Section 5328(a) on the record. N.T., 6/5/12, at 175-81. Although the trial court found most enumerated factors were equally balanced between the parties, it concluded that some factors weighed slightly in favor of granting Mother primary custody, including the maintenance of the Children’s relationship with their half-sister, the fact that Mother had been the *de facto* primary physical custodian for a few months before the hearing, and the fact that Mother had always taken the responsibility of scheduling and taking the children to medical and dental appointments. *Id.* at 177-78; Trial Court Opinion, 7/17/12, at 6.



Additionally, the trial court applied each factor required in a Section 5337(h) analysis on the record. N.T., 6/5/12, at 156-67. Before beginning its analysis, the trial court pointed out that the both parties are “loving, caring, capable parents.” *Id.* at 156. The trial court also indicated there were no concerns related to the parties’ ability to meet the Children’s physical, psychological or social needs and the parties seemed to desire that the other parent take an active role in the Children’s lives. *Id.* The trial court found that most of the other factors did not favor either parent or were irrelevant as both parties were required by military order to relocate. *Id.* at 156-58.

With regard to the fifth factor, whether either parent had established a pattern of thwarting the Children’s relationship with the other parent, the trial court found “[Mother]’s decision to opt out of the co-location program is the one single most factor in this case that is preventing this family from relocation within close proximity to each other.”<sup>2</sup> *Id.* at 159. The trial court conceded that it believed that the parties could have moved to the same general area had it not been for Mother’s withdrawal from the co-location program. However, the trial court found that the “isolated incident does not establish a pattern of conduct.” *Id.* at 159.

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<sup>2</sup> Mother testified that she withdrew from the relocation program because she thought the program applied to “couples” living in the same household and felt it was “fraudulent” to continue to claim they were still living together. N.T., 6/5/12, at 156-67.

Ultimately, the trial court found two factors weighed in favor of Mother: (1) "Mother was the *de facto* primary physical custodian in the most recent months preceding the hearings" and (2) "the [C]hildren's close relationship with their [half-sister, J.W.] would be maintained." Trial Court Opinion, 7/17/12, at 4. The trial court found that "[a]lthough the parties had 50/50 custody, in reality, Father's custodial periods with the Children decreased slightly when he moved to New Jersey to be closer to the McGuire base." *Id.* at 5. The trial court also found that, since Father moved to Rhode Island, the Children have spent slightly less time with him. *Id.* at 5. Moreover, the trial court emphasized the Children's bond with J.W., as they have lived with her their entire lives. *Id.* at 5. Mother testified that J.W. helps the Children with their homework and plays with them. *Id.* at 121. Furthermore, the trial court concluded that allowing the Children to primarily reside "with Mother would be in their best interest to maintain a close bond with [J.W.]." Trial Court Opinion, 7/17/12, at 6.

Father's first issue on appeal, in sum, seeks review of the trial court's findings of fact and credibility determinations. Although Father admits that the trial court addressed each and every factor on the record, he claims the trial court would have awarded him custody if it had given proper consideration to each factor. Father's Brief at 20-21. Our standard of review, however, does not permit this Court to re-find facts, re-weigh the evidence, or to impeach the credibility determinations of the trial court

absent an abuse of discretion. *See C.R.F., III*, 45 A.3d at 443. Thus, in this difficult case, we are constrained to find that Father's argument is without merit.

Second, Father argues that trial court committed an "abuse of discretion by specifically noting personal gender biases regarding a belief that mothers typically perform daily parental responsibilities," and that "gender bias appear[ed] to be the sole reason that the trial court awarded Mother primary custody." Father's Brief at 35. Appellant refers to the following statement made by the trial court about the parties' parental duties:

[M]om has a little bit of an edge on [D]ad on this one I think. And probably I can only guess that's probably part of the typical gender biases that people normally have that mom is really the one that is and should be more responsible for the children's day-to-day scheduling and appointments, extracurricular and their day-to-day physical needs, not that [D]ad is not capable of doing that if he had full or primary physical custody or during the periods when he does. I have no question that he is as capable of doing it as [M]om. And maybe this is a gender bias on my part, but it just seems that sometimes moms – it's that female multitasking thing, if I can refer to it in quotes, that puts mom a little bit up on that factor than on [D]ad. But, again, I have no reason to believe that [D]ad can't step up to the plate and do the same thing if he has these children for long periods of time.

N.T. 6/5/12, at 176-77.

However, this comment by the trial court must be read in context with Mother's testimony that she was solely responsible for scheduling and taking the Children to their medical and dental appointments. Mother testified that

she would leave work to take each Child to the doctor once a year and the dentist twice a year. N.T. 6/5/12, at 117-18. In contrast, Mother claimed that Father had never scheduled the Children's appointments and contended that the only time Father accompanied the Children to doctor's appointments was when they were born. N.T. 6/5/12, at 118. The trial court acknowledged that the parties' own gender bias may have been the reason that Mother took sole responsibility for the children's medical and dental appointments. Nevertheless, she emphasized that Father would be able to take the same responsibility if given the chance.

Moreover, the trial court analyzed each statutory factor on the record and stated that its reasons for awarding Mother custody were that Mother had been the *de facto* primary physical custodian in the most recent months preceding the hearings, and the Children's close relationship with their half-sister would be maintained. **See** Trial Court Opinion, 7/17/12, at 5-6. As a result, we find no merit in Appellant's assertion that gender bias was the reason that the trial court awarded Mother primary custody.

On his final issue on appeal, Father argues the trial court exhibited "a gross abuse of discretion when the trial court asked the litigants who wanted to flip a coin to decide with which parent the [C]hildren should primarily reside, in essence, ignoring its duty to carefully weigh the statutory factors." Father's Brief at 37. However, although the trial court's suggestion may have been inartful, we find the trial court was simply expressing frustration

in having to award primary custody to one parent when both parties were deserving parents. Immediately after the trial judge made the suggestion to flip a coin, she indicated the “scales of justice [were] equally balanced.” N.T. 6/5/12, at 180-81. In its 1925(a) opinion, the trial court stated that it never intended to be flippant, but wanted to “demonstrate how closely the statutory factors weighed in favor of either party.” Trial Court Opinion, 7/17/12, at 7. We reiterate that the trial court thoroughly analyzed each factor regarding custody and relocation and found two factors weighed in Mother’s favor. *Id.* at 4, 6. Therefore, we find no abuse of discretion.

Accordingly, for the reasons stated above, we affirm the trial court’s order awarding Mother primary physical custody and Father partial physical custody of Child, and granting Mother’s petition for relocation, pursuant to 23 Pa.C.S.A. § 5337(h).

Order affirmed.