NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

D.A.R. Appellee v. Y.J.B. F/K/A Y.J.R. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1765 EDA 2012

Appeal from the Order Entered June 1, 2012
In the Court of Common Pleas of Lehigh County
Civil Division at No(s): 2008-FC_0042

BEFORE: LAZARUS, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J. Filed: February 15, 2013

Y.J.B. f/k/a/ Y.J.R. ("Mother") appeals from the order denying her request to relocate from Macungie, in Lehigh County, to Berwyn, in Chester County, with the parties' children, J.R., a female, born in February of 2002, and K.R., a male, born in February of 2005 (collectively, "the Children"). We affirm.

The record reveals the following relevant facts and procedural history. The Children were born during the marriage of Mother and D.A.R. ("Father"). The parties were divorced in December of 2007. N.T., 5/25/12, at 211. In October of 2009, Mother married S.B., and they have one son, who was eighteen months at the time of the subject proceedings. *Id.* at 74, 86.

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* Retired Senior Judge assigned to the Superior Court.

Father has remained living in the parties' former marital home in Wescosville, in Lehigh County, which is a distance of approximately three to five miles from Mother's home in Macungie. *Id.* at 209.

Father initiated the underlying custody action in January of 2008, wherein he requested shared legal and physical custody. By order dated March 18, 2008, upon agreement of the parties, Mother was granted primary physical custody and Father partial custody on alternating weekends, Wednesday overnight prior to Father's custodial weekends, and two overnights prior to Mother's custodial weekends. The order granted shared legal custody.

At the time of the subject proceedings, the parties were operating under an agreed upon order dated August 17, 2011, which modified the existing custody order, granting Father partial physical custody every Wednesday overnight, one dinner visit every week, and alternating weekends from Friday after school to Monday morning when the Children return to school. During the summer, the order granted Father primary physical custody and Mother partial custody on alternating weekends, two dinner visits per week, and two nonconsecutive weeks of vacation.

On March 1, 2012, after notification by Mother of her intent to relocate with the Children, Father filed with the court an objection to the relocation and to the modification of the existing custody order pursuant to 23 Pa.C.S. § 5337(d). On April 25, 2012, Mother filed with the court the notice of

proposed relocation, which included notification of her intent to relocate within ten miles of Berwyn, in Chester County, to be closer to S.B.'s place of employment. As a result, Mother recommended, in part, that Father's midweek visits would occur near Mother's proposed new home and would not include an overnight.

On May 25, 2012, the trial court held a hearing, during which the following witnesses testified: Ronald J. Esteve, Ph.D., the parties' former parenting coordinator in the underlying custody action; Peter Abram, vice president of financial planning and analysis at Styron, LLC, S.B.'s employer; S.B.; Mother; and Father. In addition, the trial court interviewed the Children *in camera*, who were ages ten and seven.

The trial court accurately summarized the testimonial evidence regarding S.B.'s career, as it relates to Mother's request to relocate:

> S.B.[] testified that he had been employed in a remunerative position, earning in excess of $100,000 as a finance manager, with a well[-] established company, Air Products and Chemicals, Inc. ("Air Products"), located in Lehigh County. Mother also works at Air Products, where she has been employed for ten years, and also earns in excess of $100,000 as an analyst. S.B. had been employed at Air Products for eight years and, like Mother, enjoyed a routine work day from 8:30 to 5:00. By early 2011, however, S.B. became aware of what he believed to be a more lucrative opportunity with a plastics company, "Styron, LLC". . . . Accordingly, he left his position at Air Products in February of 2011 to join Styron for what he described as "more attractive" compensation, including a salary of $140,000 and the potential, if he were to "perform well," to "potentially participate" in an initial public offering [of] Styron's stock.

> Immediately, in addition to the two-hour round-trip commute to his new employer, S.B. was confronted with long hours on the job, resulting in his renting an apartment and returning home to his wife and son on weekends. Although the time demands of his new position had waned by the end of 2011, the firing of a financial director resulted in an opening and a promotion opportunity for S.B. in February 2012. With his new position as financial director of the plastics division, S.B.'s hours increased once again. Desirous of shortening his commute, S.B. indicated that he will either have to relocate his wife and child to the Berwyn area, where Styron is located, or rent or purchase an apartment. However, it was made evident at hearing that he is not required by Styron to move as a condition of employment.

Trial Court Opinion, 7/31/12, at 6-7 (citations to record omitted).

The trial court found that, if Mother relocates to Berwyn, she will have to commute to Lehigh County for work, which she acknowledged was approximately 100 miles round-trip. ***See*** N.T., 5/25/12, at 149. The court made the following relevant findings, which are supported by Mother's testimony:

> In order to maintain her position with Air Products, Mother will have to perform the commute in reverse, from Berwyn to the Allentown area. . . . In order to offset . . . Mother's diminution in time at home, she and S.B. have arranged for a "nanny," and Mother further contends she will be able to work from home more than one day per week. She has, however, provided no evidence from her employer indicating that such a revised schedule has been approved. Instead, she "guess[es]" she will be able to telecommute "on average, one, two, maybe even three times a week."
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> Notwithstanding the demands this move will place on her schedule and time spent with [the Children], and conceding "[i]t would be inconvenient . . . because of commuting to work," Mother believes the move will be positive insofar as it would afford her the opportunity to increase the time she spends with S.B. and enhance their ability to "be a family unit". . . . Mother indicates that in the event she is not permitted to relocate, she

> will continue to reside in her present home and she and S.B. will make alternate arrangements to accommodate his pursuits at Styron.

Trial Court Opinion, 7/31/12, at 7 (citations to record omitted).

With respect to the Children's preference, the court found that "they did not wish to see their time with Father decreased as a result of a proposed move by Mother. . . ." *Id.* at 5. This finding is supported by the Children's testimony.

The court found as follows regarding the routines Father enjoys with the Children during his midweek visits: "These include helping with homework, transporting the children to, and observation of, sporting events; preparation and sharing of meals; bedtime routines; and more general, but equally important, discussion and "snuggle time." *Id.* This finding is supported by Father's testimony.

In addition, the court found that "the [C]hildren enjoy time with extended family members on both Mother's side and Father's side, who are, respectively, located approximately one-half hour north and northwest of the Lehigh County township where Mother and Father presently reside. . . ." *Id.* at 8. This finding is supported by the testimony of S.B. and Father.

By order dated May 31, 2012, and entered on June 1, 2012, the trial court denied Mother's petition to relocate and directed that the custody order dated August 17, 2011, remain in full force and effect. Mother 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).

Mother raises the following questions for our review:

> I. Whether Mother's proposed move to Berwyn, Pennsylvania is a "relocation" as the term is defined in 23 Pa.C.S. § 5322(a), where there is no indication in the record that the change in residency for the children will significantly impair Father's ability to exercise his custodial rights?
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> II. Whether the [t]rial [c]ourt erred when it denied Mother's petition for relocation where she met her burden of proving that the move is in the best interests of the children when consideration is given to the factors enumerated in 23 Pa.C.S. § 5337(h) as well as those factors referenced in 23 Pa.C.S. § 5328(a) and, in addition, she has met her burden of establishing the integrity of her motive in seeking relocation?
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> III. Whether the [t]rial [c]ourt erred when it denied Mother's petition for relocation where it failed to adequately consider the factors enumerated in 23 Pa.C.S. § 5337(h) and 23 Pa.C.S. § 5328(a) and failed to provide an adequate explanation and reasoning for its decision?
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> IV. Whether the [t]rial [c]ourt erred when it did not give sufficient weight to [S.B.'s] employment change and thereby establishing an unreasonable standard for relocation matters as a result of employment opportunities and resulting quality of life for the Mother and her children?
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> V. Whether the [t]rial [c]ourt erred when it did not give sufficient consideration to the resulting physical separation of the Mother and [S.B.]'s family unit, which includes another child, as well as the children to the action and the hardship placed upon that family by refusal to grant the relocation?

Mother's brief, at 4-5.

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 factors set forth in section 5337(h) of the Child Custody Act ("Act"), 23 Pa.C.S. §§ 5321-5340, which provides:

> **(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:
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> (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.
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> (4) The child's preference, taking into consideration the age and maturity of the child.
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> (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.
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> (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.
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> (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.
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> (10) Any other factor affecting the best interest of the child.

23 Pa.C.S. § 5337(h).

As the party proposing relocation, Mother has the burden of proving that relocation will serve the Children's best interest as set forth under section 5337(h). ***See*** 23 Pa.C.S. § 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. § 5337(i)(2).

In her first issue on appeal, Mother argues the trial court erred in concluding her proposed move is a "relocation" pursuant to the Act, which defines "relocation" 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. § 5322(a). Specifically, Mother argues the distance between Father's home in Lehigh County, and Berwyn, in Chester County, is approximately forty-nine miles, and this distance should not be considered a "relocation" because it will not "significantly impair" Father's ability to exercise custody. In so arguing, Mother implies that, if her proposed move is not a relocation, then the court has no authority to prevent her move, and, it follows, the Act is inapplicable.

This matter was initiated by Mother as a Notice of Proposed Relocation and at no time during the hearing on the Notice did Mother argue that her proposed move was not a relocation. As such, Mother did not preserve the issue for our review. Accordingly, we will not consider it. ***See Jahanshahi v. Centura Development Co., Inc.***, 816 A.2d 1179, 1189 (Pa. Super. 2003) (stating that claims not raised in the trial court may not be raised for the first time on appeal); ***see also*** Pa.R.A.P. 302(a).

Mother also argues the court erred by failing "to consider other alternate and appropriate custody arrangements."[1] Mother's brief, at 19. We disagree.

In its opinion pursuant to Pa.R.A.P. 1925(a), the trial court concluded the Children's two weeknight visits with Father would not occur if the proposed relocation is granted, and the weeknight visits "have been critical in the development of their very positive and nurturing relationship with Father." Trial Court Opinion, 7/31/12, at 8. Likewise, the court stated on the record at the conclusion of the hearing that, "given [Father's] involvement with the [Children], I think it would really lessen his involvement with the [Children] during their day-to-day activities, school activities, after school activities, all of those things." N.T., 5/25/12, at 266.

In addition, the court considered that the proposed relocation "will result in disruption occasioned by a change in school districts for both [of the C]hildren, resulting in lack of continuity including a loss of friendships." Trial Court Opinion, 7/31/12, at 8 (citation to record omitted). Based on the foregoing conclusions of the trial court, which are reasonable in light of its sustainable findings, we reject Mother's argument that the court failed to

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[1] Mother states in her brief that her proposed custody schedule involved Father exercising non-overnight custody on weekdays, all school holidays preceding or following weekends during the school year, additional periods of time over the holidays, and her forfeiture of two non-overnight visits per week with the Children during the summer. ***See*** Mother's brief, at 16.

consider the feasibility of alternate custody arrangements. Rather, the court considered the feasibility of a modified arrangement and determined it would not be in the Children's best interests.

In her second issue, Mother argues the trial court failed to consider the fifth factor under section 5337(h), that is, whether there is an established pattern of conduct by either party to promote or thwart the relationship of the child with the other party. Specifically, Mother argues the court failed to consider the testimony of Dr. Esteve, who served as a parenting coordinator in the underlying custody action. Mother argues Dr. Esteve's testimony demonstrated a pattern of conduct whereby she promoted the Children's relationship with Father. It follows, she argues, that Dr. Esteve's testimony established her sincere motive in seeking the relocation pursuant to section 5337(i)(2), *supra*. In contrast, Mother argues Dr. Esteve's testimony demonstrated a pattern of conduct whereby Father did not promote her relationship with the Children, was inflexible and unreasonable in handling co-parenting issues with Mother, and, therefore, his motive in opposing the relocation is not sincere.

Upon agreement of the parties, the trial court appointed Dr. Esteve by order dated May 25, 2010, to assist Mother and Father in resolving all issues arising from their co-parenting relationship, and in the event they did not

resolve the issues, to decide the issues for them.[2] ***See*** Order, 5/25/10, at ¶ 2(A). Dr. Esteve met with the parties between June of 2010, to July of 2011, for a total of twenty-nine times.[3] N.T., 5/25/12, at 22. Thereafter, the parties agreed to modify the existing custody order, and the trial court issued an amended custody order dated August 17, 2011, described *supra*. ***See*** Order, 8/17/2011.

Prior to Dr. Esteve's testimony, Father's counsel objected to his testimony on the basis that, in part, (1) the parties had not seen Dr. Esteve since before the last hearing in the underlying action, *i.e.*, in August of 2011, resulting in the custody agreement; and (2) he was not appointed as a custody expert in the underlying action, and, therefore, it was not appropriate for him to make custody recommendations. ***See*** N.T., 5/25/12, at 15-19. The trial court overruled the objection of Father's counsel and stated, "I think the dynamic between the parties may be relevant in terms of

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[2] Dr. Esteve was appointed following Mother's petition to modify the March 18, 2008 custody order, filed on September 1, 2009, and Father's petition for contempt, filed on December 23, 2009, both of which remained pending until the parties reached a custody agreement on August 17, 2011.

[3] Dr. Esteve testified he found Mother "very flexible" and "very reasonable" in working with Father on particular co-parenting issues, in contrast to Father. N.T., 5/25/12, at 27. Dr. Esteve testified Mother had made efforts to preserve the relationship between the Children and Father, but he described two specific instances when Father conducted himself in a manner that he deemed to thwart the Children's relationship with Mother. *Id.* at 39-40.

deciding who gets primary custody, and what the custodial arrangement is going to be, and any other provisions that the Court has to include in the Order for the best interests of the child." *Id.* at 19. The court stated that Dr. Esteve "will not make a recommendation as to a custodial schedule, but I think he can certainly testify about his experience with the parties' compliance issues, communication issues, and things like that." *Id.* at 19-20.

In its opinion pursuant to Pa.R.A.P. 1925(a), the trial court did not discuss Dr. Esteve's testimony. However, it is clear from the court's statement on the record that it found Dr. Esteve's testimony relevant insofar as it would need to fashion a modified custody order. Mother subsequently testified during the hearing that, if the court denied her relocation request, she would not relocate. As such, the court did not need to fashion a new custody order because it did not grant her relocation request.

Moreover, the court agreed that Mother's motive was sincere in seeking to relocate. ***See*** N.T., 5/25/12, at 265. We remind Mother that, in addition to establishing a sincere motive, she had the burden of establishing that the relocation will serve the Children's best interests pursuant to the statutory factors in section 5337(h). ***See*** 23 Pa.C.S. § 5337(i)(1). With respect to section 5337(h)(5), Dr. Esteve's testimony related to the conduct of the parties that occurred more than one year beforehand. Mother did not introduce any evidence to establish that Father had thwarted her

relationship with the Children since their custody agreement in August of 2011. We discern no abuse of discretion by the court in the weight it placed upon all relevant statutory factors in deciding to deny the relocation request. As such, Mother's second issue fails.

In her third issue, Mother argues the trial court erred by disregarding the factors in section 5337(h). Specifically, Mother argues the court failed to analyze and apply each of the statutory factors to the evidence presented in this case. We disagree.

In its opinion pursuant to Pa.R.A.P. 1925(a), the trial court set forth the requisite section 5337(h) factors. ***See*** Trial Court Opinion, 7/31/12. The court concluded that Mother did not meet her burden in proving that the relocation will be in the Children's best interest. ***See*** 23 Pa.C.S. § 5337(i)(1). The court considered the preference of the Children, who were then ages ten and seven, not to have their time with Father decreased as a result of the proposed relocation. Trial Court Opinion, 7/31/12, at 5. The court concluded the Children are "thriving under the current custody plan which, because of its midweek visits, depends upon geographic proximity of the parents." *Id.* In addition, the court concluded the Children would have to change school districts, resulting in a disruption and "lack of continuity including a loss of friendships." *Id.* at 8 (citation to record omitted). Further, the court considered that Mother would be less available to the Children because of her lengthy reverse work commute. *Id.* at 7. The

court's decision denying the proposed relocation is reasonable in light of the statutory factors and the court's sustainable findings of fact. Therefore, we conclude the court did not abuse its discretion.

In her fourth and fifth issues, Mother argues the trial court abused its discretion in failing to give sufficient weight to (1) S.B.'s career improvement as the basis for the proposed relocation; and (2) the hardship placed upon the family unit of Mother and S.B. by denying the relocation request. As such, Mother argues the court failed to sufficiently consider and weigh the sixth and seventh factors of section 5337(h), that is, whether the relocation will enhance the quality of life for Mother and the Children. We disagree.

The trial court reasoned,

> [O]ther than Mother's desire to enjoy a more traditional family-arrangement with S.B., which presumably would have an indirect benefit to the [C]hildren in the form of a more harmonious home life with Mother during the albeit shorter time she would be present in the new house,[4] there is scarce evidence on this record to indicate any advantage of the proposed move to offset the detriments, which are manifold and manifest.
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> Nor is this conclusion tempered by any considerations of economic necessity that might otherwise apply in the event realities forced upon Mother and S.B. an intractable situation as a result of events beyond their control. Instead, the situation ostensibly militating a relocation has arisen from S.B. seizing upon what he perceived to be an economic opportunity. . . . No testimony or evidence at hearing indicated that Mother and S.B. were in any manner forced to forgo their existing arrangements

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[4] Mother would be present in the new house for a shorter time per week because of her commute to Lehigh County for work.

> at Air Products, which afforded them a highly remunerative and geographically convenient work life coupled with an eminently manageable time schedule to accommodate the custody-sharing arrangements prevailing in this family setting. That other financial opportunities, or potentialities, have presented themselves, resulting in a need for compromise, only begs the questions of by whom and in what manner those compromises are to be made. Whatever the ultimate motivations may have been in favor of S.B.'s present pursuit in Berwyn, the best interests of [the Children] militate that it not be their quality time with Father that is sacrificed in order to facilitate that endeavor.

Trial Court Opinion, 7/31/12, 8-9 (citation to record omitted). We discern no abuse of discretion by the court.

We reject Mother's fourth and fifth issues to the extent she argues the trial court abused its discretion in placing the primary focus of its analysis on the best interest of the Children. ***See Saintz***, ***supra*** (stating that the primary concern in any custody case is the best interests of the child). Further, we reject Mother's argument that the trial court's decision places an unreasonable standard on relocation cases. The court's conclusion that the Children's custody arrangement, in which they are currently thriving, should not be sacrificed in favor of S.B.'s career ambitions, is not unreasonable in light of the totality of the record evidence. Accordingly, we affirm the order denying Mother's request for proposed relocation.

Order affirmed.