

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

C.S.G.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
C.M.D.,	:	
	:	
Appellee	:	No. 1879 WDA 2012

Appeal from the Order October 30, 2012,  
Court of Common Pleas, Crawford County,  
Civil Division at No. A.D. 2004-1049

BEFORE: BOWES, DONOHUE and MUNDY, JJ.

MEMORANDUM BY DONOHUE, J.:

**FILED MAY 07, 2013**

Appellant, C.S.G. (“Father”), appeals from the order of court granting primary physical custody of the three minor children to C.M.D. (“Mother”). Father contends that the trial court failed to give proper weight and consideration to the factors set forth in 23 Pa. C.S.A. § 5328(a) in reaching its decision. Alternatively, Father argues that the trial court’s custody schedule fails to provide him with adequate time with the children. For the reasons that follow, we affirm.

Father and Mother have three children: a daughter, D.R.G,<sup>1</sup> born December 1994, and two sons, S.S.G., born November 1996, and C.C.S., born October 2001. In September 2005, Father and Mother entered into a consent custody order in which they agreed to share legal custody of all

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<sup>1</sup> A recent DNA test showed that Father is not the biological parent of D.R.G.

three children, with Father maintaining primary physical custody. Under the 2005 custody order, Mother had partial physical custody every other weekend and two days out of the other week.

In 2005, Mother resided with her boyfriend and thus lacked a place to exercise her custody. She would visit with the children in Father's home or with relatives in Sharon, Pennsylvania. Eventually, she began to bring the children to the boyfriend's residence, but this arrangement ceased in 2011 after an incident between S.S.G. and boyfriend. Mother then obtained a separate residence of her own. In March 2012, Mother filed a motion to modify the 2005 custody order. On May 16, 2012, a custody mediator entered an order essentially reversing the 2005 custody order, with Mother having primary physical custody and Father having partial custody on every other weekend.

Father requested a *de novo* custody hearing, at which Mother, Father, and the three children, among others, testified. On October 30, 2012, the trial court issued an order granting shared legal custody to Mother and Father. Because D.R.G. turned 18 in December 2012, the trial court granted Mother primary physical custody of her, with D.R.G. to decide how much time to spend with Father (including holidays). With respect to S.S.G. and C.C.G., the trial court granted Mother primary physical custody, with Father to have partial physical custody every other weekend and on Saturday afternoons of the other weekend. Mother and Father will share time with

S.S.G. and C.C.G. during Easter, Thanksgiving and Christmas, and will alternate custody by year on Memorial Day, Labor Day, and Independence Day. Father will also have physical custody during the two weeks each summer when his employer's mandatory shutdown period occurs.

In an accompanying memorandum in support of its order, the trial court summarized the testimony at the evidentiary hearing and then provided the following discussion of the relevant custody factors:

We will now consider the sixteen factors set forth at 23 Pa. C.S.A. 5328(a).

First we must consider which party is more likely to encourage and permit frequent and continuing contact between the children and the other party. Based on the testimony we heard, we cannot conclude that that factor favors either party.

Next we must consider any past and present abuse committed by a party or member of the party's household[,] and we cannot find that any abuse has occurred.

The third factor we consider is the parental duties performed by each party on behalf of the children. Again, we cannot find that either party has done so [*sic*] more than the other. Obviously, when the children are in the primary physical custody of [Father] he seemed to perform the parental duties more but that probably was not the case when the parties were living together nor is it the case now that the children live primarily with [Mother].

The next factor we consider is the need for stability and continuity in the children's education, family life and community life. We cannot find that that factor favors either party although [Mother] probably should not have allowed [S.S.G.] to go to cyber

school without consulting [Father] in advance and obviously it did not work out for [S.S.G.] to go to cyber school so that he is back in a public school.

We next consider the availability of extended family and while [Mother's] family is in the Sharon, Pennsylvania area, that factor still seems to favor [Mother] because [Father] gave no indication that his extended family is having any kind of meaningful contact with the children.

We next consider the children's sibling relationships and it appears that they have a good relationship with their siblings but that occurred in both households so that is not a factor favoring either party.

The seventh factor we consider is the well-reasoned *sic* preference of the children based on their maturity and judgment. We believe it is clear that all of the children, including the youngest two, wish to reside primarily with [Mother]. While that may be influenced to some extent by the fact that [Father's] household is more disciplined and there are more chores to do, it appears that the children simply feel more comfortable and relaxed when they are primarily at their [Mother's].

Next we consider the attempts of a parent to turn the children against the other parent and we find no evidence of that.

The next factor is which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the children adequate for their emotional needs. We believe this factor slightly favors [Mother] because she seems to have a better rapport with the children and a more open relationship where they are willing to communicate in a meaningful way with her.

The next factor we consider is which party is more likely to attend to the daily physical, emotional,

developmental, educational and special needs of the children. We believe this factor favors [Mother] since [Father] consistently works third shift leaving the children home overnight without any caretaker. Obviously [Mother] has some issues in that regard too when she works third shift and when the children arrive home after school for more than an hour and a half before she gets home. [Father's] home in the photos provided by [Mother] was clearly very dirty. But balancing the two situations, neither of which we find to be ideal, we believe this factor does favor [Mother].

We next consider the proximity of the residences of the parties and since they are seven miles apart we do not find that to be a significant factor.

Next we consider each parties [*sic*] availability to care for the children or ability to make appropriate child-care arrangements. We have already somewhat addressed that issue in that [Father] does work third shift and the children are left without someone to care for them. Again, [Mother] has that issue but not as frequently and actually both of these parents should probably be making better choices to be sure somebody is available to care for the children when they are not available.

Next we must consider the level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. While certainly the situation is not perfect we believe it is better in this regard than often in such cases.

Next we next consider the history of drug or alcohol abuse of a party or member of a party's household and there is no evidence to suggest that is a factor.

Next we consider the mental and physical conditions of a party or member of party's household and there is no evidence to suggest that is a factor.

Finally, we consider any other relevant factor and we do not believe there is anything that we need to consider in that regard.

Based upon our consideration of these factors, we believe that it is most appropriate and in the best interest of the children to be in the primary physical custody of [Mother].

While her work schedule is not ideal, it affords more time for her to be with the children than [Father's] does and clearly the children feel more comfortable and seem to have a more relaxed relationship with [Mother].

While [Father] certainly should have significant time with the children and we will try to structure an Order that does that, we cannot find that it is in the best interest of the children to have to alternate weeks between the parents' homes.

Trial Court Opinion, 10/30/12, at 7-9.

Father filed the present appeal, in which he raises the following issues for our consideration and determination:

1. Whether the [t]rial [c]ourt committed an error of law and/or abused its discretion in failing to award to [Father] primary or equal physical custody of the parties' children pursuant to section 5328 of the Pennsylvania Child Custody Act.
2. Whether the [t]rial [c]ourt erred in failing to find that the first factor of section 5328 favored [Father] where for most of the past seven years, the children were unable to spend time at [Mother's] residence due to issues with her boyfriend, [Father] actually encouraged [Mother] to spend time with the children at his residence, and there is no evidence that [Mother] has taken any affirmative steps to encourage the contact between [Father] and the children.

3. Whether the [t]rial [c]ourt erred in failing to find that the third factor of section 5328 favored [Father] where [Father] maintained primary custody of the children for seven years prior to the instant proceedings, the children spent very little time at the residence of [Mother], and [Father] was primarily responsible for the children's school needs, medical needs, extracurricular activities, and daily needs.
4. Whether the [t]rial [c]ourt erred in failing to find that factor four of section 5328 favored [Father] where the [trial court] acknowledged that [Mother] immediately allowed [S.S.G.] to enroll in cyber school without discussing it with [Father], and where [Father], who was a daily caregiver, was completely reduced to a weekend parent.
5. Whether the [t]rial [c]ourt erred in failing to find that the fifth factor of section 5328 favored [Mother] where the testimony demonstrated that the children have a relationship with extended family on both parents' sides, not just on [Mother's] side.
6. Whether the [t]rial [court] erred in giving significant weight to the preferences of the children, where it is clear that, based upon their testimony, their preferences were not well-reasoned, but rather were based upon the fact that they have significantly less supervision and responsibilities at [Mother's] house.
7. Whether the [t]rial [c]ourt erred in failing to find that factor ten of section 5328 favored [Mother] where rather than favoring [Father], where [Father] was substantially the party to attend to the children's daily physical, emotional, developmental, educational and special needs for the seven years preceding this modification action, and where the [t]rial [c]ourt gave weight to the fact that [Father] works third shift and therefore [Mother] is more available to the children but disregarded the fact that [Mother] leaves the home at 6:45 a.m., returns at 5:00 p.m., leaves for several hours several nights per week to

visit her boyfriend, and also occasionally works third shift.

8. Whether the [t]rial [c]ourt erred to the extent that it did not find factor twelve of section 5328 to be neutral, where both parties spend a period of time at work, leaving the children home alone, and where, [Mother] additionally leaves them several nights per week to spend time with her boyfriend.
9. To the extent that the decision to award [Mother] primary custody is upheld, whether the [trial court] erred in failing to provide [Father] with substantial partial custody of the children, including time during the week as well as time during the summer during the days when [Father] is home and [Mother] is at work.

Father's Brief at 7-8.

In 2010, our Legislature adopted a new Child Custody Act ("Act"), 23 Pa. C.S.A. §§ 5321-5340, which became effective on January 24, 2011. Because the proceedings in this matter occurred after the effective date of the Act, the Act is applicable. **C.R.F. v. S.E.F.**, 45 A.3d 441, 443 (Pa. Super. 2012).

Our scope and 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.

**Id.** at 443 (quoting **A.D. v. M.A.B.**, 989 A.2d 32, 35–36 (Pa. Super. 2010)).

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 wellbeing.” **Saintz v. Rinker**, 902 A.2d 509, 512 (Pa. Super. 2006). Section 5328 of the Act sets forth the factors that a trial court must consider when ordering any form of custody:

**§ 5328. Factors to consider when awarding custody**

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

- (1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.
- (2) The present and past abuse committed by a party or member of the party’s household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.
- (3) The parental duties performed by each party on behalf of the child.

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

(5) The availability of extended family.

(6) The child's sibling relationships.

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

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

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

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

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

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

(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.

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

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

(16) Any other relevant factor.

23 Pa. C.S.A. § 5328.

We address Father's first eight issues together, as they collectively pose the issue of whether the trial court abused its discretion in failing to apply appropriately the section 5328 factors to the evidence presented at the custody hearing. In particular, Father asserts that the trial court found that certain factors (the first, third, and fourth) were neutral between the parties, but in fact should favor him. Father also contends that three other factors (the fifth, tenth, and twelfth), which the trial court found to favor Mother, are instead neutral. Finally, Father claims that the trial court should not have given any significant weight to the preferences of the children, since their preferences were not "well-reasoned" and were based instead upon the lack of supervision and discipline exercised by Mother.

Contrary to Father's arguments, based upon our review of the certified record on appeal and the trial court's written opinion, in our view the trial court adequately considered the section 5328 factors in reaching its decision. In this regard, we recognize that section 5328 leaves to the sound discretion of the trial court the determination of the weight to be accorded to each factor. This Court has emphasized that in custody matters the discretion exercised by a trial court must be accorded the utmost respect, especially

since the knowledge gained by a trial court in observing witnesses in a custody proceeding cannot adequately be imparted to an appellate court by a printed record. **Ketterer v. Seifert**, 902 A.2d 533, 540 (Pa. Super. 2006) (quoting **Jackson v. Beck**, 858 A.2d 1250, 1254 (Pa. Super. 2004)). It is not this Court's proper function to re-weigh the evidence presented, even if the record could also support the opposite result. **In re Adoption of T.B.B.**, 835 A.2d 387, 394 (Pa. Super. 2003). Appellate interference is unwarranted if the trial court's consideration of the best interest of the child was careful and thorough. **S.M. v. J.M.**, 811 A.2d 621, 623 (Pa. Super. 2002) (quoting **Robinson v. Robinson**, 645 A.2d 836, 838 (1994)). Concluding that the trial court's consideration of the issues involved in this case was both careful and thorough, no basis exists here for a finding of abuse of discretion.

With respect to the first, third, and fourth factors, we take no issue with the trial court's determination that these factors do not significantly favor either party. While Father has demonstrated a willingness over time to encourage and coordinate interaction between Mother and the children, including the use of his home to do so, nothing in the record suggests that Mother would block Father's access to the children in the future. She testified that she did not want to deny Father time with his children and had never told him that he could not see them. N.T., 10/22/12, at 29, 35-36. In connection with the third and fourth factors, the evidence showed that

both Mother and Father have generally provided for the children's needs when in their physical custody, and that as a result these factors do not significantly favor either party.

More importantly, in its analysis of the best interests of the children, the trial court placed little or no weight on these factors,<sup>2</sup> and thus whether these factors were neutral or slightly favoring either party is largely irrelevant. Instead, the trial court based its decision almost exclusively on its determinations under factors seven, ten and twelve, namely that (1) Mother's work schedule provides her with more time to spend with and care for the children, and (2) the preference of the children given their more comfortable and relaxed relationship with Mother. Trial Court Opinion, 10/30/12, at 9.

With respect to (1), the trial court acknowledged that neither party's work schedule was ideal, since Mother must leave the children home alone in the afternoons before she gets home from work, and she occasionally leaves the children unattended when she works third shift.<sup>3</sup> We also note that the trial court failed to include in its analysis any discussion of S.S.G.'s

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<sup>2</sup> The same is true for the fifth factor (the availability of extended family). As a result, whether this factor slightly favors Mother, as the trial court found, or is instead neutral, as Father contends, had little or no effect on the trial court's custody determinations.

<sup>3</sup> Mother testified that she worked third shift approximately six times from May 2012 until the time of the evidentiary hearing on October 22, 2012. N.T., 10/22/12, at 39.

testimony that Mother leaves the home to go visit with her boyfriend up to three nights per week at around 9:00 p.m. for two hours. N.T., 10/22/12 (*in camera*), at 17-18. Nevertheless, overall the record supports the trial court's finding that Mother's job permits her to spend more time with the children than does Father's. D.R.G. testified that, unlike with Mother, Father's job and sleep schedule prevented him from spending any substantial time with the children:

Q. I mean, since you've moved in there [Mother's home] in the spring, how would you describe how everything is going?

A. [D.R.G.] Well, everything is going good. Like I think that I feel that [Mother] pays better attention to what goes on in our lives. I mean, we do have more freedom, but there is also more responsibility and restriction too. Like, with freedom comes like, I guess you would say restriction and I feel like it's a better environment.

Q. How do you – what do you mean by a better environment? How does that work, just in terms of how everybody is comfortable or physically better?

A. [D.R.G.] Well, comfortable. Like we have family meetings and everything we discuss. Like we always eat dinner as a family and it's more family oriented.

Q. And that's not something that would happen at [Father's] house?

A. [D.R.G.] No. At [Father's] it was – he would come home from work and go to bed and we would all have to be quiet.

Q. Okay. And then when would he get up to go to work?

A. [D.R.G.] Around nine, depending on his hours because sometimes he works overtime.

Q. Okay. So in the after school hours until bed time, he would be sleeping?

A. [D.R.G.] Right.

Q. Okay. When did you get an opportunity to interact with him then?

A. [D.R.G.] Sometimes like right after school we'd have to mow the lawn and everything, but we didn't really have any family time. It was all work and everything.

N.T., 10/22/12 (*in camera*), at 4-5. The testimony of S.S.G. and C.C.G. supported that of their sister:

Q. Would you say that your mom or your dad has more free time to spend with you?

A. [S.S.G.] Probably my mom because my dad, he works third shift and he sleeps quite a bit during the day.

***Id.*** at 13.

Q. Do you feel like your mom gets a little time to spend with you or a lot of time to spend with you?

A. [C.C.G.] A lot of time.

Q. Okay. And what kinds of things do you do together?

A. [C.C.G.] Like go Putt Putt and play rummy.

Q. Who wins?

A. [C.C.G.] My sister.

**Id.** at 21.

With respect to (2), the weight to be given a child's preference depends in part on that child's age, maturity and intelligence. **Wheeler v. Mazur**, 793 A.2d 929, 937 (Pa. Super. 2002); **E.A.L. v. L.J.W.**, 662 A.2d 1109, 1118 (Pa. Super. 1995). As this Court has recognized, "where the households of both parents were equally suitable, a child's preference to live with one parent 'could not but tip the evidentiary scale in favor' of that parent." **Bovard v. Baker**, 775 A.2d 835, 841 (Pa. Super. 2001) (quoting **McMillen v. McMillen**, 529 Pa. 198, 204, 602 A.2d 845, 848 (1992)).

The evidence of record in this case supports the trial court's finding that the preference of the children was to live with Mother because her home provides a more comfortable and relaxed environment:

- Q. Is there anything else that you would like to share with the Judge about the situation or your preference or anything?
- A. [D.R.G.] Well, I feel like I'm happier at my mom's and I know that the boys are happier there, but they can say that for themselves if they feel that that's what they need to say.
- Q. What do you think that you get at your mom's then that makes you happier?
- A. [D.R.G.] Well, like I said, it's just a nicer environment, like the family – I don't know how to explain it. We are all happier there. Like, we don't fight or argue as much as we did at our dad's. I feel like at our dad's it was just stressful because he was always working and he would never have time to do



anything as a family and I don't know. I think that covers it.

**Id.** at 6-7.

Q. And since you've come to stay at your mom's house, how do you think the relationship of the whole family is with you and your mom and your brother and your sister?

A. [S.S.G.] Not as much fighting like we usually would at my dad's because my sister would like torment my brother a lot and it's pretty much better.

Q. Okay. And that doesn't happen at mom's house?

A. [S.S.G.] No.

\* \* \*

Q. ... Now, would you want to see your dad more time than you're seeing him now?

A. [S.S.G.] I think it's all right.

Q. Okay.

A. [S.S.G.] Right now.

**Id.** at 13, 15.

Q. Okay. You've been living at mom's house primarily since the beginning of the summer. How would you describe how that's going?

A. [C.C.G.] Good.

Q. What things do you like about it?

A. [C.C.G.] Like it's comfortable and I don't really have anything like important to do, like really important. Like important stuff. I can do whatever I like.

Q. Important stuff like what?

A. [C.C.G.] Well, I have some, but they're pretty easy. Like put away the dishes and then like after that then I can just do whatever I want as long as I tell her and she knows like where I'm going to be at and stuff.

Q. And did you have more important things to do when you were at dad's house?

A. [C.C.G.] Like take care of the dog. That's about it.

***Id.*** at 20-21.

In this case, the trial court obviously determined that the three children were of sufficient age, maturity and intelligence to give weight to their preferences regarding the parent with whom they would like to live. Father contends that the children's preferences should be discounted because the children were primarily interested in more freedom and less discipline. The above-quoted testimony of the three children, however, does not appear to support this contention. Moreover, and more importantly, the trial court had the opportunity to observe the testimony of the children in person, and after doing so it did not reach the conclusion that the children were merely attempting to avoid chores and discipline by choosing Mother's home. Instead, the trial court took the children at their word – that Mother's home does in fact provide a more relaxed and comfortable environment in which to live. Not having observed the children's testimony in person, we

are loathe to disagree with the trial court's assessment and instead find hidden motives based solely on our review of the printed record.

For these reasons, we conclude that the trial court appropriately considered the factors set forth in section 5328 in determining the best interests of the children, that its findings of fact are adequately supported by the record on appeal, and that it did not abuse its discretion in finding that the children's best interests are served by awarding Mother primary physical custody. Finding no abuse of discretion in the trial court's analysis, Father is not entitled to relief on his first eight issues on appeal.

For his ninth issue on appeal, Father contends that the trial court did not provide him with sufficient partial custody time with his children. Again, however, we do not conclude that the trial court abused its discretion. Father has partial custody of the two younger children every other weekend from Friday until Sunday, and that time extends until Monday if the children do not have school on that day. Pursuant to the trial court's custody order, Father is also entitled to telephone the children every day when they are not in his custody, and Mother must make sure the children return his calls promptly if they were unavailable to receive them when placed. Easter, Thanksgiving, and Christmas are each divided into two custodial periods, and Father and Mother share the children's time on these holidays. Other holidays, including Memorial Day, Labor Day, and Independence Day, are shared on alternate years. Father gets to spend Father's Day with the

children every year, and also has custody during the two weeks every summer that his employer's operations are shut down. As a result, while it is not the alternating weeks approach recommended by Father, we cannot say that the trial court failed to provide sufficient time for Father to spend with his children.

We note that in its memorandum decision, the trial court failed to explain why Father's alternative weeks approach was not in the best interests of the children. Trial Court Opinion, 10/30/12, at 9. Father offered no expert testimony, however, in support of this approach. This Court has made clear that while alternating weeks can be an acceptable custody arrangement, shared physical custody does not require (or presume) that the parents will share time with their children equally. **See, e.g., Johnson v. Lewis**, 870 A.2d 368, 373 & n.9 (Pa. Super. 2005); **Mumma v. Mumma**, 550 A.2d 1341, 1343 (Pa. Super. 1988). Instead, every custody matter is unique and must be decided on a case-by-case basis according to the best interests of the particular children involved. **Johnson**, 870 A.2d t 373 n.9. By considering all of the section 5328(a) factors, we are satisfied that the trial court reached an individualized decision in this case.

Order affirmed.

J-A09027-13

Judgment Entered.

Nicholas V. Casatti

Deputy Prothonotary

Date: 5/7/2013