

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

G.M.G.,

Appellant

v.

M.C.K.,

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1770 MDA 2013

Appeal from the Order entered August 28, 2013,  
in the Court of Common Pleas of Clinton County,  
Civil Division, at No(s): 1715-2008

BEFORE: DONOHUE, ALLEN, and MUNDY, JJ.

MEMORANDUM BY ALLEN, J.:

**FILED APRIL 29, 2014**

G.M.G. ("Mother") appeals from the trial court's order denying her petition to relocate, and transferring primary physical custody of the parties' two minor children to M.C.K. ("Father"). We vacate and remand with instructions.

The trial court summarized the pertinent facts and procedural history as follows:

Mother filed a Complaint for Custody on November 13, 2008 and this Court pursuant to the agreement of the parties, issued an Order on December 23, 2008 granting the parties shared legal custody, Mother primary physical custody and Father partial physical custody.

No other activity occurred in this file until Father filed a Counter-affidavit Regarding Relocation on August 5, 2013, objecting to relocation. [Although Mother sent a notice of her intent to relocate to Father in a letter dated July 9, 2013, she did not file a relocation petition with the trial court.] Father then filed a Petition for Contempt on August

6, 2013, alleging that Mother had relocated the children to the State of South Carolina and Father had not received any custodial time with the children since the relocation.

This Court scheduled a hearing on August 23, 2013, directing Mother and the children to appear, and appointed John P. Boileau, Esquire as Guardian Ad Litem for the children. This Court received testimony on August 23, 2013 and August 28, 2013 from Mother, Father, Jason Foltz, Chief Probation Officer of Clinton County, Prudence Johnson, Melanie Witherite and [C.K.,] the paternal grandmother. This Court by Order of August 28, 2013 granted Father's Petition for Contempt which was filed August 6, 2013, but did not impose any sanctions. This Court further denied Mother's oral request to relocate to South Carolina, indicated that the Order of December 23, 2008 shall remain in full force and effect, directed that if Mother failed to reside in Clinton County that primary custody of the children would be transferred to Father, and directed Clinton County Children and Youth Social Services Agency to monitor Father's custody with an unannounced home visit one time per week if Father was granted primary physical custody due to Mother's refusal to obey this Court's Order. Mother thereafter filed a timely Appeal on September 27, 2013, and this Court on September 30, 2013 directed Mother to file a Statement of Matters Complained of on Appeal and a statement identifying any transcript which may be necessary for Appellate purposes. This Court received correspondence dated October 8, 2013 that appears not to have been filed in the Office of the Prothonotary. Said document is entitled Statement of Errors. It indicates that it is authored by Mother. However, it is unsigned. Since it was not filed in the Office of the Prothonotary, this Court believes that Mother has waived any and all issues that [she] has complained of on appeal. However, this Court will address the issues as alleged by Mother in this Statement of Errors.

Trial Court Opinion, 10/23/13, at 1-2.

Our review of the record reveals that Mother filed her "Statement of Errors" *pro se* with the county prothonotary on October 23, 2013. Although

the filing was two days late, the record indicates that the trial court sent its September 30, 2013 order to Mother's counsel of record. **See** Letter, 10/3/13. Because the trial court addressed the claims raised in Mother's Statement of Errors, we conclude that both Mother and the trial court have complied with Pa.R.A.P. 1925.

Mother raises the following issues in her *pro se* brief:

[1.] Did the [Trial] Court err in providing primary physical custody to [Father], who expressly did not seek primary physical custody, as the interests in maintaining the existing court order most benefited the [Paternal Grandmother]?

[2.] If the [Trial] Court erred in drastically changing the custody of the children when a Petition to Modify Custody was not filed prior.

[3.] Did the [Trial] Court acknowledge change of circumstances and events precipitating relocation that affected [Mother] and [the] custodial children?

[4.] Whether the [Trial] Court erred in changing custody in a Contempt of Court Hearing[?]

[5.] If the [Trial] Court erred by not considering [Mother's] full cooperation in visitation with [Father], his family, and maternal family in Southwestern Pennsylvania for eight years.

[6.] If the [Trial] Court erred in permitting various parties['] motives to be represented by [Father] during the Contempt Hearing[.]

[7.] If the [Trial] Court erred in prohibiting substitute visitation to Father, providing equal or greater time to maintain an ongoing, loving relationship with the children[.]

[8.] Did the [Trial] Court err in disallowing continued cross-examination of [Paternal Grandmother]?

Mother's Brief at 4 (citations omitted).<sup>1</sup>

Our standard and scope of review of custody determinations is well settled:

[O]ur scope of review is of the broadest type and our standard of review is an abuse of discretion. This Court must accept [factual] findings of the trial court that are supported by the record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, this Court must defer to the trial judge who presided over the proceedings and thus viewed 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.

With any child custody case, this Court has long stated that the paramount concern is the best interests of the child. This standard requires a case-by-case assessment of all of the factors that may legitimately affect the physical, intellectual, moral and spiritual well-being of the child. When a custody dispute involves a request by a party to relocate, we have explained that there is no black letter formula that easily resolves relocation disputes; rather custody disputes are delicate issues that must be handled on a case-by-case basis.

***C.M.K. v. K.E.M.***, 45 A.3d 417, 421 (Pa. Super. 2012) (citations omitted).

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<sup>1</sup>Mother filed a *pro se* notice of appeal, even though counsel who represented her at the evidentiary hearings remained of record. By order dated December 24, 2013, this Court granted counsel's motion to withdraw.

Because Father's petition for contempt and counter-affidavit regarding relocation was filed after the Pennsylvania Legislature's enactment of the new "Child Custody Act," **see** 23 Pa.C.S.A. §§ 5321-5340, the Child Custody Act's provisions apply to the parties' dispute. **See C.M.K.**, 45 A.3d at 421. Section 5337 of the Act specifically outlines the procedure to be followed when a party requests relocation. In response to Father's filings, the trial court held two days of evidentiary hearings, and at their conclusion, asked each party to argue their positions on the relocation factors enumerated at section 5337(h).

These factors are as follows:

**(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 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 statutory section further provides that the "party proposing the relocation has the burden of establishing that the relocation will serve the best interest of the child as shown under the factors set forth in subsection (h)," and that each party "has the burden of establishing the integrity of that party's motives in either seeking relocation or seeking to prevent the relocation." 23 Pa.C.S.A. § 5337(i).

Finally, section 5337(j) provides that the trial court "may consider a failure to provide reasonable notice of a proposed relocation as: (1) a factor in making a determination regarding the relocation; (2) a factor in determining whether custody rights should be modified; (3) a basis for ordering the return of the child to the nonrelocating party if the relocation

has occurred without reasonable notice; (4) sufficient cause to order the party proposing the relocation to pay reasonable expenses and counsel fees incurred by the party objecting to the relocation; and (5) a ground for contempt and the imposition of sanctions against the party proposing the relocation.” 23 Pa.C.S.A. § 5337(j). As with this case, however, “[i]f a party relocates prior to a full expedited hearing, the court shall not confer any presumption in favor of the relocation.” 23 Pa.C.S.A. § 5337(l).

After hearing all of the testimony, and hearing the arguments of the parties, the trial court stated the following on the record regarding its consideration of the section 5337(h) factors:

THE COURT: Okay. Thank you. Well the Court’s faced with a dilemma here that the Court really doesn’t like to be faced with a dilemma. This is a relocation case, and it’s subject to Section 5337 of the custody statute.

The first thing, as [the Guardian Ad Litem] pointed out, subsection L indicates, [if] the party relocates with the child prior to a full expedited hearing, this Court shall not confer any presumption in favor of relocation.

Basically, my understanding of that means that it doesn’t matter how much the children like it down there at this point, that we’re - - or may how good it is down there or its already a done deal, you can’t change it back, the Court can’t even consider that.

This is not an issue between Father and Mother being who’s going to be the primary custodial. The children appear to be doing well. The Court will recite the factors and place its observation under the factors.

Under number one, nature, quality, and 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.

Obviously, if the relocation was granted, the [children] would be with Mother. Father has had consistent custodial contact with the children. Paternal [G]randmother has had consistent contact with the children, testifying without contradiction, since birth.

[Paternal Grandmother] has had overnights - - since the births of these children, she's had overnights and activities. [E.K.] wants to - - asks to sleep with her. That's how close they are. They do things together, church on Sunday, meals, camping, ball. Also, Father's two children have a relationship with these children - - Father's two other children, [A.K. and B.K.], a good relationship. Paternal grandfather is also involved.

Looking at number two, the age, developmental stage, needs of the child, and likely impact the relocation will have on the child's physical and educational, emotional development, taking into consideration any special needs of the child, in this case, children.

My understanding is that both children have had some problems, and the testimony, of some speech impediments, that [E.K.] has an IEP already established at Robb Elementary. The testimony was that she's made great progress there, that [C.K.] also has a speech impediment of some sort, that there's ongoing work and process of developing an IEP for [C.K.], an issue that was begun and carried through this year, that there are no IEPs established in South Carolina, that [E.K.] has an ongoing medical situation, and she has a designated specialist at Geisinger Medical Center, and she continues to see that specialist.

Looking at number three, the feasibility of preserving a relationship between the nonrelocating party and the child through suitable custodial arrangements considering the logistics and financial circumstances of the parties.

There's no doubt that [Father] and the [Paternal Grandmother] have a relationship with these children. Mother has, rightfully so, granted more time with Father



and [Paternal Grandmother] throughout the years. And even the one sibling, [A.K.], evidently babysits for Mother.

There's no question the relationship between Father and [Paternal Grandmother] will be severely and immensely impacted. The children will be impacted. The children will be impacted by not being with them as much as they [now] are. I would note that Mother wouldn't even answer the phone calls of [Paternal Grandmother]. That's not very good.

The proposal of Thanksgiving, Easter, couple - - two or three weeks in the summer and a couple of long weekends this Court does not find will substitute for the ongoing contact that has been established throughout this case and the children's lives.

Next, the child's preference, taking into consideration the age and maturity of the children. We received that information by a report from the guardian ad litem, who has indicated the children desire to move to South Carolina.

The Court acknowledges that but also acknowledges that it appears that the children have been influenced in their discussion with the guardian ad litem by [Mother].

Next, whether there is an established pattern of conduct by either party to promote or thwart the relationship with the children and the other party. Up until the move, I would say that there was probably none. After the move, obviously Mother has done some things by leaving within the 30 days [she afforded Father to respond to her letter indicating the intent to relocate], not taking phone calls, and things of that nature.

This Court will not - - that is not a factor since it occurred after the move. But certainly, there was no contact on Father - - no conduct of Father trying to stop Mother from being the custodian of these children prior to the move.

Six, whether the relocation will enhance the general quality of life for the party seeking relocation, including but not limited to financial or emotional benefits or educational opportunities.

Well, there's no job here, allegedly, for Mother. But 30 jobs [her counsel] had discussed, Mother had several of those jobs. And Mother has left pretty quickly after being notified of the placement of the person she was caring for into a home without really exploring the job market here. I would note that Mother does not have a job in South Carolina.

Next, - - seven, whether relocation will enhance the general quality of life for the child, including but not limited to financial or emotional benefits or educational opportunities.

We heard some discussion of that, but really no evidence. And the Court does not find that factor to have much evidentiary support either way.

Eight, the reasons and motivation of each party for seeking or opposing the relocation. Father's opposition is not an evil or terrible motive. He wants to have contact with his children. Mother's motive, the Court does not find is evil or illegitimate.

But certainly, in the old cases, we used to discuss, before this statute was adopted, whims. If there ever is a whim case, this appears to be a whim case.

Nine, the present and past abuse committed by a party or a member of the party's household and whether there is a continued risk of harm to the child or abuse to the party. There is no evidence of abuse.

Ten, any other factors. Obviously, under subsection J, that factor, Mother relocated in violation of the Court Order. You know, certainly - - and as I indicated, if this appears to be anything - - to be a whim case where Mother decided without much thought and preparation and moved, even before the 30 days['] notice was up, to South Carolina.

N.T., 8/28/13, at 133-38.

Based upon these findings, the trial court, as noted above, granted Father's contempt petition and denied Mother's oral motion to relocate. The

trial court further ruled that the December 23, 2008 custody order “shall remain in full force and effect,” and that “if Mother fails to reside in Clinton County, primary physical custody of the children is awarded to Father.” N.T., 8/28/13, at 139.

The two days of hearings in this case involved Mother’s decision to relocate to South Carolina. Although Mother never filed a relocation petition,<sup>2</sup> the hearings were held not only on Father’s contempt petition, but also on his counter-affidavit to Mother’s earlier letter putting him on notice of the move. On August 5, 2013, Father filed the counter-affidavit, pursuant to section 5337(d), and stated therein that he objected to Mother’s relocation with the children, as well as the modification of the existing custody order that the move would necessitate.

Significantly, in denying Mother’s petition to relocate, and given Mother’s decision to return to South Carolina, primary physical custody was transferred to Father. “In changing the type of custody award, the trial court necessarily modified” the existing custody order, and “made a new award of custody.” **A.V. v. S.T.**, 2014 Pa. Super. LEXIS 118, \*13 (Pa. Super. 2014). Thus, “as with any award of custody, the court was required

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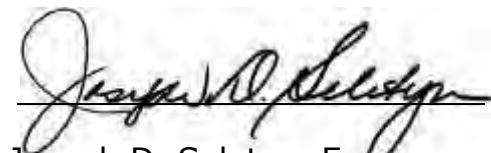
<sup>2</sup> This Court has recently noted that 23 Pa.C.S.A. section 5337 does not require that notice of an intent to relocate be filed with the court. **S.J.S. v. M.J.S.**, 76 A.3d 541, 548 n.4 (Pa. Super. 2013). The nonrelocating party’s objection, however, must be filed with the court. **Id.**

to apply the [23 Pa.C.S.A. §] 5328(a) factors regarding the best interests of [the children] and to explain the reasons for its decision." ***Id.***, at \*13-14.

Here, the trial court did not discuss these sixteen factors in conjunction with consideration of the section 5337(h) relocation factors. "[T]he trial court's failure to make the required application of Section 5328(a) while dramatically changing custody. . . require us to vacate" the trial court's August 2013 'relocation order' and remand for further proceedings." ***A.V.***, at \*17. We therefore remand this case so that the trial court may schedule a hearing to take additional testimony from the parties, and address each section 5328(a) factor, as well as the section 5337(h) relocation factors, in accordance with applicable Pennsylvania case law. ***See A.V., supra.***

Order vacated; case remanded for further proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/29/2014