

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

S.M.T.,

Appellee

v.

E.E.E.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2252 MDA 2013

Appeal from the Order entered November 27, 2013
in the Court of Common Pleas of Lebanon County
Civil Division, at No(s): 2012-20582

BEFORE: PANELLA, WECHT, and STRASSBURGER*, JJ.

MEMORANDUM BY PANELLA, J.:

FILED JUNE 24, 2014

E.E.E. ("Father") appeals the final order of the Court of Common Pleas of Adams County, entered on November 27, 2013, that granted to S.M.T. ("Mother") permission to relocate with the parties' minor child ("Child"), born in December 2011, in Lawrence County, Tennessee; that granted primary physical custody of Child to Mother; that granted shared legal custody of Child to the parties; and that granted partial physical custody of Child to Father and established a schedule of partial physical custody for Father. We affirm.

The parties do not dispute the following facts. Mother and Father are the natural parents of Child. Father also has two other children who reside with their mother near Father's residence in Virginia.

* Retired Senior Judge assigned to the Superior Court.

Father is fifty-five years old, resides in Mechanicsville, Virginia, and is a pediatrician with specialties in immunology and pediatrics. Father graduated from the University of Santo Thomas in the Philippines. Father then undertook a fellowship in Allergy and Clinical Immunology training at the Philippines General Hospital. When Father came to the United States, he began a residency program at Marshall University. Following his third year of residency, Father moved to Richmond, Virginia and began working with his current employer, Bon Secours. Father has been employed with Bon Secours for sixteen years and earns approximately \$245,000 per year.

Mother is thirty-four years old and is employed as a doctor with a specialty in family medicine. Mother attended medical school in the Philippines. In 2010, Mother came to the United States for her residency program with Penn State Hershey Medical Center. Following her residency, Mother sought employment at Crocket Hospital in Tennessee. Mother will earn approximately \$185,000 during her first year of work in Tennessee. Crocket Hospital is currently sponsoring Mother's work visa since she is not an American citizen.

Mother and Father were married at the time of Child's birth. Father has been involved in Child's life despite residing in Virginia while Mother and Child resided in Lebanon County, Pennsylvania. Following the birth of Child, Mother and Child stayed with Father in Virginia for six weeks before moving back to Pennsylvania so that Mother could restart her residency program.

Father visited on the weekends. Maternal Grandmother and Maternal Grandfather watched Child during the week. Mother's and Father's marriage deteriorated, and Mother filed for divorce in June of 2012.

On July 18, 2012, Mother filed a Custody Complaint where she sought sole legal and physical custody of Child. A Custody Conciliation Conference was held on August 23, 2012. On August 28, 2012, the Custody Conciliator filed her recommendation, indicating that the parties were able to reach an agreement. Both parties were to have shared legal custody. Mother was to have primary physical custody of the Child, and Father was to have partial physical custody with periods of visitation, as the parties agreed. In essence, the parties agreed to a one week on, one week off custody arrangement. The recommendation was adopted as an Order of Court on August 29, 2012, and the Order became final in 20 days as neither party requested a hearing.

On December 28, 2012, Father filed an Emergency Custody Petition and a Petition to Modify the Custody Order. Father sought primary physical custody of the Child in his Petition to Modify the Custody Order. On January 9, 2013, Mother filed a notice that she intended to relocate to Lawrence County, Tennessee in July of 2013 because she was offered employment. On February 1, 2013, Father filed a response to the proposed relocation.

On February 14, 2013, Mother and Father appeared for a conference before a Custody Conciliator. As the parties were unable to reach an

agreement, the Conciliator recommended that the case proceed to mediation. The mediation was held on March 26, 2013, and Mother and Father were again unable to reach an agreement. The case was referred to the trial court for a hearing.

A hearing was held on June 21, 2013. At the conclusion of the hearing, the trial court granted Mother's request to relocate with Child. The trial court also directed that counsel for Mother and Father draft a modified custody stipulation subject to certain directives, including Mother having primary custody subject to Father having partial custody of Child at least one week per month.

On November 25, 2013, Mother asserted that counsel drafted a custody stipulation, but Father refused to sign it and desired alterations that were not in accordance with the June 21, 2013 directives. By order dated November 26, 2013, and entered on November 27, 2013, Mother was granted primary physical custody of Child, and Father was granted periods of partial physical custody. Both parties were granted shared legal custody.

On December 20, 2013, Father filed a timely notice of appeal. On the same date, Father also filed a Concise Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

Father presents the following issues for review:

1. [Whether] the trial court committed an error of law and/or abused its discretion in awarding plaintiff primary physical custody of the minor child[?]

2. [Whether] the trial court committed an error of law and/or abused its discretion in deciding that the factors set forth in 23 Pa.C.S.A. § 5328 weighed in favor of plaintiff thus awarding her primary physical custody of the minor child[?]

3. [Whether] the trial court committed an error of law and/or abused its discretion in allowing plaintiff to relocate with the minor child in granting plaintiff's petition for relocation[?]

Father's Brief, at i.

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.

C.R.F., III v. S.E.F., 45 A.3d 441, 443 (Pa. Super. 2012).

We have stated,

the discretion that a trial court employs in custody matters should be accorded the utmost respect, given the special nature of the proceeding and the lasting impact the result will have on the lives of the parties concerned. Indeed, 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)).

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) (citing ***Arnold v. Arnold***, 847 A.2d 674, 677 (Pa. Super. 2004)).

We must accept the trial court’s findings that are supported by competent evidence of record, and we defer to the trial court on issues of credibility and weight of the evidence. If competent evidence supports the trial court’s findings, we will affirm 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).

Additionally,

[t]he parties cannot dictate the amount of weight the trial court places on evidence. Rather, the paramount concern of the trial court is the best interest of the child. Appellate interference is unwarranted if the trial court’s consideration of the best interest of the child was careful and thorough, and we are unable to find any abuse of discretion.

S.M. v. J.M., 811 A.2d 621, 623 (Pa. Super. 2002) (quoting ***Robinson v. Robinson***, 645 A.2d 836, 838 (Pa. 1994)).

With any custody case under the Act, the paramount concern is the best interests of the child. **See** 23 Pa.C.S.A. §§ 5328, 5338. In determining best interests under the Act, the trial court must consider the sixteen factors listed under section 5328(a). **See *E.D. v. M.P.***, 33 A.3d 73, 82 (Pa. Super.

2011). Additionally, where a request for relocation of the subject child is involved, the trial court must consider the ten relocation factors under section 5337(h)(3) of the Act.

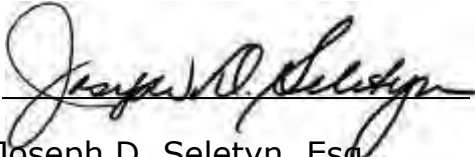
In its opinion, the trial court here presented a complete analysis of all the relevant factors enumerated 23 Pa.C.S.A. § 5328(a) and 5337(h). **See C.B. v. J.B.**, 65 A.3d 946, 955 (Pa. Super 2013), (holding, *inter alia*, that the trial court must set forth its mandatory assessment of the sixteen best interest factors in 23 Pa.C.S.A. § 5328(a)), and **A.M.S. v. M.R.C.**, 2013 PA Super 156 (Pa. Super. 2013) (holding, *inter alia*, that the trial court must consider all of the relocation factors under 23 Pa.C.S.A. § 5337(h)).

After our careful review of the record, we are satisfied the trial court properly addressed the issues concerning Mother's and Child's relocation to Lawrence County, Tennessee. The trial court also properly addressed the issues concerning the grant of primary physical custody of Child to Mother and the grant of partial physical custody of Child to Father. Accordingly, we adopt the trial court's comprehensive opinion, entered on November 27, 2013, as our own, and we affirm the trial court's order based on that opinion.

Order affirmed.

J-S29001-14

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: 6/24/2014

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY,
PENNSYLVANIA

CIVIL DIVISION

S.M.T.,

Appellee,

v.

E.E.E.,

Appellant.

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No: 2012-20582

Family Division-Children's Fast
Track Appeal

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LEBANON

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ENTERED

APPEARANCES:

M. Jannifer Weiss, Esq. for the Appellee (hereinafter "Mother")
Corey Lamoureux, Esq. for the Appellant (hereinafter "Father")

OPINION, KLINE, J., JANUARY 20, 2014

Before the Court is Father's Concise Statement of Errors Complained of on Appeal. For the reasons set forth herein, we affirm our Order dated November 27, 2013, as specified below.

FACTS AND PROCEDURAL HISTORY

On July 18, 2012, Mother filed a Custody Complaint where she sought sole legal and physical custody of the parties' minor daughter (hereinafter "the child"). Megan Ryland-Tanner, Esq. was appointed as the Custody Conciliator. A Custody Conciliation Conference was held on August 23, 2012. On August 28, 2012, the Custody Conciliator filed her recommendation, where she indicated that the parties were able to reach an agreement. Both parties were to have shared legal custody of the child. Mother was to have primary physical custody of the child, and Father was permitted to have partial custody with periods of visitation as the parties could agree. In

essence, the parties agreed to a one week on, one week off custody arrangement. This recommendation was adopted as an Order of Court on August 29, 2012, and it would become a final Order if neither party requested a hearing within 20 days. Neither party requested a hearing.

On December 28, 2012, Father filed an Emergency Custody Petition and a Petition to Modify the Custody Order. Father sought primary physical custody of the child in the Petition to Modify.

On January 9, 2013, Mother filed notice that she intended to relocate to Lawrence County, Tennessee in July of 2013 because she was offered employment. On February 1, 2013, Father filed a response objecting to the proposed relocation.

On February 14, 2013, the parties appeared for a conference before the Custody Conciliator. Both parties wanted primary physical custody of the child. Since the parties were not able to reach an agreement, the Conciliator recommended that the case proceed to mediation. Patrick M. Reb, Esq. was appointed as the Mediator. The mediation was held on March 26, 2013. The parties again were unable to reach an agreement, and the case was referred to the Court for a hearing.

A hearing was held on the issues of Father's Petition to Modify and Mother's proposed relocation on June 21, 2013. At the conclusion of the hearing, this Court granted the relocation. Further, this Court directed counsel for the parties to draft a modified custody stipulation subject to certain directives, including Mother having primary custody subject to Father having partial custody of at least one week per month. (N.T. 194).

On November 25, 2013, a conference was held in-chambers at the request of Mother. Mother asserted that counsel drafted a custody stipulation, but Father refused to sign it and desired alterations that were

not in accordance with the June 21, 2013 directives. Mother requested the conference in order to finalize the custody arrangement believing that Father would continue to refuse to sign it. On November 27, 2013, the final Custody Order with regard to the Petition to Modify was entered. In essence, this Court awarded both parties shared legal custody, and Mother was awarded primary physical custody with Father having periods of partial physical custody.

On December 20, 2013, Father simultaneously filed his Notice of Appeal and Concise Statement of Errors Complained of on Appeal. Father raises three alleged errors for the Court's review.¹ They are as follows:

I. The trial court committed an error of law and/or abused its discretion in awarding Mother primary physical custody of the minor child.

II. The trial court committed an error of law and/or abused its discretion in deciding that the factors set forth in 23 Pa.C.S.A. §5328 weighed in favor of Mother thus awarding her primary physical custody of the minor child; and

III. The trial court committed an error of law and/or abused its discretion in allowing Mother to relocate with the minor child in granting Mother's Petition for Relocation.

The case is thus before us and ripe for disposition.

DISCUSSION

Jurisdiction

We will first address for the Superior Court whether this Court had jurisdiction to modify the Custody Order. This is a unique case because at the present time, neither parent nor the child resides in Pennsylvania.

¹ Alleged errors #1 and #2 will be analyzed together.

The initial Custody Complaint was filed on July 18, 2012. At that time, Pennsylvania was the home state of the child. Pursuant to 23 Pa.C.S.A. §5421, a court of Pennsylvania had jurisdiction to make the initial child custody determination.

The Child Custody Act also provides:

§ 5422. Exclusive, continuing jurisdiction

(a) General rule.--Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth which has made a child custody determination consistent with section 5421 (relating to initial child custody jurisdiction) or 5423 (relating to jurisdiction to modify determination) has exclusive, continuing jurisdiction over the determination until:

(1) a court of this Commonwealth determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this Commonwealth and that substantial evidence is no longer available in this Commonwealth concerning the child's care, protection, training and personal relationships; or

(2) a court of this Commonwealth or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this Commonwealth.

23 Pa.C.S.A. § 5422. A comment to this statute states, in relevant part:

The continuing jurisdiction of the original decree state is exclusive. It continues until one of two events occurs:

1. If a parent or a person acting as a parent remains in the original decree state, continuing jurisdiction is lost when neither the child, the child and a parent, nor the child and a person acting as a parent continue to have a significant connection with the original decree state and there is no

longer substantial evidence concerning the child's care, protection, training and personal relations in that state. In other words, even if the child has acquired a new home state, the original decree state retains exclusive, continuing jurisdiction, so long as the general requisites of the "substantial connection" jurisdiction provisions of section 201 (section 5421) are met. If the relationship between the child and the person remaining in the state with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

The use of the phrase "a court of this state" under subsection (a)(1) makes it clear that the original decree state is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree state stating that it no longer has jurisdiction.

2. Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree state...Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the state to live elsewhere, the exclusive, continuing jurisdiction ceases.

Comment to 23 Pa.C.S.A. §5422.

The Petition for Modification was filed on December 28, 2012. At that time, Mother was still residing in Pennsylvania with the child. At the time of the hearing on the Petition to Modification in June of 2013, Mother was still residing in Pennsylvania with the child. Mother relocated to Tennessee with the child approximately in July of 2013 after the hearing. At the conclusion of the June 21st hearing, it was the Court's intentions that a stipulation would be drafted and agreed upon sooner rather than later. The final Custody Order with regard to the modification was not entered until

November 27, 2013. As of that date, neither parent nor the child resided in Pennsylvania. Nonetheless, neither of the two subsections enunciated in 23 Pa.C.S.A. §5422 have been determined by this Court. Accordingly, this Court maintained exclusive, continuing jurisdiction over the modification.

The Court also notes that a comment to 23 Pa.C.S.A. §5422 states, “Jurisdiction attaches at the commencement of a proceeding. If state A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding.” In the instant case, a Pennsylvania court had jurisdiction at the time the modification proceeding commenced on December 28, 2012. The final Custody Order with regard to the modification proceeding was not made until November 27, 2013. Pursuant to the comment, jurisdiction was not lost by all parties moving out of the state prior to the conclusion of the modification proceeding. Accordingly, this Court still had jurisdiction to entertain the custody modification.

Child Custody Award

Since the custody hearing on the Petition to Modify was held in June of 2013, the new Child Custody Act, 23 Pa.C.S.A. §5321 *et seq.* (hereinafter “the Act”) is applicable. “[I]t is the date of the commencement of the hearing that determines whether the Act applies, not the date the petition or complaint was filed.” *C.B. v. J.B.* 65 A.3d 946, 951 (Pa. Super. 2013), citing *C.R.F., III v. S.E.F.*, 45 A.3d 441, 445 (Pa.Super.2012).²

The trial court is granted authority to award custody of a child pursuant to 23 Pa.C.S.A. § 5323. The statute provides as follows:

§ 5323. Award of custody

² The effective date of the new Act is January 24, 2011. See 23 Pa.C.S.A. § 5321 Credits.

(a) Types of award.--After considering the factors set forth in section 5328 (relating to factors to consider when awarding custody), the court may award any of the following types of custody if it is in the best interest of the child:

- (1) Shared physical custody.
- (2) Primary physical custody.
- (3) Partial physical custody.
- (4) Sole physical custody.
- (5) Supervised physical custody.
- (6) Shared legal custody.
- (7) Sole legal custody.

23 Pa.C.S.A. § 5323. The factors that a trial court should consider when awarding child custody are set forth in 23 Pa.C.S.A. § 5328, which provides as follows:

§ 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(a). The law is well-settled that in a child custody matter, the paramount concern of the trial court is the best interest of the child. *S.M. v. J.M.*, 811 A.2d 621 (Pa. Super. 2002). The best interest standard must be applied on a case-by-case basis, examining all relevant evidence. *McAllister v. McAllister*, 747 A.2d 390 (Pa. Super. 2000). In *E.D. v. M.P.*, 33 A.3d 73, 79–80 (Pa. Super. 2011), the Superior Court stated that the best interests of the child analysis requires consideration of all section 5328(a) factors.

“A party seeking modification of custody arrangements has the burden to show that modification is in the child's best interest. In evaluating whether a modification of custody is in a child's best interest, the court has an

obligation to consider all relevant factors that could affect the child's well-being." *Ketterer v. Seifert*, 902 A.2d 533, 539 (Pa. Super. 2006). "As with initial custody determinations, appellate review of modification orders is broad. In order to permit proper review on appeal, the trial court must conduct a searching inquiry into all facts and circumstances affecting the child's best interests and welfare." *Jackson v. Beck*, 858 A.2d 1250 (Pa. Super. 2004).

Furthermore, the weight assigned to the testimony of witnesses, as well as credibility determinations, are left to the finder of fact. *Stokes v. Gary Barbera Enterprises, Inc.*, 783 A.2d 296, 297 (Pa. Super. 2001). The court is free to believe all, part or none of the evidence. *Id.* On appeal from a child custody determination, on the issues of credibility and weight of the evidence, the Superior Court defers to the findings of the trial judge. *S.M.*, 811 A.2d at 623. The parties cannot dictate the amount of weight the trial court places on evidence. *Id.* Having set forth the relevant legal principles, we now turn our analysis to discussion of the 16 factors.

(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.

This factor weighs against awarding Father primary physical custody. The record indicates that Mother is more likely to encourage and permit contact between the child and the other parent. Mother testified that she is willing to try to accommodate Father and give him as much visitation as possible given the distance. (N.T. 103). Mother wants the child to be exposed to Father as much as possible. (N.T. 144).

The record indicates that Father was not so willing. Father testified that if he was awarded primary physical custody, he recommended that Mother would have visitation only three times a year. (N.T. 64, 71). One

reason was the travel time if Mother moved to Tennessee. (N.T. 72). Father said that he did not want to expose the child to a mother who cannot take care of her own feelings. (N.T. 73). Father refused to allow the child to attend Mother's graduation, and the child was only allowed to attend as a result of involvement by counsel at a pretrial conference. (N.T. 117).

(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.

This factor is not applicable. The record does not indicate that there was abuse committed by a party upon the child, nor does the record indicate that there is a continued risk of harm to the child.

The Court notes that Father was attempting to portray that Mother was neglectful in certain situations. There was testimony about Father having concerns with regard to how Mother raises the child. Father claims that Mother overfeeds the baby until the baby vomits. (N.T. 44). Father also asserted that Mother does not cut the baby's nails, and she washes the baby in the sink without washing the sink properly. (N.T. 44). Father testified that Mother gives the baby to Father sometimes when the child is sick, but Mother does not discuss the symptoms. (N.T. 44). Father also had concerns about a laceration on the child's lip, a swelling/discharge of the left eye, and an abrasion scratch on the right cheek. (N.T. 46). Father said he would like to be more informed as to the child's condition. (N.T. 46). As of the June 2013 hearing, Father did not know how the child suffered the lip injury. (N.T. 47-48). Father testified that he gives Mother endorsements if the child is sick. (N.T. 44).³

³ An endorsement is a medical term and basically gives notice as to what is occurring. (N.T. 161-162).

Mother testified that she trims the child's nails. (N.T. 137). She does not overfeed the baby, and the child is not overweight. (N.T. 137). Mother admitted that she did not inform Father as to how the lip injury occurred. (N.T. 154). When the child was learning to walk, the child bumped into a cupboard and cut her lip. (N.T. 84). Mother testified that the lip injury did not require plastic surgery or antibiotics. (N.T. 96). Mother took the child to the doctor for a cold on December 24, 2012, and the doctor noted in the report that the child had the cut, but the doctor did not note if the cut needed any further attention. (N.T. 98). Mother testified that Father also took the child to a pediatrician regarding the cut on December 26, 2012, and the doctor did not state that the cut needed further attention. (N.T. 99). Mother testified that if the wound did not heal satisfactorily in six months, then plastic surgery would be required. (N.T. 100). However, the wound has healed, and plastic surgery is not required. (N.T. 100).

The Court finds Mother to be the more credible witness. Father was attempting to portray Mother as a neglectful Mother. The Court does not believe that a doctor, who went to medical school, who completed a residency, and who specializes and practices in family medicine, does not know how to tend to her own child.

Father testified he has concerns about the maternal grandmother babysitting, including discipline and hygiene. (N.T. 42). Father claimed that the grandmother smokes around the child. Mother testified that her Mother quit smoking in February 2013, and the child was never exposed to nicotine as the grandmother never smoked in the house, in the car, or around the child. (N.T. 107-108). Mother's father continues to smoke, but he does not smoke around the baby, in the house, or in the car. (N.T. 108).

(3) The parental duties performed by each party on behalf of the child.

This factor is weighed equally for the parties as the record indicates both parties perform parental duties. Father testified that he generally stays at home with the child. (N.T. 23). Father gets her ready in the morning and feeds the child breakfast before taking her to daycare. (N.T. 23). Father visits the daycare at lunch. (N.T. 23). Father takes the child to church and community activities, including health fairs and art shows. (N.T. 24-26). The child has a pediatrician in Virginia, who is one of Father's partners. (N.T. 27). Father attends doctor appointments. (N.T. 27).

Mother takes the child to church. (N.T. 85). Mother does activities with the child outdoors, such as going to the playground, and she reads to the child. (N.T. 86).

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

This factor is weighed equally for the parties. As stated, the record indicates that both parties perform church and communities activities with the child. Mother testified that the child is intelligent for her age. (N.T. 152). Father testified that if he had primary physical custody, he would enroll the child in Liberty Christian School when she was ready for school. (N.T. 52).

(5) The availability of extended family.

Mother's parents periodically come from the Philippines to stay with Mother in Tennessee. (N.T. 87-88). Mother has a cousin in Virginia. (N.T. 151).

Father testified that he has a strong support system and many friends in Virginia. (N.T. 52-53). He never indicated that this support system included family members.

(6) The child's sibling relationships.

Father has two other children with his first wife, ages 17 and 10. (N.T. 17). Father testified that his two other children love the child. (N.T. 19). Father's first wife has primary physical custody of the half-siblings. (N.T. 54-53). Father has visitation/partial custody of them every second and fourth weekend. (N.T. 55). The children also live in Richmond. (N.T. 55).

Mother does not have any other children. (N.T. 82).

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

Not applicable.

(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.

Mother testified that there is no evidence that Father has tried to turn the child against her. (N.T. 140). There was no testimony provided that Mother has tried to turn the child against Father.

(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.

These two factors are analyzed together and are weighed equally for the parties. It is evident that both parents love the child, and both parties tend to the needs of the child. Both parties are doctors. Father is a pediatrician. (N.T. 19). Mother specializes in family medicine. (N.T. 146). Both parties earn high incomes which can be used to support the child. Mother will earn approximately \$185,000 during her first year of work in

Tennessee. (N.T. 173). Father earns approximately \$245,000. (N.T. 173). There is a support order in effect. (N.T. 119).

Both parties also have work schedules where they will be available to spend significant time with the child. Father works four days a week from 8:30 to 5:00, and he generally has Wednesdays and weekends off. (N.T. 21). He is on-call on the weekends. (N.T. 21).

Mother will work 4 days a week from Tuesday through Friday from 8:00 am until 5:00 pm. (N.T. 91). Mother will not have to go into the hospital on weekends, but she will have to take a phone call every six weeks. (N.T. 92).

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

Father lives in Virginia. Mother lives in Tennessee.

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

This factor is weighed equally for both parties as both parties have provided for appropriate child-care arrangements. When the child is with Father, the child is enrolled in daycare while Father is at work. (N.T. 17, 28). Father's home and office in Virginia are approximately $\frac{3}{4}$ of a mile from the daycare. (N.T. 18). Father takes the child to daycare in the mornings and picks her up after work. (N.T. 23).

Father testified that he has two nieces who graduated from nursing school in the Philippines. His future plan is to permit them to come to his home one at a time to stay with the child for five to six months. If one of his nieces needs a break for a day, then the child can go back to the daycare. (N.T. 30).

The maternal grandmother assists in babysitting the child when the child is with Mother. (N.T. 41). Mother's parents are Filipino citizens, but

they are permitted to be in the United States for 6 month periods pursuant to tourist visas. (N.T. 87). The maternal grandmother stays for 6 months, then she has to leave the country, and then is permitted to come back for another 6 months. (N.T. 87). The maternal grandfather generally comes for 3 months. (N.T. 87-88). Usually, her parents come at separate time periods. (N.T. 88). This arrangement will continue in Tennessee. (N.T. 88). In Tennessee, Mother plans to enroll the child in daycare for 3 months even with the help from her parents. (N.T. 88, 147). When the child is not in daycare for the 3 month period, one of her parents will babysit the child. (N.T. 88).

(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.

This factor weighs against awarding Father primary physical custody. There is a strong level of conflict between the parties. The Court has concerns about how Father treats Mother. The Court was very disturbed when listening to testimony about how Father speaks to Mother. Mother testified that Father insults her ethnic tribe. (N.T. 111, 114). He has insinuated that Mother is a lesbian. (N.T. 111). Father has called Mother a "needy sex maniac, desperate." (N.T. 111). Father has made the following statements:

-Then when you shove your food through your thick lips, try not to drop a morsel.

-Because when you look down, you may then glance at your legs that put my thighs to shame.

-They're huge and muscular, hairy too like your mustache growth.

-Aren't these true? Do you want me to continue to describe your masculine attributes?

(N.T. 111-112). Father calls Mother a "dim wit." (N.T. 113). Father has also referred to the maternal grandmother as a maid. (N.T. 106).

It obvious from the record that Father does not view Mother as an equal or as the mother of his daughter, but he thinks he is superior to her and says demeaning statements to her. The Court is concerned that if Father continues to act this way towards Mother in the future, and if he makes statements like these while in the presence of the child, then this will have a negative impact on the child when the child starts to comprehend the statements.

The childish jabs go both ways though. The record indicates that Mother sent a text message where she stated Father could not please a woman. (N.T. 165).

With regard to cooperation, Mother testified to an incident when Father refused to change a custody exchange when Lebanon was supposed to experience flooding. (N.T. 120-121). Mother indicated that the parties inform each other if either one is going to be late for a custody exchange. (N.T. 170).

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

This factor offers no weight. There was no testimony that Father has a history of drug or alcohol abuse. Father testified during a break from her residency, Mother had somebody prescribe her sleeping pills, and she was taking alcohol. (N.T. 50). However, even assuming that this is true, this does not mean that Mother has a history of drug or alcohol abuse.

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

This factor offers little weight. Father testified that he is concerned about Mother's mental state. (N.T. 49). Father said that he has witnessed emotional outbursts from Mother, and she had to take a break from her residency program and attend counseling. (N.T. 49-50).

Mother admitted to taking time off, and she said that she experienced a culture shock when arriving from the Philippines. (N.T. 112). Mother took one week of counseling and 3 weeks off from her residency. (N.T. 113). The fact that Mother received counseling for one week and took a 3 week break from her residency does not mean that she is mentally unstable.

(16) Any other relevant factor.

Father testified to incidents that allegedly occurred during custody exchanges. Father testified that one time, the child did not want to go back to Mother, and the child kicked and screamed. Another time, the maternal grandmother was swearing in Filipino in front of the child and told him she wanted to hit Father's eyes, and the child was crying and screaming. (N.T. 32). Mother testified that she did not see her mother do this. (N.T. 134, 157).

During another exchange, the child did not want to go back to Mother, and Father testified that Mother hit him. (N.T. 34). Father said he called the police as a result. (N.T. 35). Mother denied that she hit him, and she said that she shoved his hand. (N.T. 128-129, 134, 156).

The Court finds that Mother is the more credible witness with regard to the events of these custody exchanges. The Court believes that Father was attempting to portray the events that occurred at these custody exchanges worse than they really were.

Father attempts to use the threat of legal proceedings as a weapon. Instead of trying to resolve disputes amicably, he threatens legal action and police involvement. One time during a custody exchange, Father texted Mother to anticipate "accelerated big court battles." (N.T. 123). Another time, he indicated, "prepare for courts." (N.T. 125-126). During a custody exchange, Father stated that there will be a report to the police. (N.T. 128). Father once requested Mother's parents' passports demographic pages. (N.T. 130). He stated that failure to provide him with these documents would result in him filing a "petition to subpoena their passport information and for immediate issuance of arrests through the County of Fairfax." (N.T. 130-131). Father insinuated that Mother's parents would be arrested publicly at her graduation. (N.T. 131). Father made two reports to Lebanon County Children and Youth Services with regard to Mother. (N.T. 132). Both of these reports were determine to be unfounded. (N.T. 132). Once again, the Court is concerned if Father continues with this behavior, then it will have a negative impact upon the child if statements like these are said in front of the child when the child is able to comprehend the meaning.

The parties' agreed to call the child a certain nickname until Wife filed for divorce in June of 2012. (N.T. 83). Father now calls her a different nickname. (N.T. 83).

Father said that the child was recently baptized on June 15, 2013, and Mother did not participate in the preparation. (N.T. 51). Mother testified that Father would not let her hold the child during the baptism, but Mother also admitted she did not ask to hold the child. (N.T. 127, 159).

To conclude, Father has not met his burden on the Petition to Modify. After taking the aforementioned 16 factors into consideration, it was not in the child's best interests to award Father primary physical custody.

Petition for Relocation

The new Act applies to petitions for relocation initiated by a filing made after the effective date of the Act. *S.J.S. v. M.J.S.*, 76 A.3d 541, 548 (Pa. Super. 2013). Here, Mother filed her notice for proposed relocation on January 9, 2013. Because Mother initiated her relocation request after the effective date of the new Act, the provisions of the new Act again apply.

Section 5337 of the new Act applies to any proposed relocation. 23 Pa.C.S.A. §5337(a). No relocation shall occur unless every individual who has custody rights to the child consents to the proposed relocation or the court approves the proposed relocation. 23 Pa.C.S.A. §5337(b). The Court is required to consider factors when determining whether to grant a petition to relocate. The new Act states the following:

(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). "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)." 23 Pa.C.S.A. 5337(i)(1).

"Each 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.A. 5337(i)(2). We will now analyze the 10 factors.

(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.

Both parties have strong relationships with the child. The child has a relationship with her half-brother and half-sister in Virginia. Mother's parents will continue to come to stay with her while in Tennessee during various periods of time. With the modified custody order, the child will still be able to foster relationships with all of these individuals.

(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.

The child is still very young so she has not yet developed any significant contacts or relationships that require her to remain in Lebanon. The child will be able to grow and develop in Tennessee. The Court does not see any reason why the child's needs cannot be met in Tennessee.

(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.

It is clear that the only way to preserve the relationship between Father and the child is that both parties are going to have to travel. When the child was born, Father chose to continue to live and work in Richmond, Virginia. Mother is now choosing to relocate to Tennessee to obtain employment. These are all choices made by the parties. Even though the parents have made these choices, the child still needs to have both parents in her life.

The parties were already travelling approximately 2 ½ hours one way when conducting custody exchanges in Maryland. It is feasible to direct the parties to travel by air after the relocation due to the distance. The distance between Tennessee and Virginia is approximately an 11 hour drive. (N.T. 69, 103). Both parties earn high incomes so they will be able to bear the cost of travel. The parties may not like the time or cost associated with travelling, but the fact of the matter is that they made the choices where they want to live and work, and the child suffers the ultimate burden due to choices made by the parents.

(4) The child's preference, taking into consideration the age and maturity of the child.

Not applicable.

(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.

The record indicates that Mother wants Father to continue his relationship with the child, and she is willing to make accommodations to promote the relationship. Father does not want to completely prevent Mother from seeing the child. However, he suggested Mother only sees the child 3 times a year. The proposed period of time would not foster the proper mother/child relationship that the child needs.

(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.

These two factors are analyzed together. The sole reason for the relocation is Mother obtained employment. When looking for employment, Mother posted her resume online. (N.T. 180). Recruiters would contact her about available jobs. (N.T. 180). Mother interviewed in Tennessee approximately in June of 2012. (N.T. 183).

When living in Lebanon and after finishing her residency, Mother did not have a job. By granting the proposed relocation, she will have a job and be able to support herself and the child. Mother will triple her income from what she was earning during her residency. (N.T. 91). Mother will earn approximately \$185,000 her first year. (N.T. 173). Mother's job in Tennessee

is a 5 year contract. (N.T. 150). Mother testified that she can decide to stay after that period. (N.T. 149).

Furthermore, Mother still is not a United States citizen. (N.T. 89). She was limited to employment opportunities due to her visa. (N.T. 180). She has an agreement with the employer that her employer will ultimately petition for her to become a United States citizen. (N.T. 90).

Mother testified that Father offered to sponsor her for a job in Virginia. (N.T. 181). Father made this offer in July 2012. (N.T. 183). However, Mother did not take him up on his offer because Father only made the offer after she had interviewed in Tennessee, and she signified her intent of wanting that job. (N.T. 181). We cannot fault Mother for not seeking Father's help since he only offered to help after her interview in Tennessee.

Mother also had a job offer in Baltimore, but she said she would have to work Monday through Saturday. (N.T. 181). Her job offer in Tennessee has better working hours than the job in Baltimore. Mother will work 4 days a week from Tuesday through Friday from 8:00 am until 5:00 pm. (N.T. 91). Mother will not have to go into the hospital on weekends, but she will have to take a phone call every 6 weeks. (N.T. 92). The 4 day work week will allow Mother to spend more time with the child. Had Mother taken the job in Baltimore, the child would not be able to spend as much time with Mother.

Based on the facts of this case, the Court finds that Mother's move to Tennessee would improve the quality of life for both Mother and the child. This factor weighs heavily in granting the proposed relocation.

(8) The reasons and motivation of each party for seeking or opposing the relocation.

This factor weighs in granting the proposed relocation. Mother's sole motive for moving to Tennessee is she obtained employment. The record

indicates that Mother does not want to thwart Father's visitation or Father's relationship with the child. Rather, Mother is willing to try to accommodate Father and give him as much visitation as possible given the distance between the two residences. (N.T. 103).

It appears that the only reason Father does not want Mother to relocate is due to the distance. This fact alone does not prevent 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.

Discussed in the custody section.

(10) Any other factor affecting the best interest of the child.

Discussed in the custody section.

Conclusion

The Court finds that Mother met her burden on the proposed relocation. For all the aforementioned reasons, it was in the child's best interests to grant Mother's request to relocate. Based on the distance between the parties' residences in Tennessee and Virginia, it was not logical for the one week on, one week off custody arrangement to continue. Therefore, it was in the best interests of the child to modify the custody arrangement and award Mother primary physical custody. Accordingly, this Court did not abuse its discretion in allowing Mother to relocate with the child, and it did not abuse its discretion in awarding Mother primary physical custody. We now turn this case over to the Superior Court for review. We will enter an Order consistent with the foregoing.