NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

A.P. Appellee v. R.P. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2341 EDA 2012

Appeal from the Order Entered August 8, 2012
In the Court of Common Pleas of Pike County
Domestic Relations at No(s): 175-2011-CV

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J. Filed: March 15, 2013

R.P. ("Father") appeals from the order entered in the Court of Common Pleas of Pike County granting A.P. ("Mother") primary physical custody of their minor child, granting Father partial physical custody, and granting the parties joint legal custody. After careful consideration of the parties' briefs, the relevant case law and the certified record on appeal, we conclude that the Honorable Gregory H. Chelak has properly disposed of Father's claims on appeal and we affirm the order based on Judge Chelak's opinion.

The child, A.P., was born on September 22, 2008 in Middletown, New York. Shortly after his birth, the parties moved to Greeley, Pike County.

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* Retired Senior Judge assigned to the Superior Court.

Father was employed as a federal corrections officer, and Mother was a homemaker and A.P.'s primary caretaker.

On January 24, 2011, Mother filed a complaint in divorce and custody.[1] That same day Mother and A.P. moved to Greenville, New York, approximately two hours away, to live with her sister and her sister's husband and their two children. Mother left a note for Father, advising him of this.

Father filed an answer and a counterclaim, which included a count for custody. He did not object to Mother's move. Thereafter, when the parties appeared for a hearing, they stipulated to an interim custody arrangement. Pursuant to that arrangement, Mother would have primary physical custody of A.P. in New York, and Father would have partial physical custody every weekend. The court entered the interim order on April 25, 2011, and scheduled a status conference for May 23, 2011.

Following a three-day custody trial, the trial court determined that awarding Mother primary physical custody was in A.P.'s best interests. The court found both Mother and Father were capable parents, but concluded that Mother was better able to provide the requisite stability and extended family relationships that would benefit A.P. The court noted that A.P. is an only child and is close to his maternal cousins, with whom he shares a

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[1] Mother filed her custody action on January 24, 2011, the date on which the new Child Custody Act took effect. ***See*** 23 Pa.C.S.A. §§ 5321-5340.

bedroom. The court also noted that Mother works part-time, with flexible hours, and that her sister is available to care for A.P. when Mother is working. The court awarded Father partial physical custody every other weekend from Thursday until Sunday and granted the parties shared primary legal custody. The court entered a detailed final custody order on August 8, 2012. Father filed this appeal.

Father raises the following issues for our review:

1. Whether the trial court committed an error of law by failing to consider any factors for relocation under 23 Pa.C.S.A. § 5321 *et seq*. when Mother relocated without any notice and without ever filing a petition to relocate, even though she had retained counsel prior to relocating?

2. Whether the trial court erred or abused its discretion in weighing and determining the enumerated factors set forth in 23 Pa.C.S.A. § 5328 of the Pennsylvania Custody act, when it determined the best interests of the child would be served by awarding primary physical custody to Mother?

3. Whether the trial court erred or abused its discretion when it ignored the court-appointed custody evaluator's recommendation that Father be awarded primary custody on the basis that the evaluator relied on education factors based on statistical data, when in fact the expert also relied on the negativity of the Mother's relatives with whom she and the child were residing and also relied on Mother's proposal to limit Father's time with the child, when Father would have offered extensive time to Mother?

4. Whether the trial court erred or abused its discretion when it denied Father's pretrial motion for a physical evaluation of Mother pursuant to Pa.R.C.P. 1915.8?

5. Whether the trial court erred or abused its discretion in failing to find Mother was a flight risk, when she absconded in the past, had a Mexican passport, has taken the child to Mexico on three occasions since the birth of the child and thought of

> staying in Mexico and further took a trip to Florida without telling Father beforehand?

In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. ***A.H. v. C.M***., 58 A.3d 823, 824 (Pa. Super. 2012).

> 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. v. S.E.F., 45 A.3d 441, 445 (Pa. Super. 2012) (citation omitted).

Initially, we note that Father misapprehends the posture of this case with respect to the statutory relocation considerations set forth at 23 Pa.C.S.A. § 5337. The court did not consider a petition for relocation because Father consented to the move. At the initial custody hearing, the parties entered into a stipulated interim order pending a final hearing. Father made no objection to Mother and A.P. residing in New York, and, in fact, he made sure she had a car so that she could facilitate the drop-off and pick-up at a midway point in New Paltz, New York. N.T. Hearing, 4/7/2011, at 3-4. Father testified at that hearing that he agreed to the interim order

and that he believed the custody arrangement was in A.P.'s best interest. ***Id***. at 5.

Permission of the court is not required when the parties agree, or when the noncustodial parent acquiesces in the move by failing to request court intervention. 23 Pa.C.S.A. § 5337(b)(1). Here, Father agreed to the move, on the record, and he agreed it was in A.P.'s best interest. Moreover, Father failed to make any objection to the interim order or request a relocation hearing. In fact, it was not until September 16, 2011, over five months after entry of the interim order, that Father made mention in his motion for a home evaluation that Mother did not seek court approval for the relocation in violation of 23 Pa.C.S.A. § 5337. ***See*** Motion, 9/16/2011, at ¶8; ***see also*** 23 Pa.C.S.A. § 5337(c)(3)(xi) ("if the nonrelocating party does not file with the court an objection . . . within 30 days after receipt of the notice, that party shall be foreclosed from objecting to the relocation."); 23 Pa.C.S.A. § 5337(d)(3) ("If notice of the proposed relocation has been properly given and no objection to the proposed relocation has been filed in court, then it shall be presumed that the nonrelocating party has consented to the proposed relocation.").

Following the full custody trial, the trial court carefully considered the statutory factors that guide a custody determination, 23 Pa.C.S.A. § 5328(a), and entered a final custody order.

After our review, we find no error or abuse of discretion. ***A.H.***, ***supra***. The trial court considered the proper statutory factors and its custody order

is supported by the record. ***C.R.F.***, ***supra***. We, therefore, affirm the order based upon Judge Cheluk's opinion and direct the parties to attach a copy of that opinion in the event of further proceedings.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF
PIKE COUNTY, PENNSYLVANIA
CIVIL

A[redacted] P[redacted],

Plaintiff

v.

R[redacted] P[redacted],

Defendant

: No. 175 - 2011 - Civil

OPINION SUBMITTED PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1925

AND NOW, this 28th day of September, 2012, after careful review of the record, this Court continues to stand by its decision and respectfully requests the Superior Court to uphold this Court's Findings of Fact and Conclusions of Law dated August 8, 2012 on appeal. This Court would like to add, pursuant to Pa. R.A.P. 1925, the following:

Facts and Procedural History:

This case arises from a Divorce Complaint with a Count for Custody filed on January 24, 2011. A[redacted] P[redacted] ("Mother") sought primary legal and physical custody of the minor child, A.P., from R[redacted] P[redacted] ("Father"). Father filed an Answer and Counterclaim to the Divorce Complaint with a Count for Custody on February 16, 2011. On April 7, 2011, Mother and Father appeared before the Hearing Officer and agreed to a stipulation concerning interim physical custody. The Stipulation was made an Order of this Court on April 25, 2011, wherein Mother would exercise primary physical custody over A.P. and Father would exercise partial physical

custody until final determination of the parties' custody claims. Subsequently, several days of Custody Trial were held on March 15, 2012, June 28, 2012 and July 18, 2012.

Prior to their final separation, Mother and Father lived in a marital home located in Greeley, Pike County, Pennsylvania. Mother testified that she moved from Pike County to Greenville, New York in January 2011. In Greenville, she resides with her sister and brother-in-law and the latter's family. Mother's sister and brother-in-law have two minor children, with whom A.P. shares a bedroom. A.P. is averred to have a close relationship with his aunt, uncle and cousins. Mother is a Mexican national who has legal residency, with immediate family still residing in Mexico. Mother plans on attaining United States citizenship. During the past several years, Mother has visited her family in Mexico three times and one time in the State of Florida with A.P., allegedly without the permission of the Father.

Father testified that he works as a federal correctional officer and was the primary breadwinner of the family during their intact marriage. He also spends approximately 20 hours per week working as a vendor on eBay. His primary work schedule is from Tuesday through Saturday. He leaves for work at 11:00 P.M. and returns home at 9 A.M. When Father is unavailable to care for A.P., Father's parents, who reside in Pike County near Father's home, would be able to undertake child care duties.

During the marriage, Mother testified that Father spent very little time with A.P. while spending most of his spare time selling articles on eBay. Mother also testified that she was the primary caregiver during the marriage because she acted as a homemaker. Mother testified that Father would only watch A.P. for 20 minutes

during dinner and change one diaper per day. Father countered by testifying that he took 3 weeks off after the birth of A.P. to assist Mother in caring for A.P.

After the parties' separation, Mother averred that she allowed Father open communication with A.P., but that he did not call on a regular basis.

With regard to her employment and work schedule, Mother currently commutes 45-minutes to work as a clerk at a Macy's store in New York State. She works 3 days per week, with one day being 8 hours and the other 2 days being 4 hours each. She averred that her work schedule is flexible and does not include weekends. When Mother is not available to care for A.P., her sister is available to provide child care.

Further, Mother's niece testified regarding two alleged incidents of inappropriate contact with Father. Father denied that anything inappropriate took place with the Mother's niece. Father testified that there were tensions in the marriage related to those allegations, as well as other issues between the parties. Father was also concerned about Mother absconding with A.P. to Mexico because of her familial ties and her previous travel there without notifying Father. Father alleged that Mother advised him that she had contemplated staying in Mexico with A.P. In addition, Father testified that Mother struck him on the chest on two occasions.

With regard to her health, Mother suffers from rheumatoid arthritis, but receives a monthly injection for treatment of that condition. Otherwise, she is in good mental and physical health. Additionally, Mother testified her arthritis does not interfere with her child care duties. Father is also in good mental and physical health. In addition, the parties have no history of substance abuse or any prior history of

mental or physical impairments. Neither party has a prior criminal record, nor were protection from abuse petitions filed by either party against the other.

Mother testified that A.P. is current on all of his immunizations, has no special needs and is in good physical health. A.P. also has a physician located in Catskill, New York. Additionally, A.P. is enrolled in a pre-school program in Greenville, New York and is to enter kindergarten in the 2013 school year in the Greenville school district.

Pursuant to Father's request, a custody evaluation was performed by Dr. Michael Stefanov, a psychologist who was admitted as an expert witness at trial. He conducted interviews of the parents, the paternal grandparents, and the family of Mother's sister. He did not express any concern about the living arrangements with Mother's sister and her family, although he expressed concern about the influence that the Mother's sister and her husband exercised over Mother and A.P. In his testimony and written custody evaluation, Dr. Stefanov proffered educational statistical data that compared Wallenpaupack Area School District and the Greenville, New York school district. He determined that Wallenpaupack was a better school district based on the data and that Father was willing to allow Mother partial physical custody on every weekend. Thus, Dr. Stefanov recommended that Father be given primary physical custody, with Mother having partial physical custody on an every weekend basis.

Based on its evaluation of the testimony taken at trial and evidence admitted herein, this Court awarded primary physical custody to the Mother, in light of the best interests of A.P. The Court found that Mother would be best able to attend to the

daily physical, emotional, developmental and educational needs of A.P. because, *inter alia*, she had served as the primary caregiver before the separation of the parties. Father was awarded partial physical custody which included every other weekend and the majority of the summer months. Both parties were awarded joint legal custody of A.P.

Analysis:

The Defendant complains of several matters on appeal which can be condensed as follows:

1. This Court committed an error of law by failing to consider any factors for relocation under 23 Pa. C.S. §5321 *et seq.* when the mother relocated without notice and without ever filing a petition to relocate.

2. This Court erred and abused its discretion when it awarded primary physical custody to the Mother after evaluating the factors pursuant to 23 Pa. C.S. §5328.

3. This Court erred and abused its discretion when it denied Father's pre-trial motion for a physical evaluation of Mother pursuant to Pa. R.C.P. 1915.8.

1. This Court did not consider the factors for relocation pursuant to 23 Pa. C.S. §5337(h) because there was no final order of this Court granting primary custody before relocation became an issue on appeal.

Relocation cases in child custody disputes are governed by 23 Pa. C. S. A. §5337 of the Child Custody Act (23 Pa. C. S. A. §5321 *et seq*). 23 Pa. C. S. A. §5337(b) of the Act provides that relocation shall be permitted where "(1) every individual who has custody rights to the child consents to the proposed relocation; or

(2) the court approves the proposed relocation." Further, notice of relocation is governed by 23 Pa. C. S. A. §5337(c), which provides that:

> (1) The party proposing the relocation shall notify every other individual who has custody rights to the child.
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> (2) Notice, sent by certified mail, return receipt requested, shall be given no later than:
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> (i) the 60th day before the date of the proposed relocation; or
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> (ii) the tenth day after the date that the individual knows of the relocation, if:
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> (A) the individual did not know and could not reasonably have known of the relocation in sufficient time to comply with the 60-day notice; and
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> (B) it is not reasonably possible to delay the date of relocation so as to comply with the 60-day notice.

In this custody matter, there was no custody order in effect at the time Mother filed her Complaint in Divorce. We are unaware of any appellate case law that imposes a requirement on a parent to serve written notice of relocation to the other parent when a custody claim has not yet been filed in the courts or prior to the entry of a custody order. In such instances where no prior custody order exists, this Court has consistently reviewed the custody dispute in the light of the best interests of the minor child. The Act references "modification of a custody order" or "revised custody schedule" in the affidavit used pursuant to 23 Pa. C. S. A. §5337(d) when filing an objection to a proposed relocation, which was not done prior to the custody trial because no custody order existed to modify. §5323(c) provides that any custody award shall include notice of a party's obligations pursuant to §5337. No prior custody award was entered by this Court at the time this action was commenced and

thus no obligation existed to provide notice of either party's obligations in regard to relocation.

Father complains in his Concise Statement that the Lower Court failed to consider the statutory relocation factors when Mother failed to serve written notice of relocation or file a written petition for relocation. We have addressed above the lack of an obligation to apply the relocation factors under the facts of this case. We also note that the parties and their counsel proceeded throughout this matter, pre-trial and trial, with the understanding that the Court would apply a best interests standard herein. *Swope v. Swope*, 689 A.2d 264, 265 (Pa. Super. 1997). Father never objected to Mother's failure to give relocation notice or file a petition for relocation until after the August 8, 2012 Custody Order. The trial record is consistent with evidence presented by both parties for a best interests analysis pursuant to the factors of §5328 and not the relocation factors of §5337(h). Accordingly, Father's allegation of error on the issue of relocation can be considered waived.

We further note that even if a review of the relocation factors were required herein, it would have confirmed the award of primary physical custody to Mother. Many of the factors required by §5337(h) are part of the review factors set forth in §5328. Those similar factors have already been addressed in this Court's August 8, 2012 Order. On the distinct, relevant relocation factors, our findings would have revealed that the relocation would enhance the general quality of A. P.'s life and Mother's life by housing stability, economic opportunity for Mother and the availability of close family members for child care and relationship purposes. Mother's purpose for moving to Greeneville appears to be the availability of family

which could assist with child care and housing. Mother's move to Greeneville was not intended to prevent Father from having custody with A. P. Accordingly, even if the relocation factors were required to be addressed, the Court did not commit any abuse of discretion.

2. This Court did not err and abuse its discretion when it awarded primary physical custody to the Mother after evaluating the factors pursuant to 23 Pa. C.S. §5328.

In determining any form of custody, 23 Pa. C.S. §5328(a) provides the following factors that shall guide a court's determination:

> (1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.
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> (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.
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> (3) The parental duties performed by each party on behalf of the child.
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> (4) The need for stability and continuity in the child's education, family life and community life.
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> (5) The availability of extended family.
>
> (6) The child's sibling relationships.
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> (7) The well-reasoned preference of the child, based on the child's maturity and judgment.
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> (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.

In this Court's evaluation of the parties' custody claims, the best interests of the child are of paramount concern. *Swope v. Swope*, *supra*. All factors that legitimately affect the child's physical, intellectual, moral and spiritual well-being should be considered when a court makes its decision to award custody. *Swope v. Swope, supra*. This Court respectfully submits that it considered every relevant factor set forth in §5328 in its August 8, 2012 Custody Order.

A trial court is given discretion when making a custody determination and an appellate court will not overturn that determination absent a gross abuse of discretion. *Ottolini v. Barrett*, 954 A.2d 610, 612 (Pa. Super. 2008). The Pennsylvania Supreme Court has defined abuse of discretion as "not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused." *Zullo v. Zullo*, 613 A.2d 544, 545 (Pa. 1992).

This Court exercised its discretion in analyzing the evidence and testimony with regard to the factors in 23 Pa. C.S. §5328(a), and making reasoned conclusions based on its analysis. Although both Mother and Father were found to be capable parents in spite of the distrust between them, and allegations of mental and physical abuse, Mother was found to be better able to provide the requisite stability and extended family relationships that would benefit A.P. Mother is able to devote more time to the care of A.P., despite having rheumatoid arthritis. She was not found by the Court to have any physical or mental impairment that would impact her ability to care for A.P.

Father specifically contends that the Court abused its discretion by crediting Mother for time served as a custodial parent after she had absconded from the marital home and moved to Greeneville. The Court's determination that Mother is best able to provide for the daily physical, emotional, developmental and educational needs of A. P. is based on her having served as primary caretaker of the child during his entire life, her having greater time available during the school week to provide care for A. P. and having family members available on a daily basis to assist when needed. The Court's determination was not therefore based solely on the time period after separation until the time of trial.

Father also contends that the Court abused its discretion in making the above determination while, at the same time, failing to condone Mother's vacating of the marital residence. We respectfully submit that these findings can be mutually exclusive. Mother's manner of leaving of the marital residence, dubbed "Operation Save a Heart", was inappropriate in our estimation. It does not, however, override the

factors weighing in favor of a custody award to Mother such as her having been the primary caretaker of A. P. during his life, her being in a better position, at the present time, to attend to the child's daily needs and the availability of family to provide assistance on a daily basis as needed.

Our custody award herein provided significant physical custody time for both parents. In essence, Mother received primary physical custody during the school year while Father received primary physical custody during the summer months. A. P. is thus able to have regular contact with both of his extended families. He is able to keep in touch with his maternal extended family in Mexico via Skype and is able to maintain regular contact with his paternal grandparents who reside near Father in Pennsylvania.

Father also claimed that Mother was a flight risk at several points of the custody proceedings and in his Concise Statement. We respectfully suggest that the trial evidence does not support this conclusion. That evidence proved that Mother returned with A.P. from every trip she took to visit her family and that Father is required to sign an authorization to allow A.P. to travel outside the United States. Accordingly, the Court did not abuse its discretion in finding that Mother was not a flight risk.

Father next alleged an abuse of discretion in failing to find that Mother's sister and brother-in-law have been negative influences on her and A. P. The testimony established that Father and Mother met each other through the introduction of Scott Close. Father and Mr. Close had been friends and the latter introduced Mother to him. It is clear that, as a result of the parties' marital problems, Mr. Close and his

wife have sided with Mother. It is also clear that Father and Mr. Close are no longer friendly. Although Mr. Close and his wife were part of the planning of the Operation Save a Heart, we determined that, as indicated above, that such action was specifically inappropriate.

Despite Father's contentions, we found no evidence that Mr. Close or his family has engaged in activities to alienate A. P. from his Father. The evidence did show that Mr. Close offered his home to Mother and A. P., that the latter have strong relationships with the Close family members and that the Closer family is available to assist with daily needs.

With regard to the testimony of Dr. Stefanov, the custody evaluator, this Court took his recommendations regarding physical custody into consideration. We determined, however, that Dr. Stefanov's analysis was based heavily on educational statistical data in comparing Wallenpaupack Area School District and the Greenville, New York school district and that the heavy reliance on statistical data in his conclusions was inappropriate in making a determination of which parent should be awarded primary physical custody. A.P. had only attended pre-school up until the present time and was not yet school age thereby making a heavy reliance on the statistical information about the school districts inappropriate to this Court's analysis at the present time.

Dr. Stefanov did, in fact, note the influence of Mr. and Mrs. Close on Mother in his report and testimony. The Court determined that while it did not agree with every action taken by Mr. and Mrs. Close, especially the Operation Save a Heart, they nevertheless had a positive relationship with each other and were very close as an

extended family. As such, it was not an abuse of discretion to fail to accept Dr. Stefanov's conclusions with regard to the issues of schooling and the influence of the Close family.

In conclusion, we assert that all of the relevant factors of §5328 were considered in our August 8, 2012 Custody Order. Mother was awarded primary physical custody based on the finding that she is a capable parent who has cooperated with Father in facilitating contact with A.P. Most importantly, as the primary caregiver from A.P.'s birth to the present, Mother, with the support of her sister's family, is providing A.P. with a stable environment in which to be raised. Based on the foregoing evaluation of the relevant factors, this Court did not err and did not abuse its discretion when it awarded primary physical custody of A.P. to the Mother.

<u>3. This Court did not err and did not abuse its discretion when it denied Father's pretrial motion for a physical evaluation of Mother pursuant to Pa. R.C.P. 1915.8.</u>

A Court has the ability to order a physical and/or mental examination of a party in a custody action pursuant to Pa. R.C.P. 1915.8. On October 14, 2011, this Court denied the portion of the Father's Motion for Evaluations and Home Study that requested a physical examination of the Mother. This Court has discretion pursuant to *Zullo v. Zullo, supra* to grant or deny the motion for a physical exam.

In the instant case, there was no evidence that Mother had any physical ailments other than rheumatoid arthritis. There was no evidence proffered before or during trial that demonstrated Mother would be incapable of caring for A.P because of any physical ailments, including rheumatoid arthritis. Father testified that he was concerned that Mother might fall as a result of the arthritis and not be able to get up.

In support of his concern, he stated this occurred on a prior occasion when the parties resided together. Our consideration of all of the evidence and observations of Mother, in the courtroom on three (3) separate trial dates, led to the conclusion that Mother was physically capable of serving as a primary custodian. Such determination supports our pre-trial ruling on Father's request for a physical examination. Thus, it was appropriate for this Court to exercise its discretion in denying the portion of Father's motion requesting a physical exam of Mother.

Conclusion:

Based on the foregoing reasons, this Court respectfully requests that the Superior Court affirm our August 8, 2012 Custody Order.

BY THE COURT:

Honorable Gregory H. Chelak, J.

cc: Robert Reno, Esquire
Christopher P. Arnone, Esquire
Court Administrator

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