

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

P.J.S.

Appellee

v.

B.C.S.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1424 WDA 2013

Appeal from the Order Entered August 9, 2013
In the Court of Common Pleas of Westmoreland County
Civil Division at No.: 2032 of 2006- D

BEFORE: BOWES, J., WECHT, J., and STABILE, J.

MEMORANDUM BY WECHT, J.:

FILED APRIL 22, 2014

B.C.S. ("Mother") appeals from the August 8, 2103 order, which granted to P.J.S. ("Father") primary physical custody of the parties' son, N.S., and permitted N.S.'s relocation to Texas. The order also granted Mother primary physical custody of the parties' two other sons: P.J.S., Jr. and D.S. Further, the order directed that the parties shall continue to share legal custody. We affirm.

Father and Mother married on November 25, 1995, and separated in November of 2006. They are the parents of three minor sons: P.J.S., Jr. (born in July of 1999), D.S. (born in September of 2000), and N.S. (born in June of 2002). A January 24, 2007 custody order granted Mother primary physical custody and Father partial physical custody Tuesday evenings and every other weekend from Saturday until Sunday. Father requested

modification of that order. On January 29, 2008, an order modified the schedule so that Father had partial physical custody every week from Thursday until Sunday and a week on/week off schedule during the summer vacation.

In April of 2009, Father moved to Texas and accepted a position as a physician's assistant with the United States Army. On February 8, 2012, Father filed a Petition for Modification of Custody, as the parties lacked an order detailing custody after Father's relocation. The trial court issued an order formalizing a summer and school holiday custody arrangement and giving the parties leave to seek a hearing on Father's petition. A June 11, 2012 order granted Father custody of the children from the last Saturday in June until the third Saturday in August. The order also granted Father custody during the children's Thanksgiving break and part of Christmas break. On November 15, 2012, a trial date was set in response to Father's request. On March 7, 2013, and June 6, 2013, the trial court held a custody trial.

Father testified that his employer in Pennsylvania, the University of Pittsburgh Medical Center ("UPMC"), gave him sixty-days' notice of the termination of his position, and, that he had been unable to find employment in Pittsburgh. Subsequently, Father found his current position in Texas. While living in Texas, Father also continued a relationship with N.N., a woman to whom he later became engaged. Trial Court Memorandum &

Order ("T.C.M."), 8/9/2013, at 1-2. Since moving to Texas, by the parties' agreement, Father had seen the children during the summer months.

Mother testified that she has been the primary custodian throughout the children's lives, and has been a stable parent. Mother has maintained the residence in which the children have lived all their lives and has had steady employment. Mother and her sisters have performed all of the parental duties for the children, ensuring that the children are cared for, and Mother has attended all of their activities. Mother and children have friends and extended family in Pennsylvania. T.C.M. at 3.

All three boys are enrolled in the Franklin Regional School District and are doing well academically. Notes of Testimony ("N.T."), 6/6/2013, at 121-18, 130-23. At the time of the hearing, P.J.S., Jr. was in seventh grade, D.S. was in sixth grade, and N.S. was in fourth grade. *Id.* at 119-20. The boys participated in extracurricular activities and scouting in Westmoreland County. *Id.* at 160-63.

In an August 9, 2013 memorandum and order, the trial court awarded primary physical custody of N.S. to Father and permitted N.S.'s relocation to Texas, awarded primary physical custody of P.J.S., Jr. and D.S. to Mother, and awarded shared legal custody of all three children to Mother and Father. Each parent was awarded partial physical custody of the children such that, during periods of partial physical custody, all three children would be together.

On September 3, 2013, Mother filed a timely notice of appeal. On September 16, 2013, Mother filed a concise statement of errors complained of on appeal, which should have been filed with her notice of appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).¹ On October 3, 2013, the trial court filed a Rule 1925(a) opinion, in which it largely relied upon its August 9 memorandum.

On appeal, Mother presents the following issues for our review:

1. Did the [t]rial [c]ourt err and/or abuse [its] discretion in separating three (3) brothers ages 14, 13, and 11, and awarding Father primary physical custody of [N.S.] and awarding Mother primary physical custody of [P.J.S., Jr.] and [D.S.,] and by doing so, thereby further err[] and/or abuse[] [its] discretion by:
 - a. separating [N.S.] from his brothers, contrary to the “whole family” doctrine and contrary to the well-established preference for not separating siblings?
 - b. giving undue weight and consideration to [N.S.’s] preference, a child of only 11 years old?
 - c. in failing to give appropriate and due weight and consideration for [N.S.’s] need for stability and continuity in his education, his family life with his brothers and his extracurricular activities and his community life, having resided primarily with Mother and his brothers for his entire life and the last 6½ years being since the parties separated?
 - d. in failing to give due and appropriate weight to the level of conflict between the parties and how their

¹ Although Mother filed her concise statement late, there is no claim of prejudice due to Mother’s procedural misstep. Therefore, we will not quash or dismiss her appeal. **See In re: K.T.E.L.**, 983 A.2d 745 (Pa. Super. 2009).

conflict will continue, if not increase, as the result of separating the siblings?

- e. in awarding custody of [N.S.] to Father contrary to the court's statement, finding and belief that the boys, including [N.S.], were "not appearing particularly close and familiar with [their] soon-to-be-step-siblings" which would make up part of Father's home environment?
 - f. in awarding custody of [N.S.] to Father based upon an apparent prejudice against Mother for failing to allow the children to have lunch with Father when he was in Pennsylvania for the [t]rial in this matter?
 - g. in failing to give due and appropriate consideration and weight to the fact that [N.S.] was sexually assaulted in Texas while in the care of Father and Father's unwillingness to get [N.S.] counseling regarding those issues?
 - [h.] in failing to adequately address and give due consideration as to whether [N.S.'s] relocation would enhance the general quality of not only [N.S.'s] life, but also the lives of his brothers, [P.J.S., Jr.] and [D.S.], who will not be able to grow up with their brother?
2. Did the [t]rial [c]ourt err and/or abuse [its] discretion in finding that Father had overcome the statutory burden of proving that relocation would serve [N.S.'s] best interest (23 Pa.C.S.A. § 5337[(i)](1)), especially when Father completed only an "online" search of the School District where he resides, presented little or no testimony and/or evidence regarding the specific school [N.S.] would attend, how far away it is from Father's home, how long it would take to get to school, or whether Father would be able to get [N.S.] to school or would have to rely on others to get him to school?

Mother's Brief at ix-x.

In custody cases, our standard of review is as follows:

In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. We must accept

findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

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

"However, this broad scope of review does not vest in the reviewing court the duty or the privilege of making its own independent determination."

McMillen v. McMillen, 602 A.2d 845, 847 (Pa. 1992).

Pursuant to the Custody Act, 23 Pa.C.S.A. §§ 5321, *et seq.*, the paramount concern is the best interest of the child. In applying the Custody Act, the trial court determines a child's best interests through consideration of the following sixteen factors:

§ 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.

Additionally, in determining whether to grant relocation, the trial court must consider the following ten factors:

(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. In its August 9 memorandum and order, the trial court discussed its findings as to each of the section 5328 best interest factors and each of the section 5337 relocation factors. While we have reviewed the record to ensure the trial court's findings and conclusions were supported by the record, we discuss only those factors which Mother challenges on appeal.

Mother's first argument is that there are strong preferences in custody law in favor of keeping siblings together. Mother contends that there are no compelling reasons in this case to separate the children. Mother's Brief at 2-7.

The trial court acknowledged the general preference for not separating siblings. Trial Court Opinion ("T.C.O."), 10/3/2013, at 1. However, the trial court found that N.S. was "very unhappy and unsettled in [Mother's] custody, and that he deeply desired a change that [would] allow him to be with his father." *Id.* Finding N.S.'s best interest to be in conflict with the general preference, the trial court followed the polestar consideration: N.S.'s best interest. The trial court properly concluded that it would be in the best interest of N.S. to permit relocation to Texas with Father, while preserving primary custody of P.J.S., Jr. and D.S. with Mother in Pennsylvania. In deciding that it is in N.S.'s best interest that he lives with Father, the trial court gave appropriate weight to each of the factors outlined in 23 Pa.C.S.A. § 5328.

Mother next argues that the trial court gave undue weight and consideration to N.S.'s preference since he is only eleven years old. Mother concedes that the court is bound to consider a child's preference, but argues that N.S. did not provide sufficient reasoning for his preference to allow the trial court to give it significant weight. Mother's Brief at 7-11.

In ordering any form of custody, the trial court shall determine the best interests of the child considering all relevant factors, including "the well-reasoned preference of the child, based on the child's maturity and judgment." 23 Pa.C.S.A. §5328(a)(7); **see** 23 Pa. C.S.A. § 5337(h)(4). This Court has held that, while the express wishes of a child are not controlling in custody, the child's preference does constitute an important consideration in determining the child's best interest. **Cardamone v. Elshoff**, 659 A.2d 575, 583 (Pa. Super. 1995). A child must provide good reasons for the preference, and the court must consider the child's maturity and intelligence. The weight to be given such testimony is best determined by the trial court that heard the testimony. **Id.**

N.S. testified that he wanted to live with his father in Texas, and he gave his reasoning for that decision. N.T. (N.S.),² 4/7/2013, at 51-52. D.S.

² The April 7, 2013 hearing transcript is in three non-consecutively numbered volumes. One part, designated herein as N.T. (N.S.), is the *in camera* interview of N.S. The second volume was the proceedings in open court, which will be designated as N.T. The final volume, herein designated as N.T. (D.S.), contains the *in camera* interviews of D.S. and P.J.S., Jr.

confirmed that N.S. had wanted to live with Father for a while. N.T. (D.S.), 4/7/2013, at 8. D.S. testified that he wanted to move to Texas, but was not yet ready to do so, and that he believed he would be happy with either parent. *Id.* at 8, 10. P.J.S., Jr. testified that he would be interested in moving to Texas after he finished high school, but did not want to move at the time of the hearing. *Id.* at 40. Both D.S. and P.J.S., Jr. testified that, even if they did not move to Texas, they would like to spend more time with Father. *Id.* at 12, 42-43. All three children testified on the second trial date in June 2013. Their testimonies were consistent in terms of where they wanted to live and to the effect that they wanted to spend more time with Father. N.T., 6/6/2013, at 295, 321. The trial court considered the preferences of all of the three children, found all three children to be credible, and found the reasoning behind their preferences to be well-considered. T.C.M. at 9-10, 15. After a review of the record, the trial court was convinced that N.S., unlike his brothers, was very unhappy in Mother's custody, and that he sincerely wanted to live with his father. The trial court reasonably found that denying N.S. the opportunity to move "would have caused [N.S.] sadness, and could have deprived [N.S.] of an opportunity for a setting that would focus on his emotional development." T.C.O. at 1.

P.J.S., Jr.'s and D.S.'s preferences and testimony were given as much weight as N.S.'s preferences and testimony, and were significant factors in the trial court's determination to keep primary custody of the two older boys in Pennsylvania with Mother. T.C.O. at 2. Because the trial court properly

considered the children's preferences, and because the record supports its findings, we find no error of law and no abuse of discretion.

Mother also contends that the trial court erred in failing to give appropriate and due weight and consideration to N.S.'s need for stability and continuity with regard to N.S.'s education, his family life with his brothers, his extracurricular activities, and his community life. N.S. has resided with his Mother and brothers for most of his life. Mother's Brief at 12-15.

The trial court gave consideration to the need for stability and continuity in each of the children's lives. The court reasoned that "[a]lthough traveling from Pennsylvania to Texas often is not the most stable situation, there seems to be stability in both places. Both parties have stable employment and a residence that is suitable for the children." T.C.M. at 9. The trial court correctly looked to N.S.'s need for stability and continuity in N.S.'s education, family life, and community life, and the trial court also considered the fact that N.S. has been and will be engaged in extracurricular activities. Father argued that, while spending significant time in Texas, N.S. has engaged in activities such as visiting museums, ranching, visiting the swimming pool, and target shooting. Father and N.S. both asserted that N.S. has friends in Texas with whom he socializes.

In reaching its decision, the trial court also considered N.S.'s living situation with Mother in Pennsylvania. The court found N.S.'s situation to be less stable for him than it is for his brothers. T.C.M. at 11. N.S. has heard Mother's child care-giver, Mrs. Grant, make disparaging comments about

Father, and the care-giver has interfered with telephone calls between Father and N.S. This made N.S. angry and uncomfortable. N.T., 4/7/2013 (N.S.), at 24-26. N.S. also has had issues at school, including a situation in which his foot was broken.³ In addition, N.S. testified that part of his reason for wanting to move was because his brothers fight with him, although he also said he would miss them. *Id.* at 51. N.S.'s issues with Mother and her childcare provider, along with N.S.'s difficulties at school and with his brothers, have caused N.S. to seek stability and continuity with his Father in Texas. The trial court found that Father better understands N.S.'s feelings of fear and need for security, and makes N.S. feel more secure. T.C.M. at 10.

Further, N.S. has lived in Texas for extensive periods of time, and there is no evidence to suggest that his stability or education will be negatively affected by relocation to Texas. T.C.M. at 4-5. The evidence elicited at trial demonstrated that N.S. will live in a familiar environment, and that he will attend school with friends from his prior stays in Texas.

The trial court determined that N.S. has no special needs, and that his relocation to Texas would not be detrimental to any progress or his education. The children testified that they are involved in different activities

³ It is unclear whether N.S.'s foot was broken in a fall or in a bullying incident when another student stomped on his foot several times. Both events occurred on the same day, and there was no testimony whether either incident by itself or the combination of incidents caused the break.

in Texas. Therefore, N.S. can participate in extracurricular activities when residing in Texas. T.C.O. at 3. The trial court did not err or commit an abuse of discretion in finding N.S.'s best interest would be served by relocation.

Next, Mother contends that the trial court erred in failing to give due and appropriate weight to the level of conflict between the parties, and how their conflict will continue, if not increase, as a result of separating the siblings. Mother argues that the order increases the number of custody exchanges, which only will increase conflict between the parents. Mother's Brief at 15-18.

The trial court determined that the conflict between the parties was a major consideration in the case. It found there to be a significant conflict between the parties despite the fact that they have been separated for over six years. The conflict stems from issues between the parties that occurred during the marriage, and the circumstances surrounding the separation. T.C.O. at 3.

Given that history, the trial court found that the level of conflict was unlikely to change regardless of the division of custody. Although this conflict was a consideration in the trial court's decision, the trial court found that the other factors outweighed it. We find no error or abuse of discretion on the part of the trial court.

Mother also contends that the boys, including N.S., were not close to and familiar with the three "soon-to-be-step-siblings." Mother argues that

an adverse inference should be drawn from the failure of Father's fiancée to testify. Mother's Brief at 18-19.

Neither the fiancée nor her children reside with Father. Moreover, there was no evidence of record that they would make up part of Father's home environment. While certain section 5328 and section 5337 factors require consideration of information regarding household members, there is no such requirement for potential household members. While it would have been preferable for the trial court to have been able to observe and hear from Father's fiancée first-hand, the testimony of Father and the children sufficed to provide a picture of Father's household. Further, the evidence demonstrated that N.N.'s children are older and do not reside primarily with her. We find no error of law or abuse of discretion on the part of the trial court.

Mother also asserts that the trial court erred or abused its discretion in awarding custody of N.S. to Father based upon an apparent prejudice against Mother for failing to allow the children to have lunch with Father when he was in Pennsylvania for the trial. Mother's Brief at 19-23.

During the trial, Mother made plans for the children to have lunch with her sisters. Despite the custody order that provided Father custody when he was in Westmoreland County and the trial court's request that Mother reconsider the lunch plans, Mother did not allow the children to go to lunch with Father. The trial court mentioned this incident as an example of Mother

not fostering a relationship between the children and Father and the conflict between the parties. T.C.O. at 3-4. It was not a determinative factor.

Mother also attempts to take some comments by the trial court out of context in an attempt to demonstrate the court's bias. However, the statements were made while trying to manage cross-examination of Mother by Father's counsel near the end of the last day of trial. N.T., 6/6/13, at 266-67. At worst, the court's comments demonstrate some frustration with Father's counsel, not bias against Mother. The trial court's reference to Father's counsel "winning" was in regard to the cross-examination being shorter than the direct examination of Mother. The reference to "appropriate and good cross-examination" was the court explaining that its interruption of cross-examination was not because the topic was irrelevant, but that the court understood the point counsel was attempting to convey and counsel could move on given the lateness in the day. Neither of these statements conveys bias, and we hold that Mother's contention otherwise is unavailing.

Mother argues that the trial court erred or abused its discretion in failing to give due and appropriate consideration and weight to the fact that N.S. was sexually assaulted in Texas under the care of Father. Mother maintains that Father has been unwilling to get counseling for N.S. regarding these issues. Mother's Brief at 23-30.

Father testified that, at his prior residence, N.S. went to a friend's house in the afternoon to play video games. While there, N.S. was sexually

assaulted by the thirteen-year-old neighbor. N.S. reported the assault immediately to Father, who then contacted the police. Father also informed Mother and kept her informed about the follow-up, including forensic evaluations. At the time, N.S. was doing well and Father testified that he and Mother had agreed that counseling was not necessary. N.T., 4/7/2013, at 23-24, 26-27.

The trial court found that Father provides an environment in which N.S. feels more secure. The trial court believed that N.S.'s needs, as a result of the assault, are better met and understood by Father. Further, there was no evidence to suggest that father's parenting was at fault or a cause of the assault perpetrated upon N.S. We see no error of law or abuse of discretion on the part of the trial court.

Mother also complains that the trial court erred and/or abused its discretion in failing to adequately address and give due consideration to whether N.S.'s relocation would enhance the general quality not only of N.S.'s life, but also the lives of his brothers, P.J.S., Jr. and D.S. Mother's Brief at 30-31.

The general preference is to keep the siblings together. However, in this case, the trial court found that the best interest of each child necessitated the separation. The trial court was persuaded that it would be in N.S.'s best interest not to reside with his siblings, but to maintain a close sibling relationship by other means. Therefore, the trial court order of August 9, 2013, preserves these relationships by granting each parent

custody of all three children, at once, for extended visits and a large portion of the summer. T.C.O. at 5. While the circumstances may not be ideal, the record supports the findings that led the trial court to this conclusion. Thus, we find no error of law or abuse of discretion.

Finally, Mother also argues that the trial court erred or abused its discretion in finding that Father had overcome the statutory burden of proving that relocation would be in N.S.'s best interest, **see** 23 Pa.C.S.A. § 5337(i)(1), especially when Father completed only an "online" search of the school district where he resides, presented little or no testimony and/or evidence regarding the specific school N.S. would attend, how far away it is from Father's home, how long it would take to get to school, or whether Father would be able to get N.S. to school or would have to rely on others to get him to school. Mother's Brief at 32-34.

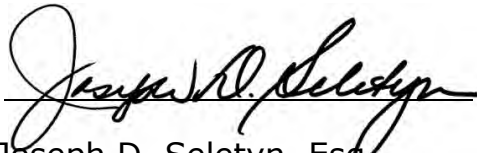
The party proposing the relocation has the burden of establishing that the relocation will serve the best interest of the child. Father researched the schools online and spoke with neighbors to gain an impression of the district. Father testified that N.S. will go to the Belton School District, which was in the top 50% of Texas schools on the basis of a variety of criteria, including graduation rate, and that he would follow through and have N.S. properly admitted to the appropriate school in the district. N.T., 4/7/2013, at 7-8. However, the school a child attends is not the only factor in determining the child's best interest.

The trial court found that Father's motivation for relocation of N.S. to Texas is N.S.'s preference. This is supported by the record and the evidence presented. The trial court considered all the factors in determining that N.S.'s best interests were served by relocation. The record supports its determination.

The trial court's decision to allow N.S.'s relocation to Texas to live with Father and attend school there was appropriate and complies with the mandates of 23 Pa.C.S.A. §§ 5328(a) and 5337(h). We find no error of law or abuse of discretion on the part of the trial court.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above the printed name and title.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014