

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

K.B.

Appellee

v.

R.W., JR.

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 658 WDA 2013

Appeal from the Order of March 26, 2013  
In the Court of Common Pleas of Westmoreland County  
Domestic Relations at No.: 01194-DR-2012

BEFORE: SHOGAN, J., OLSON, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

**FILED APRIL 22, 2014**

R.W., Jr. ("Father") appeals from the March 26, 2013 order that disposed of his exceptions to a hearing officer's recommendation for child support. We affirm.

On July 2, 2012, K.B. ("Mother") filed a complaint for child support for the parties' then-ten-year-old daughter, A.W. On August 16, 2012, the court entered an interim order directing Father to pay \$358 in child support per month, plus \$22 monthly toward arrears. On September 19, 2012, the parties appeared before a hearing officer on Mother's complaint. On September 27, 2012, the hearing officer filed her findings of fact and recommended order, concluding that there was no dispute about the parties' income and that the only issue was whether Father was the custodial parent. Hearing Officer's Findings of Fact, Conclusions and Recommended Order of

Court ("Recommendation"), 9/27/2013, at 1. As a result of the Recommendation, the trial court entered an order for the same amounts as in the August 16, 2012 order.

On October 4, 2012, Father filed exceptions to the Recommendation, in which he challenged: (1) how the hearing was conducted, alleging that part of the hearing was conducted off the record; (2) the conduct of the hearing officer, alleging the hearing officer gave Mother legal advice and made unsupported rulings off the record; (3) the failure to find that Father was the custodial parent based upon the number of overnights he had with A.W.; (4) the award of child support to a non-custodial parent; and (5) the failure to determine that Mother could not claim A.W. as a dependent for tax purposes. On December 6, 2012, the trial court held arguments on Father's exceptions. On March 26, 2013, the trial court filed a memorandum and order, dismissing Father's exceptions.

On April 9, 2013, Father filed a notice of appeal. On the same day, he filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On June 4, 2013, the trial court filed its Rule 1925(a) opinion, finding some of Father's issues to be waived and relying upon its March 26 memorandum and the September 27 Recommendation for the remaining issues.

Father raises the following challenges:

1. Whether the trial court is a neutral and disinterested decision-maker, as required by the due process clause of the 14<sup>th</sup> Amendment [to] the United States Constitution.

2. Whether the trial court erred by awarding child support to the non-custodial parent.
3. Whether the trial court erred by failing to give effect to the existing custody order, which states that [Father] shall have the custody of the child for six out of seven nights per week.
4. Whether the trial court erred by failing to acknowledge the undisputed testimony of all three witnesses that it was the practice of the parties for [Father] to have custody of the child for five out of seven nights per week.
5. Whether the trial court erred by awarding the tax benefits for the child to the non-custodial parent.

Father's Brief at 5.

Father challenges a child support order. Our standard of review for such a challenge is whether the trial court abused its discretion. ***Colonna v. Colonna***, 855 A.2d 648, 652 (Pa. 2004).

Father first argues that he was denied due process because he alleges the domestic relations section of the trial court has an interest in the outcome of the case.<sup>1</sup> Father's Brief at 11-16. However, Father did not include this issue in his exceptions to the Recommendation. Therefore, it is

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<sup>1</sup> Father also filed a motion to disqualify Mother's counsel based upon a rationale similar to that advanced in his brief that counsel's representation of Mother is a due process violation and a conflict of interest as counsel is also an employee of the domestic relations section. However, Mother's counsel was, and is, acting according to 23 Pa.C.S.A. § 4306, which authorizes a Title V-D attorney to represent complainants in child support matters. "An enactment of the General Assembly enjoys a strong presumption of constitutionality." ***Middleton/DPW v. Robinson***, 728 A.2d 368, 373 (Pa. Super. 1999). Nothing in Father's motion convinces us that the attorney's representation was, or is, improper. Therefore, the motion is denied.

waived.<sup>2</sup> **Hayward v. Hayward**, 868 A.2d 554, 561 (Pa. Super. 2005) (“In order to preserve an issue for appeal, a party must make an exception to the Hearing Officer’s report.”).

Father combines his next three issues into a unified argument. Father contends that, because he is the custodial parent and because the child support formula is based upon nights that the child spends in each parent’s custody, Mother is not entitled to child support. Father argues that the existing custody order awarded primary physical custody to Father. Father also asserts that the testimony at the hearing demonstrated that Father has custody five nights per week. Father’s Brief at 17-22.

First, we note that Father’s premise is faulty. Even if we were to determine that Father is the custodial parent, that does not relieve him automatically of all support obligations. Our Supreme Court has held that, in certain situations and when it is in the child’s best interest, a custodial parent may be ordered to pay child support to a non-custodial parent. **See Colonna**, 855 A.2d at 652. However, we need not address that situation here.

The child support guidelines are based upon the parties’ net incomes, but the amount of support is adjusted based upon shared or substantial

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<sup>2</sup> At oral argument, Father’s counsel conceded that this claim was waived. Mother filed a motion to dismiss this issue for failure to preserve it. We deny the motion as moot.

physical custody, which is defined as the child spending forty percent or more time, or overnights, with the obligor. **See** Pa.R.C.P. 1910.16-4 (a), (c). However, the rules also permit deviation from the guidelines for “other relevant and appropriate factors, including the best interests of the child,” among other factors. Pa.R.C.P. 1910.16-5 (b)(9). The overarching purpose of child support is to promote the child’s best interest. **Arbet v. Arbet**, 863 A.2d 34, 39 (Pa. Super. 2004).

While there is a 2009 custody order, both parties agreed that they have not followed it. Notes of Testimony (“N.T.”), 9/19/2012, at 28, 47. Instead, the parties have arranged custody according to their work schedules. Mother works five days per week from 6 a.m. to 2 p.m. Mother picks A.W. up from the school bus and has custody of A.W. until Father picks the child up between 8 and 9 p.m. **Id.** at 26. Mother’s days off rotate. **Id.** at 27. A.W. spends the night with Mother on the nights preceding Mother’s day off. If Mother’s day off is a weekend or school vacation day, A.W. spends the entire day with Mother until Father picks her up in the evening. If Mother’s day off is a school day, Mother takes A.W. to school. **Id.** at 27-28.

Father works five or six days per week. He gets Sundays and Wednesdays off on five-day weeks and Sundays off on six-day weeks. **Id.** at 27. Father agreed that Mother picks A.W. up from the bus, that he picks A.W. up from Mother’s home in the evening, and that A.W. only stays overnight with Mother on the nights preceding Mother’s days off. **Id.** at 32.

When A.W. stays overnight with Father, Father puts A.W. on the school bus before he goes to work. *Id.* at 47-48. During the summer, the parties follow a similar schedule, but various family members and friends watch A.W. on the days that both parties are working. On occasion, A.W. would spend the night with family members during the summer. *Id.* at 27, 29-30, 62-63.

Based upon this testimony, it is clear that both parents see and spend time with A.W. on a daily basis. If Mother is not working, she has A.W. from after school on the day preceding her day off until school the next morning, or all day on non-school days. Father has every remaining overnight due to Mother's early work hours. Mother has every afternoon and evening until Father picks A.W. up. Although Father has more overnights, A.W. appears to split each day with each parent.

In this case, the hearing officer did not deviate from the guideline amount, but deviated from the general presumption that the amount of custody a parent has is determined from the overnights a child spends with that parent. Our review of the record supports the hearing officer's finding that Mother and Father have an unusual custody arrangement, albeit one that works for their family and their situation. Because of that arrangement, the hearing officer considered the amount of actual time A.W. spends with each parent, rather than counting overnights, in determining that the arrangement is essentially a shared custody situation. Recommendation at 4-5. Having determined that A.W. spends a significant amount of time with

Mother, although not overnights, the hearing officer found that a child support award to Mother was appropriate. To find otherwise would have penalized Mother, who spends a significant amount of time each day with A.W. and must incur expenses to care for A.W. during that time, expenses which are similar to those of a parent with a more traditional shared custody arrangement. The hearing officer's decision is supported by the record. We find no abuse of discretion.

Finally, Father argues that the hearing officer erred in permitting Mother to claim A.W. as a dependent for income tax purposes. Father argues that the tax code, specifically 26 U.S.C.A. § 152, requires that the parent with primary custody take the exemption and that, because he has primary custody, Father is entitled to the exemption. Father's Brief at 22-23.

Pennsylvania rules state that, to maximize total income, a court may award the tax deduction to a non-custodial parent. Pa.R.C.P. 1910.16-2(f). In reviewing 26 U.S.C.A. § 152 and amendments thereto related to which parent may take the exemption, this Court has stated:

[I]t is clear from this legislative history that the "purpose [of the amendments] was to alleviate the administrative burden which had been placed on the Internal Revenue Service (I.R.S.) due to the necessity for it to become involved in making determinations as to which parent provided the larger portion of a child's support if the parties disagreed and both sought to claim the exemption."

This legislative history does not suggest that the changes were made to preclude state courts from exercising their

authority regarding the exemption. Instead, “this silence demonstrates Congress’ surpassing indifference to how the exemption is allocated so long as the IRS doesn’t have to do the allocating.”

[**Miller v. Miller**, 744 A.2d 778, 784 (Pa. Super. 1999)] (citations omitted).

The **Miller** court proceeded to “join the growing majority of jurisdictions holding that state courts may use their equitable powers to allocate the dependency exemption to non-custodial parents.” **Id.** at 785 (footnote omitted). The **Miller** court further opined that, “[t]he primary purpose of this allocation is to maximize the income available for the support of the minor children.” **Id.**

**May v. May**, 837 A.2d 566, 568-69 (Pa. Super. 2003). We also have recognized that other purposes beyond maximization of income may be considered in determining who may take the tax exemption. **Id.** at 570.

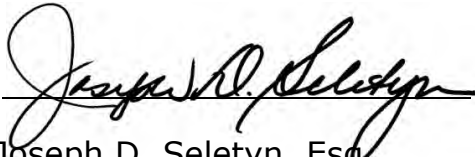
Instantly, the hearing officer found that Mother had always claimed A.W. as a dependent and that the net incomes to which the parties stipulated were based upon Mother filing as head of household with the exemption for A.W. and Father filing as single. Recommendation at 2-3. Father conceded that Mother historically has taken the tax exemption, although he said he had not consented to such an arrangement. N.T. at 51. The hearing officer determined that to award Father the deduction would result in an increase in his monthly support obligation. Recommendation at 6. Therefore, the hearing officer awarded the exemption to Mother. **Id.** Based upon our review of the record and the applicable law, we find no abuse of discretion in this decision.

Order affirmed.



J-A08040-14

Judgment Entered.

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

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/22/2014