NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

A.M.M. Appellant v. R.L.M.	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1583 MDA 2012

Appeal from the Order Entered August 8, 2012
In the Court of Common Pleas of Berks County
Civil Division at No: 09-6612

BEFORE: FORD ELLIOTT, P.J.E., WECHT, J., and COLVILLE, J.*

MEMORANDUM BY WECHT, J.: FILED: AUGUST 15, 2013

A.M.M. ("Mother") appeals from the order entered on August 8, 2012. That order denied Mother's petition, which sought to modify custody and to relocate with the parties' adopted child, E.A.M. ("Child") (born October 2006). The order granted the parties shared legal custody, granted R.L.M. ("Father") primary physical custody, and granted Mother partial physical custody of Child during the school year. The order also granted the parties shared physical custody of Child on a week-on/week-off basis during the summer. This is a close case. Because we find the trial court abused its discretion, we reverse and remand.

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* Retired Senior Judge assigned to the Superior Court.

Mother and Father married on December 14, 1996. Throughout most of their marriage, the parties lived in the vicinity of Morgantown, Berks County. Mother and Father are the adoptive parents of Child, who was born in Ethiopia, and who was approximately two years old at the time of his adoption in March 2008. The parties separated in August 2009, and divorced on December 22, 2009. Trial Court Opinion ("T.C.O."), 9/28/2012, at 1.

Mother resided in the marital residence until April 21, 2012, whereupon she relocated to Glen Mills, Delaware County. Mother moved in order to reside with her then-paramour, C.S, whom she married on June 30, 2012. Mother and C.S. live with the two sons of C.S.'s late cousin. C.S. is raising the two boys, who were ages fifteen and thirteen at the time of the hearing. Mother works as an executive assistant at Spire Capital in West Conshohocken, Pennsylvania, from 8:00 a.m. until 5:00 p.m., Monday through Friday. Mother's work hours are flexible, as confirmed by her employer. ***Id.*** at 2, 6.

Father lives in Reading, Berks County. His home is located approximately fifteen minutes from the parties' former marital residence. Father lives with his wife, D.M., and D.M.'s two children from a prior marriage, ages seventeen and twenty (at the time of the hearing). Father has a Master's Degree in Divinity, and serves as a Lutheran minister in Chester County. Father's work schedule is flexible, with no regular office

hours. Father controls his own schedule, with the exception of Sunday mornings, when he conducts church services. ***Id.*** at 2, 6.

On May 27, 2009, Mother filed a complaint for custody, seeking shared physical custody of Child. The parties consented to a 50/50 custody arrangement, which was memorialized in an order dated July 21, 2009. After separation, both parents participated in all aspects of parenting Child, and reached amicable decisions concerning medical, educational, social, and religious issues affecting Child. ***Id.*** at 1-2.

On March 7, 2012, pursuant to 23 Pa.C.S.A. § 5337(c), Mother gave Father formal written notice of her intent to relocate to Glen Mills. On April 4, 2012, Father filed written objections to Mother's intent to relocate. Mother moved to C.S.'s residence on April 21, 2012, with knowledge of Father's objections, and without the trial court's approval. ***Id***. at 2.

On April 11, 2012, Father filed a petition for contempt. Father complained that Mother had registered Child on a different T-Ball team in Garnet Valley, Delaware County, had removed Child from his current school in Berks County, and had enrolled him in a school in Garnet Valley, all in violation of the July 2009 order conferring shared legal custody. On April 20, 2012, Father filed a petition for special relief. Therein, Father sought primary physical custody of Child due to Mother's proposed relocation, and sought to prevent Mother from relocating to Delaware County with Child and enrolling him in the Garnet Valley School District. On April 30, 2012, Mother

filed a petition to modify custody, requesting permission from the trial court to relocate and seeking primary physical custody of Child. ***Id.*** at 2-3.

Following a hearing convened on May 3, 2012, to consider Father's petitions, the trial court entered a temporary order amending its July 2009 order. The temporary order provided that Mother and Father would share custody of Child so that, on alternating weeks, one parent had four days of custody, and the other had three days. ***Id.*** at 3.

On August 8, 2012, the trial court conducted a hearing to address Mother's petition for custody modification and relocation. By order entered August 8, 2012, the trial court denied both of Mother's requests. The court granted shared legal custody and primary physical custody of Child to Father, and shared legal and partial physical custody to Mother. The order also granted the parties shared physical custody of Child on a week-on/week-off basis during the summer.

On August 30, 2012, Mother filed a timely notice of appeal. Subsequently, on September 11, 2012, Mother filed her concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b). We accept Mother's Rule 1925(b) statement. ***See In re K.T.E.L.***, 983 A.2d 745, 747 (Pa. Super. 2009) (holding that failure to file concise statement contemporaneously with notice of appeal results not in automatic waiver for

failure to file a timely concise statement, but in defective notice of appeal, disposition of which will be decided case-by-case). [1]

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

> I. Whether the child custody order appealed from should be reversed where the trial court failed to make the requisite findings of fact and credibility and the requisite conclusions of law in the order as required by Pennsylvania law?
>
> II. Whether the trial court correctly determined that the mother's move to a nearby county prior to the hearing on her relocation request violated the Relocation Statute when the statute expressly contemplates that a parent may move prior to the hearing?
>
> III. Whether the child custody order appealed from should be reversed where the statutory factors in 23 Pa.C.S. § 5328 and 23 Pa.C.S. § 5337 do not support the change in custody or the denial of relocation, and the trial court grossly abused its discretion in making findings of fact and conclusions of law that are unsupported by the record?

Mother's Brief at 5.

As Mother's issues on appeal are interrelated and overlapping, we address them in a combined discussion.

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

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[1] The trial court noted that it prepared its opinion without the benefit of a transcript, which also was filed late.

> 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).

> An abuse of discretion in the context of child custody does not consist merely of an error in judgment; it exists only when the trial court overrides or misapplies the law in reaching its conclusion or when its judgment is manifestly unreasonable or the result of partiality, prejudice, bias, or ill will, as shown by the evidence of record.

Masser v. Miller, 913 A.2d 912, 917 (Pa. Super. 2006).

In any proceeding under the Child Custody Act ("Act"), 23 Pa.C.S.A. §§ 5321-5340, the paramount concern is the best interest of the child. ***See*** 23 Pa.C.S.A. §§ 5328, 5338. Section 5338 of the Act provides that, upon petition, a trial court may modify a custody order if modification serves the best interests of the child. 23 Pa.C.S.A. § 5338(a).

Section 5328 of the Act 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.

Because Father objected to Mother's relocation with Child, the trial court was required to consider all of the evidence presented and to approve the relocation before it could occur. ***See*** 23 Pa.C.S.A. § 5337(b)(2). When ruling upon a relocation request, the trial court must consider the following 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(h).

At the conclusion of the trial, the trial court stated on the record that, in arriving at its decision to award primary custody to Father and to deny Mother's request for relocation, it had considered all of the factors set forth in sections 5328(a) and 5337(h). T.C.O. at 24-32; Notes of Testimony ("N.T."), 8/8/2012, at 240-51.[2] The trial court adequately addressed both the custody and the relocation factors on the record and in its Rule 1925(a) opinion. However, a trial court abuses its discretion when its judgment is "the result of partiality, prejudice, bias, or ill will, as shown by the evidence of record." ***See Masser***, *supra*. In the instant case, there are enough examples demonstrating partiality, prejudice, bias, or consideration of

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[2] The trial court did not provide an extensive analysis of all factors listed in sections 5328(a) and 5337(h), but it did note that it had considered all of the relevant factors, and it specifically discussed several of those factors. N.T. at 242-43. ***C.B. v. J.B. & M.B. & T.B.***, 1806 WDA 2011, __ A.3d __, 2013 WL 1715684, at *4 (Pa. Super. April 22, 2013), requires that the trial court state its rationale under the 5328 factors at or near the time it issues its custody order. As the trial court did not have the benefit of that case prior to the hearing, and inasmuch as ***C.B.***'s ruling applies prospectively, ***id.*** at *8, we find no error in the court's failure to address each factor fully prior to the time the court prepared its opinion.

evidence that is not of record to call the trial court's determination into question.

We detect several instances in which the trial court ignored evidence that was favorable to Mother. We focus first on the court's finding regarding the section 5328 best interest analysis. The trial court highlighted instances in which Mother had denied Father's request to attend Child's birthday party or had refused to attend certain of Child's activities with Father. However, the trial court failed to note that Father had engaged in actions that kept Mother out of contact with Child. Specifically, Father testified that he did not allow phone calls between Mother and Child for approximately six weeks starting in March 2012 because he was angry about the proposed relocation. N.T. at 191-92.

The trial court determined that both parents are capable of performing their parental responsibilities. Father conceded that, post-adoption and pre-separation, Mother was primarily responsible for taking Child to medical appointments. The trial court concluded from Father's hearing testimony that Father also was knowledgeable of Child's needs and that Father had been equally responsible for Child's care and upbringing for the immediately preceding two and a half years. T.C.O. at 27-28. The trial court's finding is belied by Father's testimony that, post-separation, he had never taken Child to his medical appointments, dental appointments, or vision therapy appointments. N.T. at 182-83.

The trial court opined that, in this case, the need for stability and continuity in Child's education and family life was of critical importance. The trial court found that this factor favored Father, who remained in the same area where Child had resided since Child's arrival from Ethiopia. The trial court ascertained that Child was well-adjusted to school, played T-ball on the team that Father coached, had strong bonds with Father's church community members, attended many church activities, and developed friendships in the area where Father lived. The trial court emphasized that, while Child had known Father's wife, D.M., and D.M.'s sons for two of his five years, Child was introduced to Mother's current husband, C.S., and his cousin's children less than a year prior to the hearing. T.C.O. at 28. However, the record again belies the trial court's finding. Mother testified that Child met C.S. in April 2011, and the cousins in June 2011. N.T. at 31-32. That was more than a year prior to the hearing.

We are not convinced that Mother's move would undermine Child's sense of stability. The record reflects that Child is adaptable and has bonded with C.S. and the cousins. N.T. at 32. It also is clear that, while Father's church community is important to Child, Mother has created a community for Child as well, through her creation of an Ethiopian adoption network. ***Id.*** at 28. Through this group, Child has been exposed to Ethiopian culture, and has developed friendships with other adopted children and their adoptive families. ***Id.*** at 28-29.

In reaching its decision, the trial court also considered the availability of extended family and Child's sibling relationships. The court found that these two considerations favored Father heavily, particularly in view of Child's relationship with his stepbrothers and also with D.M.'s extended family, which lives close by in Exeter Township, Berks County. At the hearing, D.M. testified that Child had developed a strong bond with Child's stepbrothers and with other family members. T.C.O. at 28-29. However, Mother and C.S. testified that Child has a close relationship with C.S. and with his cousin's sons. N.T. at 32-33, 100-01. Not only are C.S.'s cousin's sons closer in age to Child, but both of D.M.'s sons were heading to college, although one would still be living at home. N.T. at 136. Again, the trial court discounted evidence favorable to Mother, without a clear basis for doing so.

With regard to the parties' availability to care for Child or to make appropriate childcare arrangements, the trial court found that the factor favored Father. The court concluded that, due to the nature of his employment, Father's schedule was considerably more flexible than Mother's. T.C.O. at 30-31. Mother worked regular office hours and followed a formal work schedule. Yet, competent evidence of record revealed that Mother's schedule was flexible. The trial court did not comment on the evidence that, despite Father's flexibility in working hours, the parties employed a full-time nanny during part of the marriage and that, when Child

was in daycare and pre-school, Father did not pick Child up until after 5:00 p.m. N.T., 116-17; 165, 188.

Turning to the court's determinations with regard to the relocation factors, the trial court determined that, with respect to the "nature, quality, extent of involvement and duration of the [C]hild's relationship with the party proposing to relocate and with the nonrelocating party, siblings and other significant persons in the [C]hild's life," Father and Mother had been equally involved in Child's life since the date of his adoption, and particularly since the date of the parties' separation. T.C.O. at 17. The testimony was clear that Mother was the primary care-taker during the marriage. T.C.O. at 27. However, the court determined that, post-separation, both parties had shared in caring for Child. As noted, *supra*, this determination was undermined somewhat by Father's own testimony.

In fashioning its order with regard to relocation, the trial court considered "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." T.C.O. at 20. The trial court found no evidence that Mother was relocating to improve either her employment opportunities or her earning potential. The trial court reasoned that, while the relocation might enhance Mother's life emotionally because she will be living with C.S., Mother would receive no other statutorily relevant enhancement by living in Glen Mills. T.C.O. at 22. The court also

found Mother's motivation for relocation was not based upon financial reasons, but on her desire to live with C.S.

We believe that the trial court underplayed the persuasiveness of Mother's testimony about the financial necessity of the move. The parties agreed to a short-sale of the former marital residence. It seems unlikely that the mortgage company would have agreed to such a sale unless there was some issue with mortgage payments. Father testified that he was well aware of Mother's attempts to refinance the home and of the fact that she had been refused. N.T. at 194-95. Additionally, the timing of Mother's engagement and the sale of the home would seem to indicate that the need to move precipitated the engagement,[3] rather than that the engagement precipitated the move, as the trial court concluded. We disagree with the trial court's conclusion that relocation offers no financial benefit to Mother. Relocation permits Mother to get out from under the mortgage on the marital residence, and also permits her to share expenses with her husband.

The trial court also considered whether the relocation would enhance the general quality of life for the Child. The court found that Mother failed to carry her burden with respect to this issue. Mother presented evidence to the trial court that the Garnet Valley School District was ranked sixth in the

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[3] ***See*** N.T. at 98-99 (C.S. testifying that the engagement in February 2012 came about in discussions with Mother after she put her home on the market in January 2012.).

state by an online website, whereas Exeter Township School District, in which Father resides, was ranked 125th out of 545 districts statewide. Father testified that he was satisfied with the Exeter School District. N.T. at 203. After hearing, the trial court made many purported findings of fact with regard to the Exeter School District, including that district's reputation in the community, its funding, its classrooms and technology, its teachers, its athletic teams, and its musical and theatrical activities. T.C.O. at 21. There was no testimony whatsoever to support those findings. Mother testified concerning the school that Child would attend in Delaware County and concerning the rankings of the two school districts: Garnet Valley and Exeter. N.T. at 41-43. The parties testified that, had Mother not moved, Child would have attended Twin Valley School District, and that the parties had discussed Child attending Twin Valley, but not Exeter or Garnet Valley. N.T. at 59-60, 166, 194, 202. As neither Mother nor Father still resided in the Twin Valley district, the choice was between Garnet Valley where Mother lived, or Exeter where Father lived.

The trial court may not consider evidence that is outside the record. ***M.P. v. M.P.***, 54 A.3d 950, 955 (Pa. Super. 2012). A court abuses its discretion when it relies upon outside information as the basis for its decision. ***Id.*** Even assuming, *arguendo*, that the information about Exeter

School District properly could have been subject to judicial notice,[4] Mother had no reason to suspect that the court would take notice of such facts. Mother "was entitled to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." ***Id.*** (internal quotation marks omitted). In relying upon facts outside the record, the trial court erred.

As part of her assertion that relocation was in Child's best interest, Mother also argues that suburban Philadelphia is culturally superior to the more rural Berks County. Father testified that Mother often told him that she did not want to raise Child in "Amishville." The trial court found this to be a reference to the Amish community in the vicinity of Morgantown and nearby Lancaster County. The court opined that Mother's statements conveyed a cultural bias. The court expressed puzzlement at Mother's comments in view of the fact that, at the time of Child's adoption, Mother lived in Berks County and intended to raise Child in that area. Father testified that, while Exeter Township is predominantly Caucasian, it has a diverse ethnic population, and that he observed many bi-racial families. T.C.O. at 20-22; 23 Pa.C.S.A. § 5337(h)(7).

The topic of race appeared to be an area of disagreement between the parties. As evidenced by her involvement in providing Child exposure to Ethiopian culture, Mother wants Child to have a strong connection to his

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[4] ***See*** Pa.R.E. 201 (Judicial notice of adjudicative facts).

roots. N.T. at 28. Father testified that Mother believed Child needed "to be raised in an area and in a surrounding that's more like him and his skin color." ***Id.*** at 208. Father, on the other hand, felt, "Ethiopia is where he comes from, but his identity is his family and his home and where he lives. . . ." ***Id.*** Both parents obviously have given this difficult issue thought and consideration. The inability to reach an agreement gives context to Mother's comments about Berks County and explains her emphasis upon the cultural aspects of her new location.

Mother also argues that the trial court was prejudiced against her, as demonstrated by questions from the court concerning her alleged extramarital affair. Mother's Brief at 20-21. We must review the record to determine whether bias or prejudice influenced the court's decision. Here, we find cause for concern. Some of the trial court's questioning strayed into irrelevant areas, and could be viewed as exhibiting bias or ill will. Following Mother's redirect examination, the court, *sua sponte*, questioned Mother about an affair in which she allegedly engaged during the parties' marriage. N.T. at 74. Significantly, although the issue was mentioned in Father's pretrial statement, neither party raised it during Mother's direct or cross-examination. N.T. at 76. After the trial court raised the issue *sua sponte*, Father testified during his direct and cross-examination regarding the alleged affair. N.T. at 149-155, 179. Mother then rebutted Father's testimony. N.T. at 226-27. Marital misconduct is not among the factors to

be considered in determining custody. 23 Pa.C.S.A. § 5328(a). While the alleged affair arguably was relevant to Mother's credibility, the trial court's *sua sponte* importation of the issue created the appearance of bias or ill will.

Beyond the issue of the alleged affair, the trial court questioned Mother aggressively about a photo album that she had prepared as an exhibit. Mother labeled pages "[Child's] Family" that showed Mother, C.S., C.S.'s cousin's sons, and Child. *Sua sponte*, the trial court questioned why Mother would label the page that way in the following exchange:

> THE COURT: Would you agree that it wasn't [Child's] family before April 2012? Would you agree that that's true?
>
> [MOTHER]: Legally, yes.
>
> THE COURT: Well, how about any other way? Before April 2012, was it his family in any other way? Am I correct the answer is no?
>
> [MOTHER]: No.
>
> THE COURT: So you would say that that's an exaggeration when you put at the top of that picture "[Child's] Family"?
>
> [MOTHER]: Not intentionally misleading, but yes.

N.T. at 86. There was a similar exchange regarding photos of Mother's new home that she labeled "[Child's] Home":

> THE COURT: There's a picture here of the residence in Garnet Valley, and on the top it says, "[Child's] Home;" Correct?
>
> [MOTHER]: Yes, Your Honor.
>
> THE COURT: Would you agree that that's an exaggeration or misrepresentation?
>
> [MOTHER]: No. I think the instructions were sent, pictures of [Child's] home, so I was trying to label - - -

> THE COURT: But nobody told you to put that heading on it, that was your choice, right?
>
> [MOTHER]: Okay. I apologize.

N.T. at 86-87.

It is not unusual for parties in custody litigation to provide photographs of family and homes for the trial court to consider. Indeed, Father admitted similar photographs of his home and of Child with D.M. and D.M.'s sons. The trial court interposed no interrogation as to those. The trial court gave undue focus to the relatively minor issue of Mother's labels on the photos, labels which do not weigh into the child custody factors. The above-transcribed exchanges carry a tenor of cross-examination and appear unduly adversarial. They do not comport with the trial court's role. While questioning from the bench is permitted, the trial court must remain impartial and must appear so. Such interrogations may raise an inference of bias or ill will.

We emphasize that any one of the errors made by the trial court alone would not require reversal. However, when taking their cumulative weight into account, we are constrained to perceive a pervasive bias against Mother. As such, notwithstanding our deferential standard of review, we are obliged to reverse the trial court's order and remand for a new hearing on Mother's petition.

As Mother also argues that the trial court erred in treating this case as a relocation, we address that issue in order to avoid any confusion on

remand. The Child Custody Act defines a "relocation" as "[a] change in residence of the child which significantly impairs the ability of a nonrelocating party to exercise custodial rights." 23 Pa.C.S.A. § 5322(a). The issue of whether a move is a "relocation" does not depend solely upon the distance of the move or the number of hours of custody involved, but rather upon the facts of the particular case. In ***C.M.K. v. K.E.M.***, 45 A.3d 417, 426 (Pa. Super. 2012), we determined that the mother's proposed move of sixty-eight miles constituted a "relocation." The father's custodial rights were impaired because the father had regular custodial time and was an active participant in the child's life, including school and extracurricular activities. ***Id.*** We found that the mother's proposed relocation "would break the continuity" of the father's involvement with the child, and that the mother's offer of additional custody time would not ameliorate the adverse effects. ***Id.***

Here, the trial court viewed the facts before it as very similar to those in ***C.M.K.***. In this case, although Mother's move was less than two hours from her former residence, she failed "to consider the day-to-day impact of such a move on the intangible elements of Father's custodial rights, such as the privilege of coaching the Child's T-Ball team[,] as well [a]s making 50/50 shared custody impossible." T.C.O. at 10.

Mother filed a relocation notice that complied with 23 Pa.C.S.A. §§ 5337(c)(3)(i-xi), as required by subsection 5337(c)(2). This indicates that Mother also viewed this case as a relocation.

Mother is correct that the statute contemplates that a party might move prior to a judicial ruling on relocation. 23 Pa.C.S.A. § 5337(l) ("If a party relocates with the child prior to a full expedited hearing, the court shall not confer any presumption in favor of the relocation."). However, the statute also states that no relocation shall occur without the consent of the other parent or permission of the court. 23 Pa.C.S.A. § 5337(b). While Mother was free to move, she was not free to relocate Child without the court's permission. Additionally, Mother unilaterally changed Child's sports team and enrolled Child in school,[5] in derogation of the July 2009 order, which specified that the parties shared legal custody. T.C.O. at 11. The trial court repeatedly referred to Mother's move as a violation of the statute. That is technically true, but Mother did continue to follow the custody schedule, with no reported imposition on Father's scheduled time. While we commend Mother for limiting disruption to Child's time with Father, and while we understand that the circumstances of the sale of the former marital

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[5] Child had been attending a private daycare and pre-school that extended through kindergarten. As of September 2012, Child would have been too old to continue attending that school and would have been required to enroll in a different school. N.T. at 22-23.

residence were, to some extent, beyond her control, Mother should have taken steps to expedite her relocation request.

The trial court noted that the relocation would place Child an hour to an hour and a half from Father's residence. Father and Mother previously had lived fifteen minutes from each other. The court found that "the relocation would render the 50/50 custody impossible." T.C.O. at 20. Child's commute to and from school would be onerous regardless of which school was chosen. Moreover, although Father's involvement would not be precluded by the relocation, the move would alter the nature of the relationship. The trial court found that Mother's proposed alternate schedule would not counterbalance the disruptive effect that relocation would have on Father's relationship with Child. T.C.O. at 20.

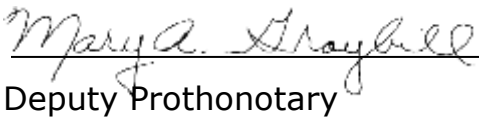
While we have taken exception to some of the court's findings, we cannot conclude that it was manifestly unreasonable for the trial court to conclude that the length of the commute would make a shared custody arrangement impracticable for a school-age child. Accordingly, the trial court did not err in considering this to be a relocation case.

Order reversed. Case remanded for hearing. Jurisdiction relinquished.

Ford Elliott, P.J.E. concurs in the result.

Colville, J. files a Dissenting Memorandum.

Judgment Entered.



Deputy Prothonotary

Date: August 15, 2013