

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

L.P.H.,

Appellant

v.

L.R.H.,

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1320 WDA 2013

Appeal from the Order July 9, 2013
In the Court of Common Pleas of McKean County
Civil Division at No(s): 580 C.D. 2007

BEFORE: FORD ELLIOTT, P.J.E., BOWES, and WECHT, JJ.

MEMORANDUM BY BOWES, J.:

FILED: March 6, 2014

L.P.H. ("Mother") appeals from the July 9, 2013 order denying her request to relocate to West Blocton, Alabama with the parties' two minor daughters. We affirm.

Mother and Father married on September 15, 2001 and daughters were born of the marriage during March 2003 and January 2005. The older daughter is approximately eleven years old and the younger child is nine.¹ On April 25, 2007, Mother filed a complaint for divorce, which requested, *inter alia*, primary physical custody and legal custody of the children. On August 17, 2007, Mother was awarded primary physical custody and Father was granted periods of partial custody. The parties shared legal custody.

¹ As the children have identical initials, we distinguish them by their respective ages.

Father exercised regular custody on alternating weekends and enjoyed informal periods of custody during the week. Father, who is disabled as a result of brain cancer, lives approximately twelve miles from Mother in Gifford, Pennsylvania. His parents and large extended family also reside in McKean County.

Prior to initiating the underlying relocation proceedings, Mother resided with the children and her paramour of approximately three years, K.S., in a three-bedroom rental home in Bradford, Pennsylvania. The eleven-year-old child is currently a fifth grader at School Street Elementary School in Bradford.² Her younger sister attends third grade at George G. Blaisdell Elementary School. Both children are proficient students. K.S. contributed to the household in Bradford and recently obtained a position as a maintenance mechanic in Alabama. Mother, who is unemployed, received a job offer in Alabama as an assistant manager at her sister's restaurant. The children have three twenty-something half-siblings, two sisters and a brother, who do not live in the home, from Mother's prior relationships. One half-sister resides in Texas and the other, who lives in Pennsylvania, intends to move to Alabama, and upon satisfying the residency requirements, enroll in a masters program at the University of Alabama. The children have had

² The Bradford Area School District utilizes sister elementary school campuses. The George G. Blaisdell Elementary School instructs kindergarten through second grade. Thereafter, the children are promoted to School Street Elementary for grades three, four, and five.

only limited contact with their half-brother because he lives in a residential care facility in Pittsburgh.

On May 31, 2013, Mother provided Father notice of relocation pursuant to 23 Pa.C.S. § 5337(c). On June 10, 2013, Father filed a counter-affidavit regarding relocation under § 5337(d), wherein he objected to the proposed relocation and requested an evidentiary hearing. During the one-day hearing, Mother and Father both testified and presented additional witnesses. Mother called K.S. to the witness stand, and Father presented David A. Jones and Sarah Tingley, his daughters' respective principals, and his sister, S.M. ("Paternal Aunt"). On July 9, 2013, the trial court entered the above-referenced order and opinion denying Mother's petition for relocation. The opinion delineated the trial court's consideration of the ten statutory factors enumerated in 23 Pa.C.S. § 5337(h) that are relevant to relocation cases. Trial Court Opinion and Order, 7/9/13, at 5-8. This timely appeal followed.³ Mother complied with Pa.R.A.P.(a)(2)(i) and filed a Rule 1925(b) statement concurrent with her notice of appeal.

Mother presents the following issues for our review:

1. Whether the trial court erred in refusing to grant Mother's request to relocate with the minor children to West

³ Prior to filing her notice of appeal, Mother filed a motion for reconsideration that requested additional evidentiary proceedings before a different trial court judge. The trial court denied the motion summarily after Mother filed the notice of appeal. Mother does not challenge the order denying reconsideration.

Blocton, Alabama, when the testimony showed the father would have had more time with the children under Mother's propos[ed custody arrangement] than he currently enjoys?

2. Whether the trial court erred in denying Mother's request to relocate with the minor children when the testimony indicated that Mother would experience a significant financial benefit which would have a positive effect on the minor children?

3. Whether the trial court erred in denying Mother's request to relocate with the minor children when the testimony indicated that the minor children enjoy a close relationship with Mother's partner who had already relocated to West Blocton, Alabama?

4. Whether the trial court erred in denying Mother's request to relocate with the minor children when Mother presented sufficient competent, credible evidence to sustain her burden of proof that, based on the factors which must be considered for relocation, the relocation serves the best interest of the minor children?

Appellant's brief at 4.

We recently reiterated our scope and standard of review of a custody determination 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.

With any child custody case, the paramount concern is the best interests of the child. This standard requires a case-by-case assessment of all the factors that may legitimately affect the physical, intellectual, moral and spiritual well-being of the child.

M.J.M. v. M.L.G., 63 A.3d 331, 334 (Pa.Super. 2013) (quoting ***J.R.M. v. J.E.A.***, 33 A.3d 647, 650 (Pa.Super. 2011)).

At the outset, we observe that Mother's third issue, relating to her daughters' relationship with K.S., is waived because she failed to raise that argument in her Rule 1925(b) statement, and the trial court did not have an opportunity to confront the issue below. Thus, we do not address it herein. **See** Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement . . . are waived"). We note, however, that the trial court did, in fact, consider K.S.'s involvement with the family, including his financial contributions to the household, and the fact that the proposed relocation was predicated primarily upon his acceptance of employment in West Blocton, Alabama.

As we previously noted, § 5337(h) lists ten factors for the court to address in determining whether to grant a proposed relocation. Those factors are as follows:

(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. § 5337(h).

In its opinion and order, the trial court addressed each of the foregoing factors. The trial court found that factors one through three militated against relocation. **See** Trial Court Opinion and Order, 7/9/13, at 5-6. Factors six and seven weighed in Mother's favor. **Id.** at 7-8. The eighth factor balanced equally, and the remaining factors were inapplicable, *i.e.*, four, five, nine, and ten. **Id.** at 6-8. Thereafter, in responding to the specific challenges Mother raised in her Rule 1925(b) statement, the trial

court expounded on the relevant aspects of its consideration of factors three, six and seven. Rule 1925(a) Opinion, 9/16/13, at 2-7.

On appeal, Mother first argues that the trial court failed to consider that, under her proposed custody arrangement following relocation to Alabama, Father would enjoy greater periods of custody with his daughters than he exercised in Pennsylvania. Mother proposed that Father exercise custody during the children's entire summer vacation and every holiday break in their academic calendar. In addition, she offered to permit Father to visit the girls in Alabama as often as he could and she offered to earmark Father's child support payments to offset his travel costs. Thus, Mother reasoned that, under her proposed arrangement, Father could exercise physical custody approximately ninety-two days per year, as opposed to the seventy-eight days per year that he currently has custody. She continued that the increase in the duration of the custodial periods would permit the children to continue the beneficial relationships the children maintain with Father and his extended family in Pennsylvania. Mother's brief at 11-12.

In rejecting this aspect of Mother's argument in its Rule 1925(a) opinion, the trial court concluded that the potential net increase in physical custody did not warrant uprooting the children from the secure bonds they shared with their extended family in Pennsylvania. The court reasoned,

Mother's first argument is couched more in terms of a negotiation tactic than it is in the best interests of the children. The Court finds Mother's argument to be disingenuous. Father currently enjoys regular and periodic custody of the girls, and the record shows that this schedule contains qualitative periods

of custody. Father is active in the girls' school events, they enjoy visits and family outings with paternal, extended family, and Father lives only twenty miles from Mother's house. Merely because Father may enjoy more periods of custody does not equate to a qualitative increase. In other words, more is not always better. Therefore, the Court respectfully submits that it was not in error to deny the relocation despite the potential increase in Father's custody schedule.

Rule 1925(a) Opinion, 9/16/13, at 3. The certified record sustains the court's finding.

During the relocation hearing, Father testified that in addition to his bi-weekly periods of physical custody on alternating weekends, he attends his daughters' educational activities and social events, assists with homework, and takes them to church. N.T., 7/1/13, at 110-114, 116, 142. Likewise, he is available for the children during the school week if they get sick at school, and he has responded when the eleven-year-old child forgot to take her musical instrument to school. ***Id.*** at 120, 123-124.

In addition to Father's description of his contact with his daughters, Paternal Aunt outlined the extent of the children's relationship with their extended family in the Bradford area. Paternal Aunt testified that the children have strong bonds with her two similarly-aged daughters and that the foursome engage in various activities together during Father's period of weekend custody. ***Id.*** at 85-87. She explained that Father's large extended family lives in the Bradford area and regularly assembles at the paternal grandmother's home on the alternating weekends that the girls are in Father's custody. ***Id.*** at 86, 91-92. The children also celebrate birthdays

and holidays with Father and other members of their extended family, several of whom have children their age. **Id.** at 89-92, 95-98, 101. In contrast to their frequent interaction with children in Father's family, there are no similarly-aged family members in West Blocton, Alabama with whom the children can interact. **Id.** at 130. The only relatives that the children have in Alabama are an aunt and uncle and two adult cousins. **Id.** at 20, 58.

Moreover, in addition to Father and Paternal Aunt's testimony regarding the children's close ties to Father's extended family in Bradford, Mother testified that the girls have strong relationships with her extended family in Bradford as well. **Id.** at 31. Indeed, the majority of the children's family resides in the the Bradford area. **Id.** at 38-39. One particular family member, a quasi-grandmother figure named Suzanne, interacts with the girls frequently, at least twice per week. **Id.** at 32-33. Mother testified that Suzanne takes the children to church regularly and recently arranged for one of the children to be baptized. **Id.** at 31-32. Likewise, she registers the children in camps and takes them swimming and to activities at the local University of Pittsburgh campus. **Id.** at 33.

As Father accurately characterized the relevant situation, "All of the people [who] play a significant role in the children's lives are in Bradford[.]" Father's brief at 14. Accordingly, we agree with the trial court's reasoning. Even though the proposed custody arrangement would net a fourteen-day

increase to Father's custody, preserving the frequent contacts that the children currently maintain with Father and their extended family is better than concentrating all of those interactions into a few seasonal visits. Mother's contrary assertion that the proposed gain in Father's yearly custody would benefit the children is unpersuasive.

Mother's second and fourth arguments concern the court's consideration of the putative financial and emotional benefits of relocation upon her and her children pursuant to the sixth and seventh factors listed in § 5337(h). In essence, Mother's second claim asserts that the trial court did not consider the concomitant benefits the children would enjoy as a result of her employment and K.S.'s increased wages in Alabama.

During the hearing, Mother testified that she was offered a position as an assistant manager at her sister's restaurant in West Blocton. She contends that, since she is currently unemployed and K.S. was at the top of the wage scale in his present position, the financial benefits associated with the proposed relocation to Alabama automatically inure to the children. Hence, she contends that the court erred in characterizing the economic benefit of relocation as "merely ancillary" to the children's best interest.

Likewise, Mother's fourth assertion is a catch-all objection that the trial court overemphasized evidence concerning the children's relationships with Father and their extended family in Pennsylvania and did not adequately consider her evidence regarding the positive impact of relocation on the

children's lives. Mother highlights evidence regarding the possibility that the children's maternal grandmother and half-sister might relocate to Alabama, and her ability to purchase a home in Alabama from her niece on an installment contract despite a contemplated bankruptcy. As there is substantial overlap in Mother's two arguments regarding the potential financial benefits of relocation upon her and the children, we address the contentions collectively.

Upon reviewing the relevant factors, the trial court concluded that, while Mother certainly would benefit from fulltime employment and K.S.'s increased wages, the record does not reveal whether the cost of living in West Blocton would offset any increase in the family income. Likewise, the court reasoned that, assuming the cost of living is similar in the two locations, the increased income would not necessarily result in an emotional benefit for the children. **See** Opinion and Order, 7/9/13, at 7-8. In reaching this conclusion, the trial court considered that the children's access to extracurricular activities is identical in both locations, which are geographically similar, and that in light of the remaining factors, the potential economic benefit of the proposed relocation was insufficient alone to sustain Mother's request to relocate. The court concluded,

After considering all of the statutory factors, the Court will not approve Mother's relocation. The children's strong ties and familial bonds are in McKean County. At their formative ages, and while maintaining proficient academic marks in school, a disruption to a state 900 miles south would not be in their best interests. Though Mother's and [K.S.'s] efforts to relocate are

admirable insofar as they are seeking fulltime employment, the relocation is based primarily around the parties' upgraded financial status; the beneficial effect, if any, upon the children is merely ancillary.

Id. at 8-9.

In its Rule 1925(a) opinion, the trial court subsequently elucidated that the relocation was predicated upon Mother's and K.S.'s increased earnings, but that benefit would not negate the fact that the relocation would not expose the children to greater "culturally diverse experiences, expanded scholastic opportunities, or closer family ties." Rule 1925(a) Opinion, 9/16/13 at 7.

The certified record supports that trial court's conclusion. In addition to the evidence of the the children's robust relationships with their extended family in Pennsylvania and the availability of similar opportunities to engage in extracurricular activities in Pennsylvania as Alabama, during the evidentiary hearing, Father adduced evidence that both of his daughters were outstanding students and that they were thriving in their current educational environment. Sarah Tingley, the eleven-year-old child's principal at School Street Elementary School, testified that the child is an excellent student academically and behaviorally and well liked. N.T., 7/1/13, 80. The child tested proficient or advanced in math and science and almost proficient in reading. ***Id.*** at 79. Ms. Tingley characterized her as "very outgoing, very friendly, very bright [with several] friends. She's just a good girl." ***Id.*** at 80.

Correspondingly, David A. Jones, the nine-year-old child's principal at George G. Blaisdell Elementary School, testified that the rising third grader is proficient or advanced in all of her classes. ***Id.*** at 62, 64-68. She is a popular student and does not have any behavioral problems. ***Id.*** at 62, 68-69. Mr. Jones also testified that the elementary school that the younger child attends has continually made adequate yearly progress under the Pennsylvania System of School Assessment ("PSSA"), a standardized assessment test administered to all public schools in Pennsylvania. ***Id.*** at 70. Moreover, the school earned at or above the national average on Terra Nova, a nationally recognized examination that is administered annually to second graders. ***Id.*** at 71.

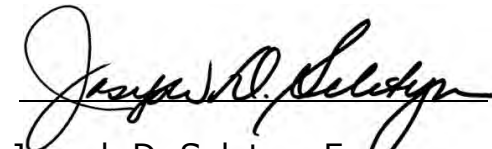
Mother conceded that both of the girls were excelling in their respective schools. ***Id.*** at 35. However, in contrast to the familiarity the children enjoy in their respective schools and the verifiable excellence that the Bradford area schools have demonstrated, the nature and quality of the public schools in West Blocton, Alabama is uncertain because the children have never been to Alabama, and Mother did not visit or present any relevant evidence concerning the school that she proposes her daughters attend. ***Id.*** at 35, 39.

As demonstrated by the foregoing evidence adduced during the custody hearing, the certified record supports the trial court's conclusions that Mother did not satisfy her burden of proving that relocating to Alabama

was in her daughters' best interest. Mother's contrary arguments essentially request that this Court ignore the trial court's fact finding and reweigh the evidence and make a determination in her favor. We must decline. **See *M.J.M., supra*** at 334 ("We must accept findings of the trial court that are supported by competent evidence of record. . . . 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."). Since the certified record sustains the trial court's findings of fact and its legal determinations are sound, we find no basis to disturb its custody decision.

Order affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/6/2014