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PAULA A. KAISER, Plaintiff vs. GORDON W. KAISER III,
Defendant, Franklin County Branch Civil Action - Law F. R.
1997 - 317

Custody - relocation by mother to Arkansas - split of siblings - preference of the children

1. Mother and father have five children. Mother and father are Arkansas natives who moved to Pennsylvania for father's job in 1994. After separation, mother seeks relocation to Arkansas with all five children.
2. It is the policy of the law that it is preferable to raise siblings together; however, this is not a determinative factor and the rule must yield if it is in the best interests of the child.
3. The preferences of the children must be considered as a factor; the older the children, the more weight must be given to the preference of the child.
4. Court gave great consideration to preferences of 14-year and 11-year old children, who wanted to live with mother in Arkansas.
5. Mother cannot adequately deal with the middle (7-year old) child who has some behavioral problems. The middle child also expressed a preference to live with his father. Evidence showed his behavior has improved since he has lived with his father.
6. While court would prefer not to separate siblings, it will be in the best interests of all children to award custody of four children to mother and custody of the middle child to father.
7. The court must consider three *Guber* factors in determining whether the custodial parent is permitted to relocate to another state.
8. Mother is permitted to relocate to Arkansas with the four children. Move will significantly improve life of mother and children because there will be emotional and financial support from mother's family and job opportunities for mother; mother's motive to move is not based on desire to frustrate father's contact with the children and she has proposed liberal visitation schedule for father; sufficient possibilities for visitation by father exists because all five children will spend half of the summer with each parent.

Janice M. Hawbaker, Esq., Counsel for the Plaintiff

Bradley L. Griffie, Esq., Counsel for the defendant

OPINION AND ORDER

Walker, P.J., August 11, 1998:

Findings of Fact

1. The parties to this custody action are Plaintiff Paula Kaiser and Defendant Gordon Kaiser, also called Trey. They have five children: Sean, born November 14, 1983; Jordan, born November 1, 1985; Jacob, born January 19, 1991; Jessica, born October 31, 1992; and Gordon (also called Drake), born February 27, 1996.

2. Paula filed a custody petition on August 19, 1997, seeking primary custody of all five children and permission to relocate to Arkansas. Hearings on this matter were held on April 30, 1998 and July 23, 1998.

3. Paula and Trey were married on June 19, 1982. They separated in November 1997.

4. Both Paula and Trey are Arkansas natives. Most of Paula's family, including her parents and a sister, live in DeWitt, Arkansas. Most of Trey's family, including his mother, grandparents and a half sister, live in Fort Smith, Arkansas.

5. From 1981 to August 1984, Paula and Trey lived in Fort Smith, Arkansas. From August 1984 until February 1988 they lived in Kansas City while Trey went to Chiropractic College. They then went back to Fort Smith, where Trey obtained a job as a chiropractor. They stayed there for five or six months. In May 1988 they moved to Rogers, Arkansas, because Trey had found another job there as a chiropractor. They stayed in Rogers until July 1989. Then the family moved to DeWitt, Arkansas, because Trey wanted to open his own chiropractor practice there. They stayed in DeWitt for five years. Trey was struggling in his own practice, and when a good position became available in Chambersburg, Pennsylvania, the family moved. This occurred in May 1994. All moves by the family occurred for Trey's education or jobs.

6. In Chambersburg, Trey worked for Dr. Cutright for one year. Then the practice was sold to Dr. Fiss, who continued to employ Trey for another one and a half years. Trey earned approximately \$800 net per week. When the contract expired in April 1997, it was not renewed. Trey testified first that Dr. Fiss did not want to renew it to cut expenses. However, later he testified that Dr. Fiss offered him a new contract, in which Trey would take home 23% of the profits rather than the 27% he had been earning under the previous contract. Thus, this court finds that Trey was offered another job but chose not to accept it. Trey had also been offered a job opportunity in Rogers, Arkansas, in the spring of 1997, but he refused to accept it.

7. In September 1997, Trey acquired office space in McConnellsburg, Fulton County, Pennsylvania to open his own practice. Trey testified that he made \$25,000 in his practice in McConnellsburg from January until June 1998, and that he averages about \$2,000 to \$2,500 per month. He also testified that his office expenses are only \$800 to \$1,000 per month due to the fact that he does not employ a receptionist. He furthermore stated that he gets 25 to 30 new patients a month, although this court finds it difficult to believe that Trey can schedule so many new appointments while he is seeing patients without the help of a receptionist.

8. Trey has several large debts. He owes approximately \$72,000 in student loans. Trey testified that he made a few payments while they were still living in Arkansas, after which he received a notice that he was in default and that he owed \$185,000. After that notice, he testified that he tried to obtain papers on the loan, but that the lender refused to provide them. For that reason, he stopped making payments on the loan. He attempted to file for bankruptcy, but it was dismissed. He has not yet made any further payments and testified that he expects to hear about the loans soon. Trey also owes approximately \$30,000 on a bank loan he obtained in Arkansas to start his own practice. He took office equipment which had been given as collateral for that loan with him to Pennsylvania without the banks' permission. Upon questioning by counsel, he testified that he did not recall that he had an agreement with the bank stating he could not take the office equipment with him. Trey also still owes money for the children's tuition payment for Shalom Christian Academy. Trey appeared to realize for the first time at the hearing on July 23, 1998, that it had not been paid and that this is the reason the children's report cards were not released by the school. He furthermore testified that the reason for the non-payment of the full tuition was not that he could not afford to pay, but just that he chose not to pay it. Trey in the past has borrowed money from Paula's father, and Paula testified that Trey recently asked her to lend him money.

9. Paula worked as a dental hygienist until 1989. She has kept her dental hygienist license in Arkansas active. She testified that as a dental hygienist in Arkansas she can earn approximately

\$25 per hour; in Pennsylvania, she can earn approximately \$18 per hour. While the family lived in Chambersburg, she has had several part time jobs. She has delivered newspapers, briefly engaged in child care, and distributed magazines to stores in the evenings. The rest of the time she has cared for the children. Paula also receives approximately \$29,000 in interest income from assets her father manages for her. Paula's father sends her approximately \$19,000 to \$20,000 per year and withholds the rest to pay the taxes. Paula also testified that her father has offered her further financial assistance if she moves back to Arkansas. Paula's father also manages some assets for the children. Paula has furthermore liquidated a \$30,000 bond to pay for living expenses and hospital bills she incurred in 1997 when she had a car accident.

10. A temporary order was entered by this court on October 2, 1997, awarding primary physical custody of Sean, Jessica and Drake to Paula, and primary physical custody of Jordan and Jacob to Trey, with each parent having custody of all five children on alternating weekends. Paula has taken care of all five children while Trey worked. Both Paula and Trey have been flexible with the custody arrangements to accommodate each other's and the children's needs. There was testimony as to some incidents which occurred when the children were at Paula's house, such as an incident where the police came over after a report of the neighbor regarding yelling by Jacob, and an incident regarding fire in the garage caused by fireworks. However, this court finds that these incidents were fairly common household incidents and this court did not attach any importance to them.

11. Paula has encountered difficulties in raising Jacob, who is 7 years old. He has been disrespectful to her and he is disobedient. This summer, he was suspended from day camp for behavior problems. He also had to be disciplined at Shalom Christian Academy several times, in the form of paddling and detention. His first grade teacher, Lisa Eby, testified that Jacob's behavior has improved since November 1997 when he started living with his father.

12. With regard to Trey's conduct toward the children, this court finds the following: One of Trey's hobbies is hunting and

he has taken Sean and Jordan along several times. He testified that Paula would leave the disciplining of the children to him, although he also testified that she has stricken Sean with a belt and gave Jordan a black eye. Trey takes an interest in the children's schooling and has attended parent teacher conferences. He believes Paula is not able to handle the children well. He also believes that Paula's father will not assist Paula and the children unless they move to her hometown of DeWitt, Arkansas. Paula wants to take Jacob and Jessica to counseling to help them deal with the divorce, but Trey believes that counseling for children of such young age is counterproductive and that all they need is love. Trey allowed Jordan to have several knives, including a knife with a long blade that locks in place, and a "homemade whitt." It appeared that Trey did not think it was wrong for Jordan to have such knives until questioned about it by the court. Trey has also told the children that Paula is responsible for the break-up of the family because she started the custody action that split them up. Trey does appear to love his children very much.

13. Paula appears to be a somewhat nervous person who has a tendency to become hysterical. She also appears to be insecure. This was demonstrated by the fact that she made Sean call his father when they were at the pool to ask permission to walk to the Wal-Mart nearby. She appears to love the children very much. She has been the primary caretaker of all five children until the separation.

14. In June 1998, Paula took all five children on a trip to Arkansas to visit family, even though Trey testified that Paula does not get along well with her parents. She also took the children to see their paternal grandparents for a weekend.

15. While Paula was in Arkansas she checked up on job opportunities in Rogers, Arkansas and she anticipates that, if permitted to move back to Arkansas, she will be able to work as a dental hygienist for several days per week at \$225 per day. She also checked on schools for the children and will be able to enroll the children in a private religious school in Rogers for a similar amount of tuition as currently charged for Shalom. Paula also anticipates her father will financially assist them upon their move to Arkansas. The average house rental will be higher than in

Pennsylvania and will cost approximately \$1,000 to \$1,400 per month for a four bedroom home.

16. If Trey would get custody of all five children, he anticipates that he will no longer need his mother to come over and help, as he had expected during the hearing on April 30, 1998. During the hearing on July 23, 1998, he testified that he will arrange for child care for the younger children with the lady across the street who runs a child care center from her home. However, he did not know her name nor did he check up on her references. He will also continue to keep them in the Shalom Christian Academy.

17. Jesse, Jordan, and Sean informed this court of their desire to move to Arkansas with their mother. Jesse, age 5, based her preference on the fact that her brother Jacob pushes her, and she anticipates that Jacob will live with his father. Jordan, age 12, has no real preference as to live with his mother or father but would like to move to Arkansas because he liked the school and the area when he recently saw it. Sean, age 14, wants to move to Arkansas because Rogers appears to be a nice town and he gets along with the extended family. Both Jordan and Sean indicated that part of their wish to relocate with their mother was based on their belief that their father will follow them. Of course, all children wanted their parents to get back together. Jacob, age 7 indicated that he wants to live with his father.

Discussion

Paula Kaiser, under a temporary order entered on October 2, 1997, has primary residential custody of Sean, age 14, Jessica, age 5, and Drake, age 2. The other two children, Jordan, age 11, and Jacob, age 7, are in primary custody of their father, Trey. Paula is now seeking custody of all five children and permission to move to Arkansas.

The paramount concern in a child custody case is the best interest of the children. *McMillen v. McMillen*, 529 Pa. 198, 202, 602 A.2d 845 (1992). One of the factors the court must consider is the policy of the law that it is preferable to raise siblings together. *E.A.L. v. L.J.W.*, 443 Pa. Super. 573, 591, 662 A.2d 1109 (1995). However, this is not a determinative factor

and the rule must yield if it is in the best interest of the child. *E.A.L.*, 443 Pa. Super. at 591. The preference of the children must also be considered as a factor. The older the children are, the more weight must be given to the preference of the child. *E.A.L.*, at 590.

This court gave great consideration to the preferences of Sean, age 14, and Jordan, age 11. Both were old enough to express a rational preference as to whom they wanted to live with. Both stated that they wanted to live with their mother in Arkansas. Both have recently seen the environment they would move to, and both expressed the desire to live there. This court furthermore took several other facts into consideration in making its decision. This court finds that Paula has been more mature in recognizing that Jacob and Jessica could benefit from counseling. Trey, on the other hand, found this idea to be ridiculous and stated his strong opinion that kids of that age do not need counseling, just love. This statement is contradicted by the fact that Jacob is still encountering behavioral problems, such as being dismissed from day camp. This court is furthermore impressed that Paula recognized the importance for children to have contact with their grandparents, and took them to see their paternal grandparents for a weekend even though Trey was not with them.

This court was not impressed with some of Trey's actions. For example, this court found it to be a serious judgment error on Trey's part to allow Jordan to possess a knife with a large blade and a "homemade whip." This court also found that Trey exercised bad judgment by telling the children that their mother was responsible for the break-up of the family. It is clear that the children love both parents, and they should not be exposed to one parent putting the blame on the other. Furthermore, this court did not feel that Trey was very serious about obtaining child care for the children if he were awarded custody. He did not even know the name of the "lady across the street" who runs a child care center from her home, nor had he checked out her references.

While this court finds that Paula has generally behaved in a mature way since the separation, it is also clear that she has a difficult time handling all five children. This court finds that this is mostly due to Jacob's behavior, which Paula seems to be

unable to control. It appears that Trey is better able to handle him. Jacob, who is 7, has expressed a preference to live with his father. It also appears from the testimony of Ms. Eby, Jacob's first grade teacher, that his behavior has improved since he has lived with his father, although he still has some disciplinary problems.

It is clear to this court that both parents love their children, and that the children love their parents. However, this court finds that Paula has been a more mature person in dealing with the children's needs and problems. Furthermore, Sean, Jordan and Jessica all expressed a desire to live with their mother. Therefore, this court will award primary physical custody of Sean, Jordan, Jessica and Drake to Paula Kaiser. As a general rule, this court would prefer not to separate siblings. However, this court finds that due to the special needs of Jacob, Paula's apparent inability to adequately deal with him, and Jacob's own desire to live with his father, it will be in the best interest of all children that primary physical custody of Jacob is awarded to Trey. This court feels that the children in Paula's custody will benefit from this separation because their mother will be a calmer person and therefore a better parent. This court also hopes that Jacob will benefit from having his father's full attention. Furthermore, this court will provide for a visitation schedule which will allow all children to spend time with each other during vacations. Thus, the best interests of the children requires this court to deviate from the general rule that siblings should not be separated.

Next, this court must determine whether Paula may move to Arkansas with the four children she has been awarded custody of. The standard in determining whether a custodial parent shall be permitted to relocate with the children at a geographical distance from the non-custodial parent has been set forth by the Superior Court in *Gruber v. Gruber*, 400 Pa. super. 174, 583 A.2d 434 (1990). The court must consider several factors. First, the court must assess the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim by the custodial parent. In considering the advantages of the move, the court need not look only to economic advantages, but also to other possible benefits,

such as the return to a network of family or friends, or the pursuit of educational opportunities. *Gruber*, 400 Pa. Super. at 184. The Superior court noted that if the move in general will significantly improve the custodial parent's life, indirect benefits will flow to the children. Secondly, the court must establish the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it. The court must determine that the move is not based on a desire to frustrate visitation rights of the non-custodial parent. *Gruber*, at 185. Lastly, the court must consider the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the children and the non-custodial parent. *Id.* The necessity of shifting visitation arrangements from the usual weekly visitation will not defeat a move which has been shown to offer real advantages to the custodial parent and the children. *Id.* The custodial parent who seeks to move bears the initial burden of showing that the move is likely to significantly improve the quality of life for parent and children. *Gruber*, at 186.

In assessing the potential advantages of Paula Kaiser's move to Arkansas, this court finds that allowing Paula to move will substantially improve the quality of her life and that of the children. In Arkansas, Paula will have access to a network of family members. Even though Paula does not intend to move to her hometown of DeWitt, she will be within driving distance and able to visit them easily. It appears that the children get along well with the family members. Furthermore, Paula's economic circumstances will improve. Paula has testified that her father, who manages substantial assets for both her and the children, will financially assist her and the children upon their move back to Arkansas. While Trey testified that Paula's father will support them only if they move back to DeWitt, this court will accept Paula's testimony that her father will assist them. It appears to this court from the testimony that Paula's father has been very conservative in making funds available to Trey and Paula because they could not handle money very well. While Trey brought home approximately \$800 per week in Chambersburg and claimed to have done well in Arkansas, and Paula has \$20,000 per year in interest income, they were still always struggling. Trey has been unable to make any of his jobs work for very long. He

furthermore has substantial debts and has been very irresponsible about repaying them. This court believes that Paula's father was cautious for good reason. This court has doubts about Trey's ability to support the family. This court believes that when Paula and the children are in Arkansas, her father will provide them with the necessary financial assistance. Furthermore, Paula will be able to work as a dental hygienist and earn somewhat higher wages than in Pennsylvania. This will offset the higher housing costs she will encounter. Additionally, Paula has made efforts to find a private religious school for the children with similar programs as the school the children are enrolled in now.

This court finds that Paula's desire to be near her family and bring her children up there constitutes a significant advantage to her and to her children. It will provide them with a stable environment with family and financial support, and ample opportunities for employment. Paula and the children have no ties to Pennsylvania other than the fact that they have lived here for the past four years. This court finds that Paula's desire to move is not based on a whim but will significantly improve her life and that of the children.

Next, this court finds that Paula's desire to move to Arkansas is not based on any improper motives to frustrate Trey's contact with the children. This court finds that since the separation, Paula and Trey have been very cooperative with each other to accommodate each other's and the children's needs and schedules. Paula does not desire to keep the children away from their father and has proposed a liberal visitation schedule with their father.

Lastly, this court finds that realistic possibilities for visitation by the non-custodial parent exist. The children will be able to spend substantial time with the non-custodial parent in the summer vacations, and Trey will be able to visit Arkansas and the children frequently if he wishes.

In conclusion this court finds that Paula will be permitted to move to Arkansas because it will significantly improve the quality of her life and that of the children. This court does note that it is impressed by how well both Paula and Trey managed to share custody in a flexible manner based on the needs of the children, and that the children benefited from being able to be with one

parent when the other was working or otherwise not available. This will no longer be possible when Paula moves to Arkansas. This court can only express its hope that Trey will do what the rest of the family believes he will do: follow them and continue the shared custody arrangement that worked so well here.

ORDER OF COURT

August 11, 1998, the court enters the following permanent custody order:

1. Primary physical custody of Sean Daniel Kaiser, born November 14, 1983, Jordan Scott Kaiser, born November 1, 1985, Jessica Ann Kaiser, born October 31, 1992, and Gordon W. Kaiser, born February 27, 1996, is awarded to Paula Kaiser (hereafter "Mother").

2. Mother is permitted to relocate to Arkansas with the children she has been awarded custody of.

3. Primary physical custody of Jacob Almon Kaiser, born January 19, 1991, is awarded to Gordon (Trey) Kaiser ("Father").

4. Father and Mother shall have shared legal custody of all children.

5. Visitation of the children shall be as follows.

A. Father shall have all five children for five consecutive weeks in the summer commencing the first Saturday after school is out. Mother shall have all five children for five consecutive weeks immediately following father's five weeks. Father and Mother shall share the costs of transportation.

B. Father shall have all five children during the Christmas vacation in 1998 and all other even-numbered years. Mother shall have all five children during Christmas vacation in all odd-numbered years. father and Mother shall share the costs of transportation.

C. If Father visits the area of Arkansas that mother and the children are living in, he will be entitled to have visitation with the children, as long as it does not interfere with their school work

and as long as he notifies Mother thirty (30) days in advance of his visit.

5. Because of the distance involved, both parents will have the right to reasonable telephone communication with the children over whom they do not have custody.

6. Both parents will inform each other of major events in the children's lives, such as medical, educational and health matters.

7. Because orientation at the school Mother wants the children to attend in Arkansas starts on Monday, August 17, 1998, Mother will be permitted to leave Pennsylvania the weekend of August 15, 1998.

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