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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Herbert E. Lindsey, Plaintiff
v. Jessica E. Rinehart n/k/a Gault, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Civil Action No. 2019 - 5190

HOLDING: The Court finds it is in the child's best interests to maintain the current custody schedule.

HEADNOTES

Child Custody – Relocation

1. In a case where neither parent is relocating and only the child stands to move to a significantly distant location, the Superior Court has held the relocation provisions under 23 Pa.C.S. § 5337 are not *per se* triggered. However, the trial court shall consider the relevant factors in Section 5337(h) insofar as they impact the final determination of the best interests of the child. *D.K. v. S.P.K.*, 102 A.3d 467, 467 (Pa. Super. 2014).
2. The party proposing the relocation bears the burden of establishing the relocation will serve the children's best interests. 23 Pa.C.S. § 5337(i)(1). Each party has the burden of establishing the integrity of the party's motives in either seeking the relocation or opposing the relocation. 23 Pa.C.S. § 5337(i)(2).

Child Custody – Grounds and Factors

3. The paramount concern of the trial court is the best interest of each child. *R.M.G., Jr. v. F.M.G.*, 986 A.2d 1234, 1237 (Pa. Super. 2009). Each case must be examined independently and individually, looking at factors that bear in the child's well-being. *Saintz v. Rinker*, 902 A.2d 509, 512 (Pa. Super. 2006).
4. The Factors codified at 23 Pa.C.S. § 5328 are of utmost importance in the Court's determination. A court must consider all of the § 5328(a) best interest factors when ordering any form of custody. *S.W.D. v. S.A.R.*, 96 A.3d 396, 401 (Pa. Super. 2014).
5. A trial court must apply the statutory custody factors and issue a written explanation of its decision when it orders any of the seven forms of custody provided for by the Child Custody Act. 23 Pa.C.S. § 5328(a).

Appearances:

Aaron J. Neuharth, Esquire *for Plaintiff*
Hilary P. Vesell, Esquire *for Defendant*

OPINION

Before Zook, J.

Before the Court is the custody of N.R., age thirteen. A one-day

trial was held on August 3, 2021. The matter is now ready for decision.

I. Procedural History

The Defendant (hereinafter “Mother”) filed a *Petition to Modify Custody* on September 13, 2019, and a *Petition for Relocation* on October 9, 2019, in Adams County. This case was transferred from Adams County to this Court on December 26, 2019. Mother filed a *Petition to Modify Custody* on January 14, 2021, with this Court requesting primary physical custody and shared legal custody.

On March 18, 2021 the parties attended conciliation. On March 30, 2021, the Conciliator recommended the two prior *Orders* from Adams County remain in effect, except for certain summer and holiday modifications.

A Pre-Trial Conference was held on May 11, 2021. On August 3, 2021, trial was held on Mother’s *Petition to Modify Custody*. The parties testified and N.R. was interviewed *in camera*.

II. Factual Background

N.R. is a thirteen-year-old male who resides primarily in Shippensburg, Pennsylvania, with the Plaintiff (hereinafter “Father”), Step-Mother, and three half-siblings. N.R. attends Shippensburg Middle School and will enter the eighth grade this fall.

Mother resides in Florida and exercises physical custody of N.R. during the summer and on holidays. She shares legal custody with Father. Mother lives in a four-bedroom home with her husband, mother-in-law, and four children, two of whom only live with Mother during the summer. Mother works as a nurse and moved to Florida to further her nursing degree. Mother does not have a set work schedule and can select her work schedule to suit her needs.

Father resides in Shippensburg, Pennsylvania. He has primary physical custody of N.R. Father lives in a three-bedroom home with his wife and four children, including N.R. Father is a truck driver and typically works from approximately 4 a.m. until between 2-6 p.m. on weekdays.

III. Best Interests Analysis

“The paramount concern of the trial court is the best interest of the

child.” *R.M.G., Jr. v. F.M.G.*, 986 A.2d 1234, 1237 (Pa. Super. 2009). Each case must be examined independently and individually, looking at factors that bear on the child’s wellbeing. *Saintz v. Rinker*, 902 A.2d 509, 512 (Pa. Super. 2006).

The factors codified at 23 Pa.C.S. § 5328 are of utmost import in the Court’s determination. A court must “consider all of the § 5328(a) best interest factors when ‘ordering any form of custody.’” *S.W.D. v. S.A.R.*, 96 A.3d 396, 401 (Pa. Super. 2014).

*(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party?*¹

Both parties permit contact with the other party while N.R. is in their custody. While N.R. is in the custody of Father, he is allowed to call and FaceTime Mother. Father has Mother blocked from calling his home phone due to her calling after he goes to bed. Father also stated that he is unable to FaceTime Mother from his phone. This factor does not weigh in favor of either 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.*²

Mother raised a concern about excessive physical discipline inflicted upon N.R. while h is in Father’s custody. Father acknowledged punishing N.R. by making him do wall-sits, hold a push-up position, hold books out in front of him with extended arms, and spanking him when he was younger. In Pennsylvania, a parent may use corporal punishment as a means of discipline provided that the parent does not act with malicious intent and there is no substantial risk of death, disfigurement, serious bodily injury, gross degradation, extreme pain, or mental illness distress. *See Boland v. Leska*, 454 A.2d 75 (Pa. Super. 1982). The Court finds that Father’s physical discipline falls within the definition of corporal punishment.

Father raised concerns about lack of proper supervision and care when N.R. is in Mother’s custody. Father testified to concerns about N.R. not being bathed, not having clean clothes, and hurting himself in suspicious ways while in Mother’s care. There was no evidence to support these

1 23 Pa.C.S. § 5328(a)(1)

2 23 Pa.C.S. § 5328(a)(2)

concerns other than Father's testimony.

This factor does not weigh in favor of either party.

(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).³

Mother requested a "welfare check" after N.R. informed her of rodents living in his room at Father's home. An opossum was in N.R.'s room after Father's landlord made repairs to the house. Father's landlord removed the opossum within a day or two of appearing. There was an additional incident of field mice being in Father's home. Father hired Terminex to remove the mice. There is no evidence that this is an on-going problem.

Father reported Mother to Children and Youth Services due to an incident in which Mother allegedly threw a can of shaving cream at N.R. and laughed at him while doing so. Children and Youth investigated; this incident was unfounded for abuse and/or neglect.

This factor does not weigh in favor of either party.

(3) The parental duties performed by each party on behalf of the child.⁴

Both parties are fully capable performing parental duties toward N.R. Both have done so since separation, providing food, clothing, shelter, and other needs. This factor does not weigh in favor of either party.

(4) The need for stability and continuity in the child's education, family life and community life.⁵

Due to the geographic distance between the parties, any change in the custody schedule would dramatically impact the child's life. The child spends most of the year with Father in Pennsylvania; placing the child primarily with Mother during the school year would necessitate uprooting the child's life.

If the child lived with Mother during the school year, the child would have to change schools. N.R. currently attends public school and would continue to do so if in Mother's primary in Florida. There is no evidence of the specifics of the school N.R. would attend were he to relocate to Florida for the school year. N.R. has not changed schools since Father was awarded primary physical custody in 2017. Mother stated that N.R. could participate

3 23 Pa.C.S. § 5328(a)(2.1)

4 23 Pa.C.S. § 5328(a)(3)

5 23 Pa.C.S. § 5328(a)(4)

in community activities if he were to relocate, including Boy Scouts, mixed martial arts, and football.

The child has ties in Father's community. N.R. has been involved in extracurricular activities at school, including previously playing the French Horn and baseball. N.R. has friends at his current school. N.R. is a member of the Chambersburg YMCA, where he exercises with Father. Considering N.R.'s age and need for stability as he matures, this factor weighs in favor of Father.

(5) The availability of extended family.⁶

N.R.'s maternal grandparents, aunts and uncles, and cousins live in the Chambersburg area. Mother visits her family members with N.R. when she is in the area. Father does not allow a relationship with maternal grandmother because he does not believe she can keep N.R. safe. Mother advised Father in the past of abuse allegations perpetrated by Maternal Grandfather against Mother. N.R. only sees Mother's extended family when she is in Pennsylvania, roughly twice a year.

Father has extended family in Dauphin County, Cumberland County, and Adams County area. These family members include Father's mother, grandmother, and great aunts and uncles. Father is an only child. Paternal grandmother regularly spends time at his house, and N.R. sees his aunt and uncles a few times a year.

This factor weighs in favor of Father.

(6) The child's sibling relationships.⁷

N.R. has two half-siblings and one step-sibling at his Mother's home and three half-siblings at his Father's home. He gets along well with all of them, aside from normal sibling squabbles. This factor does not weigh in favor of either party.

(7) The well-reasoned preference of the child, based on the child's maturity and judgment.⁸

N.R. is thirteen. He enjoys his time with both parents. However, the child expressed a preference reside with Mother during the school year. N.R. would prefer to switch to a school in Florida because he does not like Shippensburg Middle School and believes he can be better taught at school in Florida. N.R. believes Shippensburg Middle School intentionally teaches

6 23 Pa.C.S. § 5328(a)(5)

7 23 Pa.C.S. § 5328(a)(6)

8 23 Pa.C.S. § 5328(a)(7)

in a way that makes learning more difficult. No evidence was presented to substantiate N.R.'s opinion of Shippensburg's teaching methods; no credible evidence was presented to substantiate N.R.'s opinion of the teaching methods in Florida. This factor weighs in favor of Mother.

(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

Mother testified that N.R. previously asked her, "Why does dad hate you?" Mother believes Father and Step-Mother speak poorly of her in front of N.R.

Father testified that he does not allow anyone to speak poorly of Mother. He stated that the parties have a contentious relationship and that Mother has yelled at Father on the phone with N.R. in the room. This factor does not weigh in favor of either party.

(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

Both parties love and care for N.R. Both care and provide for his emotional needs. This factor does not weigh in favor of either party.

(10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.¹¹

The child receives health care in both Pennsylvania and Florida. Step-Mother takes the child to the doctor and dentist for routine checkups while in Father's care. Mother takes the child to annual checkups and the dentist in Florida. N.R. has a history of high cholesterol and adolescent obesity that has, for the most part, resolved while in Father's custody. Both parents took steps to ensure N.R. was eating healthy and getting physical exercise to manage these concerns.

N.R. is not currently receiving mental health counseling. Mother believes N.R. needs mental health counseling to process the court proceedings between Mother and Father. Mother testified she would arrange said counseling for N.R.

9 23 Pa.C.S. § 5328(a)(8)

10 23 Pa.C.S. § 5328(a)(9)

11 23 Pa.C.S. § 5328(a)(10)

N.R. is diagnosed with Attention Deficient Hyperactivity Disorder (“ADHD”) and has an Individualized Education Plan (“IEP”) and 504 Plan with his current school. Both parents were involved in the creation of the 504 Plan. Father and Step-Mother help N.R. with his homework during the school year. Father also created a classroom inside his home for N.R. while attending virtual school during the COVID-19 Pandemic. Both parents stated concerns about N.R.’s grades and indicate they believe N.R. could be doing better in school. Mother has not had primary physical custody of N.R. since he was three years old. Mother did not provide the Court with evidence about the school N.R. would attend if he was in her custody during the school year.

Considering the need for continuity and stability in N.R.’s education and health needs, this factor weighs in favor of Father.

(11) The proximity of the residences of the parties.¹²

The parties live far apart. Father lives in Pennsylvania and Mother lives in Florida. This factor has been considered.

(12) Each party’s availability to care for the child or ability to make appropriate child-care arrangements.¹³

Both Parties are available to care for the child or make appropriate child-care arrangements. This factor does not weigh in favor of either party.

(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

There is conflict between the parties which impairs their ability to effectively co-parent. The parties have had some success communicating, including arranging visits outside the terms of the custody order. However, they generally experience problems cooperating and communicating.

Mother and Father admit to not communicating well and often do not discuss healthcare, dental, or educational decisions about N.R. with each other. Mother and Father admit to not communicating well because of their contentious relationship; both agree that communication often ends in an argument. In short, both share the blame for their lack of maturity and inability to set aside their antipathy for the other party.

12 23 Pa.C.S. § 5328(a)(11)

13 23 Pa.C.S. § 5328(a)(12)

14 23 Pa.C.S. § 5328(a)(13)

Mother stated that she often emails Step-Mother instead of communicating with Father directly. Because neither party communicates well with the other, this factor does not weigh in favor of either party.

(14) The history of drug or alcohol abuse of a party or member of a party's household.¹⁵

No evidence was produced that either party has abused drugs or alcohol. This factor does not weigh in favor of either party.

(15) The mental and physical condition of a party or member of a party's household.¹⁶

No evidence was presented that any member of either party's household suffers from a mental or physical condition that jeopardizes the child's well-being. This factor does not weigh in favor of either party.

(16) Any other relevant factor.¹⁷

In this case, neither Mother nor Father is relocating. Only the child stands to move to a significantly distant location. The Superior Court has held in a case such as this, the relocation provisions under 23 Pa.C.S. § 5337 are not *per se* triggered. However, the Court shall consider the relevant factors in Section 5337(h) insofar as they impact the final determination of the best interests of the child. *D.K. v. S.P.K.*, 102 A.3d 467, 467 (Pa. Super. 2014). The Court will consider the relevant relocation factors not already discussed above.

(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.¹⁸

N.R. has lived primarily with Father in Shippensburg, Pennsylvania, since 2017. N.R. gets along well with his half-siblings in Father's home. N.R. has only lived with Mother during the summer and on holidays since 2017. N.R. gets along well with his step-sibling and half-siblings in Mother's house. It would be a dramatic change for N.R. to move to Florida and live primarily with Mother, requiring a different school and developing a new routine. Both parties attested that N.R. does well in a stable and routine environment; he does not adjust well to change. This factor favors Father.

15 23 Pa.C.S. § 5328(a)(14)

16 23 Pa.C.S. § 5328(a)(15)

17 23 Pa.C.S. § 5328(a)(16)

18 23 Pa.C.S. § 5337(h)(l).

*(2) 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.*¹⁹

Mother provided little to no information regarding the feasibility of preserving the relationship between N.R. and Father if N.R. were to relocate to Florida. This factor favors Father.

*(3) 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.*²⁰

The Court did not hear any credible evidence of an enhanced educational benefit to N.R. were he to relocate to Mother's home. The general quality of life for N.R. will not substantially change from relocation because of the stability and consistency he currently has with Father. The Court finds that both parties are financially stable. This factor favors Father.

*(4) The reasons and motivation of each party for seeking or opposing the relocation.*²¹

Both parents exhibit a true sense of love for N.R. that motivates seeking primary physical custody. This factor favors neither party.

IV. Conclusions

Overall, the Court finds that the best interest factors are closely balanced when appropriately weighted. Both parties can adequately care for the child; both parties love N.R. and want what is best for him.

The parties have two distinct parenting styles: Father is more authoritative, and Mother is more permissive. Both styles have their advantages and disadvantages. N.R. must be subject to the influence, advice, and direction of both parties. Ideally, each parent would balance the other's strengths and weaknesses. However, the parties' ability to co-parent effectively is critical. It is clear that the parties struggle to communicate and cooperate regarding the child. If the parties resided in close proximity to each other, the Court's decision would lean heavily to a 50-50 physical custody schedule. Such a schedule would facilitate the goals set forth above. However, that is not the circumstance we face.

¹⁹ 23 Pa.C.S. § 5337(h)(3).

²⁰ 23 Pa.C.S. § 5337(h)(7).

²¹ 23 Pa.C.S. § 5337(h)(8).

Maintaining the current custody schedule, while not perfect by any means considering the distance between the parties affords N.R. the best chance to develop with a certain, well-disciplined environment necessary for him to prepare for adulthood. The evidence presented by Mother does not provide the certainty for the Court that N.R. will be afforded the stability, discipline, and schedule he needs and deserves. His desire to live with Mother is reasonable, as she is the more permissive parent. Most, if not all, teenagers naturally gravitate to the parent who is less restrictive and less demanding of responsibility. However, that is not what is in N.R.'s best interests; he needs to learn to deal with responsibility and accountability. Indeed, these character traits must be instilled by parents in their children. It will serve their children well as adults. At this time, the Court finds Father is best positioned to achieve this with N.R. On the evidence presented, the Court finds the current custody schedule should not substantially change.

An appropriate order follows.

ORDER

NOW, this 18th day of August, 2021, on the forgoing *Opinion*, **IT IS HEREBY ORDERED** as follow:

1. This order supersedes and supplants all prior orders governing the custody of N.R. as between the parties;
2. The parties shall share legal custody of the minor child N.R.;
3. The parties shall share physical custody as follows:
 - a. Father shall have primary physical custody of the child during the school year;
 - b. Unless otherwise agreed by the parties: Mother shall have partial physical custody of the child commencing seven days after the last day of school in the spring until seven days before the beginning of school in the fall;
 - c. Unless otherwise agreed by the parties: During the months of October, November, February, March, April, and May, Mother shall have the right to exercise physical custody of the child one (1) weekend¹ from Friday after school until Sunday evening at 6:00 p.m. If Monday is a holiday and school is not in session, Mother shall

¹ For purposes of this paragraph, a weekend is that which both Saturday and Sunday fall within the same calendar month. In addition, the weekend periods shall not be consecutive weekends.

have physical custody of the child until that Monday at 6:00 p.m. Mother's periods of physical custody described in this paragraph shall be exercised in the Commonwealth of Pennsylvania.² Mother shall provide Father with no less than twenty (20) days' written notice of her intent to exercise any period of weekend physical custody. Text or email is sufficient to constitute written notice;

4. Unless otherwise agreed upon by the parties: Custody exchanges shall take place at the Giant grocery store in Shippensburg, Pennsylvania, during the school year.

5. Unless otherwise agreed upon by the parties: Custody exchanges for Mother's summer period of partial custody shall occur as follows:

a. Father shall arrange and pay for appropriate airfare from an airport within 75 miles of his residence to an airport within 75 miles of Mother's residence. Father shall transport the child to the airport and insure he boards the flight;

b. Mother shall arrange and pay for appropriate airfare from an airport within 75 miles of her residence to an airport within 75 miles of Father's residence. Mother shall transport the child to the airport and insure he boards the flight;

c. The parties shall inform each other of the travel arrangements, including airports, airlines, flight numbers and schedules, not less than fourteen (14) days prior to departure;

d. Unless the parties agree otherwise, the child shall fly only on direct routes, i.e., no layovers or changing of planes;

6. Holidays shall be shared as follows:

a. **Easter:** In 2022 and all even-numbered years thereafter, Father shall have physical custody of the child for Easter weekend. In 2023 and all odd-numbered years thereafter, Mother shall have physical custody of the child beginning on the first day of Easter break until the day before school starts at the end of Easter break, time and manner of exchange to be determined by agreement of the parties. In Mother's years, this period will be in lieu of the weekend period under paragraph 3(c) above and may be exercised in Florida, with Mother assuming all travel costs associated therewith;

b. **Mother's Day:** Mother shall have the right to a telephone call with or video chat with the child to occur before 7:00 P.M.;

² Except as specifically authorized elsewhere in this order.

c. **Father's Day:** Father shall have the right to right to a telephone call with or video chat with the child to occur before 7:00 P.M.;

d. **Thanksgiving:** In 2021 and all odd-numbered years thereafter, Mother shall have physical custody of the child from the beginning of the Thanksgiving break (end of school) to the Monday after Thanksgiving. Mother may exercise this period of physical custody in Florida; Mother will pay all costs associated therewith.³ In Mother's years, this period of custody will be in lieu of the weekend period provided in paragraph 3(c) above. In 2022 and all even-numbered years thereafter, Father shall have physical custody of the child beginning on the first day of the Thanksgiving break until the day before school starts at the end of Thanksgiving break, time and manner of exchanges to be determined by agreement of the parties.

e. **Christmas:** In 2021 and all odd-numbered years thereafter, Mother shall have physical custody of the child beginning on the first day of the Christmas break until December 31st. In 2022 and all even-numbered years thereafter, Father shall have physical custody of the child from the first day of the Christmas break until December 26th. Mother shall have the child from December 26th until December 31st. Unless otherwise agreed, the costs of transporting the child to and from Florida each year for Christmas break shall be paid in accordance with paragraph 5 above;

7. Holiday periods of physical custody shall supersede all other periods of physical custody;

8. The out-of-custody parent shall be afforded telephone contact or video chat with the child via Google Meet or Google Duo, or another agreed upon platform, to occur not less than (3) times per week, times to be agreed upon by the parties. Both parties shall provide N.R. with an appropriate and operable device for this purpose. N.R. shall be afforded liberal communication with the out-of-custody parent, and this provision is intended to be a minimum requirement. Neither parent shall interfere with or otherwise monitor N.R.'s communications with the other parent, nor shall they allow a third party to do so.

9. Neither party shall disparage the other party in the presence of the child or allow third parties to do so;

10. Any and all of the provisions of this order may be changed by

³ In the event Mother elects to fly N.R. down to Florida for this period of custody, Father shall transport the child to and from an airport of Mother's choosing, within 75 miles of his residence, and insure the child boards the airplane. The costs of transporting the child to and from the airport for this purpose are Father's.

mutual agreement of the parties;

11. Each parent shall ensure that all firearms are properly secured and not accessible to the child;

12. Neither party shall be permitted to relocate the residence of the child in a manner that would significantly impair the ability of the other party to exercise physical custody of the child UNLESS every individual who has custody rights to the child consents to the proposed relocation OR the Court approves the proposed relocation. A party proposing to relocate MUST comply with the notice requirements pursuant to 23 Pa.C.S.A. Section 5537(c).

13. Notice of this order shall be given pursuant to Pa.R.C.P. No. 236.