

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL ACTION

ANGELA TURNER,

Plaintiff

vs.

MICHAEL P. BOUD, JR.,

Defendant

No. 18-0855

CUSTODY

Arley Kemmerer, Esquire  
Nicholas Masington, III, Esquire

Counsel for Plaintiff  
Counsel for Defendant

FILED  
2019 AUG 16 AM 8:52  
CARBON COUNTY  
PROthonOTARY

MEMORANDUM OPINION AND ORDER

Matika, J. - August 15, 2019

In what started out as an action involving sending of a Notice of Proposed Relocation of a child, and the contemporaneous filing of a petition for modification, ends in this court determining whether the subject child should remain in the Pre-K School program in Palmerton. For the reasons stated herein, this Court finds that the status quo shall remain.

FACTUAL & PROCEDURAL BACKGROUND

On March 15, 2018, the Plaintiff, Angela M. Turner (hereinafter "Mother") filed a complaint in custody against the Defendant, Michael P. Boud, Jr. (hereinafter "Father") involving one child, Mackenzie Boud (hereinafter "the Child"), (D.O.B. 8/14/15). That complaint was resolved on June 21, 2018 when this

Court signed an order, based upon the agreement of the parties and counsel, which in essence established a 50/50 physical custody arrangement between Mother and Father.<sup>1</sup>

On April 10, 2019 Mother filed both a "Petition for Modification of a Custody Order" and a "Notice of Proposed Relocation." In that petition, she alleged, *inter alia*, the following in support of her modification<sup>2</sup>:

"Plaintiff is seeking to modify the existing custody order to obtain primary physical custody of the minor Child because of Plaintiff's desire to relocate to Nazareth, and because Defendant's work schedule continued to necessitate the minor Child to be dropped off with a babysitter at 4:00 a.m. during Defendant's periods of physical custody, despite informing the Custody Master at the previous proceeding that his work schedule would be changing."

Additionally, in her Notice of Proposed Relocation, Mother, in furtherance of her obligation pursuant to Pa.R.C.P. 1915.17, provided the following information - 1) address of intended new residence: 129 N. Whitfield Street, Nazareth, PA 18064; 2) Name of

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<sup>1</sup> The custodial arrangement agreed to by the parties resulted in Mother and Father exchanging the Child on Sundays, Wednesdays and Fridays. Further details are as outlined in that order.

<sup>2</sup> Notwithstanding that these were the only reasons provided in the petition, the Court acknowledged that other reasons, proffered by either party at time of trial, would be considered by the Court.

new school district and school: Nazareth Area School District, LVCC at Wilson School, 301 S. 21<sup>st</sup> Street, Easton, Pennsylvania 18042; 3) proposed revised custody or visitation schedule: Father to exercise two (2) dinner visits per week after work, and continue to exercise overnight visitation on alternating weekends as presently ordered. Holiday and vacation provisions shall remain the same.

A conciliation conference was scheduled for June 7, 2019 but moved by the Court to June 4, 2019. A hearing on the Notice of Proposed Relocation was scheduled for July 3, 2019.

On May 7, 2019, Father filed a "Counter-Affidavit Regarding Relocation" in which he objected to the relocation and to the modification of the existing custody order.

At the hearing scheduled for July 3, 2019, the parties agreed that for judicial economy purposes, that hearing, along with the hearing on the Petition for Modification should be held together. As a result, the hearing on the Notice of Proposed Relocation and the hearing on the Petition for Modification were scheduled for July 25, 2019.<sup>3</sup>

At this hearing, Mother testified that she presently lives in

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<sup>3</sup> The scheduling order for this date was not signed until July 10, 2019 when this Court was also presented with the recommended order from the custody hearing officer, Eileen Diehl, Esquire. This order kept in place the June 21, 2018 order.

Palmerton, Carbon County, in a rented home located at 609 Lafayette Avenue, residing with her is her boyfriend, Christopher Franciosa, her three older children, and the Child. Mother proposed moving to 123 N. Whitfield Street, Nazareth, Pennsylvania to a home owned by her boyfriend. The motivation for this move was financial in nature and because it would be closer to her location of employment, Gracedale Nursing Home. Mother also testified that the only modification she was seeking to the existing order<sup>4</sup> was to allow the Child to go to Pre-K School in the Nazareth/Easton Area, a Pre-K School she claims is similar to that in which the Child was enrolled last school year in Palmerton.

In that regard, Mother testified that the Child could go to one of several Pre-K School locations in the Nazareth/Easton Area. Mother also averred that Father, instead of having the Child taken in the early morning hours to the babysitter in Palmerton he could drop the Child off at or near her home on his way to work or at the day care at the chosen Pre-K School if it were available. Additionally, Mother testified that Father could, at the end of his work days where he would still have custody of the Child, pick the Child up at the after-school day care (if offered) or at an

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<sup>4</sup> Mother acknowledged that she wanted the physical custody of the child to remain 50/50, based upon the current 3-2-2 schedule. It should be noted that both parties agreed that they verbally modified the June 21, 2018 order insofar as they changed the Sunday exchange day to Monday. It was not clear from the record when exactly this occurred but it appeared that it had to have occurred after the conciliation conference; otherwise, the change would have been noted in the interim order of July 10, 2019.

agreed upon exchange point.

Mother also stated that there are six different locations in the Nazareth/Easton area where the Child can go to the Pre-K School program and that she can actually select the location. She believed that those such locations were five to ten minutes from Father's employment in Easton.

Mother also testified that she can and does make her own schedule at work, mostly to accommodate the days she has custody of the Child and unlike the Father, at least at the present time, does not utilize a babysitter on her custodial days. She also believed that while Father is driving the Child to and from the Nazareth/Easton area, he would get to spend more time with the Child.

On cross-examination, Mother agreed that the Child did well in the Pre-K School in Palmerton. She also admitted that she did not know the parameters of the afterschool care in any of the Nazareth/Easton area Pre-K Schools.

Father also testified. Although he filed a counter-affidavit opposing the "child's relocation", he also testified that he would like to maintain the 50/50 arrangement that the parties were actively following *vis-à-vis* custody. As to the location of the child's Pre-K Schooling, he objected to her being moved from the Palmerton Pre-K School program to one in the Nazareth/Easton area.

He explained that this school was known to the Child and has helped the Child develop and grow.

Father is employed at ASSA in Easton, as a sheet metal worker. Recently, his work scheduled changed such that he works 7:00 A.M. to 3:30 P.M., Monday through Friday. He has no mandatory overtime and rarely works on weekends. On days when Father has custody of the Child, he wakes her up and takes the Child to the babysitter, Carla Hunsicker<sup>5</sup> around 6:00 A.M. where the Child would remain until it would be time to go to school. At present, Mother's father, who also resides in Palmerton, would normally take the Child two blocks to school and then at the end of the school day, would pick up the Child from school and return her to the babysitter.<sup>6</sup> Upon his return to Palmerton around 4:00 - 4:30 P.M., should he still have custody, Father would then retrieve the Child from Ms. Hunsicker.

If permitted to go to school in the Nazareth/Easton area, Father indicated that he could drop the Child off with Mother around 6:45 A.M. and retrieve her on his custodial days around 3:45 P.M. Father further testified that he was not in favor of this as previously noted and also that the Mother has neither

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<sup>5</sup> This individual has been the child's babysitter for quite some time and is known to the child.

<sup>6</sup> Father testified that Mother threatened to not allow her father to pick up the child going forward. In that case, Father testified that the babysitter or another child's parents would do so, if necessary.

discussed the specifics regarding the logistics of the school changes nor the location of the school itself in order to make an informed decision regarding this issue.<sup>7</sup>

#### LEGAL DISCUSSION

There are two separate but interwoven issues before the Court, namely: relocation and modification. While each has its own set of factors for the Court to consider, some of these factors overlap. As the Superior Court previously noted in *D.K. v. S.P.K.*, 102 A.3d 467, 176-77 (Pa. Super. 2014), "(s)everal of the factors of section 5337(h) are encompassed, either directly or implicitly, by the custody factors of section 5328(a)." Thus, a court should avoid "dissociating the issue of primary custody from the issue of relocation" and should instead decide the two issues together "under a single umbrella of best interests of the children." *S.J.S. v. M.J.S.*, 76 A.3d 541, 550 (Pa. Super. 2013) (quoting *Collins v. Collins*, 897 A.2d 466, 473 (Pa. Super. 2006)). However, in the context of this case, it is necessary to address each separately as the decision of relocation eliminates a significant amount of consideration of all other factors/issues in this case based upon the parties agreeing that physical custody

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<sup>7</sup> Additionally, Father indicated that even if there is a school within five to ten minutes of his employment, he is unaware of any before or after school day care that he could utilize instead of dropping off/picking up at Mother's residence.



shall remain 50/50.

23 Pa.C.S.A. §5337 outlines the procedural steps that must occur when a party intends to relocate the residence of a child. This statute requires the moving party to send notice to the nonrelocating party complete with a counter-affidavit in order to allow that party to state a position with regard to the relocation. (See 23 Pa.C.S.A. §5337(c) and (d)) In this case, Father initially objected to the relocation. Accordingly, pursuant to subsection (f), this Court scheduled a hearing as required by this subsection which reads in pertinent part, . . . "if a counter-affidavit regarding relocation is filed with the court which indicates the nonrelocating party objects either to the proposed relocation or to the modification of the custody order consistent with the proposal for revised custody schedule, the court shall modify the existing custody order only after holding a hearing to establish the terms and conditions of the order pursuant to the relocation indicating the rights, if any, of the nonrelocating parties."

In determining whether to grant a relocation, the court shall consider the factors enumerated in subsection (h). However, we must first determine if an actual "relocation" is being proposed.

The term "relocation" is defined in 23 Pa.C.S.A. §5322 as, "a change in a residence of a child which significantly impairs the ability of a nonrelocating party to exercise custodial rights"



(emphasis ours). At present, both parents reside in Palmerton and share physical custody on a 50/50 basis. Mother is proposing to relocate to 123 N. Whitfield Street, Nazareth, a home owned by her current boyfriend. This location, which is approximately twenty-one (21) miles from Mother's current location is likewise the same distance from Father's residence located at 429 Franklin Avenue, Palmerton. This distance would normally be a factor to consider, however the focus in this case is how that move will affect the nonrelocating parents' custodial rights to the child. Further, "[u]nder this definition, while relocation is in part defined by a change in residence of a child, it is evident that a relocation as contemplated in the statute requires a negative custodial impact on a nonrelocating party." *D.K. v. S.P.K.*, 102 A.3d 467, 472 (Pa. Super. 2014). (emphasis ours).

Mother testified that, as far as she was concerned, the only change in the entire custodial arrangement would be where the Child goes to Pre-K School. If successful, Mother's choice of schools would be in the Nazareth/Easton area. She claims it would not negatively or significantly impact Father's custodial rights but in fact would enlarge the amount of time the Child would be with him driving to and from daycare/Pre-K. Mother's proposal would be for Father to drop off the Child prior to him going to work and then picking her up on his custodial days from the day care

associated with the Pre-K School in which the child would be enrolled. Father acknowledged that while he is opposed to his arrangement, it is conceivable that he could do as Mother proposed.

While this Court's ultimate decision does not permit the Child to be enrolled in Mother's choice of Pre-K Schools, we find that such a proposal to relocate the Child to Nazareth and move her to a different Pre-K School would not negatively or substantially impact Father's custodial rights to the Child. Therefore, this Court finds that this is not the type of residency change contemplated by the statute that would fall within the definition of relocation. Thus, an analysis of the factors set forth in 23 Pa.C.S.A. §5337(h) is not necessary. Such a decision is within the sound discretion of the Court. *Bednarer v. Vasquez*, 830 A.2d 1267 (Pa. Super. 2003).

This Court now turns to the Petition for Modification also filed by Mother. In Mother's petition she sought primary physical custody of the Child and maintained that claim until the hearing. At the hearing she as well as the Father agreed that the physical custody of the Child should remain 50/50. Both she and the Father both testified that this part of the order shall remain "as is" and the only issue at this time would be where the Child would go to Pre-K School this year. Thus, the sole issue for the Court to decide is a legal custody issue, where the Child should be enrolled

for the 2019-2020 school year.

In ordering any form of custody, the paramount concern is the best interest of the child. *S.W.D. v. S.A.R.*, 96 A.3d 396, 400 (Pa. Super. 2014). 23 Pa.C.S.A. §5328(a) set forth the factors for the Court to consider. While the testimony of the parties included evidence on factors not relevant to the only issue now before the Court, the Court will dispense of any analysis of that evidence *vis-à-vis* the irrelevant factors.

According to the testimony, the Child has been going to the Pre-K School for some time now. Additionally, the child has a babysitter, Carla Hunsicker, that Father still utilizes when needed. This babysitter, who resides only several blocks away from Father has been Child's babysitter for years. Father proposes to keep the Child enrolled in the Palmerton Pre-K School while utilizing this same babysitter if necessary.<sup>8</sup> Mother testified that her work schedule is flexible. This would allow her to set her work schedule around custody of the Child which would mean she could conceivably still make arrangements to pick up/ drop off the Child in Palmerton whether she utilizes her father to assist her

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<sup>8</sup> Father testified that Mother threatened him that he would no longer be able to utilize her Father to transport the child to and from school as had been the custom if the child remained in the Palmerton Pre-K. Father testified that should that occur the babysitter or a mother of one of the other Pre-K students would transport the child to and from Pre-K, back and forth from Ms. Hunsicker's home.

or not.

On the other hand, as previously noted, should the Child be enrolled in a Nazareth/Easton Pre-K School, Mother proposes that Father can either drop the Child off with her or at daycare prior to school and pick the Child up at the same daycare or at Mother's home at the end of the work day.

What was lacking from Mother's testimony were any specifics on the actual location of any of the Pre-K Schools she was proposing including those that may be nearest Father's place of employment. The only testimony she gave was that there were six locations to choose from and that two locations were located within five to ten minutes from Father's place of employment, yet she had not provided any details on exactly which one she was proposing.<sup>9</sup> Mother also testified that she was not aware of any parameters of the Easton after school daycare. When asked, Mother did state that the Pre-K Schools she had to choose from had similar programs to that of the Palmerton program, but provided no foundation for that opinion. When asked on cross-examine, Mother admitted that the Child knew several other children at the babysitter's and that some of her classmates in last year's Pre-School class would likewise be in this year's class. Lastly, Mother acknowledged

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<sup>9</sup> In her Notice of Proposed Relocation, Mother referenced "LVCC at Wilson School, 301 S. 21 Street, Easton, Pennsylvania, however, she did not provide any further information as to whether this was the school she was proposing.

that the Child is doing well at the Palmerton Pre-K, an opinion that mirrored that of the Father.

While keeping the Child in Palmerton for Pre-K would necessitate Mother getting her up early and traveling with her, it is no different than what Father does now or what Mother would propose if the child would be enrolled in the Nazareth/Easton area.

The most prevalent of the custody factors to be applied to this sole issue of legal custody is that of stability and continuity in conjunction with the education process.<sup>10</sup> Here, the Child has had a regular daily routine for some time. Father's plan to keep her enrolled there has minimal effects on her best interests. Alternatively, even if Mother provided the necessary information for the Court to consider regarding the Nazareth/Easton Pre-K Schools, it would require drastic changes in the Child's schooling, day care and speech therapy.<sup>11</sup> The Court also finds it helpful to examine each party's efforts to learn about the options available for the Child. Here, however, Mother's "research" was vague if not lacking as to the specifics of the

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<sup>10</sup> This is derived from 23 Pa.C.S.A. §5328(a)(9) and (10) of the custody factors that this Court needs to consider.

<sup>11</sup> The Child currently sees a speech therapist in or around the Palmerton Area. The Court will assume that since Mother is proposing a school change away from Palmerton, she would do the same with the child's speech therapist.

exact school she was proposing.<sup>12</sup>

No other testimony was deemed relevant to the sole issue of Pre-K Schooling. Accordingly, no other factors need analyzing.

### CONCLUSION

Based on the foregoing and in light of the fact that the sole issue for the Court to decide is where the Child goes to school for the school year 2019-2020, the Court enters the following order:

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<sup>12</sup> Mother attempted to establish that Father did not investigate the Nazareth/Easton Pre-K Schools. Father retorted that while he did not do so because he was opposed to it, he also testified that Mother never actually gave him the name of the school she was proposing.

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Counsel for Plaintiff  
Counsel for Defendant

ORDER OF COURT

AND NOW, this 15<sup>TH</sup> day of August, 2019 after hearing on the Notice of Relocation and Petition for Modification filed by Plaintiff, Angela Turner, and the Counter-Affidavit filed by Defendant, Michael P. Boud, Jr., it is hereby **ORDERED and DECREED** that the Child, Mackenzie Boud shall be enrolled in the Pre-K School at the S.S. Palmer School in Palmerton. No other changes shall be made to the existing order dated June 21, 2018.<sup>1</sup>

BY THE COURT:

  
Joseph J. Matika, J.

<sup>1</sup> The parties testified that the exchange day of "Sunday" noted in paragraphs A, B, D, and E was modified by agreement of the parties and that such a change benefited the Child. Should the parties still agree based on the Court's decision rendered herein, that status quo shall continue but will not be memorialized by the Court in this order.

FILED  
2019 AUG 16 AM 8:52  
CARBON COUNTY  
PROthonotary