

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

B.J.S.,	:	
	:	
Plaintiff	:	
	:	No. 13-0405
vs.	:	
	:	CUSTODY
W.K.C.,	:	
	:	
Defendant	:	

B.J.S.	Pro Se
Cynthia S. Yurchak, Esquire	Counsel for Defendant

CUSTODY OPINION AND ORDER

Matika, J. - April , 2014

On November 25, 2013, Petitioner, W.K.C. (hereinafter "Father") filed a petition for modification of a custody order involving two (2) Children, namely: K.A.C. (D.O.B. 11/6/09) and K.M.C. (D.O.B. 10/10/12). The order sought to be modified provided primary physical custody in B.J.S. (hereinafter "Mother") and partial physical custody in Father. On January 6, 2014, a conference was held before Samuel F. Feldman, Esquire, who recommended that primary physical custody should be confirmed¹ in Father, pending a bench trial on the issue of primary custody.

As part of that interim order, the Court directed the

¹ According to the testimony of Father at the custody trial, Mother dropped the Children off at her mother's house on June 26, 2013 and he retrieved them from there and has had them in his custody ever since.

parties to complete the "pre-trial custody information form", submitting it to the Court prior to the Judicial Conference scheduled for February 12, 2014. Father submitted his form. Mother neglected to do so. Further, Father appeared at the conference on February 12, 2014; Mother failed to appear. After conducting the Judicial Conference, this Court issued an order scheduling a Custody Trial for April 2, 2014. On March 27, 2014, Father filed his Pre-Trial Memorandum; Mother neglected to file one.

On April 2, 2014, a Custody Trial was held at which time this Court took testimony and received evidence on all issues present before the Court. At the conclusion of the Trial, this case was placed under advisement but is now ripe for disposition in accordance with Pa.R.C.P. 1915.4(d) and Pa.R.C.P. 1915.10.

This opinion shall examine the testimony and explain the Court's rationale for issuing its custody order taking into consideration where applicable, the factors set forth in 23 Pa.C.S.A. § 5328(a).

LEGAL DISCUSSION

With any child custody case, the paramount concern is the best interest of the children. This standard requires a case-by-case assessment of all of the custody factors set forth in 23 Pa.C.S.A. § 5328(a) that may legitimately affect the

physical, intellectual, moral, and spiritual well-being of the children. *J.R.M. v. J.E.A.*, 33 A.3d 647, 650 (Pa. Super. Ct. 2011). The Court will now examine each factor and highlight relevant evidence, if any, related thereto.

I. SECTION 5328 FACTOR ANALYSIS

1. WHICH PARTY IS MORE LIKELY TO ENCOURAGE AND PERMIT FREQUENT AND CONTINUING CONTACT BETWEEN THE CHILDREN AND THE OTHER PARTY

There was no testimony presented by either party indicating a problem with either parent encouraging or discouraging contact between the Children and the other parent. Normally, evidence of contempt adjudication would be suggestive of discouragement, however, no such evidence was presented here.

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 CHILDREN OR AN ABUSED PARTY AND WHICH PARTY CAN BETTER PROVIDE ADEQUATE PHYSICAL SAFEGUARDS AND SUPERVISION OF THE CHILDREN

Abuse comes in many forms. In this case, Father presented evidence through other witnesses that the Children were at times left alone in a car by their Mother, that the younger Child had been left alone in his room for extended periods of time without being checked on by his Mother and at times, by her own admission, Mother had Children in her custody while doing and being under the influence of heroin. While no evidence of

actual harm came to any of the Children as a result, it is tantamount, however to a risk of harm to the Children.

3. THE PARENTAL DUTIES PERFORMED BY EACH PARTY ON BEHALF OF THE CHILDREN

Mother testified that prior to the change in primary custody, she cared for the Children while working full time. She claimed to be a good mother who "do[es] everything when [I] have them." However, evidence presented by Father suggests that due to Mother's drug addiction, she began to fail in her parental duties as well as her duties as far as keeping house was concerned. Several witnesses testified that during several visits to Mother's home, they observed a cluttered residence. On one such occasion, the youngest Child's baby bottles were unwashed and had mold in them.

Father's home, on the other hand, was described as being clean and equipped with safety locks. Father testified that K.M.C. had been diagnosed with Attention Deficit Disorder and Oppositional Defiant Disorder and as a result he has begun to take him to New Beginnings in Pottsville to address these issues. Father has also successfully completed a Nurturing Parent Program provided by Justice Works Youth Care.

This factor clearly favors Father.

4. THE NEED FOR STABILITY AND CONTINUITY IN THE CHILDREN'S
EDUCATION, FAMILY LIFE, AND COMMUNITY LIFE

While the Children have only been with their Father since August, 2013, there is still evidence that Father's home is more stable than Mother's and more conducive to future stability. Father resides with his parents, which adds some stability to the situation. Mother, on the other hand, has recently been released from Prison and resides with her boyfriend at 127 West Catawissa Street, Apartment 9, Nesquehoning, Pennsylvania. Until the Mother has had adequate time to create stability in her own life, this Court cannot say that the Children will have any stability in theirs if they were in Mother's primary custody.

5. THE AVAILABILITY OF EXTENDED FAMILY

As stated above, Father resides with the Children and his parents. It therefore goes without saying that this arrangement allows Father to utilize his parents as alternate caretakers as well as individuals he can rely upon for assistance in nurturing and raising the Children. Further, Father testified that he has two sisters who live in the area and also has a good relationship with Mother's extended family. Mother does not enjoy that same relationship with her family.

6. THE CHILDREN'S SIBLING RELATIONSHIPS

The only testimony relative to this issue indicated that the subject Children have a half-sister who resides with her Father, as opposed to their Mother.

7. THE WELL-REASONED PREFERENCE OF THE CHILDREN, BASED ON THE CHILDREN'S MATURITY AND JUDGMENT

As the Children are only four (4) and one and one-half (1 and ½) years old respectively, the Court assumes this is the reason neither party presented the Children as witnesses to the Court.

8. THE ATTEMPTS OF A PARENT TO TURN THE CHILDREN AGAINST THE OTHER PARENT, EXCEPT IN CASES OF DOMESTIC VIOLENCE WHERE REASONABLE SAFETY MEASURES ARE NECESSARY TO PROTECT THE CHILDREN FROM HARM

No testimony was presented relative to this factor.

9. WHICH PARTY IS MORE LIKELY TO MAINTAIN A LOVING, STABLE, CONSISTENT, AND NURTURING RELATIONSHIP WITH THE CHILDREN ADEQUATE FOR THE CHILDREN'S EMOTIONAL NEEDS

As previously stated, Father has been maintaining the type of relationship the Children need. Mother's drug addiction issues negatively impact her relationship with these Children.

10. WHICH PARTY IS MORE LIKELY TO ATTEND TO THE DAILY PHYSICAL, EMOTIONAL, DEVELOPMENTAL, EDUCATIONAL, AND SPECIAL NEEDS OF THE CHILDREN

For the reasons previously stated, this Court finds that Father is more capable of attending to the needs of the Children and has evidenced that through the testimony presented.

11. THE PROXIMITY OF THE RESIDENCES OF THE PARTIES

According to Father, the parties reside approximately seven (7) to eight (8) miles apart. Father resides with the Children and his parents at 347 West Alley, Lehighton, Pennsylvania. This home is a three bedroom home. The paternal grandparents occupy one bedroom, Father and K.M.C. occupy the second, and K.A.C. sleeps in the third.

Mother also rents, but in Nesquehoning. She resides with her boyfriend, Shawn Billett, in a one bedroom apartment. There was no testimony as to any accommodations for the Children at Mother's residence.

12. EACH PARTY'S AVAILABILITY TO CARE FOR THE CHILDREN OR ABILITY TO MAKE APPROPRIATE CHILD-CARE ARRANGEMENTS

Father works at Kovatch Corporation, Monday through Friday and on an occasional Saturday. Testimony suggests that the paternal grandparents assist with childcare but it would appear that Father also employs a babysitter, LeeAnn Muffley, to be the alternate caretaker for the Children when needed.

Mother, on the other hand, is not employed, so would

therefore not be in need of alternate child care. Additionally, however, she would not be suitable as an alternate caretaker for Father due to her unaddressed drug issue.

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 CHILDREN FROM ABUSE BY ANOTHER PARTY IS NOT EVIDENCE OF UNWILLINGNESS OR INABILITY TO COOPERATE WITH THAT PARTY

No significant testimony was presented on this factor to allow the Court to determine whether it favors one parent or the other.

14. THE HISTORY OF DRUG OR ALCOHOL ABUSE OF A PARTY OR MEMBER OF A PARTY'S HOUSEHOLD

Father has no drug or alcohol issues nor do any of his household members. Mother has been dealing with an admitted drug problem since her late teens. Her addiction became so serious that Father, along with Mother's then best friend, made arrangements for her to go to in-patient rehabilitation. Mother refused to go. Mother admitted in her testimony that she has a heroin issue. She also admitted that she sometimes took care of the Children while under the influence of drugs. Further, evidence suggested that when K.A.C. was born she tested positive for illegal substances.

15. THE MENTAL AND PHYSICAL CONDITION OF A PARTY OR MEMBER
OF A PARTY'S HOUSEHOLD

No testimony was presented to indicate that, save for Mother's drug problem, either parent or members of their respective households have mental or physical conditions that would negatively impact the best interests of the Children.

16. ANY OTHER RELEVANT FACTOR

23 Pa.C.S.A. § 5329 requires the Court to consider certain convictions in every custody determination. In this case Father offered into evidence criminal docket entries for three separate criminal cases filed against Mother. The Court, however, will not place any weight on or consideration to these matters as they are neither convictions (Exhibits three and four) nor one of the enumerated offenses (exhibit five) outlined in §5329(a).

Father has no criminal record.

It is within the purview of the trial court, as the fact finder, to determine which of the factors outlined in 23 Pa.C.S.A. § 5328(a) are most salient and critical in each custody case. *M.J.M. v. M.L.G.*, at 339. In this case, the Court has gleaned from the record such evidence that both positively and negatively affects the best interests of the children. The Court believes that the order fashioned in this matter reflects the fact that all relevant information was taken

into consideration and evidences the Court's rationale for so ordering.

Accordingly, the Court enters the following order: