

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

L.E.B.,  
:  
:  
Plaintiff :  
:  
vs. : No. 13-0458  
:  
M.D.B., :  
:  
Defendant :

CUSTODY

Robert S. Frycklund, Esquire  
Steven Bergstein, Esquire

Counsel for Plaintiff  
Counsel for Defendant

**CUSTODY OPINION & ORDER**

Matika, J. - December , 2013

**PROCEDURAL BACKGROUND**

This custody action commenced on March 12, 2013 with the filing of a custody complaint by the Mother, Plaintiff herein, L.E.B., (hereinafter "Mother"), against the Father, Defendant herein, M.D.B., (hereinafter "Father"), involving three (3) minor children, G.M. (D.O.B. 10/27/07), M.B. Jr. (D.O.B. 2/13/09), and M.B. (D.O.B. 6/6/10) (hereinafter "Children"). A conciliation conference was held on April 8, 2013, before the Custody Conciliator and a pre-trial conference was held on July 23, 2013, before the Court. Neither conference resulted in a resolution to the issues raised; consequently, this Court scheduled a custody trial. On November 14, 2013, a custody trial was conducted at which time both parties presented

testimony and exhibits to support their respective cases on the issue of legal and physical primary custody of the Children.

### **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 set forth in 23 Pa.C.S.A. § 5328(a), where applicable, and highlight relevant evidence, if any, related thereto.

1. Which party is more likely to encourage and permit frequent and continuing contact between the Children and the other party.

Father testified that at the time the parties separated, Mother vacated the marital residence and left the Children with him. He then had to "encourage" her to spend time with them which she did. Thereafter, the parties worked out an agreement to share the Children on a "week on - week off" basis until sometime in March, 2013 when Mother unilaterally withheld custody from Father after an allegation of abuse and neglect was lodged with Children and Youth Services. This investigation led to an "unfounded" conclusion, but Mother continued to withhold

the Children until the Court entered an interim order. Since then, the parties have been complying with that Court Order without incident.

On two different occasions during his testimony, Father indicated that he felt that it was more important that the Children spend more time with his family than with their Mother. At no time did Father allege that it was because Mother conducted herself in a manner that would indicate she was either unfit or performing in such a way that her having any form of custody would be detrimental to the best interest of the Children. This is concerning to the Court as it implies that perhaps Father is reluctant to "encourage" a Mother-Children relationship, and he would prefer that the Children spend time away from her as opposed to with her.

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.

Based upon the testimony of the parties there were multiple Children and Youth investigations as well as a Protection from Abuse Petition being filed against Father's Mother, K.B. on behalf of one of the Children, M.B. Jr. According to the testimony, while this Protection from Abuse Petition was dismissed, the paternal Grandmother was not to be left alone

with that Child. For whatever reason, the parties arrived at what appeared to be a resolution that provided for adequate safeguards and supervision for this Child when he was with his Father; more specifically, the Child would stay at paternal Great-Grandmother's home. This would even occur at times when Father is sleeping overnight at paternal Grandmother's residence with the other Children.

3. The parental duties performed by each party on behalf of the Children.

Each parent testified that they performed various parenting duties on behalf of the Children including scheduling appointments, transporting to and attending these appointments, namely doctors', therapists', and counselors' appointments. Father is also involved as a coach for G.B. Both parties saw the need to engage the Children in counseling to deal with their parents' separation.

One of the biggest points of contention between the parties is that of discipline. Mother testified that during the marriage, Father had to be "encouraged" to discipline the Children. According to Mother, it was her understanding that after separation Father's form of discipline was through the use of "timeouts." Additionally, Mother testified that while the Children were in the care of Father, there was an incident

involving pepper being placed in the mouth of one of the Children. Testimony elicited from Father's witnesses suggested that his mode of discipline was otherwise commensurate with the Children's behavior.

Mother also testified that she and her boyfriend, C.K., use "progressive" discipline based upon the nature of the Children's behavior ranging from a warning to timeouts to spanking, if necessary.

Father had expressed concern over Mother's use of "corporal punishment" as her method of discipline for these young Children. Further, Father also testified that he felt that Mother's paramour had no business or right to discipline the Children, specifically with the use of corporal punishment. C.K. stated that on occasion he is responsible for the care of the Children and sometimes the Children's behavior warrants discipline, including on rare occasions, the implementation of corporal punishment but only after consulting with Mother.

This Court first notes that corporal punishment in domestic settings as a form of discipline is still lawful in Pennsylvania. This is so, presumably, because most parents understand that if corporal punishment is properly imposed, it will not produce bodily injury. *Ferri v. Ferri*, 854 A.2d 600, 604 (Pa. Super. Ct. 2004). Parents or guardians may use

corporal punishment to discipline their child so long as the force used is not designed or known to create a substantial risk of death, serious bodily injury, disfigurement, extreme pain, mental distress, or gross degradation. *Boland v. Leska*, 454 A.2d 75, 78 (Pa. Super. Ct. 1982).

This Court is also mindful of the fact that individuals, such as caretakers, are vested with authority to discipline a child under their care or control. C.K., and for that matter, any of Father's extended family members who act as alternate caretakers, unless specifically advised against employing corporal punishment, have that at their disposal where appropriate. While this then begs the questions, "when, and under what circumstances should corporal punishment be employed by alternate caretakers," this Court will not attempt to micromanage the daily upbringing of the Children unless that upbringing affects the best interests of the Children.

This Court does not believe the Children's best interests are adversely affected by the use of appropriate corporal punishment as appears to be the case here.

4. The need for stability and continuity in the Children's education, family life, and community life.

Since the entry of the interim order in this matter, Mother has been the primary custodian of the Children, while Father has

been exercising partial custody rights on days and at times determined by Father's work schedule. The Child, G.B., is enrolled in kindergarten at Parkside Elementary in the Palmerton School District. Father proposed that if he is granted primary physical custody, he would enroll her in the Northwestern Lehigh School District.

If this Court were to grant Father's primary custody request, it does not find that switching schools at this early developmental stage of this Child's education would have a great impact thereon; notwithstanding such, the Court does not give much credibility to Father's beliefs regarding the superiority of the Northwestern Lehigh School District educational process as compared to Palmerton School District. Father also believes that Northwestern School District is a better School District than Palmerton. He bases this on his claim that Northwestern is "ranked better" and therefore gets more funding, in addition to Northwestern having a larger library. He did admit, however, that as far as Palmerton is concerned, he finds no deficiencies in that School District.

Moreover, Father testified that religion plays a large role in his family and he takes the Children to church services when they are in his custody. It could be said that this would not change and neither would G.B.'s involvement in T-Ball or soccer

if Father is granted primary physical custody. If, however there is a change in primary custody, what would change is the amount of time the Children would be away from their Mother, their current primary custodian. The parties agree that the Children are currently engaged in "separation counseling" to deal with the fact that their parents are separated. A change in primary custody, where otherwise not warranted would likewise create a further separation between Mother and the Children not unlike what is occurring at present insofar as the Children cannot be with both parties at all times. The stability and continuity of the relationship between Mother and the Children is of utmost importance considering the fragile nature of the Children's emotional states and their need for counseling.

What is also a concern to this Court are the living arrangements for the Children in Father's care, that being bouncing back and forth between the Children's paternal Grandmother's home and their paternal Great Grandmother's home. Additionally, the testimony suggests that M.B. Jr. stays with the parental Great Grandmother due to the arrangement referenced earlier. This type of instability and lack of continuity is not in the Children's best interest under the partial physical custody arrangement and there was no evidence proffered by Father that it would be any different if he were awarded primary



physical custody.

5. The availability of extended family

Undoubtedly this factor weighs heavily in favor of Father due to the quantity of family members in or near Father's residence. Mother's only family member outside of her household is her Mother who has no involvement with the Children and resides in the Montoursville area.

6. The Children's sibling relationships

Mother presented testimony that she recently had another child with C.K.; however, while the Court should consider the relationship of step or half children to the subject Children, there was no testimony presented on this factor. Even if there was, it could not be said to be of great significance as this child is only several months old. No testimony was submitted on the issue of the relationships between the three (3) subject Children.

7. The well-reasoned preference of the Children, based on the Children's maturity and judgment.

No testimony was presented on this factor as the Children are only six (6), four (4), and three (3) years old, respectively.

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.

There was no testimony presented on 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.

The Court finds that both parents are caring, loving, and nurturing individuals when it comes to their Children. There was no significant testimony presented by either party to the contrary. However, due to Mother's availability, she would have a better opportunity and ability to provide more consistency and stability for the Children's needs.

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

As stated above, Mother's availability lends itself to creating a scenario suggestive of finding she is also more likely to attend to the physical, emotional, developmental, and educational needs of the Children. This is not to say Father does not, nor does it suggest he will not continue to do so into the future, however, his reliance upon others tips the proverbial scale in favor of Mother when comparing parents. Mother also testified that during the marriage she had to encourage Father to get involved in the Children's lives.

Father did not dispute this testimony.

11. The proximity of the residences of the parties.

Mother resides in a newly renovated four (4) bedroom home in Palmerton with C.K., their daughter, and the three (3) subject Children. G.M. has a separate bedroom while M.B. and M.B. Jr. share one. Mother's residence is a short drive to the Schnecksville area where Father resides. The Court does not find that the proximity of the residences is an issue or concern as there was no testimony presented that suggested there was a problem with this distance.

Mother did, however, raise concern over with whom, when, and where Father truly resides and where he exercises his partial custody rights, that being with paternal Grandmother at 5975 Newside Road, Schnecksville or with paternal Great Grandmother at 4532 Parkview Drive, Schnecksville. The Court will not address that issue here, save for the fact that both residences are in the Schnecksville area, fifteen minutes from each other.

12. Each party's availability to care for the Children or ability to make appropriate child-care arrangements.

Mother is a stay-at-home parent and is therefore available at all times to care for the Children. Father works two jobs and therefore relies on his siblings, Mother, and Grandmother to

care for the Children when he is not available. The Court does not hold this fact against Father as that would be contrary to the law. A "parent's work schedule may not deprive that parent of custody if suitable arrangements are made for the child's care in his or her absence." *Gerber v. Gerber*, 487 A.2d 413, 416 (Pa. Super. Ct. 1985).

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.

There is a reason why Mother and Father no longer reside together as Husband and Wife: the harmonious nature of their relationship is over. This is evident in the number of incidents referenced throughout the testimony indicative of conflicts between them, namely pre-school, Awana attendance, G.B.'s activities, and discipline, among others. However, these conflicts occur with intact families as well. The Court does not see these conflicts as one-sided by any means, and therefore, the Court will not find fault entirely with either parent. In fact, for the most part there is a level of cooperation between them indicative of two parents doing what is best for the Children.

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

Absent Mother's testimony that she is a "social drinker" no other evidence was presented on this factor.

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

Neither parent presented evidence of mental or physical conditions of the other parent that would indicate that they were not capable of caring for the Children. However, there was testimony that Father's brother had a seizure disorder and his Mother has arthritis. This Court does not find that either of these conditions would individually impact the best interests of the Children in light of numerous alternate caretakers in paternal Grandmother's residence, more specifically Father's brother and sister.

16. Any other relevant factor.

Notwithstanding the above factors, there are several other issues or concerns raised by the parties which the Court will now examine to determine their impact, if any, on the best interests of the Children.

A. *Employment & Financial Status*

Father testified that he is employed by Walmart full-time and works "second shift" on Tuesdays, Wednesdays, or Thursdays depending upon another co-workers schedule, in addition to

working Fridays, Saturdays, and Sundays. Father also works at Chick-fil-A on Wednesday and Saturday mornings from approximately 4:30 A.M. until 7:00 A.M.

While Father resides with other family members, this Court could only assume he shares the responsibility in paying household expenses. Mother on the other hand, has chosen to be a stay-at-home mom and relies on her boyfriend to be the wage earner. Based upon the testimony, the Court finds the employment situation of both parents adequate and their income levels sufficient, notwithstanding Father's belief that Mother and her boyfriend may not have sufficient financial means.

[I]n a custody proceeding, the sole permissible inquiry into the relative wealth of the parties is whether either party is unable to provide adequately for the [children]; unless the income of one party is so inadequate as to preclude raising the children in a decent manner, the matter of relative income is irrelevant.

*Roadcap v. Roadcap*, 778 A.2d 687 (Pa. Super. Ct. 2001). In this case there is no evidence of any inadequacy in Mother's household income.

*B. Criminal Record of Mother's Paramour*

23 Pa.C.S.A. § 5329 requires the Court to consider certain enumerated convictions of a party or household member in its determination of custody.<sup>1</sup> The Court is, however, also obliged

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<sup>1</sup> The pertinent language of 23 Pa.C.S.A. § 5329 states as follows:

to determine if those convictions "pose a threat of harm to the [Children] before making any order of custody to that parent. . . ." *id.* § 5329(a).

Numerous witnesses testified as to the criminal record of Mother's boyfriend. C.K. has been convicted of the following offenses in the years noted:

- i) Robbery (18 Pa.C.S.A. § 3702) in 2002;
- ii) Burglary (18 Pa.C.S.A. § 3502) in 2003;
- iii) Simple Assault (18 Pa.C.S.A. § 2701) in 2006;
- iv) Possession of a weapon (18 Pa.C.S.A. § 907) in 2007; and
- v) Possession of Drug Paraphernalia (35 P.S. § 780-113 (a)(32)) in 2012.

The Court first notes that none of these convictions are enumerated for consideration pursuant to § 5329(a), and therefore an examination of whether or not C.K. poses a threat of harm pursuant to this section is unnecessary. The Court would be remiss, however, if it did not examine his criminal record in any event. With the exception of the drug

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Where a party seeks any form of custody, the court shall consider whether that party or member of that party's household has been convicted of or has pleaded guilty or no contest to any of the offenses in this section or an offense in another jurisdiction substantially equivalent to any of the offenses in this section.

23 Pa.C.S.A. § 5329(a).

paraphernalia charge in 2012, these other convictions are over six (6) years old. Since C.K.'s release from prison,<sup>2</sup> he has engaged in a relationship with Mother, fathered a child with her, and has obtained full-time employment. While it has only been for a short period of time, it appears he may now be taking the road to becoming a productive individual.

Additionally, prior to beginning their relationship, Mother was initially hesitant to allow C.K. near the Children at the time when he, C.K., was dating Father's sister. She eventually befriended him after getting to know him better, even before dating him. Further, C.K.'s ex-girlfriend, Father's sister, M.W.B., testified that C.K. was a "fine person." C.K. also testified that he has a good relationship with the Children; testimony that was not contradicted. The Court finds no detrimental effect on the best interests of the Children as a result of C.K.'s relationship with them.

#### *C. Father's Living Arrangements*

As previously stated, stability and continuity in the Children's lives are of utmost importance to this Court. Impacting upon that are Father's unsettled living arrangements. Father testified that he primarily sleeps at his Mother's

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<sup>2</sup> Although there was no testimony of the exact date C.K. was released from prison, the Court does note that the sentence imposed on C.K. for his last offense, possession of drug paraphernalia, was only a probationary sentence.



residence with G.B. and M.B., and sometimes M.B. Jr.; however M.B. Jr. sleeps primarily at his paternal Great Grandmother's home. Father stated that when he has the Children the nights before he works at Chick-fil-A, he sleeps with all of them at the Children's paternal Grandmother's home, all of this while exercising partial physical custody. There is no stability or continuity in this schedule of bouncing between sleeping accommodations most especially during a school year. This Court is concerned about these arrangements and finds them to be too inadequate for primary physical custody. Further, Father asserted that the Children's paternal Great Grandmother would keep M.B. Jr. at times when Father is sleeping at paternal Grandmother's home. While this may seem like a "special treat" as per Father's testimony, it appears to be a permanent arrangement at a time when Father should be exercising his limited periods of partial custody.

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.*, 63 A.3d 331 (Pa. Super. Ct.2013) *appeal denied*, 68 A.3d 909 (Pa. 2013). In this case, the Court has gleaned from the record such evidence that affects the best interest of the Children. The Court believes that the

Court Order fashioned in this matter reflects the fact that all relevant information was taken into consideration and exhibits the Court's rationale for so ordering. Accordingly, the Court enters the following Order of Court: