

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

T.W., :  
Plaintiff :  
Vs. : No. 11-1258  
T.W. and B.A., :  
Defendants :

Leighton Cohen, Esquire Counsel for Plaintiff  
Defendant, T.W. Pro Se  
Defendant, B.A. Pro Se

**MEMORANDUM OPINION**

Matika, J. - November , 2013

This is a child custody relocation case filed by the Plaintiff, T.W., who is the Maternal Grandmother. After careful review of facts and the applicable law, including all relevant factors, the request to relocate the child to the St. Petersburg, Florida area will be **GRANTED** for the reasons stated herein.

**FACTUAL AND PROCEDURAL BACKGROUND**

On July 18, 2011, a Final Order governing the custodial situation of the subject child (hereinafter "K.A."), (D.O.B. 12/23/05), was issued granting the Maternal Grandmother, T.W. (hereinafter "Grandmother") primary physical custody of K.A. The Defendant, T.W., who is the Natural Mother, (hereinafter "Mother") was awarded partial physical custody on weekends.

[FM-66-13]

Due to the fact that the Defendant, B.A., who is Natural Father, (hereinafter "Father") was incarcerated at the time of the conference, he did not participate in that conference and since he had not seen K.A. for three (3) years prior thereto, no provisions were made for him unless they were agreed to by all parties.

For at least six (6) years prior to the hearing in this matter, K.A. was residing with Grandmother at 4177 Heritage Lane, Walnutport, Lehigh County, PA, and was in her primary custody for at least as long as this 2011 order existed. At the hearing we conducted, Father testified that he had not seen K.A. that often over the years as a result of being incarcerated. Additionally he added that other family member's attempts to arrange contact with K.A. on his behalf were thwarted by Mother.

Grandmother, on or about April 1, 2013, sent the statutorily required notice of intent to relocate K.A. to her Father, who, in turn, on July 30, 2013 filed a counter-affidavit regarding that relocation indicating his objection to it. This counter-affidavit although not filed until July 30, 2013 was executed by Father on May 4, 2013, evidencing the fact that Father possessed this notice on or before May 4, 2013 but did

not file within thirty (30) days thereafter.<sup>1</sup> Father, in his untimely filed counter-affidavit, requested a hearing on the matter of the relocation and modification, however, this untimely filing of his objection on July 30, 2013 is tantamount, under this statute, to acquiescence in the relocation and despite his objection at the hearing, this late filing precluded testimony challenging relocation.<sup>2</sup> However, this Court believes it is still constrained to review the facts of this case to ascertain an appropriate order *vis-à-vis* Father's custodial rights. This Court does undertake that responsibility and in doing so takes into consideration 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 child. 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 child.

---

<sup>1</sup> 23 Pa.C.S.A. §5337(d)(2) requires the objection to relocation to be filed within thirty (30) days after receipt of the notice of intent to relocate. This Father did not do.

<sup>2</sup> 23 Pa.C.S.A. §5337(d)(4) states:

If a party who has been given proper notice does not file with the court an objection to the relocation within 30 days after receipt of the notice but later petitions the court for review of the custodial arrangements, the court shall not accept testimony **challenging the relocation.** (emphasis by the Court).

*J.R.M. v. J.E.A.*, 33 A.3d 647, 650 (Pa. Super. Ct. 2011). This also applies to situations involving only claims regarding partial physical custody. The Court will now examine each factor and highlight relevant evidence, if any, related thereto.

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

Grandmother testified that Father's attempts to contact K.A. were minimal while he was not incarcerated. Upon moving to Florida, Grandmother testified that she would afford Father the same rights afforded under the existing order.

Father testified that there were attempts to either exercise visits with K.A. himself or have his family members do so on his behalf only to be prevented or prohibited from doing so. Even if accepted as true, they appeared to be far and few between. Further, no contempt petitions were ever filed to enforce the then existing final order.

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

No evidence was presented on this factor.

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

Grandmother has been the party wholly responsible for performing parental duties when it comes to K.A. and has done so appropriately.

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

As previously stated, K.A. has been in Grandmother's primary custody since at least the order of August 18, 2011, however, K.A. has actually lived with her Grandmother all of her life. K.A. visits with Mother on occasion while her relationship with her Father and his family is non-existent.

Father testified that while he wants to see the child, his incarceration prohibits that contact. Circumstances suggest he has no true relationship with this child.

While the move to Florida will be a change for the child, her Grandmother, the primary custodian, as well as K.A.'s Mother will be moving with her. These are the two most important people in her life. This is both stabilizing and a continuity of the proper nurturing this child deserves.

5. THE AVAILABILITY OF EXTENDED FAMILY

As stated above, Mother will be moving to Florida as well.

6. THE CHILD'S SIBLING RELATIONSHIPS

No testimony was presented on this factor.

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

No testimony was presented on this factor.

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

While Father attempted to show that Grandmother and Mother were preventing him from having a relationship with K.A., the evidence did not suggest any attempts to turn K.A. against him. His lack of a true and meaningful relationship did that for him.

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

Grandmother has been there for K.A. when neither her Mother nor Father was. She has been the main adult in K.A.'s life. Her involvement with K.A. is indicative of the type of loving, stable, and nurturing person K.A. needs in her life. For instance, Grandmother and K.A. enjoy the outdoors and swimming and Florida provides year round opportunities to do these activities.

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

Likewise, the evidence is suggestive of the Grandmother maintaining her parental obligations towards K.A. including those identified herein. Her "track record" of nurturing this child over the years is an appropriate and adequate predictor going forward.

K.A. is a seven (7) year old child who is currently enrolled in the Lehigh Elementary School in Walnutport. If permitted to move, Grandmother will enroll her in school in the St. Petersburg area. There was no other testimony that would impact upon this relocation factor.

11. THE PROXIMITY OF THE RESIDENCES OF THE PARTIES

This relocation will result in a significant distance between the child and her Father, however, for the reasons stated herein and our justification doing so, distance is not a measure of any impact on a parent/child relationship which does not exist in the first instance.

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

No testimony was presented in this 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 CHILD FROM ABUSE BY ANOTHER PARTY IS NOT EVIDENCE OF UNWILLINGNESS OR INABILITY TO COOPERATE WITH THAT PARTY

There appeared several instances of conflict between the Grandmother and Mother on one side and the Father and his family on the other as testified to by Father. If believed, however, Father's lack of a meaningful relationship with K.A. is more strenuous *vis-a-vis* that relationship than any conflict or perceived conflict involving the adults.

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

Save for one incident when Father came to see K.A., there was no testimony suggestive of a drug or alcohol issue or concern.

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

No testimony was presented on this factor.

16. ANY OTHER RELEVANT FACTOR.

Grandmother testified that employment in the St. Petersburg, Florida area would not be an issue as she has a prospect for a position similar to what she enjoys now. However, the physical move is contingent upon her listing her Walnutport home for sale and selling it before she relocates.

Father has had an extremely non-existent relationship with K.A. over the years. Permitting a move to Florida could not be said to significantly or negatively impact that relationship. Further, Father has an extensive criminal history including DUI, thefts, weapons possession, and drug convictions, among others. This criminal record was considered accordingly by the Court.

### **CONCLUSION**

As stated earlier, Father has had no true relationship with K.A., therefore a re-location to Florida will not impact that relationship. Grandmother proposed Father may visit K.A. if he ever went to Florida and should K.A. return to Pennsylvania, arrangements can be made to visit then as well. Therefore, preservation of a non-existent relationship is not a necessary concern under these circumstances save for providing and preserving what is currently the ordered status quo.

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 affects the best interest of the child. The Court believes that the 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. Therefore, based on the foregoing, the Court will grant T.W.'s request to relocate with K.A. to St. Petersburg, Florida while adequately and appropriately providing legal and physical custodial rights as follows:

**[FM-66-13]**

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

**CIVIL DIVISION**

T.W.,	:	
Plaintiff	:	
	:	
Vs.	:	No. 11-1258
	:	
T.W. and B.A.,	:	
Defendants	:	

Leighton Cohen, Esquire	Counsel for Plaintiff
Defendant, T.W.	Pro Se
Defendant, B.A.	Pro Se

**CUSTODY ORDER**

**AND NOW**, this                      day of November, 2013, following a hearing on Plaintiff, T.W.'s Request to Relocate with K.A.(DOB 12/23/05), and taking into consideration all of the relevant evidence and testimony, it is hereby **ORDERED** and **DECREED** as follows:

1. The Court awards joint legal custody of the child to Plaintiff, T.W. (hereinafter referred to as the "Grandmother"), and Defendant, T.W. (hereinafter referred to as the "Mother"). Joint legal custody means that both parties have the right to share in making decisions of importance in the life of the child, including emotional, medical, educational and religious decisions. All parties shall be entitled to equal access to the child's medical, dental, and other important records.

**[FM-66-13]**

2. Each party shall notify the other parties of any medical, dental, optical, or other appointment for the child with healthcare providers, sufficiently in advance thereof so that the other party may attend if it is practical to do so.

Notwithstanding that both the Grandmother and the Mother share legal custody, non-major decisions involving the child's daily living shall be made by the party then having custody, consistent with the provisions of this Order.

3. Any emergency decisions regarding the child shall be made by the party having physical custody of her at the time. However, in the event of any emergency or serious illness of the child at any time, the party then having custody of the child shall immediately communicate with the other party by telephone or any other means practical, informing the other party of the nature of the illness or emergency, so that the other party can become involved in the decision-making process as soon as practical. The term "serious illness" as used herein shall mean any disability which confines the child to bed for a period in excess of twenty-four hours or which places the child under the direction of a licensed physician.

4. Physical custody of the child, K.A. shall be as follows:

**[FM-66-13]**

- a) Primary physical custody of the child shall be confirmed in and remain with the Grandmother, T.W.;
- b) The Mother, T.W., shall have partial physical custody as agreed between Grandmother and Mother;
- c) The Father, B.A., shall have supervised or partial physical custody as he and the Grandmother can agree in the event Father travels to Florida or K.A. returns to Pennsylvania, in which case, Grandmother shall notify Father of K.A.'s arrival in Pennsylvania so as to allow Father to engage in discussions over periods of supervised or partial physical custody in Pennsylvania. In the event Grandmother and Father cannot agree, Father shall file a petition to modify this order to obtain set dates and times appropriate under the circumstances.

5. In the absence of any agreement between the parties, transportation shall be the responsibility of the Grandmother.

6. The welfare of the child shall be the prime consideration of the parties in any application of the provisions of this Order. All parties are directed to listen carefully and consider the wishes of the child in addressing the custodial schedule, any changes to the schedule, and any other

**[FM-66-13]**

parenting issues. In no way, however, are these wishes dispositive of those issues.

7. Each party shall have telephone access with the child at reasonable times and intervals when the child is in the custody of the other party. No party shall prevent the other parties from talking to the child, nor prevent the child from calling the other parties.
8. Each party shall keep the others advised of their current residential address and telephone number(s) to facilitate communication concerning the welfare of the child and the custody situation.
9. Each party shall give, when possible, forty-eight hours notice in the event that it will not be possible to exercise any of the rights herein identified.
10. Each party shall exert every reasonable effort to foster a feeling of affection between the child and the other parties. No party shall do or say anything which may estrange the child from the other parties, or injure the child's opinion of the other parties, or hamper or inhibit the free and natural development of the child's love and respect for the other party.
11. The parties shall communicate directly with each other concerning the child, rather than through the child. No

**[FM-66-13]**

party shall use the child to send messages to the other parties about the custody situation or changes in the custody schedule. The parties are encouraged to use e-mail, text messaging or any other form of social media to communicate with each other if direct verbal communication is impossible.

12.The parties are free to modify the terms of this Order but in order to do so, both parties must be in complete agreement concerning any new terms. That means that both parties must consent on what the new terms of the custody arrangement or schedule shall be. In the event that a party does not consent to a change that does not mean that each party follows his or her own idea as to what they think the arrangements should be.

13.No party may make a change in the residence of any child which significantly impairs the ability of the other party to exercise custodial rights without first complying with all of the applicable provisions of 23 Pa.C.S.A. § 5337 and Pa.R.C.P. No. 1915.17 regarding location.

14.The provisions set forth in Appendix "A" attached hereto are hereby incorporated into and made a part of this Order.

**BY THE COURT:**

---

**Joseph J. Matika, Judge**

**[FM-66-13]**

## **APPENDIX "A"**

CERTAIN RULES OF CONDUCT GENERALLY APPLICABLE TO CUSTODY MATTERS ARE SET FORTH BELOW AND ARE BINDING ON BOTH PARTIES, THE BREACH OF WHICH COULD BECOME THE SUBJECT OF CONTEMPT PROCEEDINGS BEFORE THIS COURT, OR COULD CONSTITUTE GROUNDS FOR AMENDMENT OF THIS ORDER. IF THE GENERAL RULES CONFLICT WITH THE SPECIFIC REQUIREMENTS OF THIS ORDER, THEN THE SPECIFIC REQUIREMENTS OF THIS ORDER SHALL PREVAIL.

1. No party will undertake nor permit in his or her presence the poisoning of the minor child's minds against the other party by conversation that explicitly or inferentially derides, ridicules, condemns, or in any manner derogates the other party.
2. The parties shall not conduct arguments or heated conversations when they are together in the presence of the child.
3. No party will question the child as to the personal lives of the other party except insofar as necessary to insure the personal safety of the child. By this, the Court means that the child will not be used as a "spy" on the other party. It is harmful to the child to be put into the role of "spy."
4. No party will make extravagant promises to the children for the purposes of ingratiating himself or herself to the child at the expense of the other party; further, any reasonable promise to the child should be made with the full expectation of carrying it out.
5. The parties should at all times consider the child's best interests and act accordingly. It is in a child's best interest to understand that she is trying desperately to cope with the fact of her parents' separation, and needs help in loving both parents, rather than interference or censure.

**[FM-66-13]**

6. The parties should remember that they cannot teach their child moral conduct by indulging in improper conduct themselves. Children are quick to recognize hypocrisy, and the party who maintains a double standard will lose the respect of the child.
7. Periods of partial physical custody shall be subject to the following rules:
  - a) If the periods of partial physical custody designated in this Order will interfere with scheduled activities of the child, then arrangements should be worked out beforehand between the parties without forcing the child to make choices and run the risk of parental displeasure.
  - b) If a party finds himself or herself unable to keep an appointment, he or she should give immediate notice to the other party, so as to avoid subjecting the child to unnecessary apprehension and failure of expectations.
  - c) The party having custody of the child shall prepare her both physically and mentally for the visitation with the other party and have her available at the time and place mutually agreed upon.
  - d) If either party or the child has plans which conflict with a scheduled visit and wishes to adjust such visitation, the parties should make arrangements for an adjustment acceptable to the schedules of everyone involved.
  - e) If a party shows up for a visit under the influence of alcohol or drugs, the visit may be considered forfeited on those grounds alone.
8. During the time that the child is living with a party, that party has the responsibility of imposing and enforcing rules for daily living. However, unless otherwise ordered, both parties should consult with one another on the major decisions affecting the child's

lives, such as education, religious training, medical treatment, and so forth.

[FM-66-13]