

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

I.N.,	:	DOCKET NO. 11-21,118
Plaintiff	:	
vs.	:	CIVIL ACTION - LAW
T.N.,	:	
Defendant	:	CUSTODY

**OPINION AND ORDER**

This matter comes before the Court on Father I.N.'s Petition to Modify Custody. This matter arises out of a dispute between the parties concerning the primary custody of their two children: **E.R.N.**, born April 5, 2002, and **J.J.N.**, born January 15, 2007. After considering the best interests of the children, the Court finds that it is in their best interests to live primarily with their Father during the school year.

**I. Procedural and Factual Background**

Mother and Father have a long history. Mother and Father's relationship began in 2001. E.R.N. was born on April 5, 2002. Mother and Father married on September 12, 2005, in North Carolina. Mother is Father's fifth wife, and, when Mother and Father married, it was Father's sixth marriage. J.J.N. was born on January 15, 2007; J.J.N. is Mother's seventh child. E.R.N. and J.J.N. are the parties' only joint children. The parties divorced in North Carolina in approximately 2007. The parties remained to live together in North Carolina until approximately 2009. In 2009, Father moved to a rental property in Trout Run, Lycoming County, Pennsylvania. Mother and children continued to reside in North Carolina until approximately July 2010, at which time Mother and children moved to Father's Trout Run home. In May 2011, Father purchased a home in Trout Run; Mother and children continued to live in Trout Run until approximately August 10, 2011. On

approximately August 10, 2011, Mother and children left Father's home. After she left the home, Mother refused contact between Father and children, and she refused to tell Father of her location.

Father filed his initial complaint for custody on August 29, 2011, in Lycoming County. At that time, Father believed that Mother and the children were residing in North Las Vegas, Nevada. Father also filed an emergency petition for custody on that date. After an ex-parte hearing held on that date, the Court granted Father's emergency petition and ordered the immediate return of the children to Lycoming County. On August 31, 2011, after a hearing, the Court ordered Mother to return the children to Lycoming County by September 19, 2011. Father assisted Mother in returning the children to the area. On September 27, 2011, the Court dismissed Father's emergency custody petition; the Court found that Father consented to Mother's relocation to Las Vegas.

On September 27, 2011, the Court entered the parties' initial custody order; that order provided that the children live primarily with Mother. On October 5, 2011, the Court entered a second custody order; that order provided that Mother shall have primary physical custody of the children during the school year and that Father shall have primary physical custody of the children during the non-school year.<sup>1</sup>

The instant action arises out of Father's petition to modify custody, filed on July 20, 2012. Father filed the petition to modify custody based on Mother's instable housing situation. In the petition, Father alleged that Mother moved from Las Vegas to her mother's home in Bloomsburg, Pennsylvania, while the children were living with Father for the summer. Father also alleged that Mother planned to move, with the children, to North Carolina at the end of the summer. In his petition, Father requested primary custody of the children. On August 3, 2012, Mother confirmed to the Family Court Hearing Officer that she intended to relocate to North Carolina. The Family

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<sup>1</sup> The Court issued an order on November 9, 2011, to further clarify its October 5, 2011 order.

Court Officer scheduled this matter for trial prior to the commencement of the 2012-2013 school year.

This Court held the first part of a custody trial on August 8, 2012. At that time, the Court received testimony from Father, Mother, Stepmother and the children, in addition to other family members. After receiving this testimony, the Court entered a temporary custody order granting Father temporary primary physical custody of the children, based upon Mother's lack of a permanent residence. The Court ordered the children to be promptly enrolled in Father's school district.<sup>2</sup> As of August 8, 2012, the Court found that Mother's living situation was unstable. Over the summer, Mother moved from Las Vegas to Bloomsburg. Mother testified that she had a home to move to in North Carolina, but she was very vague; additionally, Mother testified that she had a job in North Carolina, but she was vague on the details. The Court provided that it would enter a supplemental order regarding Mother's custody schedule when Mother reported to the Court the location of her primary residence.<sup>3</sup> However, in the interim, the Court provided that Mother should have alternating weekends of custody. The Court scheduled a follow-up conference on December 7, 2012.

On August 29, 2012, Father filed a petition for emergency custody. In this petition, Father alleged problems during Mother's custodial visits, particularly the children's half-siblings. On August 29, 2012, the Court granted Father's emergency custody petition. On September 7, 2012, the Court ordered that the children could not have contact with their half-brother A.M. Since this time, each party has filed a petition for contempt against the other.

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<sup>2</sup> Initially, the Court mistakenly ordered that the children be enrolled in the Troy Area School District; on August 23, 2012, the Court amended this provision to the Athens Area School District.

<sup>3</sup> The Court notes that it did not receive information regarding Mother's permanent residence until December 7, 2012.

On December 7, 2012, the Court resumed the custody trial held on August 8, 2012. At that time, the Court received testimony from Mother, Father, the children, and a Columbia County Children and Youth worker. After hearing this testimony, the Court believes that it remains to be in the children's best interest to reside primarily with their Father, at least during the school year.

## **II. Discussion**

In this matter, the Court finds that it is in the best interest of the children to be in Father's primary physical custody during the school year. When determining the best interest of the children, the Court must consider all sixteen (16) custody factors. *See* 23 Pa. C.S. § 5328; *J.R.M. v. J.E.A.*, 33 A.3d 647, 652 (Pa. Super. Ct. 2011). These factors include:

1. Which party is more likely to encourage and permit frequent and continuing contact between the child[ren] and another 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[ren] or an abused party and which party can better provide adequate physical safeguards and supervision of the child[ren].
3. The parental duties performed by each party on behalf of the child[ren].
4. *The need for stability and continuity in the child[ren]'s education, family life and community life.*
5. The availability of extended family.
6. The child[ren]'s sibling relationships.
7. The well-reasoned preference of the child[ren], based on the child[ren]'s maturity and judgment.
8. The attempts of a parent to turn the child[ren] against the other parent, except in cases of domestic violence where reasonably safety measures are necessary to protect the child[ren] from harm.
9. Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child[ren] adequate for the child[ren]'s emotional needs
10. Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child[ren].
11. The proximity of the residences of the parties.
12. Each party's availability to care for the child[ren] or ability to make appropriate child-care arrangements.
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 [the] child[ren] from abuse by another party is not evidence of unwillingness or inability to cooperate with the party.
14. The history of drug or alcohol abuse of a party or member of a party's household.

15. The mental and physical condition of a party or member of a party's household.
16. Any other relevant factor.

23 Pa. C.S. § 5328 (emphasis added). The Court will address each of these factors in turn.

However, in this instance, the Court considers the most important factor to be need for stability in the children's lives. *See* 23 Pa. C.S. § 5328(a)(4).

**1. Encourage and Permit Frequent and Continuing Contact**

The Court finds that neither party is likely to encourage and permit frequent contact between the children and the other party. Father initiated this custody action because Mother removed the children from Lycoming County and refused to tell Father where she relocated. The Court also heard testimony from both Mother and Father that Mother has not received a portion of her daily phone calls, as required by the order dated September 7, 2012. While the Court understands Father's reasoning for refusing some of these phone calls with Mother, the Court is concerned with the children missing their daily phone calls. Thus, the Court does not believe that either party will promote contact with the other parent. Therefore, this factor is non-instructive.

**2. Present and Past Abuse and Continued Risk of Harm**

The Court finds that both parties have committed their fair share of past abuse within their relationship with each other. This Court heard testimony from both Mother and Father regarding the fights that they had within their North Carolina home. The Court also received testimony from the parties' daughter regarding the fear she had when her parents fought in North Carolina. Since the parties separated, the Court does not believe that any abuse is occurring within either home. The Court has received testimony that both of the parties bicker with each other and that Mother has issues with the children's 16-year-old half-sister. The Court does not believe this factor supports either party.

**3. Parental Duties Performed**

The Court finds that both parents perform parental duties for the children. When Mother was primary custodian, Mother performed the brunt of these duties. However, since Father has been awarded temporary primary custody, Father has been performing these duties. Initially, the Mother testified that Stepmother performs these duties because Father works overnight. Father admitted that when he works that he is out of the home, overnight, for half of the week. However, Stepmother testified that she is a stay-at-home mother and available to the children while Father is at work. At the most recent hearing, Father testified that he is on mandatory lay-off throughout the winter and is now home throughout the week and available around the clock to the children. Based upon the testimony, the Court believes that each parent is capable to adequately perform their parental duties; this factor is non-instructive.

**4. Stability in Education, Family and Community Life**

The Court finds this factor to be crucial in the instant case. This factor supports Father's role as primary custodian of the children because Father provides the stability that these children need. Before the August 2012 hearing, the children had no stability in their lives. Both Mother and Father testified about the various moves that they made across the country, with the children in tow. However, the Court believes that it is Father who now has the stable living situation that these children need.

When Mother and Father were married, the parties and their children lived in North Carolina. Sometime after the parties divorced, Father moved from North Carolina to Trout Run, Pennsylvania. Since Father's move to Trout Run, he has stayed in North-central Pennsylvania. Father now lives in Gillett, Pennsylvania, with his new wife and two step-children.

Since Father moved from North Carolina, Mother has lived in North-central Pennsylvania, Las Vegas, and Central Pennsylvania. When Father left North Carolina, Mother and children continued to reside there. Sometime after Father moved to Trout Run, Mother and children moved to Pennsylvania and resided in the Trout Run area with Father until approximately August 10, 2011. In August 2011, the children moved to Las Vegas with their Mother; the children lived in Las Vegas for the 2011-2012 school year. While in Las Vegas, Mother and children lived with some members of Mother's family, specifically Mother's sister. The children testified that they slept on floors while in Las Vegas. The Court received testimony that Mother's Las Vegas home was too small for the amount of people living within it. For the summer of 2012, the children returned to Father's home in Trout Run, and then Gillett. While the children were in Father's custody, Mother moved out of her sister's Las Vegas home; the Court received conflicting testimony as to whether Mother voluntarily moved out or was asked to leave. After leaving Las Vegas, Mother moved in with her mother in Bloomsburg, Pennsylvania. Ultimately, in July 2012, Father filed a petition to modify custody because Mother was talking about moving the children to North Carolina for the 2012-2013 school year.

At the time of the initial hearing on August 8, 2012, Mother intended to relocate with the children to North Carolina. Mother testified that she had a home in North Carolina to move into; particularly, Mother testified that the home was an old farmhouse with four bedrooms and a big backyard. At the time of the hearing, Mother did not have pictures or an address of the home or a copy of her lease or the name of her landlord. Mother also testified that she had a job lined up on North Carolina; however, Mother was again vague with the description of the job and had no supporting documents.

At the time of the initial hearing, the Court had no other option than to grant Father temporary primary custody. At the time of the hearing, Mother and the children's three half-siblings (K.M., A.M., and AL.M.) were living with her mother in Bloomsburg, Pennsylvania. The Court received testimony that maternal grandmother's home was too small for the people currently residing in the home, let alone the two additional children. Mother testified to a home and job that she had "lined up" in North Carolina, but she had no supporting documents or credible testimony regarding this home and job. The Court granted temporary custody to Father so that Mother could arrange herself in North Carolina. The Court told Mother that she could get a more-specific custody schedule once she notified the Court of her permanent address. Yet, the Court did not hear from Mother regarding a permanent residence.

When Mother appeared at the December 7, 2012 hearing, she still had not moved into a home. Mother testified that she obtained a one-year lease for a four-bedroom home located at 62 Buckhorn Road, Bloomsburg, Pennsylvania, but that she had not yet moved into the home.<sup>4</sup> Mother testified that she had everything in the home and that her and three of her other children (K.M., A.M., and AL.M.) were going to move into the home on December 7, 2012, *after the hearing*. When asked why Mother had not moved into the home, Mother testified that this home was the first that she could find that was big enough for her family. When asked why she did not move to North Carolina, Mother testified that her attorney advised her not to move to North Carolina; however, Mother confirmed that the home that she spoke of in August 2012 was still available to her.

The Court also received testimony that Mother's living situation in Bloomsburg for the past six months has also been unstable. When Mother moved to Bloomsburg, she initially lived with her mother; the Court again notes that maternal grandmother's home was too small for Mother, her five

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<sup>4</sup> A Columbia County Children and Youth Services worker corroborated Mother's testimony, but the worker admitted that she did not see Mother's lease.



children, and maternal grandmother. At the December hearing, Mother testified that she moved out of maternal grandmother's home because her mother refused to follow the custody order. Mother briefly resided in a motel. Then, Mother moved into the home of her grandmother and her grandmother's boyfriend; this home is also located in Bloomsburg, Pennsylvania.

At the most recent hearing, Mother confirmed that she is still employed at Wise, Inc., in Berwick, Pennsylvania, and that she recently was promoted to a position with steady hours. Mother testified that she recently purchased a new car: a 2008 Honda Civic. When questioned if all five (5) of her children could fit in her new car, Mother testified that she was going to trade in her car for a van *after* the December 7, 2012 hearing.

The Court has a hard time finding Mother's testimony credible. She initially presented to this Court that she had a home and job ready for her in North Carolina. The Court was reluctant to allow the children to go with Mother based solely upon Mother's testimony. The Court notes that at the time of the initial hearing, Mother was living with her mother in Bloomsburg. Mother returned to this Court six months later, still without a permanent residence. Mother testified that she followed her attorney's advice and did not move to North Carolina. However, Mother confirmed that the house and job that she spoke of in August were available to her. When asked why Mother did not have a permanent home in Bloomsburg, Mother testified that she could not find a home large enough to fit her family until recently. When asked why she has not spent a night in the home, when all of her furniture and her belongings were in the home, Mother testified that she was going to spend the night of the hearing in the home. When asked why Mother bought a new car that was not big enough to facilitate her five children, she responded that she was going to get a van after the December hearing. Mother's testimony is inconsistent, and, according to this Court, not credible.

This Court recognizes that Father has been married quite a few times. However, the Court believes Mother's instability in her living situation far outweighs any actions taken by Father. Since July 2010, Father has lived in either Trout Run or Gillett, Pennsylvania. Since July 2010, Mother has lived in North Carolina, Trout Run, Las Vegas, and Bloomsburg. Facially, Father is more stable for the children's education, family, and community needs. Therefore, this factor *strongly* weighs in Father's favor.

**5. Extended Family**

Each party will afford the children the ability to see extended family members. Mother testified that her mother and grandmother, as well as her sister and other extended family members, live in the Columbia County area. However, the Court notes that Mother's relationship with her mother and her sister is *very* strained. E.R.N. testified that Mother does not like E.R.N. talking to her maternal aunt; Mother testified that she does not like her sister being affectionate with the children. On the other hand, Father testified that he has extended family in Bradford County and the northern portion of Lycoming County. The Court also notes that Father appears to have a good relationship with Mother's family, despite Mother's strained relationship with them. The Court believes this factor slightly favors Father based upon his relationship with Mother's family.

**6. Sibling Relationships**

Although both parties have access to the children's siblings, the Court believes that this factor favors Mother based upon Mother's residence with the children's half-brother and half-sisters. The Court struggles with this factor because Mother resides with the children's three half-siblings while Father resides with two of the children's stepsiblings. It is the Commonwealth's policy to raise siblings together; this standard applies regardless of the siblings being full or half-siblings. *In re: Davis*, 465 A.2d 614, 622 (Pa. 1983); *Albright v. Commonwealth*, 421 A.2d 156,

160-61 (Pa. 1980); *Wiskoski v. Wiskoski*, 629 A.2d 996, 999 (Pa. Super. Ct. 1993) (sibling relationships must be weighed with other factors when determining custody). However, the Court has not found authority addressing raising stepsiblings together. The Court believes an analysis of the two competing sibling environments to be appropriate. *See generally Marshall v. Marshall*, 814 A.2d 1226, 1230-31 (Pa. Super. Ct. 2002) (appellate court instructed the trial court to compare the two custodial environments in deciding whether mother's relocation petition was in the best interest of her children).

Mother testified that, when she moves into her new home, she will reside with the children's half-brother A.M. and their half-sisters K.M. and AL.M. A.M. is 13-years-old, K.M. is 16-years-old, and AL.M. is 12-years-old. In Mother's home, Mother testified that E.R.N. will share a room with AL.M. and that J.J.N. will share a room with A.M. While Mother and Father were married, the children lived with A.M., K.M., and AL.M. Father testified that he is still close with AL.M. and that she refers to him as her father. Father also testified that AL.M. spends time with him during the summer. Therefore, for a majority of their lives, the children were raised with their half-siblings as their full-siblings. On the other hand, Father testified that he resides with the children's stepsister N. and stepbrother M. N. is 14-years-old and M. is 7-years-old. In Father's home E.R.N. and N. share a room, while J.J.N. and M. share a room.

Initially, the Court notes that E.R.N. and J.J.N. are full-siblings and it will not separate them. Yet, the Court struggles with this factor because while Mother has three of the children's half-siblings living in her home, the stepsiblings living in Father's home are generally closer in age with the children. Also, E.R.N. testified that she and N. get along well and that E.R.N. enjoys talking to N. about her problems; the Court believes that it is important for E.R.N. to have this relationship with her stepsister. The Court also notes that E.R.N. has not testified about her relationship with

AL.M.; at the last hearing, E.R.N. did not mention AL.M. when talking to the Court. Yet, ultimately, the Court believes that this custody factor favors Mother because the children have lived with their half-siblings, as a family, for a majority of their lives; therefore, this relationship is stronger than the relationship that the children have with their stepsiblings.

**7. Children's Preference**

Based upon the age of the children, approximately 11 and 6-years-old, the Court did not question them as to their preferences, nor did they offer any preferences. Therefore, this factor is non-instructive.

**8. Attempts to Turn Children against other Parent**

The Court believes that Mother is the more likely party to turn the children against the other parent. The Court has received testimony that Mother constantly questions the children about what goes on in Father's home. Father, Stepmother, and E.R.N. testified to Mother's questioning. The Court finds Stepmother's testimony to be credible. Also, the Court received testimony that Mother refers to Father as "Fred" to the children, instead of "Father" or "Dad." The Court notes Mother is essentially turning the children against herself, and the Court received testimony providing as much. Based upon the testimony received about Mother's actions, the Court finds that this factor favors Father.

**9. Loving, Stable, Consistent and Nurturing Relationship**

The Court believes that this factor favors Father because Father can provide stability. The children are currently enrolled in the Athens Area School District. At the latest hearing, E.R.N. testified that she enjoys her school and has a best friend. She testified she enjoys playing the French horn and hanging out with her friends, making up dances. This testimony differed greatly from E.R.N.'s prior testimony. In August, E.R.N. did not testify as to having any friends or being

involved in any activities. Father testified that when the children come home from school, they go outside and feed the family's animals; when the children are done feeding the animals, the children come inside, have a snack, and do their homework while waiting for dinner. Both of the children are doing well in school. *See* F-1 and F-2. Last year, while living in Las Vegas with their Mother, the children lived in a crowded apartment with other families; the children slept on floors. The Court finds that the current custody situation is providing a loving, stable, consistent, and nurturing relationship for the children. The Court will not interfere with the progress that the children are making in the Athens Area School District and while living with their Father. The Court finds this factor favors Father's position as primary custodian.

**10. Daily Physical, Emotional, Developmental, Educational and Special Needs**

The Court believes that the analysis of this factor is similar to that of the previous factor. Father's stability in his family and living situations will positively affect the daily physical, emotional, developmental, and educational needs of the children. Therefore, the Court finds that this factor favors Father.

**11. Proximity of Residences**

Both parties live in Pennsylvania. However, Mother testified that she will live in Bloomsburg, Columbia County, Pennsylvania, while Father lives in Gillett, Bradford County, Pennsylvania. Based upon the distance between the parties and the need of the children to attend school, a 50/50 custody schedule is not feasible; therefore, the Court should award primary custody to one of the parents for school purposes.

**12. Availability to Care for Children**

Both of the parties are gainfully employed. Mother works at Wise, Inc., and recently received a new position within the company. Mother testified that she works from 8:30 a.m. to 4:30

p.m., Monday through Friday. Mother also testified that her work schedule has the ability to be flexible, in that she can come in to work early if she has to leave early. Father works for Union #158. Father typically works from 7:00 a.m. to 5:00 p.m., Monday through Friday; however, Father also testified that he works some overnights, out of the Gillett area. Father also testified that he is currently on standard lay-off and will return to work either March 1, 2013, or April 1, 2013. Father testified that he does not work another job during his standard lay-off period. Father and Stepmother testified that, due to a medical condition, she is also home to care for the children.

This factor slightly favors Father's stance as primary custodian. Currently, the children are in school for the majority of the day. By the time the children got home from school, Mother would be getting home from work. Yet, for the next few months, Father will be home when the children come home from school; Father's availability will change once he resumes working, but, Stepmother will still be available to the children immediately after school. Therefore, this factor leans slightly in Father's favor, but not to a great extent.

### **13. Level of Conflict between Parents**

The Court notes that the level of conflict between the parents in this case is *extremely high*. The parties' children are evident of this conflict and affected daily by it. The parties should try to work together to control this conflict.

### **14. History of Drug/Alcohol Use**

Father has a history of alcohol abuse. Father testified that he has been in alcohol counseling in the past. Also, Father testified that he has been convicted of driving under the influence three times in the past. However, Father also testified that his last driving under the influence conviction was in 2002. Based on the length of time between his last conviction and the present time, the Court is not troubled by Father's past alcohol abuse. Additionally, the Court received testimony

from Father's sister stating that Father had a problem with alcohol in the past, but that it is currently under control. Father also admitted to PFA Order violations and a terroristic threats conviction. The Court did not receive testimony regarding any drug/alcohol abuse concerning Mother. Therefore, the Court finds that this factor leans in Mother's favor.

**15. Mental and Physical Condition**

The Court did not receive any testimony regarding any mental or physical condition of either party or any members of their households. Therefore, this factor is non-instructive.

**16. Other Relevant Factors**

The Court does not find any other factor relevant to the instant matter.

After an analysis of the custody factors, the Court finds that the factors favor Father being the children's primary custodian during the school year. The Court finds Father and Stepmother have a stable home in Gillett. The Court is very happy with the progress that the children are making, both educationally and socially, within the Athens Area School District.

The Court notes that it gave Mother approximately six months to acquire a *permanent* residence, and Mother failed to do so. Mother initially came into the Court talking about a house and job in North Carolina; six months later, Mother comes into this Court talking about a house that she is moving into in Columbia County that afternoon. This Court cannot find Mother credible. Additionally, Mother's extended family situation demonstrates her instability; Mother testified that her relationship with her mother and a sister is in-existent. The Court received testimony that Mother has moved in and out of family homes repeatedly within the last year. Recently, Mother briefly resided in a motel. This Court is concerned about exposing the children to this instability during the school year.

The Court enters the following Order.

**ORDER**

AND NOW, this 14<sup>th</sup> day of December, 2012, for the reasons stated above, it is hereby ORDERED and DIRECTED that the parties comply with the Custody Order issued herewith and attached hereto.

**Neither party shall show any part of this Opinion and Order to the children.**

BY THE COURT,

\_\_\_\_\_  
Date

\_\_\_\_\_  
Richard A. Gray, J.

RAG/abn

cc: Family Court  
The Honorable Joy Reynolds McCoy  
J. Ayers, Esquire  
K. Petrini, Esquire – 2135 Rolling Meadow Dr., Macungie, PA 18062  
Gary L. Weber, Esq.