

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

AK,	:
Appellant/Plaintiff	: NO. 11-21,599
	:
vs.	: CUSTODY
	:
SK,	: RULE 1925(a) OPINION
Appellee/Defendant,	:

DATE: January 17, 2013

**OPINION IN SUPPORT OF THE ORDER OF NOVEMBER 20, 2012 IN
COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE
PROCEDURE**

AK, (hereinafter “Mother”) has appealed this Court’s November 20, 2012 Order. Mother filed her appeal on December 18, 2012 and the appeal is docketed to 2210 MDA 2012. This Opinion is submitted in regard to the pending appeal.

In Mother’s Concise Statement of Matters Complained of on Appeal (hereinafter “Concise Statement”), filed December 18, 2012, Mother raised the following issues:

1. Based upon the evidence and testimony at hearing, the Trial Court abused its discretion by failing to confirm primary physical custody of the minor child to Plaintiff, AK.
2. The Trial Court abused its discretion in finding that Plaintiff and Defendant were matched equally on § 5328 (a)(3) of the Child Custody act, governing parenting duties performed by Plaintiff and Defendant, as the record indicated that Plaintiff performed most parenting duties for the minor child since the child’s birth.
3. The Trial Court abused its discretion in not giving proper weight and consideration to § 5328 (a)(4) regarding the need for stability and continuity in the child’s life, when it made the decision to abruptly change primary physical custody of the minor child from Plaintiff to

Defendant, resulting in a cross-country move and relocation for the minor child, who is an infant, with no family available.

4. The Trial Court abused its discretion in finding that Plaintiff and Defendant were matched equally on § 5328 (a)(5), regarding the availability of extended family, because the record did not support such a conclusion, as Defendant has no family available to him in Florida, whereas Plaintiff has family support in Pennsylvania.
5. The Trial Court abused its discretion in finding that Plaintiff and Defendant were matched equally on § 5328 (a)(6), regarding sibling relationships, because the record did not support such a conclusion, as the minor child has an already-established relationship with Plaintiff's older child, and the fact that Defendant's paramour was currently pregnant did not establish relationship between her unborn child and the minor child at issue.
6. The Trial Court abused its discretion in finding that Plaintiff was less stable than the Defendant according to factor § 5328 (a)(9) of the Child Custody Act, because the record produced no evidence indicating that Plaintiff had any stability issue which affected the minor child.
7. The Trial Court abused its discretion in finding that Plaintiff and Defendant were matched equally on factor § 5328 (a)(10), as the record could only support the conclusion that Plaintiff was more likely to be available to care for the minor child, as Defendant was active military and Plaintiff had been a stay at home mother since the minor child's birth.
8. The Trial Court abused its discretion in not giving due and proper consideration of § 5328 (a)(11), regarding the proximate residence of the parties, as the Court changed primary custody of the minor child, who is an infant at this time.
9. The Trial Court abused its discretion in finding that Plaintiff and Defendant were matched equally on factor § 5328 (a)(12), as Defendant is active military and Plaintiff was a stay at home mother and thus more available to care for the minor child.
10. The Trial Court abused its discretion in finding that Plaintiff was unwilling to cooperate with the Defendant for custodial arrangements, as laid out in § 5328 (a)(15), because the record did not support such a conclusion.

11. The Trial Court committed an error of law by including a change in the minor child's state of residence, without due and proper consideration to relocation notice requirements.
12. The Trial Court abused its discretion in not considering all factors relevant to the best interest of the minor child which were relevant, as governed by § 5328 (a)(16), when it changed primary custody from Plaintiff to the Defendant, due to the infant child being bonded significant with the Plaintiff, and other factors.

There was no abuse of discretion committed by the Court. The record supports the determination that primary custody with Father is in the best interest of the child. Mother's appeal should be denied and the Order of November 20, 2012 affirmed.

Background/Facts/Procedural History

The Court first became acquainted with the parties in this case on June 16, 2011, when Mother appeared before the Court in another custody matter. In that case, Mother was petitioning the Court for permission to move herself and her minor child to Florida with her then Husband, Father in this case.

Parties

Mother lives in Williamsport, Pennsylvania with her fiancé, and their child, Payton. Mother is engaged to SF who in the June 2011 custody trial Mother testified that he was an abusive alcoholic. She is a stay at home mom. Mother's home consists of three bedrooms; each child has their own room. Mother has frequent contact with maternal grandmother. Maternal grandmother testified that she sees Mother almost daily. Maternal grandmother further testified that mother is sometimes spontaneous and that her heart just was not in the marriage to Father.

Father lives in Crestview, Florida with his fiancé, Angela Richardson and her 5 year old daughter, Savannah. Father's home consists of four bedrooms; each child has their own room. At the time of the trial Father and Ms. Richardson were expecting their first child together, the delivery was scheduled for December 27, 2012. Father is in the Army in the position of a Master Breacher; Father recently became a Master Breacher because it is more administrative in nature and requires less travel. Father testified that Florida is his permanent location and that he plans on staying there through retirement.

Facts and Procedural History

Chronologically, Mother and Father were married on March 21, 2011. In May of 2011 Father had surgery. Approximately two weeks after his surgery, Father, Mother and Mother's child came back to Pennsylvania and stayed with Father's step mother, BK, while Father recuperated. May of 2011 is when Mother became aware that she was pregnant. On June 16, 2011 the Court became familiar with the parties and SF during a custody trial. Mother and Father testified that they were committed to each other and that Mother wanted to relocate to Florida with her husband and child. During his weeks of custody time Mother had been spending a lot of time at SF's house; during the June 2011 custody trial Mother explained that she needed to be there for her daughter because SF could not care for a child on his own if something out of the normal happened, like illness. Mother and Father started experiencing difficulties in their relationship. Mother and Father were scheduled to move to Florida in July 2011 to reconnect with Father's

military unit. Mother never moved to Florida with Father, she stayed in Pennsylvania and moved in with the SF. On December 7, 2011, Mother filed for divorce.

While they were separated Mother did not keep Father informed of the progress of her pregnancy. Father heard alternate stories, at one point Mother told him that she had had a miscarriage, another time she reported that she had had an abortion and yet another time Mother stated that the baby was not his. During her testimony Mother stated that she was extremely stressed during her pregnancy and afraid of losing the baby, she had had miscarriages in the past, these statements to Father were used in a ploy to get him to leave her alone. Mother later apologized to Father's step-mother for saying those things. Father returned to Pennsylvania on January 20, 2012 because he knew that was close to Mother's due date. Once he returned he immediately began trying to get in contact with Mother. KK, the child in question, was born on January 25, 2012. Mother did not notify Father that she had gone into labor nor did she tell him when the baby was born. Father learned of his daughter's birth three to four days after the fact.

On February 10, 2012 genetic testing was performed on Father and the child. This was the first occasion in which Father had to hold his child. On February 17, 2012 the results were received and it was determined that Father was the biological father of the child. On March 19, 2012 Father presided for a custody conference. A custody conference was held on April 17, 2012. An agreement was reached at the conference and Father was given physical custody of the child from April 17, 2012 until April 28, 2012 and May 18, 2012 until May 27, 2012. A follow up custody conference was scheduled for May 31, 2012. On May 7, 2012 Mother filed a Petition for Modification of Custody.

In the petition Mother averred that Father had refused to feed the child the breast milk that Mother had provided to him and instead had given the child formula. Mother stated that the child had a reaction to the formula and needed medical attention when she got back to Pennsylvania. In the petition, Mother also stated that there was a lack of phone contact with Father and the child during the child's stay in Florida. It is noted that during the custody trial the testimony was startlingly different. Mother acknowledged that Father did advise her that they were running out of breast milk; Mother testified that she felt that she had provided enough milk and was not going to pay the \$120 plus dry ice fees to overnight the milk. The petition was scheduled to be heard on the already scheduled date of May 31, 2012.

A custody conference was held on May 31, 2012 at which time a pre-trial custody conference was scheduled for September 6, 2012. In the interim Father was given some additional periods of custody, each month Father had custody from 3:00 p.m. on the third Saturday of the month until 3:00 p.m. on the fourth Saturday of the month. The exchanges were to occur in the halfway point of Johnson City, Tennessee. It was also agreed to that the child would be fed breast milk as long as there was breast milk available.

The parties were divorced on June 22, 2012. On June 25, 2012 Mother filed a Petition for Special Relief in which Mother sought an Order of Court that allowed for her to transport the child to Florida for the exchanges instead of driving to Tennessee. Mother stated that it was not in the child's best interest to be in a car for the approximate 19 hours that she was spending with the current custody exchange provisions. After a

hearing regarding the Petition for Special Relief held on July 2, 2012 the Court entered an order that permitted Mother to fly to Florida for custody exchanges.

On August 28, 2012 Father filed a Petition for Contempt of Custody. In his petition Father stated that he missed his period of physical custody that was to begin on August 18, 2012. Father alleged that Mother refused to transport the child to Florida for the exchange due to the fact that Father was temporarily unavailable and his fiancé would be making the exchange and watching his daughter until he returned home. The testimony presented at trial was similar. Father testified that in August he was away in training from Saturday through Monday. Father told Mother that the child would be with Ms. Richardson until he returned home. Mother refused custody due to the fact that Father would not be home. Mother testified that she feels during Father's periods of custody that Father should be with the child not Father's fiancé.

On September 24, 2012 Father filed an Amended Petition for Contempt of Custody. The petition contained the missed August 18, 2012 custodial period, the amendment to the petition was that Father missed his September 2012 custodial period. September visit did not occur at first because there was confusion on Father's side as to the date in which he was to have custody. Once the dates were clarified the trip did not occur due to Mother not having the money for the airfare. Father received custody of his daughter in October and had her for approximately four weeks. When Father received his daughter she had an ear and respiratory infection, after taking antibiotics for ten days she recovered. Father's contempt petition was heard at the time of trial. On September 26, 2012 Father filed a Petition for Special Relief asking the Court to move the date of

the custody trial from December 18, 2012 to November 19, 2012 due to the fact that his fiancé was pregnant and had doctor restrictions that prohibited her from traveling after November 22, 2012. On October 2, 2012 the Court granted Father's Petition for Special Relief and scheduled the custody trial for November 19, 2012.

The trial of November 19, 2012 served as both a custody trial and a contempt hearing. At the conclusion of the trial on November 19, 2012 the Court on the record reviewed the custody factors of 23 Pa. C.S. §5328 and determined that the best interest of the child would best be served by Father having primary custody. At that time the Court reviewed the custody schedule. By order of court dated November 20, 2012 Mother was found to be in contempt of court for failing to make the child available to Father for his August and September, 2012 visits. The custody schedule that the Court reviewed on the record and the obligations of shared legal custody were memorialized in Court Order dated November 20, 2012. Mother appealed this order on December 18, 2012. Mother's appeal should be denied as there was no abuse of discretion committed by the Court and the best interest of the child are best served with her spending the majority of her time with Father.

Discussion

The scope of review in child custody cases is as follows:

[O]ur scope is of the broadest type and our standard is abuse of discretion. This Court must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, this Court must defer to the trial judge who presided over the proceedings and thus viewed the witnesses

first hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

A.D. v. M.A.B., 2010 PA Super 15, 989 A.2d 32, 35-36 (Pa. Super. 2010) (citations omitted). “It is well-established that ‘the paramount concern in a child custody case is the best interests of the child, based on a consideration of all factors that legitimately affect the child’s physical, intellectual, moral and spiritual well-being and is to be made on a case-by-case basis.’” *Staub v. Staub*, 2008 PA Super 251, 960 A.2d 848, 853 (Pa. Super. 2008) (citing *A.J.B.*, 945 A.2d 744, 747 (Pa. Super. 2008.).

When faced with a custody case in order to determine where the best interests of the child lays the Court utilizes the factors delineated in 23 Pa C.S. §5328(a):

- (1) Which party is more likely to encourage and permit frequent and continuing contact between the child 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 or an abused party and which party can better provide adequate physical safeguards and supervision of the child.
- (3) The parental duties performed by each party on behalf of the child.
- (4) The need for stability and continuity in the child's education, family life and community life.
- (5) The availability of extended family.
- (6) The child's sibling relationships.
- (7) The well-reasoned preference of the child, based on the child's maturity and judgment.

(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.

(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.

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

(11) The proximity of the residences of the parties.

(12) Each party's availability to care for the child 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 a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that 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.

Acting in compliance with 23 Pa. C.S. § 5323 (d) which mandates the court to “delineate the reasons for its decision on the record in open court . . .” this Court addressed each factor and rationale on the record in the November 20, 2012 holding. The Court believes that the matters raised in Mother’s Statement of Matters Complained of on Appeal have been fully addressed by the Court’s reasoning set forth on the record. However the Court is without benefit of the transcript of the custody trial as Mother did not submit her payment for the transcript until January 14, 2013 even though payment

was requested of Mother as early as December 21, 2012. For this reason and pursuant to *Pennsylvania Rules of Appellate Procedure* Rule 1911(d) the Court feels Mother's appeal should be dismissed for failure to timely comply with paying the deposit for the transcript.

In absence of a ruling on that matter the Court will proceed. In her Concise Statement, Mother took issue with the Court's finding on several of the factors. The Court will address each of Mother's issues in turn.

1. *Based upon the evidence and testimony at hearing, the Trial Court abused its discretion by failing to confirm primary physical custody of the minor child to Plaintiff, AK.*

The evidence presented highlighted the stability of Father from his work life to his personal life. It showed that both Mother and Father love and will care for the minor child. The Court recognized that Mother had been the primary care taker since the birth of the her child and Father's periods of custody consisted of ten days in April; one week in May, June and July; and four weeks in October. It was not the job of the Court to determine and enforce status quo. The role of the Court is to determine the best interests of the child. *Clapper v. Harvey*, 716 A.2d 1271, 1273 (Pa. Super. 1998).

The Court is concerned regarding Mother and Father's ability to co-parent given the high level of animosity that is between the parties. When the child is in the custody of Mother, Father has difficulties contacting Mother. The flow of information between the parties is nearly non-existent. Mother, knowing that Father prefers text messages to verbal conversations, chose to discontinue her cell phone in order to force Father to talk

to her. Mother testified that she will share information and try to work with Father, however her actions have not mirrored her words and the Court does not find Mother credible. In her June 2011 custody trial Mother led the Court to believe that she was happy and stable in her marriage to Father even though their relationship was struggling, and she had already told Father that she wanted a divorce.

Mother is also concerned about Father's ability to share information and to her amount of phone contact with her daughter when she is in her Father's care however it was testified to that after Father became aware that Mother wanted more contact with the child he had allowed that during the four weeks Father had custody in October. Father testified that their daughter is very young and does not speak therefore he did not realize that Mother would want phone contact with the child. Father's testimony was credible.

There was no abuse of discretion committed in this case. If the Court merely looked at the status quo and not the evidence presented the Court would not be fulfilling its duty. The testimony and evidence presented and the credibility of the witnesses highlighted that the best interest of the child are best served with Father having primary custody.

- 2 *The Trial Court abused its discretion in finding that Plaintiff and Defendant were matched equally on § 5328 (a)(3) of the Child Custody act, governing parenting duties performed by Plaintiff and Defendant, as the record indicated that Plaintiff performed most parenting duties for the minor child since the child's birth.*

During the short life of the child Mother has performed more parenting duties than Father. A large majority of Father's absence from the child during the first months of her life was due to Mother's unwillingness to work with Father. Mother did not notify

Father when she went into labor or when their child was born. Even though the presumption of paternity was with Father as the child was conceived and born during the marriage; Father had to resort to paternity testing in order to establish himself in his daughter's life. Once paternity was established, Father then had to seek custody. Father precepted for custody on March 19, 2012. Father's first period of custody with the minor child was not until April 17, 2012, at that time the girl was already three months old. Since then father has had four periods of custody with the child. When the child is in Father's care Father performs the parental duties and is responsible for her care. Just as Mother performs the parental duties and is responsible for the child's care when Mother has custody. Due to the distance of the parties and the current custody arrangement Mother has performed the day to day parental duties more frequently than Father. Both parties have seen to the child's needs and have taken her to the doctor's during their custodial time. The Court found that if this were a case where the parties lived in close proximity to each other the parental duties performed would be equal. There was no abuse of discretion when the Court found that the parties were equally matched when it came to performing parental duties. Both Mother and Father have proven that they equally have the skill set, availability, and desire to care for the daily parental duties called for by the child.

3 The Trial Court abused its discretion in not giving proper weight and consideration to § 5328 (a)(4) regarding the need for stability and continuity in the child's life, when it made the decision to abruptly change primary physical custody of the minor child from Plaintiff to Defendant, resulting in a cross-country move and relocation for the minor child, who is an infant, with no family available.

There was no abuse of discretion committed. The Court did give consideration to the need for stability and continuity in the child's life. The Court was concerned regarding Mother's stability. Mother was in a relationship with SF for multiple years. In February of 2011 Mother moves out of SF's home; in March of 2011 Mother marries Father and then in June of 2011 Mother asked permission of the Court to relocate to Florida with Father. At that time Mother did not indicate that she was having any doubts regarding her marriage or relocation even though in this trial Mother testified that she was in fact having doubts. Mother comes off as being someone who reacts without thinking things through first. Maternal grandmother even testified to the fact that Mother is spontaneous, that Mother doesn't always think her actions through and that she felt that Mother's marriage to Father was on a whim or a knee jerk reaction. Another example of Mother's instability and lack of regard to consequences is that after an argument with Father where she was extremely angry she went and slept with SF. Mother's spontaneous actions directly affect the child. It was Mother's spontaneous act of leaving SF for Father and conceiving a child that produced the minor child in question. Mother sleeping with SF because she was mad at Father led to the child's paternity being questions. Again, this directly impacted the child.

Additionally, Mother is less financially stable than Father in the fact that she is unemployed. Her financial success is dependent upon her fiancé of whom she has had a tumultuous on and off again relationship with.

On the other hand the Court does acknowledge that a year and a half ago Father also sat in the same courtroom married to Mother and very much in love and now he is

engaged to another woman who is pregnant with his child. The Court was satisfied with Father's testimony that he wanted to work things out with Mother and asked her to return to Florida with him to the home they had picked together, Father even delayed his trip by a day hoping Mother would change her mind. Father had no choice but to move on with his life. The evidence presented highlighted Father as being stable and able to provide continuity for his child.

- 4. The Trial Court abused its discretion in finding that Plaintiff and Defendant were matched equally on § 5328 (a)(5), regarding the availability of extended family, because the record did not support such a conclusion, as Defendant has no family available to him in Florida, whereas Plaintiff has family support in Pennsylvania.*

Mother's statement is made in error. The Court did not find that Mother and Father were equally matched in the availability of extended family. When going through the factors the Court stated that the extended family of both Mother and Father primarily resided in Lycoming County. The Court did elaborate to state that Father has a support system in Florida through his fiancé's extended family.

- 5. The Trial Court abused its discretion in finding that Plaintiff and Defendant were matched equally on § 5328 (a)(6), regarding sibling relationships, because the record did not support such a conclusion, as the minor child has an already-established relationship with Plaintiff's older child, and the fact that Defendant's paramour was currently pregnant did not establish relationship between her unborn child and the minor child at issue.*

There was no abuse of discretion committed by the Court. The decision and rationale of the Court is sound. "[T]he policy in Pennsylvania is to permit siblings to be raised together, whenever possible." *Johns v. Cioci*, 2004 PA Super 492, 865 A.2d 931, 942 (Pa. Super. 2004).

Time is not stagnant. At the time of the trial Father's fiancé, Ms. Richardson, was pregnant, in fact the trial date was accelerated due to travel restrictions being placed on Ms. Richardson. There is no reason to believe and no evidence presented to the contrary that KK will not establish a sibling relationship with her new sibling. Acting upon the direction of the legislature the Court took every factor into consideration when determining the best interest of the child and then the Court went through the factors in open court on the record. 23 Pa. C.S. 5328. Even though the factors are not all necessarily given the same weight the Court would be remiss not to consider all the evidence presented in conjunction with the factors. Ms. Richardson being about to give birth to KK's newest sibling is a fact needed to be recognized by the Court. There was no abuse of discretion committed by the Court in recognizing that the child in question was about to become a big sister.

6. The Trial Court abused its discretion in finding that Plaintiff was less stable than the Defendant according to factor § 5328 (a)(9) of the Child Custody Act, because the record produced no evidence indicating that Plaintiff had any stability issue which affected the minor child.

The Court found that Mother has stability issues in regards to 23 Pa. C.S. § 5328 (4). The factor in called into issue in this matter states the following: “[w]hich party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child’s emotional needs. 23 Pa. C. S. §5328 (9). The testimony and evidence presented resulted in the Court holding that both parties have the ability to care for, meet the emotional needs of the child and nurture the child. There was no abuse of discretion committed by the Court the evidence shows that both parties love this child and will continue to nurture and care for her.

7. *The Trial Court abused its discretion in finding that Plaintiff and Defendant were matched equally on factor § 5328 (a)(10), as the record could only support the conclusion that Plaintiff was more likely to be available to care for the minor child, as Defendant was active military and Plaintiff had been a stay at home mother since the minor child's birth.*

There was no abuse of discretion committed by the Court. Mother's matter complained of does not correctly depict the factor. 23 Pa. C.S. §5328 (10) states: "[w]hich party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child." The factor states nothing about availability. The Court found that Father being gainfully employed did not detract from his ability to the daily needs for the child and to provide for the child physically, emotionally, developmentally and educationally. The Court found that both parties had the ability and desire to attend to the needs of the child as both parties are loving parents. There was no abuse of discretion committed by the Court.

8. *The Trial Court abused its discretion in not giving due and proper consideration of § 5328 (a)(11), regarding the proximate residence of the parties, as the Court changed primary custody of the minor child, who is an infant at this time.*

There was no abuse of discretion committed by the Court. In determining the custody schedule for the parties the proximity of the residences played a major role. The Court recognized the distance between Florida and Pennsylvania, if this was a situation where the parties lived in the same town it would probably have resulted in an equally shared arrangement. However, that was not the fact pattern that the Court had. Given the fact that neither party has unlimited resources the Court had to fashion an order that would both be realistic and in the best interests of the child. Further evidence of the fact

that the Court was very cognizant of the distance between the parties was the fact that the Court took the time to address both flight and driving arrangements for visitations. There was not abuse of discretion committed.

9. *The Trial Court abused its discretion in finding that Plaintiff and Defendant were matched equally on factor § 5328 (a)(12), as Defendant is active military and Plaintiff was a stay at home mother and thus more available to care for the minor child.*

There was no abuse of discretion committed by the Court. 23 Pa. C.S. § 5328 (a) (12) factor states: “[e]ach party's availability to care for the child or ability to make appropriate child-care arrangements.” While Mother as a stay at home mom has unlimited availability to personally care for the minor child Father equally has the ability to make appropriate child-care arrangements for the child. The Court will not penalize Father for working. Father made appropriate child care arrangements for the child while the child was in his care and the Court found that Father would continue to do so. There was no abuse in discretion committed by the Court.

10. *The Trial Court abused its discretion in finding that Plaintiff was unwilling to cooperate with the Defendant for custodial arrangements, as laid out in § 5328 (a)(15), because the record did not support such a conclusion.*

It is believed that in her statement of matters complained of Mother incorrectly cited the statute. 23 Pa. C.S. § 5328 (15) states: “[t]he mental and physical condition of a party or member of a party's household.” The Court found that there was no evidence presented that would indicate that either party had a mental or physical condition that would concern the court.

It is believed that Mother meant to cite to 23 Pa. C.S. § 3528 (13) which states:

[t]he 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 a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.

There was no abuse of discretion committed by the Court. After an analysis of the evidence presented, the Court found that there was a high level of conflict between the parties and that Mother's actions are not illustrations of someone who is trying to work past the conflict. The relationship between Mother and Father ended poorly, Father still has some pain and anger to work through. At the time of the trial Father preferred to communicate with Mother via text messaging. Mother being annoyed by the fact that Father only wants to text message discontinued her cell phone plan. Another illustration of Mother's actions was when Mother refused Father his court ordered custodial time due to the fact that the child would be spending minimal time with Father's fiancé before he arrived home from training. Neither of these examples highlights cooperation with the other party. However, ultimately the Court determined that both parties have the ability to be able to cooperate with and share information with the other party. The evidence presented supports the Court's finding. There was no abuse of discretion committed by the Court.

11. The Trial Court committed an error of law by including a change in the minor child's state of residence, without due and proper consideration to relocation notice requirements.

The Court did not take into account the relocation factors and or the relocation notice requirements delineated in 23 Pa. C.S. § 5337 as this is not a relocation case. The notice requirements state:

(c) *Notice.*

(1) The party proposing the relocation shall notify every other individual who has custody rights to the child.

(2) Notice, sent by certified mail, return receipt requested, shall be given no later than:

(i) the 60th day before the date of the proposed relocation; or

23 Pa. C.S. § 5337 (c). The notice requirements are not applicable in this case as Father is not petitioning the Court for permission to relocate. Father lived in Florida prior to the birth of the child and plans on continuing in Florida. Mother is well aware of Father's place of residence as she helped him pick the house in which he currently resides. There was testimony that Father's station is permanent and he and his fiancé have no plans to leave the area due to strong ties with the community. This is a custody case where one parent lives in Pennsylvania and the other parent lives in Florida and they both have resided in their respective states separately and apart from each other prior to the birth of their minor child. There was no error by the Court in not utilizing the relocation factors.

12. The Trial Court abused its discretion in not considering all factors relevant to the best interest of the minor child which were relevant, as governed by § 5328 (a)(16), when it changed primary custody from Plaintiff to the Defendant, due to the infant child being bonded significant with the Plaintiff, and other factors.

There was no abuse of discretion committed by the Court. The Court considered all relevant factors, all of the evidence presented, the credibility of the witnesses and the current applicable law when reaching the ultimate decision of where the best interest of the child lay. The Court recognized that Mother and child were bonded and that Mother clearly loves her daughter. The Court took those facts into consideration when reaching the ultimate decision. This was not a decision that the Court took lightly, no child custody case is. In every custody trial the Court focuses on the best interests of the child that was the focus of this custody trial as well. *Schmehl v. Schmehl*, 927 A.2d 183, 185 (2007). In this case the best interest of the child is to be in the primary custody of Father. There was no abuse of discretion committed by the Court.

Conclusion

Determining the best interests of a child is not a task that the Court takes lightly. In cases like the case at hand the decision is doubly difficult because of the distance between the parties and the fact that the evidence did not establish either parent as being glaringly better than the other. It was apparent that both parties deeply love and care for their child and that her welfare is important to them. The Court looked at the totality of the circumstances and evaluated the evidence in conjunction with the delineated factors. The evidence presented highlighted the fact that the child's best interests lie with being primarily in Father's custody. The Court is confident that the child will flourish and

strive in the home that Father has made in Florida. For those reasons and the other reasons illustrated above the Court' decision of November 20, 2012 should be affirmed.

BY THE COURT,

Joy Reynolds McCoy, Judge