

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

J.C., : No. 08-20853
Appellee :
vs. :
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 :
T.K., :
Appellant : 1925(a) Opinion
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T.K., : No. 08-20,855
Appellant :
vs. :
 :
 :
J.C., : 1925(a) Opinion
Appellee

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

This opinion is written in support of this court's Opinion and Order dated December 2, 2013, which denied Mother's relocation request. The relevant facts follow.

J.C. (Father) and T.K. (Mother)¹ are the natural parents of M.C., whose date of birth is June 9, 2002, and R.C., whose date of birth is September 20, 2004. The parties were never married, but they were in a long-term relationship until approximately June of 2008. Since their relationship ended, they have had shared physical custody of the children on a 50/50 basis, with Father having the children Monday and Tuesday overnight, Mother having the children Wednesday and Thursday overnight, and the parties alternating Friday through

¹ In October 2009, Mother married J.R. Therefore, Mother's initials are now T.R. The caption in this case, however, never was amended to reflect Mother's new married name.

Sunday overnight. The children, the parties and their current spouses, and all of the extended family resided in the Trout Run area.

Mother, her husband, his parents, and the children (when they were in Mother's custody) lived on an approximately 3-acre farm. Although Mother does not work outside the home, she raises goats, chickens and ducks and she sells some of the offspring from the goats and the eggs from the chickens and ducks that she raises. In or around May 2013, Mother decided she wanted to move to the Turbotville area in Northumberland County so she could have a larger farm and a goat dairy and the children could attend what she believes is a better, safer school with other "like-minded" children.

On June 20, 2013, Mother sent Father a notice of relocation, listing a proposed relocation date of August 1, 2013, which Father received on June 25, 2013. She proposed a custody modification whereby Father would have custody three weekends per month during the school year and she would have custody of the children for the rest of the month; during the summer, the parties would alternate custody each week. On July 19, 2013, Father filed a counter-affidavit in which he objected to the proposed relocation and Mother's proposed modification of the custody order and requested that a hearing be held on both matters prior to the relocation taking place.

A hearing was held on July 31, 2013. By that date Mother already had a real estate closing on the new farm in Turbotville and she was moving there over the next two days regardless of the outcome of the relocation hearing. Unfortunately, the hearing could not be completed on July 31, 2013, and a second hearing was held on September 30, 2013.²

²The court tried to schedule the continued hearing for an earlier date but was unsuccessful due to a variety of scheduling difficulties, including the fact that the court was presiding over jury selection, motions in limine and a trial in a homicide case during the last week of August and the first half of September.

Counsel requested the opportunity to brief the matter, which the court granted. After reviewing the briefs, the court denied Mother's relocation request in an Opinion and Order dated December 2, 2013. Mother filed a timely notice of appeal and a concise statement of matters complained of on appeal.

The court generally would rely on the Opinion and Order dated December 2, 2013. Nevertheless, because that Opinion does not specifically address each of the issues raised in Mother's concise statement, the court will briefly discuss each issue asserted by Mother.

Mother first contends that the court erred in failing to give proper weight to the role of Mother as the primary caretaker of the children. Simply put, Mother was not the "primary caretaker." The parties had a 50/50 custody arrangement. Although the parties had different parenting styles, Father was (and is) very involved in every aspect of the children's lives.

Mother next asserts that the court erred in emphasizing the stability of the children's relationships as a main factor in denying Mother's request to relocate with the children, where the children will be experiencing change in their school if they live with Father in Williamsport due to the fact that their prior school closed. This statement is not accurate.

While two elementary schools in the Williamsport School District closed and there was just reorganization in the Williamsport School District such that the grades covered by all of the remaining schools except the high school changed slightly, the children's prior school did not close. Before this school year, both children attended Hepburn-Lycoming Elementary School, which previously included kindergarten through fifth grade. With the

reorganization, that school includes kindergarten through third grade and is now called Hepburn-Lycoming Primary School. Lycoming Valley Middle School previously included sixth through eighth grade. Now it is called Lycoming Valley Intermediate School and it includes fourth through sixth grade. R.C. still attends Hepburn-Lycoming. Due to the reorganization, M.C. now attends Lycoming Valley, but she still attends school with her friends from her old school.

The court also considered the stability of the children's relationship with their extended family. Not only does Father's extended family live in the Trout Run and Williamsport area, but Mother's parents, her husband's family and Father's wife's grandparents all live in that area. Transcript, July 31, 2013, at pp.94, 106; Transcript, September 30, 2013, pp. 193 Mother does not have any family in the Turbotville area. Transcript, July 31, 2013, at p. 94. If an emergency arises at school and the natural parents can't be reached or are otherwise unavailable, the paternal grandmother and paternal aunt and uncle can be contacted and pick up the children. Transcript, September 30, 2013, p. 138. This support network is not readily available if the children attend the Warrior Run School District in Turbotville.

Mother also contends the court erred in disregarding the developmental needs of the children served primarily by Mother and the impact on the children's physical, educational and emotional development which result from a transfer of primary custody to Father, where Father has no involvement with the children's schooling, school activities, and friends, and little to no involvement with their extracurricular activities. Mother's contention is not supported by the record in this case.

Father is very involved with the children's lives and development. When the

children are in his custody, he writes them each a letter every day before he leaves for work. Transcript, September 30, 2013, p. 178. He also helps them with their homework. M.C. is involved in music and theater. Father attends all of her concerts and shows. Id. at 194. R.C. enjoys karate. Father attends this activity as well. Father and the children also enjoy outdoor activities together, such as hunting and fishing. He fosters the children's interests and activities and encourages them children to expand their horizons and try new things. Id. at 191. There is nothing in the record to show that Father missed any of the children's activities or events.

In comparison, Mother's own testimony was such that she wanted to limit the children's activities to two days per week. Transcript, September 30, 2013, p. 22. Her rationale was that she did not want the children overextended, but it also seemed like Mother did not want to be inconvenienced with the demands caused by M.C.'s activities when she said, "I just think it puts a hinderance on the whole family, especially her brother." Id.

There also was credible testimony that M.C. was very disappointed because Mother missed one of her chorus concerts. Mother told M.C. that she tried to attend, but there was no parking so she left. However, there was plenty of parking when Father brought M.C. to the concert and there was an additional, lower parking lot that had a shuttle bus. Transcript, September 30, 2013, pp. 181, 220-221.

Mother alleges the court erred in determining that there are not adequate substitute partial custody arrangements that would preserve the relationship between Father and the children, where the children would have the opportunity to spend long weekends every other month, plus extended holidays and extended time in the summer with Father. No testimony was presented about the children having the opportunity to spend long weekends,

extended holidays or extended time in the summer with Father if the court granted Mother's relocation request. Mother's proposed modification of the custody order did not propose giving Father "extended" holidays or "extended" time in the summer. Instead, Mother proposed that she would have more custody during the school year, but that she and Father would have equal custody at the holidays and in the summer.

Mother next alleges that the court erred in emphasizing the impromptu comment by Father that Mother used marijuana when no such allegation was raised at the first portion of the relocation hearing and the child's testimony regarding alleged drug use was unsubstantiated and lacked credibility. The court cannot agree.

The first hearing was shorter than the second. The court briefly spoke to the children and Mother testified on direct examination, but her cross-examination could not be completed on that date. Other than partial cross-examination of Mother, Father did not have the opportunity to present any evidence at the first hearing.

M.C. did not mention Mother's alleged drug use when the court spoke to her at the first hearing, but the court questioned the children and its focus was on making the children comfortable and seeing if they had a preference regarding the proposed relocation. Furthermore, M.C. indicated that she was concerned about hurting one of her parent's feelings. Transcript, July 31, 2013, pp. 32-33.

During Father's testimony, his attorney asked him if he thought it would be in the children's best interests to reside primarily with Mother. Father said no. When asked why, he replied that he had some responsibility issues. Counsel asked what he meant. Father then mentioned Mother's failure to appear to court on time. When asked for other examples, Father mentioned tardiness at school, then said, "There's also something that's

been brought to my attention that there's been drug use in front of the kids." He indicated that M.C. brought the drug use to his attention. Transcript, September 30, 2013, at pp. 203-204. The children arrived at the courthouse toward the beginning of Father's cross-examination. With the agreement of counsel, Father's cross-examination was interrupted so that the court could speak to the children.

By the time of the second hearing, Mother had moved but the parties were still following their 50/50 custody schedule. The court asked the children about Mother's new residence and the travel involved to see if that impacted the preference to live with Father that they expressed at the first hearing. In light of Father's specific concerns about Mother's tardiness and drug use, the court also asked M.C. about "seeing drugs or something." M.C. testified she was seven or eight years old when she first saw her mom doing drugs. She walked into her mom's room to ask her a question and saw her smoking a pipe. After her mom was done, M.C. went in and saw little green stuff like leaves lying all over. She knew what it was right away because they taught her about it at school. M.C. admitted that she didn't say anything at first because she was afraid she would get in trouble and the only people she told were her step-mom and her dad. She didn't tell anyone until maybe three years after the first time. When the court asked if she had seen it after that time, M.C. testified that her mom does it almost every day. She smelled it on her mom yesterday when her mom was tucking her into bed, but the last time she saw her do it was probably three or four days ago. M.C. found her mom's drug use "kind of scary." The court asked M.C. if she was sure and not just saying this because she didn't want to live at her mom's new farm in Turbotville. M.C. said she was "absolutely positive," she was not telling a lie, and she would never make something like that up. Transcript, September 30, 2013, at 231-235.

Mother refused a drug test and, despite having the opportunity to rebut M.C.'s testimony, she failed to do so.

The court believed M.C.'s testimony. Her credibility was strengthened by the adverse inference arising from Mother's failure to rebut M.C.'s testimony by either taking a drug test or providing testimony on this subject.³

Mother's final allegation is that the court erred in granting Father's oral motion to modify custody when no petition was filed with the court. The court cannot agree.

Indeed, Mother's allegation of error on this point is entirely disingenuous. The specific issue of Mother relocating without the children and the court then modifying the present order was discussed at length by the parties and the court. Transcript, July 31, 2013, pp. 10-14. Both parties presented the court with proposed orders modifying custody depending on the school resolution. Transcript, July 31, 2013, p. 11. At the beginning of the September 30, 2013 hearing, the court specifically noted that one of the issues was "how the order should be modified to address the fact that Mother has relocated." Transcript, September 30, 2013, p. 2. No objection was raised by Mother. The court also advised the parties at the conclusion of the hearing that "in light" of the relocation determination it would decide "what the custody arrangements should be." Transcript, September 30, 2013, p. 277. Again, Mother did not object. Since Mother did not object or otherwise raise this issue in the trial court, she waived this issue. Pa.R.App.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

In the alternative, the court believes that section 5337(f) gives the court the

³ Even assuming for the sake of argument that M.C.'s testimony was not credible, her testimony still would speak volumes. A child like M.C. would have to have strong feelings in opposition to the proposed relocation

authority to modify the custody order. 23 Pa.C.S. §5337(f).

Finally, under the facts and circumstances of this case, the court had no choice but to modify the prior custody order. Mother closed on the Turbotville farm and began to move on the first day of the relocation hearing. Transcript, July 31, 2013, pp. 71, 119. While the parties temporarily complied with the prior custody order until the hearing could be completed, neither the parties nor the children wanted to continue all of the traveling that was required to do so. Instead of removing the children from the schools in which they were thriving and the support network that they had from extended family, the court kept the children in their stable environment and gave Mother the exact custody schedule that she believed was adequate for Father.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Clark, Esquire
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Superior Court (original & 1)

to make up allegations of drug use against a parent whom she loves.