

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JM,	:	DOCKET NO. 12-21, 192
	:	
Plaintiff	:	
	:	
vs.	:	CIVIL ACTION - LAW
	:	
SF,	:	
	:	
Defendants	:	CUSTODY

OPINION AND ORDER

This matter comes before the Court on JM, Father’s Petition to Modify Custody, (hereinafter Father) filed March 12, 2014. This matter arises out of a dispute between Mother and Father concerning not the award of primary custody of the children: **BM**, born October 5, 2009 and **JM**, born August 8, 2011 to Mother but whether or not the Children shall have visitation with Father during his periods of incarceration. At the time of the hearing Father appeared via video conference, Mother appeared and was represented by Todd Leta, Esquire, and paternal grandmother appeared and was represented by Meghan Young, Esq.

I. Procedural and Factual Background

Father is incarcerated for several criminal convictions including Driving Under the Influence and Aggravated Assault. Father began his term of incarceration in July 2013. Father anticipates he will remain incarcerated for his minimum sentence of three and one half years. Prior to July 2013, the parties followed, to some extent, an Order of August 23, 2012. The Order which the parties entered by agreement, granted Mother primary custody with Father having periods of partial custody every weekend from Friday until Sunday.

The instant action arises out of Father’s Petition to Modify Custody, filed on March 12, 2014. At the time of the conference held May 14, 2014, Father was incarcerated and an Order was

entered granting Mother primary custody with Father's visitation occurring as the parties may agree. Mother objected to Father having visitation with his children during his period of incarceration.

Paternal Grandparents, TM and BS, filed a Petition to Intervene on July 31, 2014. This Petition was also scheduled to be heard at the time of the trial, September 25, 2014. The Petition to Intervene was granted by agreement of the parties which resulted in a separate custody order granting Maternal Grandparents periods of partial custody for one weekend each month.

A custody trial was held on September 25, 2014 with regard to Father's request for visitation and phone contact.

II. Discussion

By agreement of the parties, evidence was not presented regarding all sixteen factors of custody pursuant to 23 Pa. C. S. A. §5328, instead the Court makes its determination on the limited issue of visitation with Father while incarcerated by considering the best interest of the children. The Court will not disturb the parties underlying award of custody which grants Mother primary physical custody and the parties shared legal custody. The parties' Order of May 14, 2014 contemplates Father's visits while incarcerated to occur as the parties may agree. The Superior Court has held, "[b]ecause the trial court did not make an award of custody, but merely modified a discrete custody-related issue, it was not bound to address the sixteen statutory factors in determining the Children's best interest. However, under Section 5338, the trial court was required to determine that the modification that it did order was in the Children's best interest".

M.O. v. J.T.R., 2014 PA Super 15 (Pa. Super. Ct. 2014)

To consider the Children's best interest in regards to visitation in an institutional setting the Court has found the case of *D.R.C. v. J.A.Z.*, to be instructive.

The Superior Court recognized some of the factors to be considered in deciding a question of visitation where the parent is incarcerated: (1) age of the child; (2) distance and hardship to the child in traveling to the visitation site; (3) the type of supervision at the visit; (4) identification of the person(s) transporting the child and by what means; (5) the effect on the child both physically and emotionally; (6) whether the parent has and does exhibit a genuine interest in the child; and (7) whether reasonable contacts were maintained in the past. Of course, although not mentioned in *Etter*, another relevant consideration is the nature of the criminal conduct that culminated in the parent's incarceration, regardless of whether that incarceration is the result of a crime enumerated in section 5303(b). All of these factors can be evaluated by the court without first providing counseling to the inmate. Consequently, we find the counseling required by section 5303(c) is not a prerequisite to a court's engaging in its evaluation of a child's best interest in the context of a request for prison visits.

D.R.C. v. J.A.Z., 612 Pa. 519, 536-537 (Pa. 2011)

Similar considerations are made in the Dependency system when determining incarcerated parent visitation. In the Dependency system, the Court considers the safety of the children, the contact the parent had prior to incarceration, the child's needs and wishes, age of the child, distance of travel necessary, the visitation schedule of the facility and finally the wishes of the incarcerated parent. *See* Pennsylvania Children's Roundtable Initiative.

Pennsylvania Dependency Benchbook Second Edition Harrisburg, PA: Office of Children and Families in the Courts, 2014.

The polestar and paramount concern in evaluating parental visitation, in dependency as well as non-dependency situations, is the best interests and welfare of the children. Once a child is adjudicated dependent, the issues of custody and continuation of foster care are determined according to a child's best interests. Thus, it has been said that the sole concerns of a court called upon to enforce a parent's right of visitation are the welfare and best interests of the child.

However, because of the constitutionally protected liberty interest parents have to such visitation, parental visitation is usually not denied or limited unless visitation with the parent poses a grave threat to the child.

In re C.J., 1999 PA Super 94, 95(Pa. Super. Ct. 1999)

Father became incarcerated in July of 2013. Until November of 2013, Mother allowed the children to visit with Father at the Lycoming County Prison on approximately five occasions. Mother or Father's family transported the children to the visitation. The visitation setting at Lycoming County Prison involved glass barriers and the necessity to talk to Father via a telephone. After November 2013, Mother unilaterally decided to stop allowing the children to visit with Father at the prison. Mother said she made the decision due to behavioral issues with the parties' oldest daughter following visits. Mother said the younger child exhibited no negative effects of the visits; however Mother also did not allow the younger child to visit with Father. No evidence was presented to indicate Mother attempted to discuss her concerns with Father or make the decision jointly. Father petitioned the Court on March 12, 2014 seeking visitation with his children while incarcerated. The Children have not seen their Father since November 2013.

Father is incarcerated at SCI Frackville, which is approximately a one hour drive from paternal grandmother's home. Father testified regarding the visitation setting at his current institution. Father testified that the visits would be full contact, there is a children's play area and the potential to take the children outside. Father testified that sexual offenders are not present during the visitation times and that no other inmates would be allowed to have contact with the children. Father argued visitation would promote a Father/ daughter bond and allow the children to know who he is. Father testified that his visitation prior to incarceration was every weekend but acknowledged missing some weekends if he was mandated to work. Father testified that he has sent numerous letters to the children including most recently a birthday card. Father testified that he has not been able to have phone contact due to financial constraints but expects to remedy the circumstance after he is able to begin working.

Mother does not agree with the children having visits with Father while incarcerated. Although JM, age 3 showed no negative effects from the visitation, BM the parties' four year old became distraught after visits because she wanted her "Daddy". Mother reported BM didn't understand why Father could not leave with her. Mother reported after the visits the child took two weeks to settle down, was violent and had trouble at school. Mom acknowledges that JM doesn't know who Father is. Mother said she is not opposed to contact with Father through letters and phone calls. Mother offers to respond to Father's letters, although Father testified he has only received four letters from Mother regarding the children in the fourteen months he has been incarcerated. Mother also wishes the phone calls to be limited to only birthdays and holidays. Mother raised no concerns over Father's appropriateness towards the children or the children's safety in Father's presence. Mother's only safety concern was regarding the children's safety in the presence of other inmates.

Maternal grandmother witnessed behavioral issues with BM but said the behaviors occurred both after visits with the paternal grandmother and after visits with Father while incarcerated. These behavior included, BM becoming violent and difficult to calm down. Maternal grandmother confirmed that BM loves and misses her "Daddy".

Mother presented testimony of C. Townsend Velkoff, M.S., whom met with the children and Mother for a total of two-hours on May 28, 2014 and June 5, 2014. Mr. Velkoff had no contact with Father. Mr. Velkoff did not interview the children and his recommendations were based solely upon information provided by Mother. Mr. Velfoff reported the experience of visiting Father would be too emotionally taxing on the young children. Mr. Velkoff's recommendation is the visitation in the incarcerated setting should not occur. Although, the Court appreciates Mr. Velkoff's opinion on the issue this Court cannot agree that in in general

incarceration should not occur in incarcerated settings. If the trial court chooses not to follow the expert's recommendations, its decision must be based on competent evidence of record. *See King v. King*, 889 A.2d 630, 632 (Pa. 2005); *Nomland v. Nomland*, 813 A.2d 850, 854 (Pa. Super. 2002). Mr. Velkoff was candid with the Court that he has done no specific research in this area and has little experience with incarcerated parent visitation. Mr. Velkoff also confirmed that any poor behavioral reaction BM was having from the visits could also be due to the inconsistency and infrequency of the visits. Further, Mr. Velkoff cannot determine whether any behavioral issue BM exhibited were caused by visitation with Father or in the alternative his absence.

The Court has considered the course of criminal conduct that lead to Father's incarceration pursuant to 23 Pa.C.S.A. § 5329, however the Court specifically finds that Father's visitation while incarcerated presents no threat of harm to the children.

The Court finds it is in the children's best interest to visit with Father while he incarcerated once each month. Although, the children are a young age BM's bond with her Father requires that she be allowed to see him for her own well-being. Additionally, JM needs to see her Father in order to form and maintain a bond. The Court cannot find that the two hours in the car each month required to have visitation is too taxing on the children even given their young age. Father has and does exhibit a genuine interest in the child and also maintained reasonable contacts in the past. Paternal Grandmother is available and willing to provide transportation to the visitation. Paternal Grandmother has been active in the children's lives. The issue left before the Court is the effect on the child both physically and emotionally. This Court cannot determine whether any behavioral issues BM exhibited were due to the visitation with Father or due to the trauma she experienced at his loss. Mother's choice to further traumatize her

children by totally removing Father from their lives was not in their best interest. Mother is encouraged to seek out a support system to help her children to deal with having an incarcerated parent.¹

The Court also finds that it is the best interest of the children that Father maintains weekly, consistent contact with his children through either letters or telephone. Father's obligation to make this weekly contact with his children is not only a right but a duty. His failure to do so may impact this Court's analysis of the best interests of the children in the future.

ORDER

AND NOW, this 2nd day of October, 2014, for the reasons stated above, it is hereby ORDERED and DIRECTED that the parties comply with the Custody Order issued on this date.

BY THE COURT,

Date

Joy Reynolds McCoy, J.

¹ Mother may find the following website helpful:
<http://www.sesamestreet.org/parents/topicsandactivities/toolkits/incarceration>