

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

TH,	:	DOCKET NO. 10-21, 0512
	:	
Plaintiff	:	
	:	
vs.	:	CIVIL ACTION - LAW
	:	
SM,	:	
WL	:	
and TL,	:	
	:	
Defendants	:	CUSTODY

**OPINION AND ORDER**

This matter comes before the Court on WL and TL, Maternal Grandparents' Petition to Modify Custody, (hereinafter Grandparents). This matter arises out of a dispute between Grandparents and Father, TH concerning the primary custody of the child: **MJH**, born June 10, 2008.

**I. Procedural and Factual Background**

Mother, SM is incarcerated for several criminal convictions concerning sexual abuse of the minor child. Prior to August 2011, Mother had primary custody of the minor child. All of Mother's custody rights are suspended by previous Order of Court dated April 20, 2012. The parties Order of October 13, 2013 prohibits the child's contact with Mother.

On June 7, 2012, following a custody trial the Court issued an Order granting Father sole legal and primary physical custody. Grandparents were awarded periods of partial custody every other weekend alternating in that one weekend the period of custody was Friday until Sunday and the next weekend custody was only from noon until 8:00 p.m. on Sunday. The Court's Order contained language specifically raising concerns regarding Father's lack of unemployment and lack of residence.

On December 17, 2012 following a Petition to Modify filed by Grandparents which purported to be based on Grandparents' concerns regarding Father's employment and residence, the parties agreed to expand Grandparents' shorter period of custody to include an overnight.

The instant action arises out of Grandparents' Petition to Modify custody, filed on September 24, 2013. At the time of the conference, Father was found to be homeless and the child was placed in the primary custody of Grandparents.

A custody trial was held on January 14, 2014 and April 14, 2014.

## **II. Discussion**

In this matter, the Court finds that Grandparents have met their burden of clear and convincing evidence and should retain primary physical custody.

[W]here the custody dispute is between a biological parent and a third party, the burden of proof is not evenly balanced. In such instances, the parents have a prima facie right to custody, which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the biological parents' side. Our legislature recently codified this principle in 23 Pa.C.S. § 5327(b), which states in pertinent part, "In any action regarding the custody of the child between a parent of the child and a nonparent, there shall be a presumption that custody shall be awarded to the parent. The presumption in favor of the parent may be rebutted by clear and convincing evidence." 23 Pa.C.S. § 5327(b). We have explained, "The standard of clear and convincing evidence means testimony that is so clear, direct, weighty, and convincing so as to enable the trier of fact to come to a clear conviction, without hesitation, of the truth of the precise facts in issue.

Addressing the appropriate methodology in the context of the common law presumption, we elucidated what the judge must do, therefore, is first, hear all evidence relevant to the child's best interest, and then, decide whether the evidence on behalf of the third party is weighty enough to bring the scale up to even, and down on the third party's side. Our Supreme Court noted that "these principles do not preclude an award of custody to the non-parent. Rather they simply instruct the hearing judge that the non-parent bears the burden of production and the burden of persuasion and that the non-parent's burden is heavy." Essentially, the Supreme Court determined, "where circumstances do not clearly indicate the appropriateness of awarding custody to a non-parent, we believe the less intrusive and hence the proper course is to award custody to the parent or parents."

*V.B. v. J.E.B.*, 2012 PA Super 200 (Pa. Super. Ct. 2012)(internal citations omitted).

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 factors to be the risk of abuse,

need for stability in the child's life, and the mental condition of Father. *See* 23 Pa. C.S. § 5328(a)(2)(4)(15).

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

The Court finds that Father is much less likely to encourage and permit frequent contact between the child and Grandparents. Father stated his intention clearly in that he wishes his Wife to adopt the minor child and for Grandparents to have no custodial rights. In 2013, Father filed an action for Protection of Abuse (PFA) against TL, (hereinafter Grandmother) which was subsequently dismissed. Father has also repeatedly made allegations to Children and Youth regarding inappropriate touching of the minor child by Grandmother. All investigations into Grandparents' home were unfounded. Father's testimony that he called Grandparents 15 times to see the minor child during the period of October 2013 until the hearing in April 2014 was not credible. Both Grandparents' testimony regarding Father's limited requests for custody and how those requests were addressed were credible. Grandparents have permitted Father to have frequent contact via the telephone with Father and have allowed Father to exercise periods of physical custody upon his request.

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

The Court finds the risk of harm to the minor child in Father's custody most troubling. Mother had filed a PFA against Father out of an incident that lead to Father entering a guilty plea to Indecent Assault charges in August 2011. Initially, Child was a protected party in that action. Father has had multiple physical altercations with his family. Father had an altercation, which resulted in criminal charges, with his Father-in-law in September 2012. Father had a physical altercation with his Wife in August 2013, which resulted in criminal charges. Father had a physical altercation with his mother in October 2013, which resulted in criminal charges. Father is again residing with his

Wife increasing the risk that the Child may be exposed to abuse between Father and Wife. Both Lycoming County and Bradford County Children and Youth Agencies have concerns regarding Father's discipline and parenting. There was at least one incident with Father and his son, wherein Father's physical discipline was inappropriate. Bradford County Children and Youth were considering removing the children from Father's care. Paternal Grandmother intervened when Father would get physical with Child. Father testified to his need to remind himself that the present custody situation was not the minor child's fault. Grandmother reported that Father has hit Child with a belt.

Father has attended an anger-management program. Additionally, Father did voluntarily work with a family-based mental health worker, however due to Father's residence changes the sessions were not finished. Father's family-based mental health worker testified to her need to remind Father that he was not angry at his children. This Court cannot find that Father has put any of the services or lessons into use in controlling his physical and verbal aggression. This factor, along with the Court's concerns regarding Father's mental health weighs heavily on this Court's decision.

### **3. Parental Duties Performed**

The Court finds that both Father and Grandparents have performed parental duties for the child. When Father was primary custodian, Father assured these duties were completed. The Court would note however that often the parental duties fell on whoever Father was residing with at the time. Paternal Grandmother testified to performing many parental duties while Father and the child lived in her home such as insisting the child be enrolled in school or helping the child with homework. The Lycoming County Children and Youth worker also confirmed Paternal

Grandmother was regularly helping with homework during the period Father and Child resided with her. Father was not employed at this time nor seeking employment. Paternal grandmother testified that Father spent his time without the child in his bedroom. Paternal Grandmother felt it necessary at times to make Father feed and play with his daughter. Father's Wife also testified to the fact that she called to enroll the child in school, BLAST and counseling services. Since Grandparents have been awarded temporary primary custody, Grandparents have been performing all parental duties. Father has basically relinquished his parental duties to Grandparents since October 2013. Father has had little involvement with the Child. He has not participated at school events or appointments. Based upon the testimony, the Court believes that Grandparents are more capable of performing parental duties.

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

The Court finds this factor to be crucial in the instant case. This factor supports Grandparents' role as primary custodian of the child because Grandparents provide the stability that this child needs. Before the October 2013 Order, the child had no stability in her life. At the time of trial June 7, 2012 Father's lack of permanent address was a concern of the Court. From April 2012 until August 2012, Father, his Wife and Child lived with Wife's family in Wells Township. Father had a physical altercation with Wife's Father and moved in with his Mother in August of 2012. In November of 2012, Father moved in with his Wife in Gillett, Pennsylvania. After, a physical altercation with his Wife, Father moved back to his Mother's in August 2013. After a physical altercation with his Mother in October 2013, Father stayed with his brother but sent the child to live with his Wife. All of Father's moves were without regard to maintaining the Child in the same home, school district, community, counseling, or service providers.

Father has now resided at his current address in Columbia Crossroads, with his Wife since December 2013. However, the Court would note that Father's ability to maintain their current address appears tenuous. Father's work history is limited and sporadic. For a few months, Father worked for a local newspaper and then a few months for a pizza restaurant. Father has not worked since 2013. Father is currently unemployed and offered no testimony regarding his job search. Wife is working less than full-time for \$8.00 per hour. Father's current rent is \$600.00 per month. This Court is not considering the financial benefit of the child residing with Grandparents; in fact no testimony of Grandparents income was presented. Income is not relevant to the best interests of the minor child. However, in this case income is relevant in determining Father's ability to maintain stable housing.

Grandparents have resided at the same address for nearly 4 years. Grandparents have been married for over twenty years. Grandmother has had the same job for over a year. WL (hereinafter Grandfather) has had the same job for seventeen years.

The child is currently enrolled in the Williamsport Area School District and has been since October 2013. Father enrolled the child in two separate school districts within weeks of her beginning school. A change to primary physical custody with Father would necessitate yet another school change for the minor child. While in Grandparents custody, Child has developed friendships including a close friendship with another child in Grandparents' neighborhood. Father offered no testimony of Child's friendships or community life while in Father's custody.

Grandparents are more stable for the child's education, family, and community needs. Therefore, this factor *strongly* weighs in Grandparents' favor.

**5. Extended Family**

Grandparents did not offer testimony regarding extended family. Grandparents due foster and support a relationship between Child and Paternal Grandmother. Paternal Grandmother visits with Child every other weekend.

Father's extended family consists of his Wife's family. However, the Court notes that Father's relationships with both his Wife and her family have been at times strained. As a result, Child's contact with Wife's extended family is limited. The Court believes this factor is not instructive.

**6. Sibling Relationships**

Father resides in a home with Child's younger half-brother HH. There are no siblings in Grandparents' home. 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). This factor favors Father.

**7. Children's Preference**

Based upon the age and maturity of the child, 6-years-old, the Court was not able to gain insight into the Child's preference. Therefore, this factor is non-instructive.

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

The Court believes that Father is the more likely party to turn the children against the other party. Father has made the same allegations of sexual inappropriateness by Grandmother on at least three occasions. Father has sought a PFA against Grandmother which prohibited Child from seeing Grandparents for a period of time. Father's ultimate goal is for his Wife to adopt the Child and end



any custodial rights of Grandparents. Father lacks any insight that his child loves Grandparents and desires to spend time with them. Based upon the testimony received about Father's actions, the Court finds that this factor favors Grandparents.

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

The Court believes that this factor favors Grandparents because Grandparents can provide stability and consistency in their relationship with the child. Father has lacked initiative since the October 2013 Order to seek regular and meaningful contact with his daughter. From October 2013 until January 2014, Father only asked to see his daughter on three occasions. Prior to the Court's hearing in January 2014 Father was not even being consistent in his telephone contact. Father's physical contact with the child since January 2014 has been limited. Father has not sought to become involved with the Child through school. The Court finds this factor favors Grandparents position as primary custodian.

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

Child is struggling in school and her teacher is concerned. Child's teacher testified that Grandparents are welcoming and working to complete extra assignments. Child's teacher testified to the improvements in her attitude and behavior. Grandparents have ensured MJH is enrolled in a speech therapy program through the school to address her special needs. Grandparents' are appropriately addressing MJH's educational, developmental and special needs.

Father did involve the child with BLAST services, Headstart and with a family-based mental health worker while he had primary custody. However, Father's multiple moves caused all of these programs to be delayed or incomplete. Since October 2013, Father has failed to be involved in any way with MJH's education.

Uncontroverted testimony, by Grandparents, Paternal Grandmother, the Children and Youth caseworker and MJH's teacher all concurred that MJH is emotionally improving in the primary care of Grandparents. Grandparents described her change into a singing, happier child. MJH has had less aggression issues. Father offered no testimony to contradict any of these assessments. Grandmother ensures she tells MJH she "loves her". Grandparents are clearly meeting MJH's emotional needs.

Throughout the trial Father discussed his anger and reactions towards the abuse of MJH by her mother. His inappropriate reaction was to blame the Child and at times purposely limit his contact with her. Father also highlighted his feelings on how this change of custody has impacted him. He says he has "gotten worse" since his child was taken. Father at no time discussed his child's emotional well-being in regards to either the abuse, the instability in her life, or the multiple changes in primary custody that have resulted. Father is failing to meet or recognize his child's emotional needs.

MJH most important physical need is stability and in the most basic sense stable housing. MJH at age 6 has been abused, lost her Mother to incarceration, and moved repeatedly. Father has not been able to provide stability. Father has allowed people MJH loves to be taken in and out of her life based on Father's anger. Father adds to the trauma MJH has suffered. In the past six months, Father has only exerted himself to see MJH on a few occasions.

Grandparents are better able to meet the child's daily physical, emotional, developmental, educational and special needs. This factor is strongly in Grandparents' favor.

#### **11. Proximity of Residences**

Both parties live in Pennsylvania. Grandparents live in Williamsport, Lycoming County, Pennsylvania, while Father lives in Columbia Crossroads, Pennsylvania. The residences are an hour and a half apart. Based upon the distance between the parties and the need of the child 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 Grandparents are gainfully employed. Grandfather's schedule allows him to pick the child up daily from school. Grandmother drops child off at school in the morning. Father is currently unemployed and therefor available to watch the child.

This factor is non-instructive.

**13. Level of Conflict between Parents**

The Court notes that little testimony regarding the level of conflict between the parties was offered. Grandmother testified to being able to work with Father. Both Father and Wife presented as extremely angry at Grandparents.

This factor is slightly in favor of Grandparents.

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

The Court did not receive testimony regarding any drug/alcohol abuse concerning either Father or Grandparents.

**15. Mental and Physical Condition**

The Court is very concerned regarding Father's emotional health and its impact upon the Child. Dad met with psychologist, Robert Meacham following a referral from Children and Youth in May 2013. Father described himself to Mr. Meacham as emotional and explosive. Father discussed having severely beaten a friend when he was 14 years old. Mr. Meacham discussed with Father Child's temper including biting herself and banging her head during tantrums. Father said "nothing works right now". Mr. Meacham described Father as abrupt with the children and would

become more frustrated with the children with in the course of an hour. Mr. Meacham reported that “Dad clearly needed help” and was concerned with the children’s safety in Father’s home.

Father’s mental health caseworker described Father has having impulse control and anger issues. Although, his behavior was not out-of-control during her sessions, Father needed to be reminded to “lower his voice” and that he was not angry with his children.

Father himself indicated he is “fighting a mental disorder”. Father was un-medicated from December 2012 until April 2014 for any of his psychological issues. The impact of regular medication to Father’s mental health stability cannot be assessed by this Court as Father has only recently sought medical intervention.

Father testified that he wants to strangle himself for this predicament (meaning the custody situation).

#### **16. Other Relevant Factors**

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

There is a presumption that Father should have custody of the minor child above all third parties. Grandparents in the case at hand have clearly met their burden and rebutted the presumption by clear and convincing evidence. The evidence presented certainly weighs heavily in Grandparents’ favor. The best interests of the Child would best be served by Grandparents having primary physical custody.

This Court is concerned about exposing the child to abuse, instability, inconsistency and Father’s mental health issues. This Court cannot emphasize enough its concern about the Child’s physical and emotional safety in Father’s primary care. This safety concern outweighs the

preference for the child to be raised in the same home as a sibling. The Court struggled with what periods of partial custody to give Father in light of the serious physical and emotional safety concerns for the child when in Father's custody. The Court believes it is important for Father to have regular contact with MJH in light of the losses she has already suffered. By granting Father short periods of physical custody the Court feels the child will be safe.

The Court enters the following Order.

**ORDER**

AND NOW, this 24<sup>th</sup> day of April, 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,

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Joy Reynolds McCoy, Judge