EDWARD T. FOCHLER,

Plaintiff

vs

MARGARET C. GROVES,

Defendant

IN THE COURT OF COMMON PLEAS
FOR THE 26TH JUDICIAL
DISTRICT, MONTOUR COUNTY
BRANCH, PENNSYLVANIA
CIVIL ACTION - LAW

CASE NO: 325 OF 2005

APPEARANCES:
REBECCA L. WARREN, ESQUIRE, Attorney for Plaintiff
GARRY WAMSER, ESQUIRE, Attorney for Defendant

MARCH 6, 2006. JAMES, J.

FINDINGS OF FACT, DISCUSSION, AND OPINION

On August 3, 2005, plaintiff filed a complaint for custody requesting primary physical custody of the parties' minor son, Ryan Andrew Fochler, born October 3, 1996. Factually, defendant had been the primary custodian of the child for most of the time since the child's birth. Thus, although there was no court ordered custodial parent, the action was designed to modify the status quo. A Special Master was appointed to review the matter and make recommendations. By order of September 14, 2005, the Special Master recommended that the status quo be maintained. He recommended that defendant have primary physical custody of Ryan and that

plaintiff have partial physical custody of Ryan every weekend except one weekend every two months plus certain holiday times and unspecified time in the summer.

Plaintiff filed exceptions. Both parties sought primary physical custody of Ryan. A full hearing was scheduled and held before this court on February 28, 2006.

At the hearing plaintiff's witnesses included plaintiff himself and numerous witnesses, including teachers, his girlfriend, his sister, work associates of defendant, a former landlord of defendant, and defendant herself and her boyfriend, both called as of cross-examination. Plaintiff presented many exhibits, including progress reports and school records for the child, photographs of the parties' homes, and potential new school information.

Defendant's witnesses included defendant herself and Jay Figard, her boyfriend, both of whom rested on their testimony as part of plaintiff's case. Defendant presented no exhibits.

Ryan was questioned by the court, with a few follow-up questions by counsel for both parties.

FINDINGS OF FACT

The court finds that the following facts have been proved:

1. Plaintiff is Edward T. Fochler, age 30, born May 27, 1975. He lives in Maryland, near Baltimore, in a single family dwelling house in a residential area. The house has plenty of room for all occupants, including the child and defendant's girlfriend of several years with whom he just purchased the home. Plaintiff works for the National Institute of Aging doing computer work. His hours of employment are normally dayshift, Monday through Friday. He can be flexible with his hours and even do work at home if necessary. He is a graduate of Bucknell University.

2. Defendant is Margaret C. Groves, age 33. She lives in Danville, Montour County, Pennsylvania. She is the mother of six children, one of who is deceased. Two of the children (ages 17 and 15) live with their father, and she has not seen them in ten (10) years. The other three children are Ryan, Ethan (age 6), and Taija (age one (1). She lives with the children and her boyfriend of seven (7) years Jay Figard. Their home is in a residential area of Danville. They rent the four bedroom home. Defendant has "some" college education. She work two jobs, one at Perkins (5:30 a.m. to 9 or 11 a.m.) and the other at Burger King (usually 11 a.m. to 4 p.m.). She has no driver's license.

3. Mr. Figard is 36 years old. He has four (4) other children, one of whom (Alicia, age 19) who is often at the home and sometimes lives there. The other three children live with their mother in Danville and visit often. He is a "house husband" plus a band manager. Defendant's income is the main source of the family's income, plus they receive food stamps and have a medical card.

4. Since 1998, defendant and her family have changed residences frequently, occasioning the minor child to change schools several times. Understandably, the minor child expressed an interest in not changing schools any more

5. The parties were never married. They met in Louisiana in 1995 when plaintiff was stationed in the armed service.

They lived together briefly. Plaintiff moved to Lewisburg, Pennsylvania, to attend Bucknell. Although she had little connection to Pennsylvania, defendant moved to Pennsylvania at plaintiff's request so that he could have frequent contact with the child. Over Ryan's life, defendant has been very cooperative with allowing plaintiff free and easy access to Ryan and plaintiff has been diligent in seeing Ryan on a regular basis. During 1994 he had primary custody of Ryan for about six (6) months at defendant's request when she was having a difficult time with a pregnancy. Jay has also been very cooperative with allowing and encouraging plaintiff's access to Ryan. Until this custody action, these people were a model of how people should cooperate in the best interest of a child.

6. This custody petition arose in July 2005, when plaintiff moved to Baltimore to be with his girlfriend. She is an electrical engineering graduate of Bucknell and works at Lockheed-Martin. She is a hard-working individual who will cooperate in this custody matter in the best interest of the child. Since moving to Baltimore, plaintiff has transported Ryan to Baltimore almost every weekend. It is a three hour trip each way. Plaintiff's girlfriend has helped with the transportation.

7. Ryan is in third grade in the Danville schools. He is an intelligent child who excels at sciences but has struggled at times with reading and spelling. However, during third grade, his report card reflects above average grades, although he is probably underachieving. His teachers speak highly of him personally and academically. The Danville schools are providing him with excellent support. If defendant would have custody, Ryan would remain in the Danville schools. If Plaintiff were to have custody, Ryan would attend the Hartford County Public Schools near Baltimore.

8. Defendant has an underachieving work history. She has lost decent jobs through irresponsible actions. She and her boyfriend have had a poor financial history. In second grade, Ryan was tardy an extraordinary number of time. In third grade, that problem has been mostly resolved, although not totally. The tardiness in second grade was due to Taija's child's frequent illnesses in the morning, although this court believes that defendant could have found a way to keep Ryan from being late for school.

9. Plaintiff's major concern with the child is assuring that he is well-educated. He is also concerned about some hygiene matters involving the child, including proper medical care and dental care. These concerns are legitimate and defendant must take greater effort in attending to them.

10. Plaintiff has a significant network of family and friends to supply support and nurture to the child. Defendant's network of friends and family is not as significant.

11. Defendant and her boyfriend smoke regularly in the home. They have assured this court that they would not object to a provision in the custody order prohibiting them from smoking in the house.

12. Ryan is a friendly child and has a best friend who lives just across the street from him.

13. Ryan clearly loves and respects both his father and his mother.

14. Both parties have provided the child with love and affection.

15. All of the witnesses in this case are credible.

16. Both parents have been significant caregivers.

17. Both plaintiff and defendant have been loving and caring parents, who sincerely have the best interests of the Ryan at heart.

DISCUSSION

The paramount consideration of any child custody proceeding is what is in the best interest and welfare of the child, which includes preserving the welfare of the child's physical, intellectual, and spiritual well being. Cardamone V. Elshoff, 442 Pa.Super. 263, 659 A.2d 575 (1995). The court

will consider all relevant factors that could affect a child's well being. Andrews v. Andrews, 411 Pa.Super. 286, 289, 601 A.2d 352, 353 (1991).

The legislature has given some guidelines for determining what custody arrangement is in the best interest of the children. 23 Pa.C.S. § 5303(a) provides the "general rule":

> (1) In making an order for custody or partial custody, the court shall consider the preference of the child as well as any other factor that legitimately impacts the child's physical, intellectual and emotional well being.
>
> (2) In making an order for custody, partial custody or visitation to either parent, the court shall consider, among other factors, which parent is more likely to encourage, permit and allow frequent and continuing contact and physical access between the noncustodial parent and the child.
>
> (3) The court shall consider each parent and household member's present and past violent or abusive conduct that may include, but is not limited to, abusive conduct as defined under the act of October 7, 1976 (P.L. 1090, No. 218), known as the Protection From Abuse Act.

All parties agreed on the record that this case was spawned because Plaintiff moved to Baltimore. Plaintiff has filed this complaint to establish a custody order, and to his great credit, he has not resorted to self-help as many do. He recognized that there needed to be a hearing and custody determination before he moved with the child. See Plowman v. Plowman, 409 Pa. Super. 143, 597 A.2d 701 (1991), as to whether

it is in the best interest of the custodial parent to move out of the jurisdiction.

The parties have alluded to the three-prong test under Gruber v. Gruber, 400 Pa. Super. 174, 583 A.2d 434 (1990), to determine whether a custodial parent and child may relocate. The three Gruber considerations are:

1. The court must assess the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a momentary whim on the part of the custodial parent.

2. The court must establish the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it.

3. The court must consider the availability of realistic, substitute visitation arrangements, which will adequately foster an ongoing relationship between the child and the non-custodial parent.

In our case the custodial parent has not been decided, but the principles are the same, particularly since this is a "geographical" case. See McAlister v. McAlister, 747 A.2d 390 (Pa.Super. 2000). However, since this court has decided to maintain the status quo, a lengthy discussion of the Gruber elements is not necessary. But, there is no reason to believe that plaintiff moved for an improper motive or for a frivolous reason. He moved to improve his job status and to be

with his serious girlfriend. It was not based on a momentary whim and, he believes, would improve the life of the child.

In this case, both parents have been loving and devoted to Ryan, each in their own manner. Both parties are able to care for Ryan, either by themselves or with the help of responsible family members. Both of the parties are hard workers, although defendant has been underachieving.

Both parties have a support network to help with nurturing the child. Each party has adequate and reasonable care for the child when he or she is at work.

This court agrees that Ryan's educational future is important. He must be given every opportunity to succeed academically. Both parties seem to be addressing these needs with the school authorities. Plaintiff is more committed to helping Ryan at home. Defendant has cooperated with the school personnel. This court is concerned that a nice young man like Ryan is not involved in activities outside of school. He needs to be engaged in activities that allow him to positively develop skills.

This court is also concerned with the Ryan's hygiene needs. Defendant seems to be trying to address this better, and the custody schedule set for below will allow plaintiff to monitor these hygiene concerns.

The biggest consideration in this case is the separation of Ryan from his half-siblings, Ethan and Taija. Ryan has lived with them almost constantly since their birth. There is no reason to believe that he has not bonded with them in the way that most children bond with their siblings. There is a strong policy in our law that in the absence of compelling reasons to the contrary, siblings should be raised together whenever possible. "Absent compelling reasons to the contrary, the policy of this Commonwealth has been that siblings should be raised together whenever possible. … The threshold for this standard is that the evidence must indicate it was necessary to separate the children and the evidence was forceful in this regard. … Without these compelling reasons, the children should be raised together in one household, which permits the continuity and stability necessary for a young child's development." Ferdinand v. Ferdinand, 763 A.2d 820, 823-824 (Pa.Super. 2000) (citations omitted), appeal denied, 784 A.2d 118 (Pa. 2001).

In this case, the court finds that there are no compelling reasons for disrupting the status quo and splitting up siblings. There are reasons to argue for a change of primary custody: plaintiff will clearly be more attentive to the child's educational and hygiene needs and will provide Ryan with a bit more stable situation. However, under the facts as

they now exist, these factors alone do not merit taking this child away from his siblings. Defendant appears to be stabilizing her situation. The tardiness is diminished. The parties have stayed in the Danville school district for over a year. Defendant and her boyfriend have agreed not to smoke in the house. The Danville School District is solidly addressing Ryan's educational needs. In the big picture, Ryan's best interests are served by remaining during the school year with his siblings. The liberal partial custody schedule will further allow plaintiff to more closely monitor his concerns.

Finally, this court has taken into consideration the fact that defendant moved to Pennsylvania to allow Ryan to be near his father while he was going to school. Thereafter, she provided Ryan with day-to-day care while plaintiff finished his education and established himself in the job market. She has acted in good faith and has provided Ryan with a strong bond not only with her, but also with his father. Without her cooperation over the years, it would have been much more difficult for Plaintiff to have the solid relationship he has built with Ryan. To be sure, plaintiff has been sincere and cooperative and steady in building his relationship with his child. His actions have been as admirable as any this court has seen. But defendant has given plaintiff this opportunity, while being the main caregiver for almost ten years.

After consideration of all of the relevant factors, the court finds that the best interest of the minor child would be served by a custody arrangement that provides for shared legal and with primary physical custody of Ryan with defendant and partial physical custody of Ryan with plaintiff.

EDWARD T. FOCHLER, Plaintiff vs MARGARET C. GROVES, Defendant	IN THE COURT OF COMMON PLEAS FOR THE 26TH JUDICIAL DISTRICT, MONTOUR COUNTY BRANCH, PENNSYLVANIA CIVIL ACTION - LAW CASE NO: 325 OF 2005

ORDER

AND NOW, this 6th day of March 2005, it is ORDERED and DECREED as follows:

1. The parties shall enjoy joint legal custody of their minor child, Ryan Andrew Fochler, born October 3, 1996, and physical custody of the child subject to the physical custody schedule set forth herein.

2. Defendant shall have primary physical custody of the minor child except during those times when plaintiff shall have physical custody as specified in paragraph three (3) below.

3. Plaintiff shall have physical custody as follows:

    a. **Weekends** – The first three full weekends of each month from Friday at 6:00 p.m. to Sunday at 6:00 p.m.

    b. **Summer** – From one week after school ends until two weeks before school starts. Defendant may have one week during this summer period of time to take the child on vacation. She shall give plaintiff thirty (30) days written notice as to when the week shall be. In addition, defendant shall have partial custody during the summer on alternating weekends from Friday at 6:00 p.m. to Sunday at 6:00 p.m.

    c. **Christmas** – From Christmas Day at 2:30 p.m. until December 28th at 6:30 p.m.

d. **Thanksgiving** – In even numbered years from 6:30 p.m. on the eve of the holiday until 2:30 p.m. on Thanksgiving Day. In odd numbered years, Defendant shall have physical custody from 2:30 p.m. on Thanksgiving Day until 6:30 p.m. the following day.

e. Father's Day weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday. (Plaintiff shall have every Mother's Day weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday).

f. Both parties shall have access to the child on or near the child's birthday and on or near the parties' birthday.

g. At such other times as the parties shall agree.

The holiday schedule shall supercede the regular custody schedule to the extent it conflicts with the regular schedule.

4. Nothing in this order shall be construed to restrict or limit the ability of the parties to agree to additional custody arrangements.

5. Plaintiff shall provide all transportation necessary to implement this Order

6. The parties shall have reasonable telephone contact with their minor child when he is in the custody of the other party.

7. The parties shall exchange all information pertaining to the health, education, and welfare of the minor child; including without limitation, report cards; progress reports from school; approval of extraordinary medical and dental treatment; summer school; summer camp; and approval of schools in general, provided that such approval shall not be unreasonably withheld.

8. The parties shall have equal access to all school and medical records of the minor child, and each shall have the ability to consent to emergency medical treatment when the child is in the custody of such party.

9. If circumstances from time to time prevent the exercise of physical custody, the parties shall provide one another

with timely and reasoanble notice as to the existence of such circumstances and an equal amount of make-up physical custody time shall be provided at the earliest mutually agreeable date and time.

10. The parties shall notify one another by telephone of any serious illness of the child.

11. In the event of any serious illness of the child, each party shall have the right to visit the child as frequently as he or she desires, consistent with proper medical care.

12. The term “illness”, as used herein, shall mean any disablity which confines the child to bed under the direction of a licensed physician for a period in excess of forty-eight (48) hours.

13. The parties shall exert reasonable efforts to maintain free access and unhampered contact between the child and each of the parties and to promote a feeling of love and affection between the child and the other party.

14. The parties shall not harass, molest, or malign each other, or their respective families in the presence of their child.

15. Neither party shall engage in a pattern or course of conduct designed to interfere with the free and natural development of the child’s love and respect for the other party.

16. If either party intends to relocate from their present residence, he or she shall provide the other party with a minimum of thirty (30) days advance written notice of such relocation to permit modification of the terms and conditions recommended herein, if necessary.

17. Both parties shall keep the other party informed at all times of their respective addresses and telephone numbers.

18. Neither party will abuse alcohol while caring for the minor child and each will maintain a safe environment for the child.

19. Neither party shall smoke or allow others to smoke in the home where the child is residing.

20. Both parties shall enrol the child in and encourage the child to participate in extracurrilcular activities.

21. Both parties shall allow and encourage the minor child to communicate with the other parent via e-mail.

BY THE COURT

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HONORABLE THOMAS A. JAMES, JR., J.