

BILLEE JO HEIMBACH,

Plaintiff

vs

MARK H. CASHNER,

Defendant

IN THE COURT OF COMMON
PLEAS FOR THE 26TH JUDICIAL
DISTRICT, COLUMBIA COUNTY
BRANCH, PENNSYLVANIA

CIVIL ACTION - CUSTODY

CASE NO: 1098 OF 2005

APPEARANCES:

W. KIM HILL, ESQUIRE, Attorney for the Plaintiff

HUGH SUMNER, ESQUIRE, Attorney for the Defendant

June 23, 2006. JAMES, J.

OPINION PURSUANT TO PA.R.APP.P. 1925(a)

This is a custody case where the issue is relocation. After hearing held May 2, 2006, this court immediately entered an order granting defendant's request to deny plaintiff the right to relocate to South Carolina with the parties' two children. The court stated its reasons on the record to expedite the decision, while reserving the right to issue a supplemental opinion.

Plaintiff appealed. In her 1925(b) statement she complains of three errors. Specifically she states that this court failed to adequately address the three prongs of Gruber v. Gruber, 583 A.2d 434, 438 (Pa.Super. 1990). This court

hereby files this comprehensive Findings of Facts and Opinion addressing plaintiff's complaints on appeal.

FINDINGS OF FACTS, DISCUSSION, AND OPINION

FINDINGS OF FACTS

The court finds that the following facts have been proved:

1. Plaintiff and defendant are the parents of two minor children, Cole Marcus Cashner, born February 8, 2001, and Ian Scott Cashner, born December 5, 2005. The parties were never married to each other.
2. The parties lived together in Columbia County from February 1995 until August 28, 2005, when they separated.
3. By court order (entered into by agreement) dated November 14, 2005, plaintiff was granted primary physical custody of the children. Defendant was granted partial custody of the child at mutually agreeable times. The parties have shared legal custody.
4. Before and after the custody order was entered, defendant saw the children regularly, during the week when plaintiff worked and on weekends as agreed, particularly when he was not working. He was and is an active and committed father.
5. However, it did not take long for plaintiff to notify defendant that she was moving to South Carolina. By letter dated February 16, 2006, plaintiff told defendant that she was moving on February 19, 2006. He did not receive the notice until after she had moved. She testified that she told him of her intention to move on January 3, 2006. Defendant objected to the relocation. There is a requirement in the custody order requiring thirty (30) days written notice before relocating.
6. Defendant tried to seek legal representation after he was told of the proposed move. He went to several attorneys

before securing the services of his present attorney. He acted in good faith. Defendant is a laborer at a local factory where he has held a steady good job for over ten (10) years. He is not sophisticated in business or legal matters and did his best to act promptly.

7. Defendant filed a Petition for Special Relief on March 28, 2006, seeking to find plaintiff in contempt of court for violating the notice requirement of the court order. He sought primary custody.
8. Plaintiff moved in with her sister after the parties separated in August 2005. She worked as a server 20-25 hours per week at a restaurant. Until the order was entered November 2005, defendant saw the children each day while she worked.
9. Plaintiff moved to South Carolina to be with a man (Grant Hagens) whom she has "known" for three years. Plaintiff testified that she met Mr. Hagens through mutual friends. However, it appears that she met him, or at least primarily communicated with him, over the internet. He is an electrician with a good job. However, she never actually met Mr. Hagens until September 2005.
10. Plaintiff married Mr. Hagens a few days before the May custody hearing. They married because she is allegedly pregnant (the baby is supposedly due December 31, 2006) and needs health insurance that he can provide. The timing of the marriage and the alleged pregnancy seem contrived to help plaintiff factually with this custody case.
11. Plaintiff is not employed nor is she seeking employment, although she states that she anticipates being employed some time in the future.
12. Defendant works third shift (10 p.m. to 6 a.m.). He now has a girlfriend with whom he recently started cohabitating and who helps with the children. He has parents and an extended family in the area who provide a solid support system.
13. Cole, the older child, has a physical problem (underdeveloped muscles) which requires regular physical therapy. He was receiving the therapy and treatment at Geisinger Medical Center near the parties' home in Pennsylvania before plaintiff's move. The move to South

Carolina has disrupted that therapy and treatment, although plaintiff is trying to establish such treatment in South Carolina.

14. Plaintiff's parents, her two brothers, and her sister all live in the Columbia County area.
15. Defendant's parents, his two sisters, and his brother all live in the Columbia County area. Defendant's parents are active grandparents.
16. Neither plaintiff nor defendant has any relatives in South Carolina. Neither party has any connection to South Carolina except plaintiff's connection to Mr. Hagens whom she apparently met or developed a relationship with over the internet.
17. Cole will attend kindergarten in the fall of 2006. Ian will be in pre-school.
18. Defendant's ability to travel to South Carolina is extremely limited by finances and time. Plaintiff is not employed nor does she apparently intend to be employed any time soon. Thus, her ability to help with travel is even more limited.
19. Plaintiff's reasons for relocating are only based on a romance developed over the internet. Other than that, there is no advantage or benefit to the children by her move to South Carolina. There is no financial benefit, no family benefit, no educational benefit, no health benefit. There is no benefit to the children that either flows directly to them or through some benefit to their mother.
20. There are numerous disadvantages to the children by the relocation. The relationship between plaintiff and Mr. Hagens seems tenuous, at best. Plaintiff's arrangements for health care for Cole are inadequate. Plaintiff is financially much more dependant and insecure in South Carolina. South Carolina provides no extended family support. The children will be deprived of their father's nurturing. There is no educational benefit.
21. Defendant's reasons for opposing the move are legitimate. He wants to see his children on a regular basis as he has for all their lives. He is an active father with a family which is also active in the children's lives. He

is a good, hard-working man who is a good role model for these children.

22. After plaintiff moved to South Carolina, her efforts to allow defendant contact with the children have been weak and obstreperous.
23. An adequate substitute visitation schedule for the defendant to foster an ongoing nurturing relationship with his children is impossible and impractical and unrealistic.
24. In no way are the best interests of these children served by relocating to South Carolina.
25. If plaintiff stays in South Carolina, the best interests of the children are served by being in the primary physical custody of their father.
26. Plaintiff is not credible.
27. Defendant is credible.

DISCUSSION

"[W]here either parent files a petition which raises the issue of whether it is in the best interest of the child to move with the custodial parent outside of the jurisdiction, a hearing must be held either before the move, or under exigent circumstances, within a reasonable time thereafter." Plowman v. Plowman, 597 A.2d 701, 706 (Pa.Super.1991). Our hearing January 25 and February 8, 2002, was in accordance with Plowman.

In every relocation dispute the court must consider "the custodial parent's desire to exercise autonomy over

basic decisions that will directly affect his or her life and that of the children; a child's strong interest in maintaining and developing a meaningful relationship with the non-custodial parent; the interest of the non-custodial parent in sharing in the love and rearing of his or her children; and finally, the state's interest in protecting the best interests of the children." Gruber v. Gruber, 583 A.2d 434, 438-39 (Pa.Super. 1990).

There is a three-prong test under Gruber 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. Gruber v. Gruber, 583 A.2d at 439.

"These considerations must then be factored into the ultimate consideration of the court, which is to determine what is in the best interests of the child." Mealy

v. Arnold, 733 A.2d 652, 655 (Pa.Super. 1999)(quoting Plowman, 597 A.2d at 707). "The review must be based on the best interests of the child at the time of the hearing."
Paradis v. Paradis, 748 A.2d 1260 (Pa.Super. 1999)(unpublished opinion regarding Columbia County case)(citing Plowman, 597 A.2d at 707).

"In all instances where a custodial parent seeks to relocate and the non-custodial parent opposes the move, the burden is on the custodial parent to establish a significant improvement in the quality of life for that parent and child. Further, with respect to the first Gruber prong, the potential advantages of the move, the trial court is not permitted to rely solely on 'enhanced economic opportunities ... but must also assess other possible benefits of relocation' such as a 'return to a network of family or friends, ... educational opportunities, or ... an improved physical environment.'" Maurer v. Maurer, 758 A.2d 711, 714 (Pa.Super. 2000)(citing Gruber, 583 A.2d at 439-439).

Although Gruber and its progeny have emphasized that the primary concern in relocation cases is the best interests of the child, the cases have repeated that the best interests of the child are inextricably related to the best interest of the primary custodial parent. "In terms of the best interests of the child, the primary physical custody

family must be viewed as the family central and most important to the child's best interest." Gruber, *supra*, 400 Pa.Super. at 182, 583 A.2d at 438. This court believes that a pure best interest analysis is more appropriate, yet is bound by Pennsylvania precedent.

In this case, the benefit to mother is almost non-existent. The only benefit is that she is able to move to South Carolina from Pennsylvania to be with a man she communicated with for two and one-half years by e-mail or phone and never met until September of 2005. When the custody order was agreed to in November of 2005, that she had apparently already made up her mind to move. The agreed upon order was a fraud perpetrated upon the defendant. He did not know all the facts when the agreement was made, otherwise he may have proceeded differently. Nevertheless, there is no benefit to her by moving, other than to be with her boyfriend. That is simply not enough reason to uproot children and tear them from their involved, hard-working father and all of their relatives and their physical and familial stability.

We may live in a mobile society, but that alone does not give license to a parent to seek out romances several states removed and then relocate without regard to the welfare of the children. Plaintiff states that she wants to be a stay-

at-home mom and that would be best for the children.

However, at the same time, she testified that she anticipated being employed at some time in the future. Plaintiff is not credible. She just moved to South Carolina. She does not know what is in store for her. She may have to work to sustain the children. She has no solid plan. She seems to have dragged the children along on an adventure. She states that she got married right before the hearing because she was pregnant and needed health insurance. Query: Would she have married if she were not pregnant? Query: Is she really pregnant? She is simply not in a stable situation, certainly not one which would significantly improve the lives of these children.

Defendant's reasons for objecting to the move are solid and reasonable. He has been an involved father. He wants to continue to know his children. He wants his children to know him and his family and their mother's family. He wonders what kind of life his children will have in a distant state being raised away from family and friends with a person whom their mother met on the internet. He is a man of very modest means who cannot afford the cost of multiple trips to South Carolina throughout the year. He knows that plaintiff is not working and cannot help financially with transportation. The fact that he did not make a legal objection to the move until

after plaintiff had moved is a specious argument. He objected from the beginning and sought legal advice promptly. Moreover, he received written notice after she left, in violation of the court order. Defendant acted in good faith and with integrity in objecting to the move.

In light of the distance and parties' financial constraints, realistic substitute visitation arrangements are not available. The arrangements would realistically be a week at Christmas and all summer with defendant. That is not adequate under the circumstances. Importantly, such arrangements should not be necessary since the proposed relocation will in no way substantially improve the quality of life for the children.

The Superior Court should affirm the decision of this court denying relocation for the reasons stated above.

BY THE COURT:

HONORABLE THOMAS A. JAMES, JR., J.