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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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Opinions

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COLLEEN ABEL, on behalf of minor child, S.A. vs. JASON ACERRA

PFA

Father appeals the trial court's entry of a 1-year final PFA order, which Mother sought on behalf of the parties' Children.

Case No.: FD 14-007297-005. 790 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Family Division. McGough, J. August 14, 2023.

OPINION

Defendant Jason Acerra ("Father") appeals from this court's Protection from Abuse (PFA) Final Order of Court dated June 9, 2023, and docketed on July 7, 2023, which granted the Petition for a PFA filed by Plaintiff Colleen Abel ("Mother") on behalf of herself and the parties' minor children. Mother's Petition was filed on August 10, 2022, but due to an ongoing criminal investigation into the allegations raised in the Petition, the matter was continued several times by agreement of the parties until June 8, 2023. Following an in-camera interview of one of the minor children that was conducted the day before the hearing, as well as testimony from CYF, Mother and several other witnesses, the court ultimately issued a 1-year Final PFA Order. Father raises several evidentiary issues on appeal, including whether the court inappropriately considered hearsay testimony and whether it failed to give proper weight to the testimony of CYF caseworkers. For the following reasons, this court firmly believes that the Final PFA Order should be affirmed.

BACKGROUND AND PROCEDURAL HISTORY

Mother and Father are involved in ongoing custody litigation regarding their two minor children, S.A. (age 14) and C.A. (age 11). Before Mother's PFA Petition, the parents shared physical and legal custody of the children per this court's May 21, 2021 Consent Custody Order of Court. On August 10, 2022, Mother filed a PFA Petition on behalf of herself and both children. *(The PFA Petition and subsequent Orders were erroneously captioned as Mother v. Father and not Mother o/b/o minor child. This was corrected in the November 8, 2022 Continuance Order but is not reflected in subsequent Orders. Page 1 of the Final Order contains what is believed to be the correct caption for this matter given the nature of the allegations.)* Mother described the most recent incident of abuse, which happened on or about July 27, 2022, as follows:

S.A. disclosed occurrences of sexual abuse that occurred during Defendant/Father's custodial periods. C.A. disclosed occurrences of physical and emotional abuse and threats of physical abuse and false imprisonment that occurred during father's custodial periods. There is significant police involvement through the Hampton TWP PD, Detective David Mitchell and Officer Carl Good. There is significant involvement with Children Youth and Families Services (sic) of Allegheny County. There is a scheduled Forensic Evaluation scheduled for both children on August 19, 2022 and an active investigation against father for causing sexual abuse and or exploitation of a child through any act/failure to act, specifically in regards to minor child S.A. Pending the Forensic Evaluation, there is to be no contact between S.A. and C.A. and Father as per CYF and Hampton PD.

PFA Petition, 8/10/22, at 7. Mother also described the following prior incidents of abuse:

The minor children, S.A. and C.A., have made significant disclosures as it regards past incidents of physical and sexual abuse and or incidents that arise to a threat of physical and/or sexual abuse that have occurred since the issuance of the May 21, 2021 Final Custody Order.

Id. While the PFA Petition mentions both children, the allegations raised by S.A. (hereinafter "the Child") eventually became the focus of the case. Mother's request for a temporary PFA Order was granted and a final hearing was scheduled for August 23, 2022. With the consent of both parties, that final hearing was ultimately continued five times between August 23, 2022, and January 17, 2023, due to the ongoing investigation into the allegations described by Mother. On January 17, 2023, the court noted that no further continuances would be permitted, however, the matter was continued for a sixth time on Father's motion as well as the court's concern for the Child's well-being.

The court conducted an in-camera interview of the Child on June 7, 2023. Attorneys for both Mother and Father were present for the interview. The parties agreed that the Child's interview would be incorporated into the record of the final PFA hearing as the Child's testimony and that the Child would not be re-called absent leave of court for good cause shown. The interview was conducted on the record and, near the conclusion of the interview, both attorneys were given the chance to submit written questions for the Child. See N.T. Interview, 6/7/23, at 20:23. During the interview, the Child stated the following when asked about the PFA:

Q. What was the PFA about?
A. My dad like did stuff to me, like sexual stuff to me.
Q. You said your dad did sexual stuff to you?
A. Yeah.
Q. What did he do?
A. He like put his hands on like my chest.
Q. Where did that happen?
A. In his office or like the guest bedroom. It's like combined.
…
Q. Are you able to tell me -- when you say he put his hand on your chest, was it over or under your clothes?
A. It was over my bra but under my shirt.

N.T. Interview, 6/7/23, at 8:1-8, 10:10-13. Both attorneys were also given the opportunity to review relevant portions of documents received by the court from CYF.

The final hearing was held on June 8, 2023. The following witnesses testified at the hearing: Morgan Slater, Butler County CYF In-take Caseworker; Lindsey Nelis, the child's therapist; Justin Hewitt, Cranberry Township Police Officer; Cassidy Schemm, Allegheny County CYF Caseworker; Christine Murray, Father's girlfriend; and Mother. *(For sake of simplicity, the court will use the "CYF" acronym throughout this opinion to refer to the various Children and Youth offices and agencies whose names vary from county to county.)* Father did not testify and did not invoke the 5th Amendment.

On June 9, 2023, the court entered a Final PFA Order of Court that expires on June 9, 2024. Father timely filed a Notice of Appeal on July 7, 2023, but failed to file a Concise Statement at that time as required by Pa. R.A.P. 1925(a)(2). The court issued an Order of Court pursuant to Pa. R.A.P. 1925(b) requiring Father to file a Concise Statement and Father filed a that statement on July 28, 2023. Father raises the following issues for review:

a. The evidence presented at the time of the hearing did not support the entry of a Final PFA Order;

b. The court erred in the entry of a Final PFA when the Child did not testify that she had reasonable fear of imminent abuse;

c. The court erred in permitting witness Lindsey Nelis to present hearsay testimony for statements disclosed by the Child for the truth of the matter asserted;

d. The court erred in permitting witness Lindsey Nelis to consult her session notes during her testimony;

e. The court erred in permitting witness Lindsey Nelis to testify that the Child's behavior is a result of Appellant's alleged actions, when Ms. Nelis testified as a fact and not an expert witness;

f. The court erred in admitting the letter from Ms. Nelis directed to the Child's school as Exhibit 2;

g. The court erred in permitting Appellee Colleen Acerra to present hearsay statements disclosed by the Child for the truth of the matter asserted;

h. The court erred by entering a Final PFA when the evidence and testimony presented as to the alleged acts by the Appellant was inconsistent and did not conform with the allegations raised in the Petition for Temporary Protection from Abuse Order;

i. The court erred in the admission of Court Exhibit 1 without authentication and to which the court viewed in advance of the hearing;

j. The evidence presented at the time of hearing does not support the three-year duration of the Final PFA; and

k. The court did not provide the appropriate weight to the testimony provided by representatives from Butler County CYF, Allegheny County CYF, and Cranberry Township's Police Department.

DISCUSSION

To obtain a PFA order from the trial court, the petitioner's claims of abuse do not have to be proven beyond a reasonable doubt, but only by a preponderance of the evidence. K.B. v. Tinsley, 208 A.3d 123, 128 (Pa. Super. 2019). A "preponderance of the evidence standard is defined as the greater weight of the evidence, i.e., to tip a scale slightly is the criteria or requirement for preponderance of the evidence." Raker v. Raker, 847 A.2d 720, 724 (Pa. Super. 2004).

When reviewing a PFA order, the Superior Court reviews the trial court's conclusions and order for an error of law or abuse of discretion. C.H.L. v. W.D.L., 214 A.3d 1272, 1276 (Pa. Super. 2019). "In reviewing the validity of a PFA order, [the Superior Court] must . . . defer to the [PFA] court's determination and the credibility of witnesses at the hearing." Id. at 1276-77. "Assessing the credibility of witnesses and the weight to be accorded to their testimony is within the exclusive province of the trial court as the fact finder." S.G. v. R.G., 233 A.3d 903, 907 (Pa. Super. 2020). "[The Superior Court] has no authority to overturn the trial court's credibility determinations" in PFA matters. Karch v. Karch, 885 A.2d 535, 537 (Pa. Super. 2005).

I. The Testimony of Therapist Lindsey Nelis

The court has grouped the issues raised by Father by topic and will address each in turn. Errors C-F are regarding the testimony of the child's therapist, Lindsey Nelis, and the evidence introduced through her testimony. Father alleges the court erred in permitting the witness to present hearsay testimony for statements disclosed by the child, to consult her session notes during her testimony, to testify that the child's behavior is a result of Father's alleged actions, and in admitting Exhibit 2.

Beginning with the statements of the child that Ms. Nelis included in her testimony, such statements were not hearsay because they were not offered for the truth of the matter asserted. In this case, that would be whether or not the events described by the Child actually occurred. During argument on this issue, Counsel for Mother explained as follows:

I can ask Ms. Nelis about [the Child's] testimony and whether she believed it was truthful or not and whether she heard the same things and whether her reports, which were detailed to CYF and in the package yesterday, also say the same things which we looked at in camera yesterday, [counsel for Father] and I, in the fifth floor office.

N.T. Hearing, 6/8/23, at 20:16-23. Further, the court only considered the Child's statement as described by Ms. Nelis in order to evaluate the consistency between the Child's telling of events in the days following the alleged incident and her recounting thereof almost a year later during her in-camera interview. This is also reflected in an exchange between the court and Father's counsel when the hearsay objection was initially raised:

[Counsel for Father]: The child testified yesterday. The child is the best evidence. She is the alleged victim.

The Court: The consistency of her statements is relevant in the determination of credibility.

Id. at 21. At no point did the Court rely on the child's statements as testified to by Ms. Nelis in making a final determination in this matter. Instead, and as explained below, the court's finding of abuse was based on, among other things, the allegations contained in the Child's own testimony, which Father never denied. The statements relayed by Ms. Nelis were not considered in this finding.

With regard to Father's objection that Ms. Nelis was permitted to consult her session notes during her testimony, the court first notes that this objection was not raised at the time of trial and should be waived. When counsel for Mother requested to show the witness her notes, the objection made by counsel for Father was with regard to hearsay. N.T. Hearing at 35-36. While the court did initially admit the notes as evidence, it was very soon after clarified that the documents would not be moved for admission and instead were only to be used by the witness to refresh her recollection. Id. at 37:10-25. Counsel for Father did not raise an objection. The witness then used the notes as permitted by Pa.R.E. 612.

In his Error E, Father argues that the court erred by permitting Ms. Nelis, a licensed professional counselor who was not presented as an expert witness, to testify that the Child's behavior was a result of Appellant's alleged actions. Rule of Evidence 701 guides the court regarding testimony by a lay witness and states the following:

Rule 701. Opinion Testimony by Lay Witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Pa.R.E. 701. While the court did review the witness's work experience as a professional counselor, at no point was Ms. Nelis offered or qualified as an expert witness. When she testified on issues regarding her sessions with the Child, the court understood that her testimony was to be based purely on her perception and not based on specialized knowledge that is beyond that possessed by the average layperson. See Pa.R.E. 702. Here, again, the issues raised by Father are without merit.

Finally, Father's Error F concerns the admission of Exhibit 2, a letter written by Ms. Nelis to exempt the Child from PSSA testing due to ongoing sleep disturbance. The objection itself seems to have been that the letter was a report and would need to have been provided to Father before the hearing, and also that the letter was not relevant. Given the previous discussion regarding Ms. Nelis as a lay witness, it was clear to the court that this letter was certainly not a "report" that required advance notice to the opposing party. The question of relevance, however, requires more discussion. Pa.R.E. 401 holds our test for relevance and states:

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Here, the court found the letter to be relevant in determining whether the Child continued to carry the trauma described by Ms. Nelis in the weeks and months following the alleged events which gave rise to the PFA. The court further found such a fact was certainly "of consequence" in making its determination. As such, the court reasonably concluded that the letter was admissible when offered into evidence.

II. The Testimony of Mother, Colleen Abel

In Error G, Father also raises hearsay concerns and alleges the court erred by permitting Mother to present hearsay statements disclosed by the Child for the truth of the matter asserted. However, this alleged error is inconsistent with the record. During Mother's testimony, counsel for Father raised hearsay objections five different times, and the court sustained her objections each time. See N.T. Hearing at 85, 87, 96-98. As such, Error G raises no issue of law that was not promptly and appropriately addressed at trial.

III. The Testimony of Butler County CYF, Allegheny County CYF, and Cranberry Township Police Department

In Error K, Father contends that the trial court erred in not providing adequate weight to the testimony of three witnesses: Morgan Slater from Butler County CYF, Officer Justin Hewitt from Cranberry Township Police Department, and Cassidy Schemm from Allegheny County CYF. First, it is worthwhile to reiterate that determinations of the credibility and weight of testimony in a PFA hearing lie strictly with the trial court. See S.G. v. R.G., 233 A.3d 903, 907
(Pa. Super. 2020). Nevertheless, the testimony from these witnesses was given the appropriate weight. Officer Hewitt's involvement in this case was limited to the investigation of allegations raised while Father lived in Butler County years before the incident giving rise to the immediate PFA petition. N.T. Hearing at 141. The court found Ms. Schemm and Ms. Slater to be credible in relaying the involvement of the Allegheny and Butler County agencies involved in the case, but the trial court does not decide the outcome of PFAs based on whether county agencies have intervened to provide services to a family. In 2018, the Superior Court recognized the difference between "abuse" as defined by the PFA Act and the CPS guidelines:

However, this Court is cognizant that the definition of "abuse" used by the PFA Act is broader than the definition used by Child Protective Services. Although the PFA Act may incorporate those definitions, it does not require that abuse rise to the level of criminality or for removing a child from the home. Thus, this Court is not bound to accept the agency's findings as proof that abuse has not or is not reasonably likely to occur.

S.W. v. S.F., 196 A.3d 224, 232 (Pa. Super. 2018) (citations omitted). Here, Ms. Schemm repeatedly stated that she did not personally interview the Child regarding the allegations. N.T. Hearing at 152:21-24. Ms. Slater, the intake caseworker in Butler County, testified that her supervisor closed the case because it did not meet Child Protective Services ("CPS") guidelines. Id. at 17:6-11. She explained that for a case to be marked as "founded," the agency would require that the physical touch was for "sexual gratification". The PFA Act has no such requirement. While the court certainly respects and greatly appreciates the difficult work done by the county CPS agencies, we are mindful that each plays a different role in our legal system, and it is the court's task to make decisions in PFA matters.

Father also found fault in the court's admission of Court Exhibit 1. In Error I, Father alleges that Court Exhibit 1 was entered without authentication and was viewed by the court in advance of the hearing. Court Exhibit 1 is a video of the Child's forensic interview conducted in Allegheny County on August 19, 2022. It was provided to the Court as part of CYF's response to a subpoena submitted by Father. In providing the file to the court, CYF instructed the court to review the materials in-camera to determine whether they contained exculpatory information which should be disclosed to the parties. The court also discussed the entry of the forensic interview with counsel before the hearing with the understanding that it would likely be offered into evidence. Ultimately, the exhibit was offered by counsel for Mother at the conclusion of Mother's testimony. N.T. Hearing at 100:11-18. Counsel for Father objected on the basis that it was "not appropriate for it to be admitted under Ms. Abel's testimony." The court did not understand this to be an objection regarding authentication and the word "authentication" was never mentioned. Instead, after the exhibit was reclassified as "Court Exhibit 1" both parties were in agreement with its admission without objection. Id. As such, the court believes that its handling of the admission of the exhibit was proper given the nature of Father's objection.

IV. The Evidence Supported the Entry of a Final PFA Order

Father's remaining errors all involve the court's decision to enter a Final PFA Order in light of the evidence presented at the hearing. Father's Error J argues that the evidence did not support a final order with a duration of three years. However, as previously stated, the Final Order issued by the court was granted on June 9, 2023, and expires one year later on June 9, 2024. See Final Order 06/09/23 at 1. The one-year duration of this order was carefully considered by the court given the amount of time that the Temporary PFA had been in place and the amount of time needed for Father's criminal investigation to conclude and for Father to seek out appropriate services. The error alleged by Father is both factually incorrect and without merit.

Father's Error B states that the court erred in its entry of a final order when the child did not testify that she had a reasonable fear of imminent abuse. As previously explained, during the Child's in-camera interview, the Child stated that Father had placed his hand under her shirt. In the PFA Act, "placing another in reasonable fear of imminent serious abuse" is the second of five definitions of the word "abuse". 23 Pa.C.S.A. § 6102. Here, the Court was able to infer the Child's fear in several ways. Most compelling was the Child's own statements during the court's in-camera interview. When asked if she wanted to see Father again, the Child stated the following:

Q. Well, do you want to see him again?

A. I don't know.

Q. You don't know?

A. No, I haven't really thought about it because I don't like thinking about stuff that makes me feel uncomfortable.

N.T. Interview at 20:4-9. Additionally, the Child's therapist testified that in reporting the incident to Detective Mitchell she reported that the Child was fearful of Father:

Q. Tell us what you told Detective Mitchell.

A. That [the Child] had been reporting feeling fearful of her father, that he had been screaming in her face and driving erratically with her in the car, blocking her from leaving rooms, things that would qualify as physical abuse.

N.T. Hearing at 34:2-9. The court's inference of fear in this matter comports with the Superior Court's reasoning in T.K. v. A.Z., 157 A.3D 974 (Pa. Super. 2017). There, the Court noted that the appellee's fear was evident from her testimony:

Although Appellee did not use the specific word "fear," she clearly testified to her deep concern for her safety, opining that Appellant's behavior would eventually escalate from repetitive stalking to seeking to cause her bodily harm.

Id. at 978. Given the Child's discomfort when considering seeing Father again, as well as the statements of her therapist, the Court reasonably concluded that she was fearful of both imminent and serious abuse as defined by the PFA Act.

In his Error H, Father also argues that the evidence and testimony presented as to the alleged acts by Father must be consistent with the allegations raised in the PFA Petition. However, it has been well settled that the PFA Act "does not anticipate that a person filing a Petition will be rigorously limited to the specific allegations of abuse found in that Petition." Snyder v. Snyder, 629 A.2d 977, 981 (Pa. Super. 1993). Additionally, the court notes that by the time of the final hearing, both parties had ample opportunity to review the documents provided by CYF, tapes of the Child's forensic interview, and the Child's in-camera interview with the court. This was not a trial by ambush. Both parties were well aware of the specific details of the Child's allegations. Mother filled out the petition with the assistance of counsel and with the understanding that it did not require "incredible specificity." N.T. Hearing at 102. The court found that, along with Mother's testimony, there was sufficient detail to grant the temporary PFA, and ultimately the final PFA.

Finally, Father's Error A alleges that the evidence presented at the time of the hearing did not support the entry of a Final PFA Order. The court strongly disagrees. As previously explained, the petitioner's evidence in a PFA matter must tip the scale in their favor. Here, the court conducted its own in-camera interview of the 14-year-old Child, and it found the Child to be credible and compelling. The Child stated that Father touched her at least 3, possibly 4, other times under her shirt during a span of weeks or months in 2017. N.T. Interview at 15:7-9, 17:7-8. The Child's statements during the in-camera interview were supported by the Child's own forensic interview. As explained by Father's own witness, the Child gave several interviews, and her statements were generally the same with regard to where and how the abuse occurred. N.T. Hearing at 153:25-154:3. The Child's therapist credibly testified to the effect that this incident had on the Child:

She reported an increase in dreams, re-experiencing dreams, fear that either everybody would forget what had happened, forget what she had reported, or that they would be mad at her. That's something that she still to this day worries about but at that time very much was very concerned with being a problem. She felt like by telling the truth she had just inconvenienced everyone around her.

Id. at 48:17-25. The Court also gave weight to the text messages between Mother and the Child at the time of the incident (Exhibits 3 and 4). The court found Mother's actions to be consistent with those of a parent genuinely concerned for her child and not someone seeking to tip the scales in a custody dispute.

Finally, when ultimately weighing the evidence, the court drew a negative inference from Father's decision not to testify in this matter. Whether the court can draw a negative inference from a defendant's decision not to testify in a PFA matter was recently addressed by the Superior Court in Young v. Young, 277 A.3d 1170 (Pa. Super. 2022). *(This case is citied only for its persuasive value only. See Superior Court I.O.P. 65.37.)* In a footnote to the opinion, the Court noted, "In any event, considering the civil nature of PFA proceedings, see Charnik, supra, we would discern no error in the court's drawing a negative inference from Appellant's decision not to testify." Id. at FN 2.

Here, the allegations made by the Child in this matter directly concern Father and his alleged actions. Father's failure to offer testimony in his defense and his decision to rely on the testimony of third parties can only be seen by this court as an unwillingness or an inability to address the Child's allegations. This inference was not critical to the court's decision, but it did weigh in Mother's favor.

CONCLUSION

When considering whether a petitioner has met their burden in a PFA matter, the court is not bound by the decisions of other agencies with their own rules and procedures. While those decisions can certainly be informative and carry weight, they are not dispositive. An agency conducts its own evaluation and makes the best determination it can at that time, but it lacks the court's insight and its authority to hear testimony and review evidence. When considering the totality of the testimony and evidence, it was this court's determination that the greater weight of the evidence favored entry of a Final PFA Order. Accordingly, Appellant's appeal at 790 WDA 2023 should be DISMISSED.

BY THE COURT:
/s/The Hon. Hugh Fitzpatrick McGough

TYLER BROWN vs. NICOLE SORRENTINO

Custody

Court examined legalities regarding a driveway easement.

Case No.: FD-19-08998-002. 1071 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Family Division. Costa, J. October 6, 2023.

OPINION

Nicole Sorrentino ("Mother") appeals from this Court's interim orders dated November 21, 2022, and December 21, 2022. These interim orders are not appealable. Accordingly, this Court's Order should be affirmed.

Background

Father and Mother were married May 4, 2018. They share one (1) child together: E.B. (D.O.B. 8/19/2013). On October 10, 2019, Mother filed a Complaint for Custody. On October 31, 2019, Father filed a Complaint in Divorce including a second count for

equitable distribution. The parties were ordered to attend an education seminar on November 2, 2019. Mother's Complaint for Custody was dismissed on November 6, 2019, due to her failure to appear at the education seminar. Mother's Complaint for Custody was reinstated by the Consent Order of Court dated December 6, 2019. The parties were eventually scheduled for an Interim Relief Hearing on February 4, 2020. On this date, the parties signed a Final Consent Order of Court ("2020 Final Consent Order") resolving the custody action. Paragraph four (4) of the 2020 Final Consent Order gave Father primary physical custody and Mother partial physical cmtody. Under the Final Consent Order, Mother exercised custody every other weekend from Friday at 6:00 P.M. until Sunday at 7:00 P.M.

On November 18, 2022, Father submitted an Emergency Motion to Suspend Custody asking this Court to suspend Mother's custody on an interim basis. In his Emergency Motion to Suspend Custody, Father, through counsel, stated that he had been informed by the Office of Children, Youth, and Families ("CYF") that Mother had overdosed on heroin twice in the month of October. Father requested an interim suspension of Mother's custody to ensure the safety of the Child.

This Court permitted Mother's counsel three (3) days to file an answer to the Emergency Motion. On November 21, 2022, Mother's counsel submitted an Answer and New Matter. Based on their pleadings, this Court issued an Interim Order of Court that (1) suspended Mother's custody until December 5, 2022, (2) instructed Father to file a Petition for Modification of Custody before the Order expired on December 5, 2022, and (3) allowed either party to praecipe for an expedited Interim Relief Hearing.

Mother's custody was suspended for 2 weeks from November 21, 2022, to December 5, 2022. According to their custody schedule, Mother lost 2 days of custody time during the 2-week suspension of her custody.

On December 13, 2022, Mother, through counsel, filed a Petition for Special Relief. Father submitted a response. On December 21, 2022, this Court entered an Interim Order of Court granting Mother's Petition for Special Relief in-part. The Court, granting paragraphs one (1) and four (4) of Mother's proposed order, referred Mother to the IMPACT program and allowed the issue of make-up time to be addressed at the upcoming Interim Relief Hearing.

At the February 22, 2023 Interim Relief Hearing, the parties signed a Consent Interim Order of Court that returned physical custody to the schedule set forth in the 2020 Final Consent Order.

Following a judicial conciliation in May, the parties agreed to another Consent Interim Order of Court dated May 18, 2023. Physical custody was modified to shared physical custody on a 5-2-2-5 basis. As a part of that consent order, another judicial conciliation was scheduled for August 10, 2023.

On August 10, 2023, the parties and their counsel signed a Final Consent Custody Order of Court ("2023 Consent Custody Order"). The parties agreed to a week-on, week-off shared physical custody schedule.

On September 8, 2023, Mother filed a timely Notice of Appeal and a Concise Statement of the Matters Complained of on Appeal ("Concise Statement").

Issues on Appeal

The Concise Statement identifies the following issues for appeal:

I. The Court erred in changing custody in a non-record proceeding without rnalyzing the factors set forth in 23 Pa.C.S.A. §5328(a);

II. The Court denied Mother's due process rights by suspending all physical c..1stody rights without an evidentiary hearing.

Discussion

It is not entirely clear what Mother seeks to appeal or what remedy she seeks. This custody action was resolved with the 2023 Consent Custody Order signed by both parties and their counsel. However, Mother is not appealing from that order. Rather, Mother appeals "from the Interim Orders entered in this custody matter on the 21st day of November, 2022 and December 21, 2022." *(Mother's Notice of Appeal, September 8, 2023.)*

"Few legal principles are as well settled as that an appeal properly lies only from a final order unless otherwise permitted by rule or statute." G.B. v. M.M.B., 448 Pa. Super. 133, 139, 670 A.2d 714, 717 (1996). Mother's Notice of Appeal alleges that these orders are "appealable as of right" pursuant to Rule 341 of the Pennsylvania Rules of Appellate Procedure.

Under Rule 341, "an appeal may be taken as of right from any final order of a government unit or trial court." A final order (1) disposes of all claims and of all parties; (2) is entered upon an express determination by the trial court that an immediate appeal would facilitate resolution of the entire case; or (3) disposes of a petition for post-conviction collateral relief. Pa.R.A.P. 341. These orders are interim orders that fail to meet the definition of a final order.

The Interim Orders of Court are Not Final Orders

The Interim Order of Court dated November 21, 2022, suspended Mother's partial custody for two (2) weeks until December 5, 2022. This was not a Final Order, or an award of custody that required analysis of the §5328 custody factors. This was a two-week suspension of custody to ensure the safety of the Child while Father filed for modification of custody. This order did not dispose of the claims, nor was it entered upon an express determination by this Court that an immediate appeal would facilitate a resolution of the entire case. Accordingly, this order was not a final order as defined by Rule 341 of the Rules of Appellate Procedure.

The Interim Order of Court dated December 21, 2022, was a proposed order attached to the Mother's Petition for Special Relief emailed to this Court on December 13, 2022. The Court granted paragraphs one (1) and four (4) of Mother's proposed order, referring Mother to the IMPACT program and allowing the issue of make-up time to be addressed at the upcoming February 2023 Interim Relief Hearing. The Court struck paragraph two (2) stating Mother would continue to exercise custody so long as she continued to have clean drug screens. The Court also struck paragraph three (3) requiring the parties to agree upon a Christmas and New Years schedule. This order did not dispose of the claims, nor was it entered upon an express determination by this Court that an immediate appeal would facilitate a resolution of the entire case. Accordingly, this order was also not a final order as defined by Rule 341 of the Rules of Appellate Procedure. An appellate court may take an appeal of certain interim orders.

The Interim Orders are Not Appealable

An appellate court may entertain an appeal from an interlocutory order, taken either as a matter of right, Pa. R.A.P. 311, or by permission, Pa. R.A.P. 312 and 1311. Rule 311 allows for interlocutory appeals to be taken as of right from the following types of orders: (1) Affecting Judgments, (2) Attachments, (3) Changes of Criminal Venue or Venire, (4) Injunctions, (5) Preemptory Judgements in Mandamus, (6) New Trials, (7) Partitions, and (8) New Trials. The November 21, 2022 Interim Order and the December 21, 2022 Interim Order do not fit any of the listed types of orders for an interlocutory appeal to be taken as of right.

An interlocutory order may also be appealed if permission for the appeal is oought in the form of a certification under 42 Pa.C.S. §702(b) or Pa.R.A.P. 341(c). Mother did not seek the permission required. The Interlocutory Orders at issue are not appealable as a matter of right or by permission.

Conclusion

Mother appeals from two (2) interim orders that cannot be appealed. The November 21, 2022 Interim Order suspended Mother's custody for two (2) weeks. The December 21, 2022 Interim Order granted Mother's Petition for Special Relief in-part.

The parties resolved the custody action with a final Consent Custody Order on August 10, 2023. If Mother is seeking make-up time, Mother had ample time to address the make-up time before consenting to a final custody order that doesn't provide for it.

The interim orders at issue cannot be appealed because they are not final orders, nor are they the type of interlocutory orders that can be appealed.

For the foregoing reasons, Mother's appeal should be quashed.

BY THE COURT:
/s/The Hon. Jessel A. Costa III

STEEL VALLEY SCHOOL DISTRICT and BOROUGH OF MUNHALL vs. DAVID S. BOCSY and GLORIA L. BOCSY

Judgment

Defendant has appealed to the Superior Court of Pennsylvania the court's entry of a $58,348.53 judgment against him for delinquent property taxes from tax years 1994 to 2021. This opinion sets forth the reasons the $58,348.53 judgment was entered against him, as required by Pennsylvania Rule of Appellate Procedure 1925(a).

Case No.: GD23-438. Superior Court docket no. 960 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. September 25, 2023.

OPINION

Defendant David Bocsy has appealed to the Superior Court of Pennsylvania from my entry of a $58,348.53 judgment against him for delinquent property taxes from tax years 1994 to 2021. This opinion sets forth the reasons the $58,348.53 judgment was entered against Mr. Bocsy, as required by Pennsylvania Rule of Appellate Procedure 1925(a).

Defendants David Bocsy and Gloria Bocsy own real property in Munhall Borough known as 822 East 10th Avenue. From 1994 to 2021, they failed to pay the Steel Valley School District property taxes, and from 2022 to 2021, they failed to pa the Munhall Borough property taxes. The School District and Borough filed liens against the Defendants' property for each delinquent tax year.

Plaintiffs Steel Valley School District and Borough of Munhall initiated this proceeding on January 11, 2023 by filing a writ of scire facias, which is part of the statutory process to foreclose on delinquent property taxes under the Pennsylvania Municipal Claims and Tax Liens Act, 53 P.S §§7101-7505. The scire facias proceeding is "in rem," or exclusively a proceeding against the Defendants' real property. The writ of scire facias notifies the property owner to file an "affidavit of defense," if there are any defenses, within fifteen days or "judgment may be entered against you for the whole claim, and the property…sold to recover the amount thereof." 53 P.S. §7185. If an affidavit of defense is filed, "a rule may be taken for judgment for want of sufficient affidavit of defense, or for so much of the claim as is insufficiently denied…." 53 P.S. §7271.

On February 27, 2023 the Defendants filed a nineteen page document entitled "motion to vacate judgment." Plaintiffs filed preliminary objections to the motion to vacate judgment, and on April 18, 2023 the Honorable Arnold Klein sustained the preliminary objections, struck the motion to vacate judgment and ordered the Defendants to file an appropriate answer to the writ of scire facias within 45 days. On June 2, 2023 Defendants filed a thirteen page document entitled "answer." On June 21, 2023 Plaintiffs then presented a "petition for rule to show cause why judgment should not be entered for want of a sufficient affidavit of defense pursuant to 53 P.S. §7271." See Department of Court Records electronic docket documents 16 and 17. The Honorable Mary McGinley issued the requested rule to show cause, ordered the Defendants to file any answer to the petition within 20 days, ordered the petition to be decided under Pa.R.C.P. No. 206.7 and scheduled argument for July 21, 2023.

I was the Civil Division "motions judge" for the July 21, 2023 argument on the petition. The Defendants had not filed an answer to the Petition or any depositions and evidence in response to the rule to show cause. There was no court reporter present to transcribe the argument, but I have a general recollection of what occurred. Counsel for the Plaintiffs and Gloria Bocsy were present, but David Bocsy was not. Counsel argued that the Defendants' "answer" does not deny the $58,348.53 owed for property taxes, hence judgment in that amount should be entered against them. Ms. Bocsy argued that neither Defendant was properly served with the writ that commenced this proceeding. Counsel responded that Allegheny County Sheriff deputy Steven Costello filed a return of service that showed service of the writ upon Mr. Bocsy at the property on January 31, 2023, which also constituted service on Ms. Bocsy. It was then argued by Ms. Bocsy that she did not reside with Mr. Bocsy, therefore any service on him did not constitute service on her.

My decision was to grant the Plaintiffs' petition for judgment only as to David Bocsy in the amount of $58,348.53. David Bocsy filed a timely notice of appeal from my decision to the Superior Court of Pennsylvania. With Pennsylvania Rule of Appellate Procedure 341(b) allowing an appeal by right only from an order that "disposes of all claims and of all parties," my decision may not be appealable since it did not dispose of one of the parties, Gloria Bocsy. I will, in any event, address what I perceive to be the issue Mr. Bocsy sets forth in his concise statement of errors complained of on appeal. *(The concise statement of errors complained of on appeal consists of five and one half pages with seventeen numbered paragraphs and the completed two page Superior Court Civil Docketing Statement appended to it. Most of what are described as errors I made are based on a misunderstanding of the law and procedure. For example, Mr. Bocsy complains I refused to vacate a judgment of default when the judgment was not entered by default. Mr. Bocsy also references a "Tax Sale Law" that is inapplicable to Allegheny County's municipalities and school districts (see 72 P.S. §5860.102). He also references requirements of a "tax claim bureau" when Allegheny County is not authorized to utilize a tax claim bureau to collect delinquent taxes and sell tax delinquent properties. Additionally, he describes the requirements for properly posting a property for a tax sale when a sale of the property owned by the Defendants has not yet been ordered.)*

Mr. Bocsy contends that I made an error by entering a judgment against him when there was no proper service of process. In the answer to the writ of scire facias "the lack of proper service" is premised on David Bocsy not "receiving mail because David departed from the premises in 1988 six months following the purchase of the property." Department of Court Records electronic docket document 6, paragraphs 1 and 3. This premise is incorrect since the Municipal Claims and Tax Liens Act requires the writ of scire facias to be served by the sheriff handing a copy to the defendant (see 53 P.S. §7186), and the docket shows deputy sheriff Costello served it on Mr. Bocsy. The Plaintiffs do not argue that original service on Mr. Bocsy was effected by mail. They instead rely on it having been done in the proper manner by a deputy sheriff. Therefore, I did not make an error by entering judgment against Mr. Bocsy.

While not specifically set forth in the concise statement, I will address an additional error Mr. Bocsy could be claiming. He may be arguing that, notwithstanding deputy Costello's report that he served the writ on Mr. Bocsy at 822 East 10th Avenue Homestead, PA 15120 on 1/31/2023 at 17:34, this service on Mr. Bocsy actually did not happen. But "in the absence of fraud, a sheriff's return which is complete on its face is conclusive and immune from extrinsic attack as to facts of which the sheriff presumptively has personal knowledge…." and as to facts of which the sheriff would not have personal knowledge, the party contesting service has the burden of establishing this negative. American Exp. Co. v. Burgis, 328 Pa. Super 167, 176-178, 476 A.2d 944, 949-950(1984). By failing to file an answer, depositions and other evidence responsive to the rule to show cause, Mr. Bocsy offers no explanation for how deputy Costello misidentified him. *(For example, Mr. Bocsy could have offered evidence, if it existed, that a tenant, squatter, etc. was in possession of 822 East 10th Avenue on 1/31/2023 and the deputy misidentified the tenant, squatter, etc. as him.)* Therefore, Mr. Bocsy failed to carry his burden of proving he was not served with the writ of scire facias, and my entry of judgment against him was correct.

BY THE COURT:
/s/The Hon. Alan Hertzberg

ADAM O'PATCHEN vs. SAMANTHA THOMPSON

Custody

Father appeals from this court's order awarding legal custody to mother for the limited purpose of choosing where the parties' children would attend school. This order is supported by testimony presented at trial.

Case No.: FD-20-007466-002. 755 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Family Division. Costa, J. July 31, 2023.

OPINION

Adam O'Patchen ("Father"), appeals from this Court's June 12, 2023 Order awarding legal custody to Samantha Thompson ("Mother") for the limited purpose of choosing where the parties' children, A.O. and Z.O. ("Children"), would attend school for the 2023-2024 school year. This Court's order is supported by the testimony presented at trial.

Accordingly, this Court's Order should be affirmed.

Background

Father and Mother were married on October 8, 2011. They had two (2) children together: A.O., age 6, and Z.O., age 10. During their marriage, they resided in the Baldwin-Whitehall School District ("Baldwin"). Notes of Testimony Page 15, School Choice Hearing #1, December 12, 2022. Their oldest child, Z.O., attended Kindergarten and First Grade in the Baldwin-Whitehall School District.

On March 5, 2020, Father filed a Complaint in Divorce. On the same day, Father's Counsel filed a Marriage Settlement Agreement ("Agreement") signed by both parties. The Agreement addresses Custody in Article Eight (8), it reads, in-relevant part, as follows:

ARTICLE EIGHT
Custody and Support

Section 1. Physical Custody. The parties agree to share custody and will work toward a mutually agreeable physical custody schedule that is in the best interests of the minor children.

Each party shall be permitted to exercise two (2) non-consecutive weeks of vacation with the minor children during the summer. The parties agree to provide no less than thirty (30) days' notice of such vacation and shall provide all relevant information regarding the trip including accommodation location, telephone number, and other individuals taking the vacation. Additional weeks may be permissible as the parties may agree.

The parties shall make every effort to be flexible with regard to the children attending major family events. The parties shall agree as to a holiday schedule which shall supersede the regular schedule and vacation schedule.

Section 2. Legal Custody. The parties have agreed to share legal custody. Shared legal custody means that the parties share responsibility for all major decisions concerning the education, medical care, dental care, religion, and all other matters which concern the general welfare of the children. For this purpose, the parties sharing legal custody shall consult and confer with each other on matters affecting the welfare of the minor children. They shall take into account the best interests of the minor children, and to the best extent possible, the wishes of the minor children. The parties shall also include one another on all contact information sheets, including but not limited to those for school, medical, religious, and extracurricular activities.

On August 13, 2020, Divorce Decree was granted. Mother moved out of the marital residence to the Chartiers Valley School District ("Chartiers Valley"). SCH1 p. 27. At that time, the parties agreed that the Children would attend Chartiers Valley. SCH1 p. 27. Mother and Father both attended school at Chartiers Valley. Notes of Testimony Page 32, School Choice Hearing #2, May 25, 2023. Subsequently, Father moved into his Parents' home in Chartiers Valley School District in December 2021. SCH2 p. 32.

Mother remarried on February 2, 2022. SCH1 p. 28. Mother and her spouse moved to the Upper St. Clair School District. SCH1 p. 28. The Children were enrolled in Upper St. Clair School District in February of 2022. SCH1 p. 52. Mother verbally notified Father that the Children would be enrolled in Upper St. Clair School District in January of 2022. SCHl p. 52. SCH2 p. 62.

On August 8, 2022, Father filed Motion for Special Relief - Status Quo Custody, seeking an order from the Court to reenroll the Children in the Chartiers Valley School District. Mother filed a Response to Plaintiff's Motion for Special Relief - Status Quo Custody on August 12, 2022.

On August 23, 2022, this Court granted Father's Motion for Special Relief, and ordered the Children to be reenrolled in the Chartiers Valley School District for the 2022-2023 school year.

On August 25, 2022, Mother, through her counsel, filed an Emergency Motion for Reconsideration asking this Court to reconsider the August 23, 2022, Order by allowing the Children to attend school in the Upper St. Clair School District pending a School Choice Hearing.

On August 30, 2022, this Court issued an order granting Mother's motion in part by scheduling the first School Choice Hearing for December 12, 2022. Mother's request for the Children to attend school in the Upper St. Clair School District in the interim was denied.

On December 12, 2022, the parties appeared for the School Choice Hearing. Prior to the start of testimony, counsel for both parties agreed that the School Choice Hearing would require an additional day to complete. Notes of Testimony Page 8, School Choice Hearing #1, December 12, 2022. Only Mother was able to testify on December 12, 2022. On January 3, 2023, this Court issued an order scheduling the 2nd day of the School Choice Hearing for May 25, 2023.

On May 25, 2023, all parties appeared for the 2nd day of the School Choice Hearing. Father and the Children testified.

On June 12, 2023, this Court issued an Order awarding Mother legal custody for the limited purpose of school choice for the 2023-2024 academic year only.

On June 27, 2023, Father filed a timely Notice of Appeal and a Concise Statement of the Matters Complained of on Appeal.

Issues on Appeal

In his Concise Statement of Matters Complained of on Appeal, Father asserts the following challenges to this Court's Order dated June 12, 2023:

I. The Court erred in entering an Order providing Mother sole legal custody for the purposes of selecting the Children's school for school year 2023 - 2024.

II. The Court erred in overruling Father's objections to the submission of school rankings evidence into the record.

III. The Court erred in not considering the best interests of the children in rendering its Order of June 12, 2023.

IV. The Court erred in not considering the preferences of the Children in rendering its Order of June 12, 2023.

Standard and Scope of Review

In reviewing a custody order, the scope is of the broadest type and the standard is abuse of discretion. Durning v. Balent/Kurdilla, 19 A.3d 1125, 1128 (Pa. Super. 2011). The Appellate Court must accept the findings of the trial court that are supported by the evidence. S.W.D. v. S.A.R., 96 A.3d 396, 400 (Pa. Super. 2014)(Citing M.P. v. M.P., 54 A.3d 950, 953 (Pa. Super. 2012). The appellate court must defer to the trial court regarding the weight and credibility of the evidence. Id. The appellate court may reject the trial court's conclusions, only if they involve an error of law or are unreasonable in light of its factual findings. Id.

Analysis

The Court was called on to resolve an impasse over which school district the Children will be enrolled in for the 2023-2024 academic year. Their current custody agreement explicitly states that Mother and Father have shared legal custody and shared physical custody. However, the Agreement is silent as to school choice.

Mother and Father both testified that they exercise custody on rotating schedule. Notes of Testimony Page 14, School Choice Hearing #1, December 12, 2022. Notes of Testimony Page 30, School Choice Hearing #2, May 25, 2023. Mother exercises custody on Week 1 from Sunday at 12:30 p.m. to Wednesday after school, and exercises custody on Week 2 from Sunday at 12:30 p.m. to Thursday after school. SCH1 p.14. SCH2 p. 30.

The question before the Court was: whether attending the Chartiers Valley School District or the Upper St. Clair School District served the best interests of the Children. Neither party requested a modification of custody in connection with the choice of school. The choice between these two neighboring school districts did not otherwise affect the custody arrangement of Mother and Father. When resolving discrete and ancillary issues related to custody, "the considerations that could affect a trial court's decision are myriad." S.W.D. v S.A.R., 96 A.3d 396, 403-04 (Pa. Super. 2014). The Court is not required to "explicitly consider each of the 23 Pa.C.S.§ 5328(a) factors." *("A reading of the § 5328(a) factors further supports our interpretation that all these factors only must be considered when a "form of custody" is ordered. Most of the § 5328(a) factors are better suited to addressing the larger issue of the form of custody to be awarded, rather than considerations beneficial to resolving discrete and ancillary disputes relating to custody. In the latter, the considerations that could affect a trial court's decision are myriad. Thus, it makes little sense for a trial court to analyze each of the sixteen 5328(a) factors when arbitrating, for example, a dispute over a custody-exchange location; which youth sports the children should play; or whether a parent should be required to have children's toys, beds, or other things in his or her house.5 Rather, when read as a whole, it is apparent that the § 5328(a) factors were designed to guide the best-interest analysis when a trial court is ordering which party has the right to a form of custody. We emphasize that in all matters affecting custody, the child's best interest is still paramount. (Citation Omitted). The § 5328(a) factors, however, are a means to that end, and represent a legislative framework for determining a form of custody that is in a child's best interest. Even where a trial court need not consider and address the § 5328(a) factors, it still must consider the child's best interest in custody matters." S.W.D. v. S.A.R., 2014 PA Super 146, 96 A.3d 396,403 (2014).)* Id.

After considering the reputations of the schools, the proximity to the Children, the Children's ability to adjust to transferring schools, the needs of the Children, and the preferences of the Children, the Court found it is in the Children's best interest to attend school in the Upper St. Clair School District for the 2023-2024 school year.

It is first helpful to compare the Academic reputation of the two school districts. Mother's belief is that, academically, Upper St. Clair is a markedly better school district than Chartiers Valley. Mother testified that when conducting her own research on the relative merits of each school, "Chartiers Valley perfonned way lower than Upper St. Clair." (SCHl p. 40). To support her testimony that she attempted to discuss the merits of the schools with Father, Mother admitted into evidence a chart of data she collected from the Department of Education (Exhibit 3), and the respective ratings of Upper St. Clair (Exhibit 4) and Chartiers Valley (Exhibit 5) from a website, Grcatschools.org. SCH1 p. 40-47.

Father denied that Upper St. Clair is a better school district than Chartiers Valley. SCH2 p. 67. When pressed on how he came to this conclusion, Father referred to anecdotes from people who attended both schools. SCH2 p. 67-68. Father made it clear

that he is not concerned with the differences between the schools, stating "[t]hat's not my issue..[m]y issue is changing schools again." SCH2 p. 68.

Father was then presented with reports from Niche.com for both Chartiers Valley (Exhibit 7) and Upper St. Clair (Exhibit 8). SCH2 p. 68. According to these reports, Upper St. Clair received an overall grade of A+ and was rated the 4th best school district in the Greater Pittsburgh Area. Chartiers Valley received an overall grade of B+ and was rated the 32nd best school district in the Pittsburgh Area. Despite this disparity, when Father was asked if Upper St. Clair is the better school district based on these reports, he replied that difference was "marginal." SCH2 p. 68. Father's refusal to admit that the Niche.com report found Upper St. Clair to be a better school damaged the credibility of his testimony.

The reports from Niche.com are informative. They make it clear that Upper St. Clair School District is one of the best school districts in the Greater Pittsburgh Area. Father provided no comparable research to support his belief that the difference between the School Districts is "marginal." The Court found that Upper St. Clair is academically superior to Chartiers Valley. While the relative merits and reputation of each school was relevant, it was not dispositive.

Upper St. Clair is not only the better school, but a better fit for the Children. The Children attended Chartiers Valley School District for the 2022-2023 school year. Z.O. was in 4th grade. SCH2 p. 6. A.O. was in 1st grade. SCH2 p. 22. Mother detailed legitimate concerns with Chartiers Valley School District.

Z.O. is struggling with some of her subjects at Chartiers Valley. SCH1 p. 32. Mother testified that Z.O. doesn't do well with the "standardized common core" because she "thinks differently." SCHI p. 32. Father submitted internet screen shots of Z.O. grades from November (Exhibit E) and the end of the school year (Exhibit M). SCH2 p. 43. Father's position was that Math was Z.O.'s only issue. SCH2 p. 42. However, Father admitted that Z.O. could do better and struggled in other subjects at times. SCH2 p. 41, 66. Z.O. has been evaluated for an Independent Education Plan (IEP). SCH2 p. 43. Z.O.'s grades in Math and Reading are indeed behind her scores in other subjects. Exhibit M.

At Upper St. Clair, Z.O. would have the International Baccalaureate program ("IB program") available to her. SCHI p. 33. Mother suggested that the 1B program would offer Z.O. an alternative style of learning. SCHI p. 33.

Beyond Z.O.'s academic issues, she has had social issues at Chartiers Valley. Z.O. has been in four (4) fights this year in school. SCH2. p.16-17, 44-45. Father discounted them as Z.O. reacting and suggested these fights would happen anywhere. SCH2 p.44.

Youngest child, A.O., has done well academically through the first-grade at Chartiers Valley. SCH2 p. 45-46. However, her time at Chartiers Valley has not been without issue. Mother testified about an incident where A.O. did not get off the school bus at her stop. SCHl p. 32-33. Despite A.O. being on the correct bus, Chartiers Valley could not locate her for an hour. (SCH1 p. 32-33). This was understandably upsetting to Mother.

The Children both testified on the 2nd day of testimony on May 25th, 2023, after they had almost finished the 2022-2023 school year. At the time, Z.O., was 9 years-old, and A.O. was 7 years old. SCH2 p.6, 22. Both Children have friends at Chartiers Valley. SCH2 p. 11, 25. Z.O. even said she "loves it" at Chartiers Valley. SCH2 p. 11. She also noted that "some people are kind of mean." SCH2 p. 15. Neither of the Children were steadfast in their desire to attend one school over the other. Z.O.'s exchange with Father's Counsel was telling:

Question: Have you talked to anybody about maybe going to Upper St. Clair next year where your cheerleading is at?

Z.O.: My mom, she kind of wants me to go to Upper St. Clair. I don't know where I want to go. I kind of lean more to go to Chartiers Valley, but... SCH2 p. 15.

The Children seemed to have good experiences with both communities. Both children like their school in Chartiers Valley. Z.O. likes cheerleading in Upper St. Clair. SCH2 p. 21. A.O. is excited for the pool at the Upper St. Clair Community and Recreation Center. SCH2 p.24-25. Both attend gymnastics at a location that is not affiliated with either school. SCH2 p.12. While the Court appreciated the Children's testimony, if a preference for one school over the other existed, it was marginal.

Father's testimony that a change in schools could affect his custody was not credible. SCH2 p. 55-56. Father testified that the Children attending the Upper St. Clair School District would not be "optimal for them" because he "would be waking them up way earlier than necessary." SCH2 p. 56. The Court struggled to see how waking up earlier would affect Father's custody.

Father does not transport the Children to school, as he is not home when they leave. SCH2 p. 65. Father works 7:30 a.m. to 3:30 p.m., Monday through Friday. SCH2 p. 38. Paternal Uncle currently takes the Children to the bus stop in front of their house. SCH2 p. 65. The Court's Order did not change Father's custody in any way.

It seems it would be more convenient for the Children to attend school in the Upper St. Clair School District. According to their custody arrangement, Mother transports the Children to school more often than Father. Over the same 2-week period, Mother has seven (7) days where she is responsible for transporting Children to school in the morning. Over that same 2-week period, Father has three (3) days where he is responsible for transporting the Children to school in the morning. Over a 36-week school year, Mother is responsible for transporting the Children to school on 126 days compared to 54 days for Father. Attending school in the Upper St. Clair School District would be less of an inconvenience to the Children's morning commute.

Father was concerned about the inconvenience to him if the Children attend Upper St. Clair. Regarding the Children's transportation to school, Father stated that he "would probably lose my support if they went to St. Clair." SCH2 p.56. When asked on cross-examination about the driving distance for Mother, Father responded "[t]hat's her choice because she decided to move(.]" SCH2 p. 63. While that is an understandable concern for Father to have, it is not a consideration this Court weighed heavily in making this decision.

Father's concern about Z.O. transferring schools again was weighed more heavily. Z.O. transferred to Chartiers Valley during COVID and her parents' divorce. SCH2 p. 39-40. She struggled with her grades and making friends. SCH2 p. 17-18, 39-40. Father explained that Z.O. was not good at virtual learning. SCH2 p. 40 Since 2020, Z.O. has adapted well. SCH2 p. 40.

Father's concern was that this would be three (3) different schools in five (5) years for Z.O., given her setbacks in 2020, it would "take her a while to overcome" all the issues she previously experienced. SCH2 p. 53. Father's concern is legitimate. However, the circumstances are not the same.

Z.O.'s prior issues with virtual learning and making friends occurred during the COVID-19 pandemic. At the Upper St. Clair School District, she will not be attending school virtually. Z.O. will be able to meet her classmates and attend school in-person. Father described Z.O. as a "social butterfly," he explained "[s]he can talk her way through anything, meet anyone." SCH2 p. 44. Given the nature of Z.O.'s struggles in 2020, her sociable personality, and the lack of a global pandemic, the Court found plenty of reasons to believe transferring to Upper St. Clair will be easier for Z.O.

There is no scoreboard for a School Choice Hearing. The Court can't simply place a myriad of considerations into a chart and calculate an irrefutable absolute certainty of an answer. Here, we have two loving parents. One lives in the Chartiers Valley Community, the other lives in Upper St. Clair. Upper St. Clair appears to offer the Children comparatively greater academic opportunity and an easier morning commute. Chartiers Valley offers them consistency. With the support system the Children enjoy, they will surely find future success along either path.

The Court found that the Children's best interest is served by attending Upper St. Clair. Z.O. and A.O. are intelligent children. Upper St. Clair gives them the best opportunity to take advantage of their intellect by offering multiple approaches to learning, and an education from the more renowned school. Given the custody arrangement, Upper St. Clair is much closer to their primary residence, Z.O.'s stated preference for the Chartiers Valley School District and Father's concerns about transferring, for the reasons provided above, could not outweigh the opportunity available to the Children at one of the most highly rated schools in the Greater Pittsburgh Area. This is critically important when that school is physically closer, and they've had academic difficulties with their prior school.

On appeal, Father's Counsel asks if the Court erred by overruling Father's objections to the submission of Exhibits 3, 4, and 5. All items were admissible as relevant evidence of Mother's efforts to research. Exhibit 3 is a chart created by Mother that lists areas where the Upper St. Clair School District excels. Exhibits 4 and 5 are the ratings of the Upper St. Clair and Chartiers Valley School Districts, respectively, from a website called Greatschools.org. The testimony at the time these exhibits were entered into evidence, was about whether Mother and Father had discussed the relative merits of each school district. SCH1 p. 40. The exhibits were relevant evidence of Mother's attempts to discuss the merits of the schools with Father. Mother provided a proper foundation by explaining that these were items she researched and prepared for discussion with Father about the comparative merits of the schools.

Father's counsel refers to the Exhibits admitted against his objection as "school rankings evidence." The only evidence that actually ranked the school was the Niche.com reports, Exhibits 7 and 8. Father's counsel did not object to the Niche.com reports as evidence. Even if the Court erred in admitting Exhibits 3, 4, and 5, there could be no prejudice to Father.

Conclusion

The Court correctly overruled Father's hearsay objections where the evidence was not offered to prove the truth of the matter asserted.

The Court did not fail to consider the preferences of the Children in rendering its Order of June 12, 2023. The Children's preference was at best slight and it was considered. As stated above, the Court found that Z.O.'s preference, given her age and lack of certainty, was insufficient to overcome the educational opportunity and proximity provided by the Upper St. Clair School District.

Finally, the record supports the Court's finding that attending Upper St. Clair School District for the 2023-2024 school year is in the Children's best interest of the Children.

For the foregoing reasons, this Court's order of June 12, 2023, should be affirmed.

BY THE COURT:
/s/The Hon. Jessel A. Costa III