

D.Q.P.,
Plaintiff : IN THE COURT OF COMMON PLEAS
 : DAUPHIN COUNTY, PENNSYLVANIA
 :
v. : NO. 2007 CV 9813 CU
 :
T.C., :
Defendant : CIVIL ACTION – CUSTODY

October 25, 2018

MEMORANDUM OPINION

Mother has filed an appeal from a child custody order I entered August 17, 2018 following a hearing, granting Father primary physical custody and Mother partial physical custody. This opinion is issued in support of the custody order pursuant to Pa.R.A.P. 1925(a).

Procedural Background

Mother (T.C.) and Father (D.Q.P.) are the parents of a son born in January 2007. An initial agreed custody order was entered in 2007 granting the parties shared legal custody of the Child, Mother primary physical custody and Father partial physical custody consisting of alternating weekends and one weekday overnight. The order was amended in 2009 to increase Father’s partial custodial periods on weekends, Thursday through Monday. The order was amended in 2010 increasing Father’s mid-week custodial periods and keeping other custodial periods the same. The parties agreed in 2012 to modify the mid-week custodial periods. That order remained in effect until the parties entered an agreed order in 2016 modifying the 2010 and 2012 orders. The new order directed that the parties share both legal and physical custody alternating physical custody on a week-on/week-off schedule. In addition, each parent was granted custody one weekday evening during the week he or she did not have physical custody. The parties agreed that the Child would continue to attend school in the district in which Mother lived, which at the time was East Pennsboro School District, in Cumberland County.¹

In June and July 2017, respectively, Mother and Father filed petitions for modification, each seeking primary physical custody. Mother also filed an emergency petition for special relief

¹ All custody orders filed through 2016 were entered by agreement following custody conciliation and without a court hearing.

raising concerns about two incidents occurring in May 2017, when the Child was ten years old, reflecting problems with the Child's emotional health and behavior. The first occurred while the Child was on a school field trip and expressed a desire to kill himself. The second involved the Child allegedly watching cartoon pornography on his phone at Mother's home and showing it to two younger children. The latter incident was investigated by Cumberland County Children & Youth Services which directed the parents obtain counseling for the Child. In addition to these incidents, Mother asserted in her special relief petition that around this same time period she discovered videos on the Child's phone taken by the Child of himself naked while at Father's home.

I held a telephone conference July 18, 2017 with the attorneys on the petition for special relief. Following the conference, I issued an order directing, among other things, that the parties immediately enroll the Child in therapeutic counseling, require the Child be supervised by an adult at all times, require that the Child's electronic devices have parental controls and that Father consent to the Child receiving mental health treatment at Pressley Ridge.

The parties' requests for custody modification were addressed later at a custody conciliation August 8, 2017, resulting in an agreed supplemental order, entered August 28, 2017. The parties agreed to the same custodial time as existed, i.e. shared legal custody and equally shared physical custody. They also agreed that the Child would change to Central Dauphin School District, Father's residence's school district. Finally, the parties agreed that if the Child's pattern of truancy persisted, either parent could request a re-conciliation with the custody conference officer. Around March 2018, Father requested re-conciliation to address truancy as well as his request for primary physical custody. Following unsuccessful re-conciliation, the matter was assigned to me for a hearing.

In preparation for the hearing, the parties supplied me with the progress notes from the Child's Pressley Ridge therapists as well as Cumberland County Children & Youth Report.² Following a pre-trial telephone conference with counsel, I issued an interim order April 26, 2018 directing that Father be granted primary physical custody for the remainder of the school year (approximately six weeks). During this period of time, Mother was granted partial physical custody

² All records requested are filed under this case docket, under seal.

every other weekend plus two evenings during the weekdays. For the upcoming summer, the parties would return to their shared physical custody schedule of week-on/week-off. Following Mother's continuance request, I held the custody hearing August 17, 2018.

Following the custody hearing, I issued a final custody order / parenting plan (dated August 17, 2018) under which terms the parties shared legal custody. I granted Father primary physical custodial rights and responsibilities and Mother partial physical custody under the same terms as in the interim order, i.e. alternating weekends plus two evenings per week during the school year and equally shared physical custody on a week-on/week-off schedule during the summer. The order also included provisions requiring any electronic equipment used by the Child be monitored at all times and that the Child not be left unsupervised with either Mother's brother or the Child's two younger half-siblings. Mother filed a timely appeal from my order.

Factual Background

Father currently lives in a two-bedroom home he purchased in the Central Dauphin School District. The Child has his own bedroom with Father and he is the only child who lives with Father.³ (N.T. 12) Father is employed as a claims processor for Highmark Blue Shield and works from home, typically 6:00 a.m. to 2:30 p.m. weekdays. (N.T. 11) His husband M.M. is a driver for Capital Area Transit working 5:00 a.m. to 1:00 p.m. weekdays. Father claimed he has a very close relationship with the Child and is better suited to provide a loving, stable, consistent and nurturing relationship. (N.T. 14) He testified the Child is comfortable in his household and discussing any issues he has. (N.T. 14)

The Child has been diagnosed with ADHD and asthma and has had difficulties in school, both educationally and with social isolation. (N.T. 6, 58) According to Father, since switching school districts in August 2017, the Child is doing better in school and has improved his social relationships. (N.T. 12, 57) Father spends about one hour per day helping the Child with homework and also attends all parent-teacher conferences, IEP meetings and regularly communicates with

³ Both parties' direct testimony was presented at the hearing as an offer of proof by their attorneys and adopted by each party. (N.T. 9, 15, 81) Following the offers of proof, each party was subject to cross examination.

the Child's teachers. (N.T. 11, 25, 59) Father also enrolled the Child in karate which has helped with his social skills. (N.T. 12)

Father testified that during a May 10, 2018 meeting with Mother and the Child's physician, Dr. Ramer, he advocated for the Child to stop taking his ADHD medication Focalin. (N.T. 17, 21) Father did so because the school year was almost over and because he was generally opposed to medication. He believed there were alternatives including counseling and tutoring and he was satisfied with the school's attempts to address the Child's lack of focus. (N.T. 21, 28, 29-30) Father admitted that he told the custody conference officer at the March 2018 conciliation that he would pay for a tutor for the Child but never did due to financial issues. (N.T. 31-32)

Father claimed that Dr. Ramer agreed to suspend medication for a trial period and schedule another appointment in October 2018 with instructions they contact her in the interim if problems arose. Father denied he was told by Dr. Ramer she wanted the Child to remain on Focalin and claimed this was reflected in the Child's medical paperwork. (N.T. 17, 30, 43) At that point I asked to see the paperwork which Father provided. (N.T. 43) The outpatient letter directed that the Child have a two-week trial off medication following which his teachers were to be contacted for their observations, without having known he had not been taking medication. (N.T. 43) If there was no difference in behavior then Dr. Ramer advised that the Child stay off medication but if there was significant difference, Dr. Ramer would consider new medication. In any event, she believed he should remain on Focalin for the rest of the school year. (N.T. 43)

I thereafter questioned Father, who admitted he failed to follow up with the Child's teachers after the trial period about their observations. Father also failed to make sure the Child went back on his medication after the trial period (as did Mother apparently). (N.T. 43) Father testified he did not understand it was his responsibility to follow up with teachers. (N.T. 45) As of the hearing, the Child was still not on his ADHD medication though Father promised the court he would get the prescription filled ASAP and would contact Dr. Ramer and clarify her recommendation.⁴ (N.T. 46-47, 57)

⁴ During a break in the hearing, Father called the pharmacy as directed to obtain the ADHD medication. He later reported to the court that the pharmacy told him he needed a new prescription. Father informed the court he then called Dr. Ramer's office and left a voicemail to update the prescription. (N.T. 118)

Father testified that at the time of his May 10, 2018 meeting with Dr. Ramer he told her the Child was doing well in school and did not need ADHD medication even though the Child was barely passing most of his subjects with C's and C-'s. (N.T. 17-20, 22; Exbts. D-1, D-2) Father testified, however, the Child was performing much better than in prior years in East Pennsboro including with socialization. (N.T. 57-58) A May 21, 2018 email from the Child's 5th grade teacher stated "[s]ocially [the Child] is doing very well and has a couple of strong friendships built up with other boys in the classroom. As for academic success, it is still a struggle to get [the Child] to produce work that would be up to his potential. As well as a lack of focus that keep his grades at mid to low C's." (N.T. 57-58; Exbt. D-1) In an email a few weeks later, June 1, 2018, the teacher wrote that the Child had a reading grade drop due to a missed assignment but also had an increase in his math grade. As for his behavior, the teacher reported the Child "has been maintaining those friendships ... [h]e has also been more receptive to help. So overall I have seen a lot of positive behavior." (N.T. 58-59; Exbt. D-2)

Father pointed out that the Child had to repeat a year in elementary school for the 2016-2017 school year after having started that year at East Pennsboro Junior High. (N.T. 19-20, 24) Father also noted that since Mother exercised equal physical custody with Father through April 2018, she shared any responsibility for the Child's educational difficulties. (N.T. 26)

During the course of his testimony, Father revealed that he and Mother continued to have a high level of conflict and had not been sharing information or communicating about to their legal custodial obligations, including medical appointments, counseling dates and notes from teachers. (N.T. 35-37, 60) In my interim order from April 2018, I had directed both parents to subscribe to the online program BothParents.com by May 1, 2018, which provides a forum for information sharing between separated parents. (N.T. 35-36) Father admitted he had not complied with my order and was communicating with Mother by text.⁵ (N.T. 36)

⁵ It appeared Mother also failed to subscribe to BothParents.com. I thus directed at that time, and later in my order, that they both subscribe to a different website, Family Wizard, within three days and if they failed I would find them both in contempt. (N.T. 37-38) Family Wizard is an on-line subscription based service for divorced or separated parents providing tools by which the parties can schedule child custody and parenting time, share family information, manage expenses and create an accurate, clear log of communication. <https://www.ourfamilywizard.com/> (visited 10/12/18).

Father testified that the Child has told him he prefers to live with Father. (N.T. 4) According to Father, the Child considers Mother's household chaotic noting she lives with her two younger children (ages three and five) from her relationship with W.B. (N.T. 4-5, 87) Father testified that the Child has told him that when he is with Mother he has to help out with the care of his half-siblings, one of whom is autistic. (N.T. 5)

Father believes Mother has not provided a stable home for the Child. In February 2016 she moved from Enola to Camp Hill, both in Cumberland County. Because her move was within the same school district, she was told the Child could finish the school year in the same elementary school if Mother provided transportation. Mother refused and the Child had to change schools for the last few months of the school year. (N.T. 9) Mother moved again in February 2018 to another town in Cumberland County, further away from Father. (N.T. 10) Father also believed Mother was living not only with her two younger children, but also with her brother, his girlfriend and their baby. (N.T. 10-11, 75) Father is concerned because Mother's brother has a criminal history including drug charges. (N.T. 10, 75) Father also testified that in the past, Mother allowed the Child to be in the presence of Mother's father, who was charged in 2014 with rape of a child and following conviction in 2017, was sentenced to a 25 to 50 year prison term. (N.T. 10, 74)

With regard to the earlier behavioral problems that arose with the Child in May 2017, prompting Mother to file a special relief petition, Father testified that the first concern arose around May 3, 2017. While in Father's custody, the Child, then ten years old, videotaped himself on his phone putting items in his anus. (N.T. 33-34) The video was later discovered by Mother. (N.T. 33) Father testified he had a long conversation with the Child about the video and that the Child's behavior was and is being addressed through counseling at Pressley Ridge. (N.T. 34)

The second incident occurred May 18 2017. While on a field trip, the Child expressed suicidal thoughts that appeared to have been the culmination, at least in part, of being cyber-bullied by a classmate. (N.T. 39-40, 51) Mother was called by the school and eventually took the Child to crisis intervention at a local hospital. According to Father, she did not tell him about the incident until late in the day. The Child was determined not suicidal but inpatient or outpatient therapy was recommended. (N.T. 7-8, 48) Father claimed he was not in favor of the Child going to crisis intervention because he wanted the Child to be with him. (N.T. 40-41) Father later discussed the

incident with the Child and Father's impression was that the Child did not understand what suicide meant and dismissed the notion the Child had been suicidal. (N.T. 51) Father eventually agreed to counseling and scheduled a session with a counselor at Pinnacle Health but Mother refused to consent to treatment there due to a \$13 co-pay. (N.T. 8, 63-65) He and Mother later mutually agreed to schedule the Child for counseling at Pressley Ridge, which had no co-pay. (N.T. 8, 65)

The other incident occurred May 28, 2017 and was reported to Cumberland County Children & Youth in early June. On that day, while in Mother's custody, the Child was discovered in a room with two younger children, all with their shirts off. The Child had allegedly shown the younger children cartoon pornography on his phone. (Form 5329.1 C&Y Report, filed 7/20/17) Children & Youth directed that if the parents obtained counseling for the Child they would discontinue their investigation. Id.

Mother testified that commencing in May 2018, she began employment in the Dauphin County Controller's Office as an accounting assistant working 20 to 30 hours per week. (N.T. 80) She lives in a townhouse in New Cumberland (Cumberland County), which has three bedrooms. The Child has his own room when with Mother. (N.T. 91; Exbt. D-3) Mother's two youngest children, from a former marriage to W.B., also live with her. They are currently ages three and five. (N.T. 87) Mother divorced W.B., who had been in the Child's life between 2011 and 2016. W.B. is currently living in Honduras. (N.T. 87) While living with Mother, W.B. was convicted three times for DUI. (N.T. 87) The older of Mother's two children with W.B. is on the autism spectrum and also has ADHD. (N.T. 87) Mother denied that her brother and his family live with her. She claims they currently live somewhere in Harrisburg. (N.T. 85) Mother was aware that her brother, with whom she only recently connected, has a criminal history including drug delivery. (N.T. 86) Mother has allowed his brother and girlfriend to watch her children for short periods when she is not available. (N.T. 85-86)

Mother testified that she does not believe Father should have primary physical custody because he has failed to act in the Child's best interests including his opposition to the Child taking ADHD medication as recommended by Dr. Ramer and also for being reluctant to agree to counseling for the Child. (N.T. 80) Mother also indicated concern that while in the waiting room prior to the May 10, 2018 meeting with Dr. Ramer, Father and his husband made fun of the Child's

intelligence. (N.T. 80) According to Mother, during the meeting, Father repeatedly interrupted Dr. Ramer and adamantly refused to agree to put the Child on medication. (N.T. 80)

Mother testified that the Child has done poorly this past school year (2017-2018) while attending 5th grade in the Central Dauphin School District. (N.T. 80) She believes that if she was granted equally shared physical custody again, the Child could attend school in her district (now West Shore School District in Cumberland County) and suggested the Child could improve academically. (N.T. 80, 82) Mother nevertheless admitted that ever since Kindergarten, the Child has always done poorly academically and has always disliked school. (N.T. 82)

Mother agreed that the earlier change in school districts, recommended by the custody conference officer, was due to cyber-bullying issues within East Pennsboro schools during the 2016-2017 school year. (N.T. 81, 83) Although she agreed to the change of school districts, Mother testified she only did so because she was “bullied” by the custody conference officer into accepting the move. (N.T. 81) She also blamed Father for the cyber-bullying problem because she claimed he had allowed the Child unsupervised internet usage on technology Father provided. (N.T. 81) Mother complained broadly that Father gives the Child every possession he wants while failing to provide adequate supervision. (N.T. 81)

Mother denied that the Child had recently told her that he did not want to live with her. (N.T. 84) She did admit, however, that during therapy sessions with the Child, the Child told the therapist he wants to live with Father. (N.T. 86) Mother reasoned that the Child said this because he was angry with her. (N.T. 86) Finally, Mother testified she has been diagnosed with OCD and anxiety. (N.T. 88-89)

The Child’s therapist, Boyd Major, testified that the Child began receiving weekly counseling at Pressley Ridge in July 2017, initially with another therapist. (N.T. 97-98) According to notes from the other therapist from July and August 2017, Mother had a very negative impression and opinion of the Child and had difficulty stating positive things about him. (N.T. 97) The first counselor reported that Mother spent a lot of time talking negatively about Father. (N.T. 98) That counselor also noted that as of August 2017 the Child was doing well in Father’s home. (N.T. 98)

In September 2017, Boyd Major, indicated in his notes that the Child had viewed text messages on Mother's phone in which Mother wrote that she wanted to give up custody of the Child. (N.T. 99) He reported in October 2017: "Things good at Father's home. Conflict at Mother's home. Mother hits him, spanked him with her hand." (N.T. 99) At that time, the Child told the therapist he did not want to live with Mother and felt more comfortable in Father's home. (N.T. 99) In late November 2017, the Child told the therapist that during the family Thanksgiving at Mother's home, she announced to everyone at the gathering that the Child did not want to live with her, embarrassing the Child. (N.T. 99) In an early January 2018 session, the Child told the therapist he did not want an improved relationship with Mother. (N.T. 100)

Due to their strained relationship, the therapist began family therapy sessions every other week with both the Child and Mother, focusing on creating a more positive relationship and improving their communication and problem solving skills. (N.T. 94, 100-101) As of January 2018, Mother continued to report the Child as "oppositional and noncompliant" and that she has not had a good relationship with him since he was five or six years old. (N.T. 101) Around the same time period, the therapist reported that the Child "has been doing well at his Father's home" which "appears stable." (N.T. 100-101)

He testified that as of March 2018 the Child considered things to be "horrible" with Mother. (N.T. 101) He also reported that the Child was not going to bed on time when with Mother, staying up late playing games, and would fall asleep at school. (N.T. 101-02) In April 2018, the therapist reported that Mother told him the Child rebuffed any attempt she made to hug or snuggle with him. (N.T. 102) The Child reported to the therapist again in late May 2018 that things were still "horrible" with Mother. For example, on one occasion the Child refused to sit at the same table while eating dinner with Mother at a fast food restaurant. (N.T. 102)

The therapist testified that as of the date of the custody hearing, the relationship between Mother and the Child had improved and was less oppositional and more cooperative and nurturing, although he recommended continued family therapy with the Child and Mother. (N.T. 94, 96, 103) He also noticed the Child was less negative and oppositional and more cooperative and focused during times Mother said he was taking his ADHD medication and less so when not. (N.T. 95-96)

The therapist testified that the Child has told him things are going fine with Father. (N.T. 96) He also testified he did not see evidence of parental alienation by Father although Mother would bring up disagreements she had with Father in front of the Child during their sessions. (N.T. 105-06)

Following in-court testimony, I spoke with the Child in chambers in the presence of a court reporter, counsel waiving their presence. We initially discussed his sessions with Boyd Major and he agreed his relationship with Mother was improving. (N.T. 107) We discussed the new school year and that he would be attending middle school for the first time. The Child admitted he was nervous about that. (N.T. 108-110) We next discussed his interest in karate and that he was taking classes three nights per week. The Child also indicated an interest in starting wrestling and playing an instrument in middle school. (N.T. 110-113) I then discussed his weekend visits with Mother and he told me he would rather stay with Mother until Sunday night instead of Monday morning. (N.T. 113-114) I next asked him whether I should know anything else before I determined the final custody schedule. He answered “no.” (N.T. 114) I thus asked whether a schedule whereby he would be with Mother every other weekend (during the school year) was okay with him. He responded that it was. (N.T. 114)

Best Interest of the Child – Application of Custody Factors

At the conclusion of the hearing, I reviewed the list of statutory factors set forth in the Child Custody Act which a judge must consider in determining the best interest of the Child,⁶ as follows:

⁶ The list of factors is as follows:

5328. Factors to consider when awarding custody.

(a) *Factors.* --In ordering any form of custody, the court shall determine the best interest of the Child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the Child, including the following:

- (1) Which party is more likely to encourage and permit frequent and continuing contact between the Child and another party.
- (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the Child or an abused party and which party can better provide adequate physical safeguards and supervision of the Child.
 - (2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).
- (3) The parental duties performed by each party on behalf of the Child.
- (4) The need for stability and continuity in the Child's education, family life and community life.

The basis for my decision to give primary custody to Father during the school year is based on many of the factors. The most important of which is that the child's relationship with Mother, regrouping, is still in its initial phases.

We've heard a lot of testimony concerning the negative remarks by Mother and the child's oppositional behavior with her because of their extremely difficult relationship.

The household seems to have a lot of people in it, plus the three- and a five-year-old, which seems to be very chaotic, which I know this child has expressed before.

[Factor 5328(a)(1)] I think both parties will encourage and permit frequent and continuing contact between each other. Now that the final order is issued, hopefully, that will be behind us.

[Factor 5328(a)(3)] The concerns about parental duties performed by each party. Obviously, Father has been doing more of them recently because of the change in custody. Mom is capable of doing that, and, hopefully, she will quit bouncing around. And now that she's got a good job, hopefully, it will go full time. Hopefully, she can get a place of her own and provide more stability to her life.

[Factor 5328(a)(4)] Obviously, it's best for the child to continue to maintain himself in the Central Dauphin School District where Father owns his home so that there will not be that type of bouncing around from school to school to school. And he has his own bedroom there, which is very, very important.

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- (5) The availability of extended family.
 - (6) The child's sibling relationships.
 - (7) The well-reasoned preference of the Child, based on the Child's maturity and judgment.
 - (8) The attempts of a parent to turn the Child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the Child from harm.
 - (9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the Child adequate for the Child's emotional needs.
 - (10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the Child.
 - (11) The proximity of the residences of the parties.
 - (12) Each party's availability to care for the Child or ability to make appropriate child-care arrangements.
 - (13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.
 - (14) The history of drug or alcohol abuse of a party or member of a party's household.
 - (15) The mental and physical condition of a party or member of a party's household.
 - (16) Any other relevant factor.

[Factors 5328(a)(5) and 5328(a)(6)] The availability of extended family. Father has a spouse, a husband, who is there, immediately available. Mother does not. While there's a three- and a five-year-old sibling, it's not the type of relationship with those children that that would become a factor in determining custody.

[Factor 5328(a)(7)] We know what the preferences of the child are.

[Factor 5328(a)(9)] We also know that Father is currently the one who's providing the most nurturing relationship with the child. My hope is that Mother continues to develop and be able to create a more nurturing relationship between her and the child.

[Factor 5328(a)(10)] Both parties can tend to the child's physical, emotional, and educational needs. I would like to see both parties step up to the plate and do a little better.

[Factor 5328(a)(11)] Based on their proximity, they can't share. The school buses can't go back and forth across the river. It just doesn't work.

[Factor 5328(a)(12)] Dad is able to make appropriate child-care arrangements with his husband if he's not there. I don't know who Mom would select, but it's got to be someone that's responsible, doesn't have a criminal record, isn't molesting children, using drugs, using alcohol, that sort of thing. So she'll have to use her best efforts to find an appropriate person should she need care.

[Factor 5328(a)(13)] The level of conflict between the parties is high, and we're hoping that will be resolved with continued counseling, use of Family Wizard, and a parenting coordinator.

[Factor 5328(a)(14)] We do not appear to have drug abuse or alcohol abuse by either party nor a current member of either party's household. We did have that issue with Mom's household several years ago.

[Factor 5328(a)(15)] Mom should continue treating for her mental health issues and maintain her counseling and any pharmacologic treatment as recommended as well as the family counseling. We do not have any other issues with any other party or member of the household that I'm aware of.

[Factor 5328(a)(16)(Any other Relevant Factors)] I'm concerned about the negative feelings about the child that have been relayed to him. I'm concerned about the way that was handled by Mom, but, hopefully, that can be repaired through the counselor. I'm concerned that Mom wouldn't agree to Pinnacle Health because she didn't want to pay the \$13. We've already talked about that and the child's in Pressley Ridge. So that's good.

If the teacher recommends tutoring, I'm going to direct Dad to hire a tutor, and those expenses would be paid 50/50. Mom, you need to be sure to work with him when you've got him with you on weekends. It's not just playtime. And same with you, Dad. You know, if the grades aren't what they should be, no Xbox. No videos. No nothing. You should both get educated on understanding ADHD better and how you approach it, and I'm giving you that website.

The both of you also need to explore the sexual education. He's going into middle school. That's where kids start having sex. And you can pretend that it isn't happening, but it is, and having him learn it from YouTube is a very bad idea. So you need to check with his counselor and see what the best books are to use to help you talk to your child about sex.

(N.T. 122-125)

Finally, there were a few factors not directly addressed on the record, which I address here:

[Factor 5328(a)(2)] There was no evidence of past or present abuse committed by either parent and no indication the Child is at risk of physical harm in either parent's home. There was testimony from the therapist that the Child reported Mother has used corporal punishment upon the Child (N.T. 99), which I do not find abusive. I nevertheless included in my final custody order/parenting plan that "[t]here shall be no physical punishment of the child by any one."

[Factor 5328(2.1)] I reviewed all Children & Youth records in this matter, the most relevant of which addressed the May 2017 incident where the Child, while in Mother's custody, allegedly viewed pornography on his phone and showed it to younger children.

[Factor 5328(a)(8)] There was no definitive evidence presented that either parent attempted to turn the Child against the other parent.

Legal Discussion

In his statement of errors, Mother raises the following issues, including that this court committed an abuse of discretion and/or error of law by: (1) failing to ask the child his preference during the court's interview with the Child; (2) violating Mother's procedural due process rights by limiting the amount of time Mother's attorney had to conduct Mother's direct examination and preventing Mother from presenting the Child's physician as a witness; and (3) granting Father primary physical custody.

1. Child's Preference

Mother argues I committed an error of law and/or abused my discretion by failing to directly ask the Child his preference as to which parent he desired to primarily live with. As noted, one of the factors the court must consider in awarding custody is “[t]he well-reasoned preference of the Child, based on the Child's maturity and judgment.” 23 Pa.C.S.A. § 5328(a)(7). In this case, I heard testimony from both Father and the Child’s therapist that the Child preferred to live with Father. Mother testified as well that the Child expressed this same preference to the therapist, in Mother’s presence. There was no evidence presented that the Child preferred to live with Mother. The Child’s preference to live with his Father was well-reasoned given evidence that the Child is generally doing well living with Father while he has had a very poor relationship with Mother and her home is chaotic.

Mother suggests that I was required to directly ask the Child whether he wanted to live primarily with Father or Mother. I do not read Section 5328(a)(7) as requiring the child be directly asked a preference. In fact, a child’s attendance is not even required at a custody hearing. Pa.R.C.P. 1915.11(c), Explanatory Comment --1991 (“... the presence of a child in court is not always necessary or desirable. The experience may be traumatic and disruptive.”) In addition, even where a child is present, it is completely within the court’s discretion whether to interview the child. Pa.R.C.P. 1915.11(b) (“The court may interrogate a child, whether or not the subject of the action, in open court or in chambers.”) As such, I reject Mother’s interpretation of the law as requiring I directly ask the Child his preference at a custody hearing, particularly where there is significant evidence of a preference from other sources.⁷

In any event, I interviewed the Child in chambers during which we discussed the upcoming school year. Although I did not directly ask him his preference, the Child told me that he was satisfied with a schedule (during the school year) whereby he would spend alternating weekends with Mother, thus indicating a preference by implication that living primarily with Father was his preference. (N.T. 114) This was consistent with all the other credible evidence presented regarding the Child’s preference.

⁷ As a matter of practice, when I interview a child, I rarely ask a child directly for his preference because it is potentially harmful to a child to be asked to choose between parents. It should never be a child’s responsibility to be asked to make that choice.

2. Court Proceedings – Limit on Testimony and Witness

Mother next argues that the court erred and/or abused its discretion by unfavorably treating her case presentation differently than it did Father's, thus violating her right to procedural due process. Specifically, Mother suggests that her attorney was unable to properly examine Mother since I granted her attorney thirty minutes to present Mother's testimony. Mother also claims that the limitation on her time prevented her from presenting the testimony of Dr. Ramer. Mother argues the court's limitations "short-circuited" the trial and were imposed without any advance notice.

The issue of time constraints arose following re-direct examination of Father. (N.T. 71) At that point it was late in the morning and I still had to hear from Mother, the Child's therapist Boyd Major, the Child and Dr. Ramer. I thus informed the parties that Mother would be allotted half an hour to testify, after which the Child's therapist would testify, then I would interview the Child in chambers, followed by Dr. Ramer's testimony at 1:30 p.m. (N.T. 71) Mother's attorney stated at that time "I don't think that's going to be enough time [to examine Mother]." (N.T. 71) Mother's attorney then offered suggestions for the order and timing of witnesses, none of which were workable. (N.T. 71-72) The hearing thereafter proceeded including the conclusion of Father's testimony (N.T. 72-79), Mother's testimony (N.T. 79-91) and Boyd Major's testimony (N.T. 92-106). I then interviewed the Child in chambers. (N.T. 107-116)

Following the Child's interview, I returned to the courtroom and discussed with the parties some of my observations from my discussion. (N.T. 116-118) I then informed them I would be ordering that the custody schedule for the school year remain the same; that is, Father would retain primary physical custody during the school year with Mother having alternating weekends and a number of weeknights. They would equally share physical custody during the summer. (N.T. 120) Following my statement about intended custodial time, the following discussion occurred:

Mother's Attorney: So we don't need - - we can contact [Dr. Ramer] and say we don't need her, right?

The Court: I don't think we do because I'm going to say you've got to get the medication.

Mother's Attorney: Right.

(N.T. 121) I thereafter discussed the custody factors for the record and the hearing concluded.
(N.T. 122-125)

Regarding Mother's current objection to the limitation of Mother's testimony to thirty minutes, Mother's attorney raised no objection on the record at the time and thus the issue is waived. Jones v. Ott, 191 A.3d 782, 787 (Pa. 2018) (in order to preserve an issue for appellate review, a litigant must place a timely, specific objection on the record; issues that are not preserved by specific objection in the lower court are waived). Even if preserved, however, Mother has utterly failed to suggest how she was prejudiced other than broadly complaining that a time limitation "short-circuited" the hearing. Absent from her statement of errors are any specific claims as to his prejudice, i.e. what evidence would Mother have provided the court but was unable to due to the time limitation. Accordingly, the issue as raised is without merit.

With regard to Dr. Ramer's testimony, Mother again failed to raise any objection whatsoever during the hearing and the issue is thus waived. Id. In fact, not only did Mother's attorney not object to Dr. Ramer not testifying, but when the issue was discussed, counsel indicated his *agreement* that her testimony was no longer necessary since the primary reason for her testimony would have been to state her recommendation that the Child take ADHD medication. As noted, I directed that Father immediately obtain an updated ADHD prescription. Mother additionally fails to cite any prejudice she suffered due to Dr. Ramer not testifying. As such, this argument lacks any merit.

3. Primary Physical Custody to Father

I awarded Father primary physical custody because it was in the best interests of the Child. I fully explained my reasons therefore including application of the custody factors set forth in Section 5328 of the Custody Act, recited above. Mother argues my award of primary physical custody to Father was an abuse of discretion "based upon the following:

- (i) Father refused to follow treatment recommendations from the Child's physician in failing to administer the Child's ADHD meds;

(ii) At one point, the Court asked Father whether he had a problem with reading comprehension

(iii) At another point, the Court asked Father why he failed to follow its Orders;

(iv) Father admitted to having the Child released from Holy Spirit Mental Health, which the school had instructed Mother to arrange, because he felt he was better able to handle on his own;

(v) The Child's academic progress at [Central Dauphin East] he was attending under Father's guidance was less than stellar;

(vi) The Court refused to view a video done during Father's period of custody in which [the Child] appeared naked Court and inserted objects upon his anus; [and]

(vii) Instead of holding Father in contempt, it gave him primary custody."

In Point (i), Mother raises issues with Father's past refusal to abide by Dr. Ramer's recommendation that the Child take ADHD medication and suggests this warranted a finding that Mother should have primary physical custody. Indeed, I strongly disapproved of Father's decision to oppose Dr. Ramer's recommendation and instructions concerning medication. Father, who appeared to me uneducated about the importance of ADHD medication for most children (see N.T. 65-66), agreed however, over the course of the hearing, to change his position opposing medication. In addition, as part of my final custody order/parenting plan, I directed both parents educate themselves about ADHD, including reading information supplied by Dr. Ramer, and visit websites such as www.understood.org/ADHDhelp. (See N.T. 89) Father's willingness to change and agreement to consent to the Child re-starting his ADHD medication, in conjunction with the other custody factors, supported my final custody decision.

In Points (ii) and (iii), Mother refers to a portion of the trial where I confronted Father during his testimony, stating "Sir, you don't read and follow court orders; so I'm not surprised you don't read and follow doctor's orders." (N.T. 44) My statement about Father's failure to follow court orders referred to his earlier admission that he failed to follow my interim custody order which required both he and Mother subscribe to BothParents.com to address their communication problems. (N.T. 35-36) During the course of my exchange with Father, I asked him how we could address his problem with written instructions and whether he had a problem with reading comprehension. (N.T. 44) He denied he had a reading comprehension problem. (N.T. 44) Father

nevertheless agreed to try harder to follow instructions and seek clarification if necessary. (N.T. 45) He also promised to immediately call and obtain the ADHD prescription, which he did. (N.T. 45, 118) In addition, in my final custody order / parenting plan, both he and Mother were directed to subscribe to Family Wizard by August 24, 2018, which they presumably did. As such, the issues raised by Mother in Points (ii) and (iii) certainly did not warrant a change in primary physical custody.

In Point (iv), Mother claims that I abused my discretion awarding Father primary physical custody because he admitted that in May 2017, after the Child expressed suicidal thoughts, Father wanted the Child released from the hospital's crisis center without counseling, claiming he was better able to handle the Child's issues. While the record did reflect Father's reluctance to obtain counseling and that he minimized the Child's mental health problems, he nevertheless agreed to counseling and even initiated getting services through Pinnacle, which Mother rejected due to a \$13 co-pay. *Both* parents in this matter have made some poor decisions in the past on the Child's behalf, as I discussed on the record:

... I get the point that these parents don't quite get what the importance was to get the child into counseling, what Crisis is, how important it is to get a child to Crisis when they say something like they did, how important medication is, how that helps 80 percent of kids with ADHD. If one doesn't work, you try another one. They're not doing the research and the hard work that's needed. They don't read and understand. They're having a lot of challenges.

Mom doesn't get the child immediately into counseling because she doesn't want to pay 13 bucks. Things that many of us can't even imagine doing. But she did. She said, no, I don't want to pay \$13 for every counseling session for my son. I'm sure she regrets it and wishes she had been smarter and done better.

Dad, the same. He now wants to re-call [Dr. Ramer] to clarify when these six lines [on the outpatient paperwork] couldn't be clearer. So I -- you know, it's hard for us to understand how you can't understand six simple lines that are very clear. And now you need to call the doctor to clarify. So that's what we're working with here.

So beating up on them any more about their challenging decisions that they made with this child are what they are. We can hope that they do better in the future.

(N.T. 65-66)

Mother next argues in Point (v) that she should have primary physical custody because the Child failed to show academic progress over the past school year while at Central Dauphin East. Mother suggests this failure is Father's fault because he had primary physical custody for part of the school year. At the outset I note there was no evidence presented that the Child's academic progress worsened during his 5th grade year. The evidence presented was that the Child has never done well in school. In fact, during the prior year (2016-2017), the Child was held back a grade while attending school in East Pennsboro School District. There was evidence, however, that the Child's social isolation problem has improved significantly since changing schools. In addition, for almost his entire 5th grade year, the Child spent equal time living with each parent. It was only for the last six weeks of the school year that Father had primary physical custody during school days. There was no evidence presented that the Child's failure, if any, to show academic progress over the past year was Father's fault.

In Point (vi), Mother takes issue with my "refusal" to view the video discovered by Mother on the Child's phone from May 2017 in which the Child is naked and appears to be inserting objects into his anus. Mother never raised any objection on the record to this issue and it is thus waived. Jones v. Ott supra. Furthermore, even if preserved, it is unclear to this court why it would have been necessary to view the video given that I was fully aware of what it revealed. There was no dispute about the video's content and Mother has not presented a viable argument why viewing the year-old video was necessary. The Child has been in therapy since that time and the issue has been addressed. It concerns me that Mother believes I should have personally viewed her child's embarrassing and humiliating video during a custody trial, which content is uncontested.

Finally, in Point (vii), Mother suggests I should have found Father in contempt instead of awarding him primary physical custody. There was no pending contempt petition filed by either party in this matter and contempt was not litigated before me at the custody hearing. To the extent I acknowledged that the parties had failed to follow court orders, I chastised them equally for various actions detrimental to the Child and hope they will re-focus their best efforts to co-parent the Child in the future.

October 25, 2018

Date

Jeannine Turgeon, Judge

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