

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE PRO TEMPORE: HON. FREDERIC J. DARDIS

CASE NO. R-20090132

COURT REPORTER: NONE

DATE: August 28, 2012

AMY JEANE

Petitioner

and

GIL

Respondent

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IN CHAMBERS UNDER ADVISEMENT RULING:

This Court took under advisement the issues of custody, parenting time, relocation of the children and attorney's fees. After the final day of hearing in this matter on July 31, 2012, the Court took all issues under advisement. Based on the testimony of the parties and the exhibits presented at trial, as well as a review of the testimony of the witnesses presented in Court at all previous hearings and the Exhibits entered into evidence in those hearings and reviewing the file in this matter,

The Court makes the following findings:

1. The parties were awarded Joint Legal Custody of their two girls in their Decree of Dissolution in Utah in August, 2008.
2. The parties have two children, ELLE, born November and WHITNEY, born March
3. Petitioner/Mother has lived in Tucson, Arizona with their daughters for the past four years. She is currently employed by Southwest Airlines as a Flight Attendant. She is based out of Phoenix, Arizona.
4. Respondent/Father has maintained an apartment in Tucson, Arizona until recently when he terminated his lease and now lives full time with his wife in Henderson, Nevada. He is currently employed by Southwest Airlines as a Flight Attendant. He is based out of Las Vegas, Nevada. His wife is a flight attendant for Southwest Airlines and is also based out of Las Vegas, Nevada. His wife has a son and she and her son's father have a parenting time schedule.
5. Both children were interviewed by the Conciliation Court and that report was admitted into

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evidence.

CUSTODY:

Petitioner/Mother and their children have resided in Arizona continuously for at least the six months preceding the filing of the petition for dissolution. This Court, therefore, has jurisdiction as Arizona is the “home state” of the children. See A. R. S. § 25-1031.

The best interests of a child is the primary consideration in awarding child custody. Hays v. Gama, 205 Ariz. 99, 102, ¶ 18, 67 P.3d 695, 698, ¶ 18 (2003). The child's best interest is paramount in custody determinations. Section 25-403(A) enumerates specific factors for the Court to consider, among other relevant factors, in making a determination concerning a child's best interests. See A. R. S. § 25-403(A) (“The Court shall determine custody, either originally or on petition for modification, in accordance with the best interests of the child. The Court shall consider all relevant factors including [the ten factors enumerated in the subsection].”).

In making a custody determination, the Court is mindful that as a matter of public policy, absent evidence to the contrary, “it is in a child's best interest: (1) To have substantial, frequent, meaningful and continuing parenting time with both parents[; and] (2) To have both parents participate in decision-making about the child.” See A. R. S. § 25-103(B).

Pursuant to Pollock v. Pollock, 181 Ariz. 275, 277, 889 P. 2d 633 (1995) Respondent/Father has the burden of proof of establishing that he is entitled to the relief he is seeking. The Court would further note that the Court in Pollock stated:

... the interest of the parties and the child are best safeguarded by clear and careful fact finding rather than heightened burdens of proof or the inequitable application of constitutional rights for or against one party,

PURSUANT TO A.R.S. § 25-403,

The court finds as follows regarding the girls’ *best interests*:

1. *The wishes of the child's parent or parents as to custody.* Petitioner/Mother seeks to keep the previously ordered Joint Legal Custody with girls living with her in Tucson, Arizona. Respondent/Father seeks to have sole custody of the girls with them living with him in Henderson, Nevada. If the Court keeps the girls in Tucson, Arizona, then Respondent/Father

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requested that the previously ordered Joint Legal Custody remain in full force and effect.

Respondent/Father testified that because of the flight schedules of each of the parents, the fact that they live in different states, the previous history of conflict between the parties, and the lack of any meaningful joint decision making in the past, Joint Legal Custody is not only logistically not possible but not in the children's best interest.

2. *The wishes of the child as to the custodian.* It was uncontroverted that their older daughter wants to remain in Tucson, Arizona and that her relationship with Respondent/Father is not the best. This Court will not make any further findings in this Ruling as to the wishes of the children because of the public nature of this Ruling and their tender age. However, it should be noted that this Court has carefully reviewed their interviews. Further, both parties are advised that in determining a custody award, this Court will not place more weight on one factor than another.
3. *The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.* Petitioner/Mother presented a number of witnesses who testified as to Petitioner/Mother's interaction with their daughters. She is highly involved with both girls at their school, their extra-curricular activities and their friends. Respondent/Father's wife testified that both girls are well bonded with Respondent/Father and with her and they get along well with her son.
4. *The child's adjustment to home, school and community.* There was no issue that either girl was not well adjusted to her home and school. They are or were actively involved in softball, dance and other activities. They have a number of close friends with whom they spend the night.
5. *The mental and physical health of all individuals involved.* There was no testimony that Respondent/Father had any medical issues. This Court finds that one of their daughters may have a disability and the Court has considered the testimony in regard to that.

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Petitioner/Mother has a number of physical disabilities which in the past have caused her to take leaves of absence from her work. Currently, she is working full time and none of her physical disabilities interfere with her ability to parent their daughters.

Petitioner/Mother in 2010 was arrested and convicted of shoplifting and sentenced to serve house arrest for three days. In addition, on another occasion she received a Diversion Program for a number of incidents of shoplifting. One of Petitioner/Mother's shoplifting incidents involved one of their children.

As a result of these arrests and convictions, Petitioner/Mother went through counseling and successfully completed her Diversion Program. Petitioner/Mother testified that through counseling she has learned the underlying factors for why she was acting as she did and there have been no further incidents.

Respondent/Father would have this Court change custody based on her previous convictions as well as her involving their daughter in one of these incidents. This Court is neither condoning nor dismissing the importance of the actions of Petitioner/Mother as well as her involving their daughter in her illegal activities. However, her testimony regarding counseling, the fact that there have been no further incidents lead this Court to conclude that based on her previous actions alone is not a basis for changing custody.

6. *Which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent.* This is really difficult to assess given the work schedules of each of the parents and their approaches to that work schedule. Respondent/Father has a defined work schedule and any parenting time that he has exercised has had to conform to that schedule. Petitioner/Mother on the other hand testified that she picks and chooses her assignments to maximize her earning potential and limiting the time away from the children. Complicating this issue is that the parenting time being exercised by Respondent/Father occurs in Henderson, Nevada and the girls fly stand-by which may result in their missing a flight. Finally, there were conflicting orders

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about holidays whether reliance should be on the Utah Statutes as they apply to holiday parenting time or the previous orders of the Court. Petitioner/Mother, when it was convenient relied on a Utah Statute to deny parenting time in the face the historical practice of the parties. It would appear to the Court that Respondent/Father would more likely allow meaningful contact with Petitioner/Mother.

7. *Whether one parent has provided primary care of the girls.* Petitioner/Mother has been their primary caretaker.
8. *The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.* There was no evidence of this factor.
9. *Whether a parent has complied with Chapter 3, Article 5 of Title 25, Arizona Revised Statutes.* This provision is not applicable.
10. *Whether either parent was convicted of an act of false reporting of child abuse or neglect under A. R. S. § 13-2907.02.* There was no evidence of this factor.
11. In addition to the foregoing, the Court must also consider any history of domestic violence (A. R. S. § 25-403(E) and 25-403.03), any drug related offenses of either party (A. R. S. § 25-403.04) and any sexual offenses (A. R. S. § 25-403.05). This Court finds that neither party has been convicted of any offense.

RELOCATION:

In determining custody, because of the current location of both parties, any award to Respondent/Father would result in a relocation of the girls to Henderson, Nevada. This Court must analyze such relocation pursuant to A. R. S. § 35-408.

This Court has considered the factors of A. R. S. § 25-403 as set forth above, this Court must now analyze the remaining factors of A. R. S. § 25-408(I):

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- A. *Whether the relocation is being made or opposed in good faith and not to interfere with or to frustrate the relationship between the child and the other parent or the other parent's right of access to the child:* Respondent/Father has already moved to Henderson, Nevada and for all intent and purposes all parenting time has pretty much in the recent past been with Respondent/Father in Henderson. This Court cannot find that the request for relocation or the opposition to the relocation is made with intent to frustrate the relationship of either parent or is being made in bad faith.
- B. *The prospective advantage of the move for improving the general quality of life for the custodial parent or for the child:* Although Respondent/Father testified that there is a performing arts school in Henderson and their daughter would be able to attend that program, it would not be until school year 2013/2014 and she would have to start in high school this year in another school. Respondent/Father presented evidence that if the girls were with him and his wife they would have a set schedule and that they would have "structure." The girls would not be exposed to Petitioner/Mother's shoplifting as set forth above. On the other hand, Petitioner/Mother and her witnesses testified about the girl's involvement in many activities. This Court is concerned about Petitioner/Mother's testimony about Respondent/Father's behavior and the resultant withdrawal from participation in softball because of Respondent/Father's behavior at her games. This Court cannot find that a placement in Nevada would improve their general quality of life.
- C. *The likelihood that the parent with whom the child will reside after the relocation will comply with parenting time orders:* There was no evidence that either parent would not obey a Court Order contrary to the testimony of BOTH parties.
- D. *Whether the relocation will allow a realistic opportunity for parenting time with each parent:* The historical practices of the parties as well as the parenting time that each testified that the other would have no matter where their girls live affords a realistic opportunity for parenting time.
- E. *The extent to which moving or not moving will affect the emotional, physical or developmental needs of the child:* This Court is very concerned how in the face of their daughter's resistance to leave Tucson and live with Respondent/Father in Nevada, that

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would impact their emotional development. These parents have differing styles in raising children and it must be difficult for the girls to respond to the differing styles at parenting time let alone for a longer period of time.

- F. *The motives of the parents and the validity of the factors given for moving or opposing the move including the extent to which either parent may intend to gain a financial advantage regarding continuing child support obligations:* Respondent/Father testified a number of times that he was NOT motivated by the fact that he is paying child support to Petitioner/Mother. However, in reviewing the totality of his testimony and his wife's, this Court is not convinced that the major motivation for Respondent/Father seeking a change of custody is to avoid the amount of his child support. There was testimony about being able to get another house, reductions of work schedules and more money and time to do things with the girls.
- G. *The potential effect of relocation on the child's stability:* In applying this factor, the Court has considered the stability and routine that has been established in their daughters' lives in Tucson, Arizona. Their girls have a number of friends with whom they are close, have been in schools here and participate in a number of activities. Their stability would be impacted if they were to move.

This Court finds that the current stability in their daughters' lives far outweighs any change to Henderson, Nevada.

This Court finds that in reviewing and balancing all of the factors, that Respondent/Father has not sustained his burden of proof with regard to a change in Custody.

IT IS THEREFORE ORDERED that Respondent/Father's request for modification of Custody is DENIED.

IT IS FURTHER ORDERED that the parties will continue to have Joint Legal Custody of their daughters with their primary residence with Petitioner/Mother and their secondary residence with Respondent/Father.

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RESIDENTIAL SCHEDULE:

1. Since the girls will reside in Tucson, Arizona full time with Petitioner/Mother they will be attending the Amphi School District.
2. A. R. S. § 25-103 mandates that a parent have frequent and meaningful contact with their children.
3. To accomplish that goal, the following schedule meets those standards:

IT IS THEREFORE ORDERED that Respondent/Father's residential schedule shall be as follows:

1. Respondent/Father shall have the girls on the third and fifth weekend of each month as defined by the third and fifth Saturday of the month beginning no later than the first flight from Tucson, Arizona to Las Vegas Nevada on Southwest Airlines on a standby basis but in no event to leave Tucson, Arizona later than 10:00 a.m. and to return to Tucson, Arizona no later than 5:00 p.m. on Sunday.
2. In the event that the following Monday after the third or fifth weekend is a school holiday, then in that event, the girls will remain with Respondent/Father until they are returned to Tucson, Arizona no later than 5:00 p.m. on Monday.
3. FALL INTERCESSION: In all odd years, Respondent/Father shall have the girls from no later than 10:00 a.m. on the first Saturday after they are released from school until 5:00 p.m. on the day before they are to return to school when they shall arrive in Tucson, Arizona. In all even years, Petitioner/Mother shall have this time.
4. THANKSGIVING: In all odd years, Respondent/Father shall have the right to have the girls from after school on the day that they are released for their Thanksgiving Break until 5:00 p.m. on the day before they return to school. In all even years, Petitioner/Mother shall have this time.
5. WINTER/CHRISTMAS BREAK: In all odd years, Respondent/Father shall have the right to have the girls for the first half of their Break as determined by counting the night that they are released from school until the day before they are to return to school. Respondent/Father's

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- parenting time shall begin on the first Saturday morning following the day that they are released for their Winter/Christmas Break until 5:00 p.m. on the day which is half way. Petitioner/Mother shall have the balance of time with the girls. In all even years, Petitioner/Mother shall have the first half and Respondent/Father the second half.
6. RODEO BREAK: In all years, Respondent/Father shall have the right to have the girls on the Saturday of their Rodeo Break until Sunday according to Respondent/Father's weekend parenting time as set forth above.
 7. SPRING BREAK AND/OR INTERCESSION: In all odd years, Respondent/Father shall have the girls from no later than 10:00 a.m. on the first Saturday after they are released from school until 5:00 p.m. on the day before they are to return to school when they shall arrive in Tucson, Arizona. In all even years, Petitioner/Mother shall have this time.
 8. SUMMER TIME: In all years, the parents shall alternate having the girls for two consecutive weeks with Respondent/Father having the first two weeks begin on the first Saturday after they are released for their summer break. The parties will then alternate every two weeks with Saturday begin the day of exchanges with the girls arriving at the receiving parent's home no later than noon on Saturday.
 9. The sending parent shall make all travel arrangements to send the girls to the receiving parent. Each party shall pay the cost of their own transportation as well as that of the girls in arranging such transportation. Both parties shall cooperate in assuring that the girls are picked up on time and are at the appropriate place.

CUSTODY RULES

Parental Communication- It is in the furtherance of each child's *best interests* for the parents to confer and for the views of each parent to be considered. There shall be communication between the parents to address day-to-day and more significant issues. The parents shall develop their communication by utilizing e-mail as

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their primary method for communication. This shall afford a method that ensures both accountability and verifiability. Both parties shall maintain and regularly review their e-mail accounts. They shall each respond in a timely fashion, even if such response is merely to acknowledge the receipt of information. Each should print copies of all e-mails received and sent so that if an issue arises in the future that has been addressed through email, each party shall have proof as to what was communicated.

Relocation- Neither parent shall relocate the residence of their daughters outside of the state of Arizona or to a distance greater than 100 miles from the current residential locations unless that parent first secures the written consent of the other or secures a court order authorizing the move.

Presumptive Decision Making Authority-It is anticipated that parental decisions shall be required for major issues in raising their daughters and in meeting on-going needs. If/when they arise; the parents shall address the issues. Each shall give good faith consideration to the views of the other. If the decision involves medical or schooling issues, the parties may further elect to seek input from treating physicians or educators. Both parents shall be provided with such input. If the parents cannot agree after making a good faith effort to come to an agreed upon decision Petitioner/Mother shall have “presumptive decision making authority” when the girls are in her residence. Respondent/Father shall have “presumptive decision making authority” when the girls are in his residence This level of authority shall allow the parent the right to make a preliminary decision that shall then be communicated to the other parent. If the other parent believes that the residential parent’s decision is contrary to the best interests of their daughters, that parent shall have the right to seek review through the Court. That parent shall have the burden to demonstrate that the other parent’s decision is contrary to their daughters’ best interests. It shall not be sufficient to demonstrate that an alternative decision may have also been in the interest of their daughters.

IT IS FURTHER ORDERED:

1. Neither party is to use derogatory language, insulting remarks, negative characterizations of the other party or references which can be construed as insulting or other negative in their communication with the other.

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2. Pursuant to A. R. S. § 25-337, each parent shall be entitled to full access of all of their children 's medical, psychological and educational records, and Both parents shall sign such forms as are necessary to afford both parents such access.
3. Both parents shall be entitled to access of all school information each year, including the name of their children's teacher(s), their children's class schedule, grades, field trips and activities, and parent-teacher conferences. Both parents shall be listed as the parents on all school records. Both parents shall sign such forms as are required by the school's administration to permit information to be released and/or sent to both parents; beyond that it shall be each parent's responsibility to stay informed about their children's school activities and to contact the school directly if that parents feels that that parent is not receiving the information to which that parent is entitled. Both parents shall be entitled to attend any and all school functions and shall treat each other with civility.
4. A parent may not schedule their children for elective activities that affect the other parent's visitation if that parent has NOT consulted the other parent prior to enrolling their children in the elective activities. The parent who has parenting time shall take their children to the elective activities. Both parents shall be entitled to attend their children's extracurricular events, regardless of visitation schedules, and they shall treat one another with civility during such events.
5. Both parties shall be entitled to authorize emergency medical treatment for their children as needed. Both parents shall immediately notify the other if either of their children are hospitalized or experience a significant medical condition.
6. Neither parent shall say negative things about the other in their children's presence or within their children's hearing, nor shall they allow others to do so. If the parents disagree about an issue, they shall discuss it elsewhere. Neither parent shall discuss this legal proceeding with their children nor allow others to do so.

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7. Both parents shall keep the other advised at all times of the address and telephone number where their children may be reached.
8. When a parent is traveling for two or more days with their children outside the greater metropolitan areas of Tucson or Henderson, s/he shall provide the other parent with a written travel itinerary and a means for contacting the traveling parent in the event of an emergency. Said itinerary shall be provided at least 14 days prior to their children being removed from the State overnight.
9. Both parents shall have reasonable telephone access to their children when their children are with the other parent. Reasonable is defined as one time per day when their children are with the other parent.
10. When their children are transported in a car or truck, a car seat appropriate to the age and weight of the child shall be used. BOTH PARENTS SHOULD BE AWARE OF RECENT CHANGES IN ARIZONA LAW AND CURRENT NEVADA LAW REGARDING BOOSTER SEATS.
11. When their children are picked up from the other party, the parties are not to discuss any issues regarding their children, except for instructions regarding feeding or medical care necessary during that party's parenting time.
12. If their children are taking medication, the party who has the medication shall furnish the medication to the other parent with written instructions as to the administration of the medication when the other party picks up their children. At the end of the parenting time, the medication shall be returned.
13. If their child is sick, this is not a reason to not have parenting time. Part of the responsibility of being a parent is taking care of their child who is sick.
14. Each party shall furnish their own food, car seat or other equipment necessary to the proper care of their children.
15. Their children shall be properly clothed and necessary clothing furnished the other parent at the

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- beginning of all parenting time. All clothing shall be returned at the end of all parenting time.
16. If a toy is sent with their children at the beginning of the parenting time, that toy shall be returned at the end of the parenting time.
 17. Neither party shall post any lewd, obscene, profane, libelous, or insulting remarks concerning this litigation or about the other parent or their children on any Internet, blog, face book, print media or other public or family/group communication devices or services nor permit or encourage others to do.
 18. Neither parent shall post their children's picture on the Internet without disclosure to the other parent.
 19. Each parent shall monitor their children's use of the computer to assure that it is being properly used and that their children are not being exposed to or visiting sites which are inappropriate to their age and sex.
 20. Each parent shall have an ongoing affirmative duty to immediately notify the other parent in writing if they have knowledge of any convicted or registered sex offender or person convicted of a dangerous crime against their children as defined pursuant to A. R. S. § 13-604.01, who may have access to their children. The notice required by this section shall be made by certified mail, return receipt requested.
 21. Each parent shall keep the litigation pleadings, evaluations, tests, notes, exhibits and other paperwork from litigation out of the reach and out of view of their children and shall maintain them in a locked cabinet or secure location.
 22. Neither parent shall use their children as a "mailman" or third-party through which to communicate with the other parent.
 23. Neither parent shall use their children, directly or indirectly, to gather information about the other parent, including their personal, business or financial affairs.
 24. Neither parent shall instruct their children to keep secrets from the other parent.

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25. Neither parent shall blame the other parent to their children for their life difficulties including personal, financial or business problems.
26. Neither parent shall use third parties as a substitute to circumvent the parenting boundaries set forth in this order.
27. Neither party is to obtain an order of protection or injunction against harassment which in any way interferes with this court's ruling on the residential schedule. If any party determines that there is a basis to modify the residential schedule set forth above, that party shall proceed under Rules 47 or 48 of the Arizona Family Law rules and such shall be brought in this court under this case number with notice to all parties.

ATTORNEY FEES:

In making an award of attorney fees, this Court is guided by the mandate of A. R. S. § 25-423. Based on that statute, this Court finds that each party shall pay their own attorney fees and costs.

The Court will sign this Ruling in lieu of a more formal Order.

HON. FREDERIC J. DARDIS, DIVISION 50

cc. Hon. Frederic J. Dardis
Clerk of the Court
Under Advisement Clerk
Jacob Amaru, Esq., Attorney for Petitioner/Mother
Dawn Wyland, Esq., Attorney for Respondent/Father

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Judicial Administrative Assistant