

**Philadelphia Bar Association – Family Law Section
December 2021 - Case Law Summaries**

Graves v. Graves, ___ A.3d ___, 2021 PA Super 188 (Pa. Super. September 17, 2021).

Mother appealed an Order granting Father primary physical and sole legal custody of the parties' minor child.

Mother and Maternal Grandmother ("MG") lived in Philadelphia and Father lived in Middletown, Delaware. There was no dispute that the child had always lived with Mother and that Father had never cared for the child or taken him to school or medical appointments. Father testified that: the child lived with Mother in Pennsylvania for his entire life, Father never cared for the child or filed for custody, and Father did not know the child's doctors or teachers. According to Mother, Father had seen the child two times in his life. There was no custody agreement between the parties.

On April 29, 2019, MG filed a complaint seeking primary physical and shared legal custody of the child. MG's complaint named Mother and Father as defendants. On May 13, 2019, Mother filed a complaint (naming MG as the sole defendant) for sole legal and physical custody of the child.

At the hearing (where Mother, Father and MG were present and testified), counsel for MG informed the court that the child was currently residing with Father in Delaware and, as a result, MG modified her request for primary physical custody to visitation. The trial court entered an order granting Father sole physical and legal custody of the child and granting Mother partial, supervised physical custody of the child every second, third and fourth weekend of the month. Additionally, the order granted MG visitation as mutually arranged and agreed upon by MG, Father and the child.

Mother appealed, contending, in relevant part, that the trial court erred by awarding Father physical custody when he had not filed a petition for custody and when the "child [had] never been in Father's care."

The Superior Court noted that it appeared that this was a case of first impression on the issue. The Court vacated the trial court's order and remanded the matter after concluding that the applicable provisions of the custody statute did not specifically set forth whether a trial court is confined to granting custody to a party who petitions the court or precluded the court from granting custody to a party who does not.

In its analysis, the Court noted that it had previously determined that a trial court cannot *sua sponte* modify custody where there is no petition for modification before it, citing Langendorfer v. Spearman, 797 A.2d 303 (Pa. Super. 2002) and P.H.D. v. R.R.D., 56 A.3d 702 (Pa. Super. 2012). The Court noted that the applicable case law "suggests strongly that, because notice plays an essential role in custody litigation, custodial rights may not be adjusted in the absence of a petition and the burden of proving that custody is in the best interest of the child falls on the party seeking custody." Here, Mother and MG filed complaints and specifically requested

custody while Father did not so. Thus, the only custody dispute squarely before the trial court was solely between Mother and MG.

The Court reasoned that, while Langendorfer and P.H.D. dealt with modifications of existing custody orders, those cases illustrated that a trial court cannot *sua sponte* make custody decisions without a proper custody petition before it and proper notice to the opposing party. Here, the trial court granted sole physical and legal custody to Father, even though Father never petitioned the trial court for custody and the child never lived with Father prior to the commencement of these custody proceedings. This deprived Mother of notice and the procedural safeguards to which she was entitled pursuant to the custody statutes. Without notice of Father's claims and contentions, Mother was at a loss to conduct effective preparation, including factual investigation, legal research and the development of a litigation strategy.

The Court also noted that if a parent cannot petition for custody on behalf of a third-party, a third-party cannot petition for custody on behalf of a parent. Thus, MG's petition for custody was not a substitute for Father's failure to file a petition for custody in his own right. Here, Mother was not given notice that Father sought custody or that MG had changed her request from primary custody to just visitation. Therefore, Mother's due process rights to adequately prepare and defend herself were violated.

Lastly, the Court noted that there was no evidence presented regarding Father's availability to care for the child or the ability to make appropriate child-care arrangements, Father's history of drug or alcohol abuse or the mental and physical condition of Father. The Court held that, "without information pertaining to these factors. . . the trial court could not have properly considered them." Father had been granted custody, despite not petitioning, and he did not provide evidence that the custody factors weighed in his favor. Accordingly, the trial court erred by granting custody to Father. On remand, the court directed that, if Father seeks custody, he must formally petition the trial court to do so or the trial court must rule solely on the petitions filed by Mother and MG and either grant or deny their specific requests.

S.A.T. v. G.P., No. 1563 MDA 2020 (Pa. Super. September 8, 2021)
Memorandum Decision - Non-precedential

Father appealed from the order granting Mother's petition to relocate from Hazleton, Pennsylvania to Bayonne, New Jersey, with the parties' child.

By way of background, a custody order was entered that provided for shared legal custody and shared physical custody on a week-on week-off basis. Mother then moved Bayonne, New Jersey, which prompted Father to file a petition for special relief, averring that Mother moved without his consent or court approval. After the hearing on Father's petition, the parties reached an agreement that "Mother could exercise physical custody in Bayonne, but if Mother later wished for the child to attend school there, she would formally petition for relocation."

Mother filed a notice of proposed relocation, requesting court approval to relocate to Bayonne, New Jersey with the child, who was five years old at the time. In her notice, Mother averred that the child would begin kindergarten that fall in Bayonne, and the relocation would provide Mother a better financial opportunity and the child a more stable home life and better educational opportunities. Father filed a counter-affidavit objecting to the relocation and a modification of the existing custody order.

The trial court issued an order: granting Mother's petition to relocate with the child, granting Mother primary physical custody of the child, and granting Father physical custody for two weekends per month and for six weeks over the summer.

Father appealed, arguing that the trial court erred and abused its discretion in granting Mother's petition to relocate with the child since Mother did not meet her burden of proving that the relocation would serve the best interest of the child as required by 23 Pa.C.S.A. §5337.

The Superior Court affirmed. In its analysis, the Court first noted that when Mother filed her notice of proposed relocation, "she was not moving, but rather sought primary physical custody so that the child could enroll at her local school. Thus, the §5337 factors were not *per se* triggered." That said, the Court still concluded that the trial court properly considered all of the §5337(h) relocation factors in addition to the §5328(a) best interest factors.

The Court noted that the trial court credited Mother's testimony that the elementary school in her area was a "Blue Ribbon" school two blocks from Mother's residence, that the child would receive daily speech therapy at the school, and that this therapy is something that the child needed. The court also commented that there was no evidence presented that there would be a negative impact on the child's emotional development if he was to reside primarily with Mother in Bayonne.

Finally, the Court rejected Father's challenge to the prospective nature of the trial court's custody order, which directed the new custody schedule would begin the following August. The Court rejected Father's argument that the court abused its discretion in issuing an order that started in approximately nine months after the order was issued, reasoning that the trial court scheduled the new custody arrangement to coincide with the commencement of the school year. The Court added that, if, in the future, Father determined that the child's best interests were not served by the school in Bayonne or by being in Mother's primary physical custody, he could file a petition to modify the custody order. Father's observation that circumstances may evolve in the nine months was no basis to disturb the trial court's order.