

# The Family Court of the State of Delaware



MICHAEL K. NEWELL  
CHIEF JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 N. KING STREET, SUITE 9400  
WILMINGTON, DELAWARE 19801-3732

February 17, 2016

Patrick Boyer, Esquire  
-----  
-----, -----

Gary Smith, Esquire  
-----, -----  
-----, -----

## LETTER DECISION AND ORDER

Re: **A--- P---- v. U--- P----**  
**File No.: CN14-01480; Petition No.: 15-23518**

Dear Mr. Boyer and Mr. Smith:

On February 4, 2016, this Court conducted a hearing in the above-captioned matter on a Petition to Modify Custody filed by A--- P---- ("Father") and a counterclaim to Father's petition filed by U--- P---- ("Mother"). Present in Court were Father, represented by Patrick Boyer, Esquire ("Mr. Boyer"), and Mother, represented by Gary Smith, Esquire ("Mr. Smith"). The matter pertains to the legal custodial arrangements for the parties' minor child, S--- P---- ("S---"), born -----, 2003.

### ***Procedural History***

On April 23, 2015, the parties entered a stipulation for joint legal custody on all issues regarding S--- as well as shared residency. Pursuant to that stipulation, Mother has S--- in her care overnight on Mondays and Tuesdays, and Father has him overnight on Wednesdays and Thursdays. S--- alternates between the parties' homes every other weekend. Father subsequently filed this Petition to Modify Custody and an accompanying Motion for Priority Scheduling on August 5, 2015. In his motion, Father requested final educational decision-making authority for S--- in light of a disagreement regarding school enrollment for the 2015-2016 academic year and thereafter.

According to Mr. Boyer, Father believed at the time of the stipulation that the parties could resolve the issue of school enrollment. However, the parties still had not reached an agreement as of the summer of 2015, and Father became increasingly

concerned about S---'s educational tuition expenses after losing his job in July 2015. In light of his unemployment, Father asserted that it was no longer financially prudent for the parties to continue paying S---'s tuition at C----- Academy, where he has attended school since he was four years old. Father instead proposed that S--- attend ----- -. ---- -- Middle School ("-. W-----") in the A----- public school district for the 2015-2016 year. Upon Mother's disagreement, Father filed the instant petition.

Mother filed an answer and counterclaim to Father's petition, also seeking final educational decision-making authority, on August 14, 2015. Mother asserted that it is in S---'s best interest to continue attending C----- Academy. Despite a child support order requiring the parties to split the cost of any private school tuition on a 50/50 basis, Father had reportedly refused to pay his 50% and instead enrolled S--- in -. W-----. Mother contends that the parties have adequate financial resources to afford the yearly cost of tuition at C----- Academy, which is approximately \$12,000.

Father filed an answer to Mother's counterclaim on August 20, 2015, arguing that the child support order only obliges the parties to contribute equally to any mutually agreed-upon private school expenses. Despite their lack of agreement for S--- to attend C----- Academy for the 2015-2016 school year in this case, Father agreed to pay his 50% share of tuition on an interim basis pending resolution of the matter.

Mother subsequently filed a Motion for Emergency Order on August 25, 2015, and the Court conducted a teleconference on September 2, 2015. Following that teleconference and on the same date, the Court entered an Order awarding Mother interim decision-making authority with respect to S---'s education to the extent necessary to ensure that he remains enrolled C----- Academy pending a final resolution of the matter. The parties also agreed to engage in Alternate Dispute Resolution ("ADR") pursuant to Family Court Rule of Civil Procedure 16.1 in an attempt to permanently resolve the issue of educational decision-making authority. That attempt ultimately failed, and the Court conducted this hearing on February 4, 2016.

### ***Factual Background***

Father resides at - ----- Drive in B---, Delaware. He was previously employed as an Engineering Manager at Bank of America earning \$140,000 annually, but he lost his job in July 2015. One month prior to this hearing, Father became re-employed as an Infrastructure Engineer at Chase earning approximately \$100,000 annually.<sup>1</sup>

Mother resides at --- ----- Drive in B---, Delaware. Mother is

---

<sup>1</sup> As of the date of this hearing, Father had not yet informed Mother and/or DCSE about his re-employment since he is still in the 90 day probationary window. However, he confirmed when asked by Mr. Smith that he would inform DCSE immediately.

employed as an Accounting Assistant at Thales Corporation, where she earns \$47,400 annually.

Pursuant to the parties' stipulation on shared residency, Mother has S--- in her care overnight on Mondays and Tuesdays, and Father has him overnight on Wednesdays and Thursdays. S--- alternates between the parties' homes every other weekend. Although they agree to maintain shared residency and joint legal custody on all other issues, both parties are seeking final decision-making authority with respect to S---'s education.

### ***Legal Standard***

Under 13 Del. C. § 729(b), a written agreement between the parties concerning the legal custody of a child or his or her residence may be modified at any time by the Court in accordance with the standards set forth in 13 Del. C. § 722(a).<sup>2</sup> The Court must balance the best interest factors,<sup>3</sup> and this Court has held that some factors may be given more weight than others.<sup>4</sup>

### ***§ 722 Factors***

Since the parties have stipulated to shared residency and joint legal custody on issues other than education, the Court must only conduct its analysis in regards to the legal custodial dispute on final educational decision-making authority.

#### ***(1) The wishes of the child's parent or parents as to his or her custody and residential arrangements;***

Both parties are seeking to modify their agreement on joint legal custody to obtain final decision-making authority with respect to S---'s education. The parties clarified that they are not asking this Court to determine where S--- attends school; rather, they are each seeking an award of final educational decision-making authority.

Father told the Court that he makes decisions based upon extensive research on qualitative and quantitative data. He indicated that, if he is appointed as the final decision-maker, he would share his research with Mother in an effort to engage

---

<sup>2</sup> 13 Del. C. § 729(b) states in full: "An order entered by the Court by consent of all parties, an interim order or a written agreement between the parties concerning the legal custody of a child or his or her residence may be modified at any time by the Court in accordance with the standards set forth in § 722 of this title."

<sup>3</sup> See *Ross v. Ross*, 992 A.2d 1237, 2010 WL 1404220 (Del. Apr. 7, 2010)(unpublished table decision).

<sup>4</sup> *Ross* citing *Fisher v. Fisher*, 691 A.2d 619, 623 (Del. 1997) (noting that "[t]he amount of weight given to one factor or combination of factors will be different in any given proceeding. It is quite possible that the weight of one factor will counterbalance the combined weight of all other factors and be outcome determinative in some situations.")

in a mutual dialogue to reach the best decision for S---. Father stated that he values Mother's input since she loves S---; thus, he would continue to utilize a collaborative approach. Father would also consider and place great weight on S---'s opinion. Father represented that he would not take his final decision-making authority lightly and would only use it as a "last resort" in the event of an impasse. Conversely, Father asserted that Mother is not open to changing the status quo and would continue to make unilateral decisions if she is appointed as the final decision-maker.

Based upon his research, Father concluded that it is in S---'s best interest to attend -. W----- for the remainder of middle school and attend A----- High School for ninth grade. Thereafter, Father believes the parties should explore charter school options for S---. Father based his conclusion upon an assessment of four specific factors related to school options: (1) the child's aptitude; (2) parental involvement and support; (3) the school itself; and (4) peer involvement and community engagement.

With respect to S---'s aptitude, Father emphasized that S--- has a love for learning and performs well academically. His educational goals have changed over time, but he most recently expressed a desire to become a doctor. Accordingly, Father believes A----- public schools are a better option than C----- Academy because they have a better Science, Technology, Engineering and Mathematics ("STEM") Program, which is ideal for medical studies, as well as more Advanced Placement ("AP") course offerings.

Father explained that the parental involvement and support factor contemplates what a parent is doing to benefit the child versus what the parents of other students in the district are doing; it includes a consideration of parents' educational backgrounds as well as wealth or poverty. However, when asked by the Court, Father admitted that he did not really measure this factor since it is not quantitative.

Under the third factor, Father represented that the A----- School District is among the top ten in Delaware according to the results of a District Curriculum and Assessment Council ("DCAC") study. He asserted that A----- High School is "up there" in the rankings with prestigious schools such as Wilmington Charter School. Further, in addition to its allegedly superior STEM Program and greater number of AP courses, Father represented that A----- schools also have more foreign language options than C----- Academy.

Father emphasized that S---'s peer involvement and community engagement would be enhanced by attending A----- public schools. He expressed concern that C----- Academy does not expose S--- to a diverse group of students. Additionally, Father stressed that continuity of social relationships is important to building social skills, and S--- does not currently socialize outside of school with the same children who attend C----- Academy. According to Father, the children in his

neighborhood all attend public school, and S---'s friends from school do not live nearby. Father told the Court that S--- does not get invited to birthday parties or sleepovers. Further, Father testified that A----- public schools offer more extra-curricular activities and clubs for S--- to participate in. He acknowledged that S--- currently plays soccer, baseball, and other indoor sports through C----- Academy; however, he pointed out that A----- schools have those same opportunities.

Aside from the four above-stated factors, Father also considered the financial aspect of S---'s school enrollment in reaching his conclusion. Father stressed that he would like to help S--- afford college, and the parties have already started a college tuition fund for him. Tuition at C----- Academy currently costs about \$12,000 per year, and according to Father, the cost increases by about \$500 every year. If S--- attended public school, Father pointed out that the money currently spent on tuition could be contributed to his college fund, which would then earn additional interest.

On cross-examination by Mr. Smith, Father clarified that he never stated he could not afford tuition at C----- Academy; rather, he does not believe that it is financially prudent. He emphasized that the parties' financial circumstances have significantly changed since the divorce; they now have two households to support, and Father's savings were depleted during his period of unemployment. Father represented that he is earning less income at his new job and that the job market in his industry is not stable.

Father further explained on cross-examination that he supported S---'s enrollment at C----- Academy up until this year on account of the parties' residence in Colonial School District, which he believes is inferior, during the marriage. Now that both parties have relocated to the A----- School District, Father would like to enroll S--- in public school.

Mother also requested that the Court appoint her as the final decision-maker on educational issues for S---. She believes she is more capable than Father of making logical and effective decisions based upon the circumstances. Mother asserted that Father's preference is driven solely by financial matters, as she could not identify any other possible reason why Father would prefer public school. If Mother was appointed as the final decision-maker, she represented that she would conduct research, visits schools, and discuss all educational issues with Father. She agreed that the parties would ideally meet face-to-face to engage in such discussions; however, in order for that to happen, she emphasized that Father would have to begin genuinely considering her opinions. Mother would also place great weight on S---'s wishes when reaching a decision.

Mother would like S--- to continue attending C----- Academy. She believes that the school promotes good values, such as honesty, integrity, and good sportsmanship. Additionally, she asserted that C----- Academy has a great academic

program and develops well-rounded students. Mother emphasized that S--- has been attending C----- Academy since Pre-Kindergarten and has good relationships with his teachers. She does not want S--- to change schools at this time, as she does not feel that it is in his best interest to undergo another major life transition during a time of divorce. Mother has not begun researching high school options for S--- but intends to do so in the near future, as she is willing to consider options other than C----- Academy.

Despite Father's expressed desire to put the money spent on tuition at C----- Academy towards S---'s college fund, Mother pointed out that Father stopped contributing to that account all together since the divorce. She acknowledged on cross-examination that any money spent on tuition takes away from S---'s college savings; however, she argued that C----- Academy is preparing S--- for college and that the cost of tuition is not so significant as to prevent the parties from contributing to S---'s college tuition as well.

**(2) *The wishes of the child as to his or her custodian or custodians and residential arrangements;***

The parties did not request that the Court conduct an interview with S---, and the Court would not consider S---'s preferences in regards to the limited legal issue of final educational decision-making authority in any event. Nonetheless, Mother asserted her belief that S--- would like to continue attending C----- Academy, while Father contends that S--- is now "open to public school."

Father represented that, if S--- expressed a desire to continue attending C----- Academy, he would place great weight on his wishes but would continue to research and reevaluate the best option for future years. Mother similarly stated that if S--- expressed a desire to attend public school she would agree to send him there.

**(3) *The interaction and interrelationship of the child with his or her parents, grandparents, siblings, persons cohabiting in the relationship of husband and wife with a parent of the child, any other residents of the household or persons who may significantly affect the child's best interests;***

Mother told the Court that she acted as S---'s primary caregiver during the marriage and was a stay-at-home mother for the first seven years of S---'s life. According to Mother, Father spent a lot of time on the computer during the marriage and often would not join them for dinner.

Mother believes that Father's relationship with S--- became difficult when S--- was nine years old; she indicated that S--- began forming his own opinion around that age, and Father does not like when people disagree with him. According to Mother, S--- will usually go to her when he needs something, especially money, because of the difficulties he experiences with Father. For example, Mother told the Court that S--- had

to “plead his case” to Father for permission to play soccer in the Fall of 2015, which was an upsetting conversation for S---. Father eventually agreed that S--- could play soccer after S--- promised to keep his grades up. Mother also believes S--- turns to her for emotional support and that Father was not even aware of how difficult it was for S--- to transition into middle school.

**(4) *The child's adjustment to his or her home, school and community;***

S--- is a seventh grade student at C----- Academy, where he has attended school since Pre-Kindergarten. The parties reported that S--- performs well academically; he is an above-average student whose grades consist of “A”s and “B”s. However, Father testified that S---’s grades, particularly in Math, were affected by his involvement in soccer in the Fall of 2014, since he was required to attend practice every day for the first two months of the season. S--- was able to bring his grade up in Math from a “C” to a “B” with lots of tutoring from Father. Father represented that this is the reason he was reluctant to allow S--- to play soccer again in the Fall of 2015, but as noted above, Father eventually agreed to allow S--- to play. Father acknowledged that S---’s involvement in soccer is important; however, he believes S--- should also participate in other sports and activities, such as baseball, so that he is not a “one trick pony.”

Father expressed concern about S---’s social development at C----- Academy due to limited peer and social opportunities. He believes S--- has a few friends at school but told the Court that he does not socialize with those friends outside of school since they do not live nearby. According to Father, the neighborhood children with whom S--- socializes all attend public school. Both parties live in the A----- School District and reside only five minutes apart.

Mother told the Court that she resides about ten minutes away from C----- Academy, and she was able to name five of S---’s friends from school. However, she admitted that his socialization with those children is typically limited to their lunch period at school, when they like to discuss Pokemon, boxing videos, and the latest gadgets.

Pursuant to the parties’ stipulation on shared residency, Mother has S--- overnight on Mondays and Tuesdays, and Father has him overnight on Wednesdays and Thursdays. S--- alternates between the parties’ homes every other weekend. The parties did not raise any issues with respect to S---’s adjustment to the residential schedule.

**(5) *The mental and physical health of all individuals involved;***

On cross-examination by Mr. Smith, Father confirmed that he is currently seeing a therapist and psychiatrist for Generalized Anxiety Disorder (“GAD”). Father is prescribed two daily medications for GAD, including Lexipro and another medication

that he was unable to list by name. Father also takes medication for psoriasis and arthritis.

No evidence was presented in regards to Mother's or S---'s health.

**(6) *Past and present compliance by both parents with their rights and responsibilities to their child under § 701 of this title;***

Mother and Father entered into their stipulation for joint legal custody and shared residency in April 2015. The parties have had no issues exercising their shared residential schedule in accordance with that stipulation. However, with respect to joint legal custody, the parties have been unable to satisfy their obligation to reach a mutual decision on S---'s education.

According to Father, the parties were aware of their disagreement regarding which school S--- would attend for the 2015-2016 year at the time the stipulation was entered. However, Father "naively" believed the parties would be able to resolve the issue without Court involvement. By the summer of 2015, the parties still had not reached a decision, and Father became increasingly concerned about paying tuition at C----- Academy after losing his job at Bank of America in July 2015. Father told the Court that he had previously experienced a period of unemployment in 2009 for eight to nine months, and he could not predict how long he would be unemployed on this occasion. Father immediately informed Mother of his concerns and attempted to discuss alternative educational solutions.

Father told the Court that he offered Mother the following suggestions: (1) move S--- to --. W----- for one year to see how he adjusts, and if necessary, move him back to C----- Academy or to a local charter school the following year, or (2) pay for S---'s seventh and eighth grade tuition at C----- Academy with his Coverdell Educational Savings Account and explore public and charter school options for high school. Father claims that Mother "immediately shut down" all of his proposals without offering any counter-solutions, maintaining that the parties had adequate financial resources to continue paying tuition and that Father should use his work bonus to pay his share. According to Father, Mother was unwilling to acknowledge their financial change in circumstances as a result of the divorce.

Conversely, Mother contended in her testimony that Father's only proposals for S---'s school enrollment were for her to pay the entire cost of tuition at C--- Academy or for S--- to attend --. W-----. Mother did not offer to pay the full tuition, but she remained willing to pay 50% in accordance with the child support obligation. Mother admitted on cross-examination that she did not visit --. W----- or speak to any staff members upon learning of Father's proposal. However, she stated that she conducted some research and discovered some "unappealing" things about the school, including recent disciplinary actions.



After receiving a letter from Mr. Smith on behalf of Mother indicating that Mother would be enrolling S--- at C----- Academy for the 2015-2016 school year “regardless of the Court’s decision on [Father’s] contribution,” Father filed the instant action. Father acknowledged that the timing was not ideal, as school was scheduled to begin in early September and he did not want S---’s enrollment to be a last minute decision. Mother claims that Father pulled S--- out of summer camp one day around this time to visit -. W----- without informing her. According to Mother, this period of uncertainty was a “terrible time” for S---, and she believes Father created a “huge mess” over \$5,500 of tuition expenses.

The Court conducted an emergency teleconference on September 2, 2015, the day before school was scheduled to begin. At that time, S--- was enrolled at both C----- Academy and -. W-----, and Father was scheduled to have S--- in his care from September 2<sup>nd</sup> to September 4<sup>th</sup>. According to Mr. Boyer, Father intended to take S--- to -. W----- on his residential days while Mother took him to C----- Academy on her days pending a resolution of the matter. The Court found this proposition unreasonable and therefore granted Mother interim educational decision-making authority to the extent necessary to enroll S--- at C----- Academy for the 2015-2016 school year.

The parties subsequently engaged in ADR in October 2015; however, Mother did not authorize Mr. Smith to attend on her behalf. Mother informed the Court that she did so because she believed the meeting would be more productive if conducted between the parties and the mediator only. While the parties appeared to have come to a resolution at the conclusion of ADR, Mother subsequently revoked her agreement.<sup>5</sup>

Father contends that he has made every attempt to comply with his obligation as a joint legal custodian, including requests to meet with Mother face-to-face, to communicate through email, text message, and letters through counsel, and to participate in ADR and co-parent counseling. However, he claims that Mother is “completely closed” to discussion on the issue of education. Father told the Court that Mother is only willing to communicate via email and that even those communications have been hostile. For example, in an email to Father on August 4, 2015, Mother stated that S--- would be enrolled at C----- Academy “no matter how much [Father] cr[ies] about it” and that he should “accept that [Mother] [does] not want S--- at public school

---

<sup>5</sup> Mr. Smith objected to the admission of any evidence related to settlement negotiations in ADR; however, Mr. Boyer contended that the evidence could be offered under Rule 408 for other purposes, including its relevance to factors (1) and (6) of the best interest analysis in this case. However, the Court has already been made aware of the failed ADR attempt by way of the motion for scheduling, and the Court does not place any considerable weight on the fact that Mother did not authorize counsel to attend or that negotiations ultimately failed.

and stop with the whining.” After Father responded with a request to meet face-to-face, Mother sent another email refusing his request, stating that she was “sick of looking at [Father’s] fat face after all of these years.”

Mother acknowledged that face-to-face discussions are an important aspect of exercising joint legal custody; however, she has refused to meet with Father because he becomes extremely difficult when she will not agree with him on an issue. According to Mother, the parties merely “go around in circles” and end up in an argument, and she does not want to put herself in that situation. When asked by Mr. Boyer, Mother attributed Father with “100%” of the blame for the parties’ communication difficulties. While she would like to see the parties improve their communication, she believes this could only be accomplished if she is willing to “agree with everything he says.” However, Mother believes Father would become more open to her suggestions if she is granted final decision-making authority on education.

The most recent child support order in effect between the parties was entered on October 2, 2015. Mother acknowledged that Father has always paid child support on time; however, the Court notes that, as of the date of the hearing, Father had not yet informed DCSE of his new employment beginning in January 2016.

The Court takes judicial notice of Delaware Child Support Rule 503, which directs that parties under a child support order shall share equally in all incidental expenses. However, the parties both presented evidence of circumstances in which the other party failed to contribute an equal share to S---’s incidental expenses. For example, Father refused to contribute to the cost of a new iPad cover for S--- in March 2015, which he claims was because Mother did not consult him prior to the purchase. Father informed the Court that Mother failed to reimburse him for half of the cost of S---’s flu shot in October 2015, which amounted to \$8.20. On cross-examination by Mr. Smith, Father admitted to sending an email in which he threatened to initiate a lawsuit for violation of the child support order due to the outstanding \$8.20 payment.

Additionally, Mother testified that S--- was supposed to get braces in November 2014 and had several teeth pulled in preparation for the procedure. However, Father reportedly revoked his consent at the last minute in order to obtain a second opinion. Mother told the Court that Delaware Orthodontics also recommended that S--- get braces, but Father still was unwilling to commit. According to Father, the orthodontist indicated that the procedure could wait a year, and he wanted to obtain price estimates from other local orthodontists before going forward. Father ultimately obtained a quote from Dr. C----- for less than \$4,000, while Delaware Orthodontics had quoted about \$6,000. Father pointed out that S--- will now be getting braces at the end of February 2016, but Mother asserted her belief that he only recently consented because he knew the issue would come up at this hearing.

Finally, the parties have had a disagreement with respect to payment for

S---'s piano lessons, which he began taking when he was five years old. According to Father, the parties agreed that they would split the cost on a 50/50 basis and would send each other spread sheets of any piano expenses to be reimbursed. However, Father told the Court that Mother failed to reimburse him for a six month period in 2014. Mother explained that she refused to satisfy Father's reimbursement claims for certain lessons that she knew S--- did not actually attend. In March 2015, the parties agreed to suspend S---'s piano lessons until the disputes regarding S---'s school enrollment and braces were resolved.

Mother believes that S--- would benefit from participating in counseling with a third party in order to address issues related to the parties' divorce. She attempted to discuss the matter with Father in March 2014, and Father was initially in agreement. However, Father later revoked that agreement; he told the Court that he did so because Mother attempted to make a unilateral decision on S---'s counselor, and he wanted to defer the decision until after an agreement on custody was reached. Mother sought an opinion from S---'s pediatrician, who reportedly wrote a letter recommending that S--- engage in counseling. Father claims that he did not see that letter and that he would have been more agreeable had Mother made him privy to that information. Mother claims that she informed Father of the pediatrician's recommendation, although she may not have provided him with a copy of that letter.

Father told the Court that he is involved in S---'s extra-curricular activities in several ways. For instance, he coaches S---'s Little League team, he assists S--- with homework and tutoring, and he worked extensively with S--- on a project for the school Science Fair last year. Father explained that S--- set out to explore whether an individual can run faster before or after eating a meal, and the two had fun and learned a lot together in conducting their research. According to Father, Mother was not involved in that project and did not attend the Science Fair as she had in previous years.

Mother represented that she also is involved in S---'s school activities. She is a mentor for his Lego League team, which made it to the State finals for the first time this past year. Mother is familiar with all of S---'s teachers and the parents of his friends from school, who she could list by name. On cross-examination by Mr. Smith, Father could only list one of S---'s friends by name, although he knew the names of two parents.

**(7) Evidence of domestic violence as provided for in Chapter 7A of this title;  
and**

No evidence of domestic violence was presented by either party.

**(8) The criminal history of any party or any other resident of the household  
including whether the criminal history contains pleas of guilty or no**

***contest or a conviction of a criminal offense.***

Neither party testified in regards to this factor. The Court conducted an independent review of the parties' criminal histories and determined that Mother has no criminal history and Father only has motor vehicle violations on his record.

***§ 722 Best Interest Analysis***

Based upon the below analysis, the Court finds that it is in S---'s best interest to **grant Mother final decision-making authority** in regards to S---'s education. The Court finds that factors (3), (4), (5), and (6) of the best interest analysis support its conclusion. Factors (1) and (8) are neutral, and factors (2) and (7) are inapplicable. Pursuant to their agreement, the parties shall continue exercising shared residency and joint legal custody with respect to all other issues.

Factor (1) is neutral for purposes of the Court's analysis. Despite the extensive testimony presented regarding the parties' wishes, their positions are ultimately opposed in regards to final educational decision-making authority.

Factor (2) is inapplicable, as the Court did not interview S--- and would not consider his preferences on the limited legal issue being addressed.

The evidence under factor (3) suggests that Mother has a stronger relationship with S---. The Court credits Mother's testimony that S--- turns to her for emotional support since his relationship with Father is more "difficult," as evidenced by the conversation regarding S---'s participation in soccer. For that reason, factor (3) favors an award of final decision-making authority to Mother.

Under factor (4), the Court notes that S--- has been attending C----- Academy since fourth grade. He is clearly well-adjusted after some initial difficulty transitioning from elementary to middle school. S--- is involved in several sports and exceeds academically. In light of his recent transition to middle school and the circumstances surrounding the parties' recent divorce, the Court agrees with Mother's assertion that it would not be in S---'s best interest to undergo another major life change at this time by switching schools. Thus, the Court finds that factor (4) also supports an award of educational decision-making authority to Mother.

The Court did not receive evidence under factor (5) with respect to Mother's or S---'s physical or mental health. However, the evidence suggests that Father receives treatment and takes medication for GAD. Although this does not raise a significant concern with the Court, this factor slightly favors Mother's decision-making capabilities based upon that evidence.

Several issues were raised within the evidence pertaining to factor (6).

First, the evidence suggests that both parties have contributed to their significant communication difficulties in this case. In that regard, both parents have failed to demonstrate the attitude and efforts necessary to effectuate joint legal custody. The Court warns the parties that, although the resentment may be directed at one another, the only victim of their failure to communicate is S---.

Further, the Court acknowledges Father's argument that Mother did not exert adequate efforts to explore and consider his proposals for S---'s seventh grade school enrollment and merely "shut him down" instead. However, the testimony regarding the parties' respective proposals and their reactions to the other party's proposals is contradictory. Whether or not Mother made appropriate efforts to consider Father's alternative suggestions for the current year, the Mother appears to have an open mind for S---'s enrollment for future years, particularly for high school.

The Court's conclusion under factor (6) ultimately comes down to the same reasons supporting its decision to award Mother interim educational decision-making authority in September 2015. The actions demonstrated by Father at the commencement of the 2015-2016 school year, particularly his intention for S--- to continue to be enrolled in two different schools and split his time in accordance with the parties' residential schedule, does not exemplify the reasonableness necessary to make sound educational decisions in S---'s best interest. While the parties have both exhibited unreasonable behaviors at times throughout these proceedings, Father's suggestion in that circumstance continues to be the most concerning to the Court. For that reason, the Court finds that factor (6) supports an award of final educational decision-making authority to Mother.

Neither party presented evidence of domestic violence under factor (7); therefore, the Court did not apply this factor to its analysis.

Factor (8) is a neutral factor, as the Court has no concern with either party's criminal history.

### ***Case Law on Public vs. Private School***

Mr. Boyer submitted to the Court three cases which he contends support the principle that, where parents cannot reach an agreement between private school or public school for their child, the child should attend public school absent any special needs that cannot be met by public school. Specifically, this Court has stated that:

"In the conflict between the choice of public and private school, ... [t]he Court does not believe that it is appropriate for a Court to designate particular schools for children to attend unless they have special problems which clearly cannot be served by public schools ... While private schools, in the eyes of some people, have academic, social, or other advantages

over public schools, it is not for the Court to decide how children should be educated, nor is it appropriate for a judge to adopt an elitist position that private education is, in all cases by definition, superior to public schooling. In fact many people have the opposite view. Rather, the decision to send children to private schools and, if so, the selection of particular schools or programs is one which parents themselves must make in concert with the children involved. Where parents cannot make such decision and come to a decision together about the selection of schools ... and where there is no indication of any special needs which public schools cannot address, then the Court must conclude that the children involved in such disputes should attend ... the public schools.”<sup>6</sup>

However, what the three cases cited by Mr. Boyer have in common, as is the case in the instant matter, is that the Court did not and will not decide which school a child should attend. This Court has consistently maintained that “[t]his Court will not insert itself in the role of a parent to decide where...children should attend school.”<sup>7</sup> The Court has also stated:

“[P]arents, and not judges, should decide where their children should attend school. Attentive and involved parents know their children’s educational needs far better than judges who have never met the children do. And, unlike the courts, parents can investigate various schools for their children. Where parents cannot agree, the court’s responsibility is to determine *how* a (and not what) decision should [be] made.”<sup>8</sup>

As the parties in the instant proceeding are asking this Court to do, the Court in the proffered cases merely chose a final decision-maker in the event that the joint legal custodians were unable to reach an agreement regarding a child’s education.

In Riley v. Riley, the Court appointed the mother, who was a proponent for private school, as the final decision-maker. However, the Court noted that it would not “award her any separate funds for private schooling for any of the children,” leaving the parties to resolve the issue of any tuition expenses outside of the custody action. The Court further noted that “[i]t may be that the father will agree to a sharing of expenses...or it may be that the parties can compromise on sending one or more of the children to [public school]. Again, however, the education of children is for parents and not for the Court[,] and the public schools paid by taxpayers are available for all children where parents cannot agree on other alternatives.” In other words, while the Court appointed the parent in favor of private school as the final educational decision-maker in

---

<sup>6</sup> D.W. v. E.W., 2009 WL 6303016 at \* 8 (Del. Fam. July 28, 2009), citing Riley v. Riley, 1992 WL 208374 (Del. Fam. Aug. 21, 1992).

<sup>7</sup> F.W.W., Sr. v. M.W., Del. Fam., C.A. No. CN99-08005, Newell, J. (August 2, 2006), and D.W. v. E.W. at \* 2.

<sup>8</sup> D.W. v. E.W. at \* 2.

that case, the Court did not see the child's enrollment in private school as inevitable.<sup>9</sup>

Further, in D.W. v. R.E., the parties originally entered a stipulation to keep their two children enrolled in the same schools for the upcoming school year, one of which was private and the other of which was public. The father subsequently filed a Motion to Register for Public School, raising an objection to private school on the grounds of tuition expenses and religious affiliation. The Court vested the mother with limited interim educational decision-making authority to the extent that she kept the children enrolled at their current schools pending a final resolution.

As a result of the final hearing, the Court vested the father with final educational decision-making authority for one child, noting that the child had always attended public school and there was no indication that the child had any special needs that could not continue to be met by the school.<sup>10</sup> The instant case can be distinguished from D.W. v. R.E., as S--- has always attended private school and Father has not raised any objections until the present school year.

Finally, the parties in J.F.F. v. E.N.F. had a disagreement regarding which high school the child would attend in the first instance. The father preferred public school, while the mother wanted the child to be enrolled in a private high school. In that case, the child had attended public school until fourth grade and then switched to private school for middle school. The Court ultimately appointed the father as the final educational decision-maker, essentially declining to compel the child to attend private school.<sup>11</sup>

However, the present case can be distinguished in that S--- has only ever attended C----- Academy, a private school, and he is not faced with circumstances wherein he will be forced to transition to a new school in either event on account of his grade level. The Court shares Mother's belief that it is not in S---'s best interest to effectively force him to undergo another school transition at this time, as he just recently overcame the difficulties related to his transition to middle school. Further, S--- has undoubtedly faced many changes and difficulties as a result of the parties' divorce, and he has not yet engaged in any counseling. Thus, the Court is not persuaded by the factually distinguishable cases above.

### ***Conclusion***

On the issue of final decision-making authority, it is unfortunate that the parties, as joint legal custodians, cannot work together to reach decisions that are in S--

---

<sup>9</sup> Riley v. Riley at \* 8-9.

<sup>10</sup> D.W. v. E.W. at \* 9-10. The Court in that case declined to enter an Order appointing a final educational decision-maker for the other child, as there did not appear to be a significant disagreement between the parties.

<sup>11</sup> J.F.F. v. E.N.F., 2001 WL 1807754 (Del. Fam. Aug. 27, 2001).

Patrick Boyer, Esquire  
Gary Smith, Esquire  
**P---- v. P----**, CN14-01480  
February 17, 2016  
Page 16 of 16

-’s best educational interest. Nonetheless, the Court recognizes that a conflict exists and there is a need to grant one parent final decision-making authority. In reaching its decision to appoint Mother as the final decision-maker, the Court places great weight on factors (3), (4), and (6) of the best interest analysis, which support its conclusion. Factor (5) also slightly favors the Court’s conclusion. Factors (1) and (8) were neutral, and factors (2) and (7) were inapplicable to the Court’s analysis. The Court also is not persuaded by the case law submitted by Mr. Boyer, as this case is factually distinguishable, and the Court does not find it appropriate to make a decision on which school S--- should attend in any event.

For the above-stated reasons, the Court **GRANTS Mother final decision-making authority** with respect to issues related to S---’s education only. The Court emphasizes that, as the final decision-maker on education, Mother remains obligated to exert a good faith effort to involve Father in all educational issues and attempt to reach a mutual decision. Mother’s final decision-making authority shall be used only as a last resort in the event of an impasse.

**IT IS SO ORDERED.**

Very truly yours,

*/ Michael K. Newell /*

MICHAEL K. NEWELL, Chief Judge

MKN/amp

Date mailed: February 17, 2016