

The Family Court of the State of Delaware



ROBERT BURTON COONIN
JUDGE

LEONARD L. WILLIAMS JUSTICE CENTER
500 N. KING STREET, STE 9400
WILMINGTON, DELAWARE 19801-3732

August 23, 2019

A----- A-----
--- Fairfield Court
Middletown, DE 19709

**LETTER, DECISION
AND ORDER**

R----- C-----
-- West Hopi Drive
PO Box --
Bagdad, AZ 86321

RE: A----- A----- v R----- C-----
File No.: CN16-02195; Petition No.: 18-32985
Petition to Modify Custody Order: S---- C----- (D.O.B. 04/--/08)
File No.: CN16-02195; Petition No.: 18-32993
Petition – Rule to Show Cause

Dear Ms. A----- and Mr. C-----:

This is the Court's decision regarding the Petition to Modify Custody Order filed by A----- A----- (hereinafter "Mother") on October 30, 2018 against R----- C----- (hereinafter "Father") in the interest of their minor child S---- C----- (hereinafter "Child") born April --, 2008. Also before the Court is Mother's Petition – Rule to Show Cause ("RTSC") filed on October 30, 2018 against Father with regard to allegations that Father was not abiding by the Permanent Consent Joint Custody Order signed by the Court on February 7, 2017. The parties are self-represented.

Procedural History

Pursuant to the Permanent Consent Joint Custody Order of February 7, 2017, Mother and Father agreed to share joint legal custody with primary residential placement of Child granted to Mother. Father, who resides in Arizona, was granted visitation with Child every summer, as well as every other Christmas, Thanksgiving, Easter and Spring Break. His summer visitation period is essentially from “up to one week after the last day of school and ending by August 14th” with the possibility of additional days tacked on if the start of summer is delayed due to snow days.¹ Mother is expressly responsible for the cost of transporting Child to Arizona at the outset of the summer and Father is expressly responsible for the cost of transporting Child back to Delaware at the end of the summer. However, the Order is silent on whether the parties equally share the cost of flying Child to and from Arizona during Father’s shorter holiday visitation periods listed above. Finally, also included in the Order are various provisions related to communication between the parties, communication with Child about the other parent, sharing of information between the parties about Child’s school and medical needs, and more.

On December 6, 2017, Father filed a Petition – RTSC alleging that Mother was not permitting Child to fly to Arizona for Christmas 2017. Father’s Petition was dismissed on April 6, 2018 following a case management teleconference with the parties during which it was disclosed that Mother ultimately permitted Child to fly to Arizona and therefore there was no violation of the Order as to that issue. Although the parties disputed whether Child should be permitted to fly unaccompanied, they also agreed during the teleconference that the Custody Order does not address whether either parent has to accompany S---- on her flights to and from visits with Father in Arizona and therefore there was no violation of the Order for Mother to request that Child fly accompanied.²

In her Petition to Modify Custody Order, Mother requested sole legal custody and the reduction of Father’s summer visitation to only four weeks in July. However, that same day, in her Petition – RTSC Mother requested that the Court enforce the Permanent Consent Custody Order of February 7, 2017. Mother also made several allegations against Father that he has acted in

¹ Although the summer visitation provision of the Order later makes reference to an August 7th end of the summer date, Mother testified that her expectation was that Child could remain with Father until August 14th.

² Although the parties spent considerable testimony at the June 28, 2019 hearing on the issue of whether Child should or should not fly unaccompanied, the Court will not address that issue in this Order as that matter was already addressed in the April 6, 2018 Order.

violation of the Custody Order including that Father has prohibited contact between Child and Mother while Child is visiting Father, has refused to allow Child to participate in counseling, has bribed Child, and has failed to ensure that Child is returned to Mother in a timely fashion at the conclusion of his visitation.

On February 7, 2019, the Court held a consolidated case management teleconference with the parties. At that time, Mother informed the Court that she no longer wished to modify the February 7, 2017 Permanent Consent Custody Order but, instead, would like to enforce the Order as written.³ Notwithstanding this request, Mother did not want to dismiss her Petition to Modify Custody at that time. During the teleconference, the Court granted Father's request to expand the time frame within which Father could call Child while Child is in Mother's care to between 4:00 PM and 9:00 PM Eastern time.

On June 28, 2019, the Court held a final hearing in this matter, participated in by Father and Mother. Testimony was taken from Mother; Father; Child's former life coach, Rose Wooten; Father's wife, A----- C-----; and Mother's husband, T----- A-----. All testimony was in the Court, except for Ms. Wooten who testified by phone.⁴ Although Mother also wished to call Child's maternal grandmother, T---- S-----, and Child's maternal aunt, J----- M-----, as witnesses, there was insufficient time remaining to do so. Additionally, although Father initially also wished to call Child's godmother, A----- R-----, he relented when Mother objected because he did not previously disclose Ms. R----- as a potential witness.

Background Facts

According to Mother's initial Petition for Custody from 2016, the parties resided together in Arizona from Child's birth until their separation in 2011 at which point Mother relocated to Delaware and Father remained in Arizona. Furthermore, according to Mother's initial Petition, Child has resided primarily with Mother in Delaware since 2012. Aside from Child, Mother and Father have no other children in common. However, Mother also has a one-year-old daughter, C---, and Father also has a two-year-old son, C-----.

Mother, 29 years old, currently resides with Child in Middletown, DE in an apartment with her husband, T----- A----- (D.O.B. 01/--/92, hereinafter "Stepfather"), and one-year-old C-----.

³ At the final hearing on June 28th, Mother reported that she said, during the teleconference, that she did not want to modify the February 2017 Order because she did not know if she could both hold Father responsible for his alleged violations of the Order and also modify the Order.

⁴ The Court permitted Ms. Wooten to testify by phone pursuant to an Order issued on June 26, 2019.

They have resided in the apartment since 2012. Mother is not currently employed as she stays home to care for the children. Stepfather is employed as a mechanic for Pepsi.

Father, 29 years old, currently resides in Bagdad, AZ in a home with his wife, A----- C----- (hereinafter “Stepmother”), his seven-year-old stepdaughter C-----, and two-year-old C----. Father is employed as a miner. Stepmother is not currently employed.

Rule to Show Cause

The purpose of a Petition RTSC seeking to hold someone in civil Contempt of Court is to enforce compliance with the court's order. The standard for a Petition RTSC is well-established in this Court. “In order to find someone in civil contempt of the Court's Order the Court must first find by clear and convincing evidence that a violation of its Order has taken place.”⁵ Specifically, the Court must find that 1) a valid mandate, judgment or order exists; 2) the alleged violator had the ability to abide by the valid mandate, judgment or order; and 3) the alleged violator disobeyed the valid mandate, judgment or order.⁶ The failure to obey the Court’s Order must not be a mere technicality but must be done in a “meaningful way.”⁷ Because the purpose of levying a civil contempt fine is to coerce compliance with a Court Order, subsequent compliance with the Order may purge the finding of civil contempt.⁸

First, the Court finds that a valid mandate, judgment and order exists, as the dispute arises out of the language of the Permanent Consent Joint Custody Order from February 7, 2017. Mother alleges that Father has violated numerous provisions of the Order as detailed below.

Second, Father only presented evidence that he was not able to abide by Provision A.1.a., related to Child’s summer visitation periods with Father in Arizona and that she is supposed to be returned to Delaware on August 14th every summer, because of issues Father had finding coverage at work. Specifically, Father said it was primarily an issue in 2017 before Mother started letting Child fly unaccompanied, because he would have to fly with her to and from Delaware and not just transport her to the airport, but even became an impediment in 2018. The Court is unpersuaded that Father was unable to abide by the return date. Rather, his excuse indicates that he was not

⁵ *J.T.D. v. B.N.D.*, No. CN07-04006, 2010 WL 2708610, at *4 (Del. Fam. Ct. May 5, 2010) (citing *Feliciano v. Colon*, 697 F. Supp. 26, 34 (D.P.R. 1987)).

⁶ See *Watson v. Givens*, 758 A.2d 510, 512 (Del. Fam. Ct. 1999).

⁷ *J.T.D. v. B.N.D.*, 2010 WL 2708610 at *4.

⁸ *DiSabatino v. Salicete*, 671 A.2d 1344, 1350 (Del. 1996) (citing *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994)).

adequately prioritizing the flight itinerary by booking the flight well in advance at a time when he would be off work.

Third, there is clear and convincing evidence that Father has disobeyed some of the provisions of the February 2017 Order but not all of the provisions as raised by Mother in her Petition. The Court will address Mother's allegations provision by provision.

Provision A.1. sets out that the "parties are responsible to notify the other party of the time and date of arrival and any flight information as soon as they become aware of such information." Mother and Stepfather both alleged that Father threatened to not return Child to Delaware and withheld flight information from her during the Christmas holiday of 2017 until Father had a chance to tell Mother what the rules would be about Child's use of the phone he had just bought her for Christmas. According to Mother and Stepfather, Father ultimately relented and did provide the itinerary to Mother but not until about 24-hours before Child was scheduled to arrive unaccompanied in Delaware. Father defended his actions by stating that Child wanted Father to talk to Mother before Child got on the plane. He also later admitted that he waited to deliver the itinerary to Mother on this one occasion. The Court finds that, by his own admission, Father disobeyed the Order but then cured his disobedience. Additionally, the Court instructs Father that it was inappropriate for him to try to use the flight itinerary as leverage for trying to get Mother to agree to his rules on Child's cell phone use.

Provision A.1.a. sets out that Child shall travel to Arizona "up to one week after the last day of school" and shall return to Delaware on August 14th, or several days thereafter depending on if snow days during the previous school year pushed back the start of the summer vacation period. Additionally, Provision A.2.j. sets out in relevant part that "[n]either party shall attempt to convince the child not to spend custodial time with the other parent, or to attempt to convince the child to terminate a custodial period with the other parent before said period is completed.." Mother testified that Child was "put in the middle" about whether she should leave school early at the end of the 2018-2019 school year, thereby prematurely terminating her residential period with Mother. In support of that claim, Mother cites to a May 14, 2019 exchange between Father and Mother wherein the parties discussed whether Child should stay through the end of the school year or travel to Arizona for a reunion with Father's family. Thereafter, Father decided to see what Child wanted to do and later informed Mother via text message that he "talked to S---- [... and] she thinks the family reunion is what she wants to do." Mother's Ex. #3. Mother admitted that she

ended up letting Child leave for Arizona three days before the end of the school year in Delaware. Although Father and Mother should have resolved this matter between them, rather than essentially putting the deciding vote on their eleven-year-old, the Court notes that it only amounted to a shortening of Mother's custodial period by three days. Therefore, Child's participation in Father's family reunion was only a nominal deviation from the express language of the Order.

However, a bigger issue than Child leaving for Arizona early has been Child returning to Delaware late in both 2017 and 2018. Specifically, in 2018, Child did not return until August 29th, the day before Child's school's open house. Father admitted that he has not been returning Child on time and the Court already dismissed his excuses for why Child has been returned late. Therefore, the Court will find that Father has disobeyed the Order as to the return date. Although the Court is not inclined to give Mother make-up time for the violations to date, if Father continues to return Child late from her summer visitation periods, the Court will be forced to reconsider the appropriate response to Father's violation of Court Orders.

Provision A.2.b. sets out in relevant part that "[n]either parent shall attempt or condone any attempt whatsoever, directly or indirectly, by artifice or bribery, to estrange the minor child from the other party or injure or impair the mutual love and affection of the minor child for either parent." Mother alleged that Father is trying to alienate Child from her. In support of her allegation, Mother presented a text message she sent to Father on September 26, 2018 that reads in part, "S-- -- said that you told her you're sending her some school clothes because you don't trust me to get her everything she needs." In his response message, Father admitted that he did not trust Mother. Mother's Exhibit #3. However, in the courtroom, Father denied ever telling Child that he did not trust Mother to provide adequate clothing for Child.

Mother also testified, without supporting documentary evidence, that Father has told Child that he opened a savings account for her in Arizona that he will not put any money into until Child makes her primary residence in Arizona because all of that would-be money is going to child support payments. Father did not confirm or deny Mother's testimony on that issue. Finally, Mother testified that Father has offered Child a four-day school week, a new bike and a new pet, among other benefits, if Child changes her primary residency to Arizona. Both Father and Stepmother denied ever bribing Child to change her primary residency to Arizona. However, Father admitted that he told Child she could not have a pet, specifically a ferret, in Arizona because no one would be able to care for it during the school year while Child is in Delaware. The Court

finds that there is not clear and convincing evidence of Father's violation under this Order because there is no documentary evidence of what Father has said directly to Child. However, the Court cautions Father that if he or Stepmother are in fact trying to undermine Mother's primary residency with gifts and promises of money, such conduct would be in flagrant violation of the Order.

Although Stepmother is not a parent as contemplated in the Order of February 2017, Mother also presented text messages between Stepmother and Child wherein Stepmother wrote on October 13, 2018 asking Child what she wanted for Christmas and proposed such items as a "[c]otton candy maker, arts crafts, playground set lol[,] New bike[,] puzzles[,] legos[,] Hover board lol." Mother's Exhibit #6. Although it seems premature to be asking about Christmas wishes so early in the year, even if Stepmother were a party to the provision, the Court would not conclude this was evidence of "bribery" as contemplated in the Order. Stepmother is clearly joking. The Court also would not find it bribery for Stepmother to ask Child if she wanted lights above her bed in her bedroom in Arizona. It is appropriate to consult a child on how she wants to decorate her room.

However, on November 1, 2018, Stepmother sent a message to Child asking her if she wanted to dress up as characters from the movie Wreck-it Ralph "next year" with her "brother". Mother's Exhibit #6. The Court can make no other plausible conclusion than that Stepmother was referring to Halloween in 2019 and Child being in Arizona with her half-brother C----. Although why Stepmother might mention Halloween 2019 when Halloween is unequivocally within Mother's school year visitation period is unclear to the Court, the Court finds that this exchange is a subtle attempt to cause Child to favor primary residential placement with Father. Whether the message comes from Father or Stepmother, the Court believes it is completely inappropriate to talk to an 11-year-old about any residential placement scenario that would require a revision of this Court's Order as if it is going to happen. Communicating in such a way only sets the child up for disappointment if it does not happen and may even cause her to have an impaired view of Mother as the obstacle that stands in the way of changing the residential arrangement.

On September 11, 2018, Stepmother also wrote that she was "filing for co guardianship of S---- [...] can't wait to see you in court." However, she testified that she did not intend that as a threat but rather to try to make things easier because Mother and Father cannot get along. Although the Court is unfamiliar with the legal system in Arizona and acknowledges it may be possible for a stepparent in Arizona to assert some legal rights over a child, the Court disagrees with

Stepmother and finds the language of her September 11th message to be very threatening and in no way helpful toward lessening the current parental discord. Although the Court cannot find Stepmother in violation of the February 2017 Order because she was not a party to that Order, the Court can instruct Father that Court Orders apply to parties or anyone acting on behalf of the parties. Therefore, the Court can attribute Stepmother's conduct to Father and find Father in violation of the above provision.

Provision A.2.d. sets out in relevant part that “[i]n the event the parties are unable to agree, then each parent shall have the discretion to establish rules in his or her own respective residence.” Both parties testified that Father was opposed to Child attending counseling sessions, and even engaging with a life coach. In addition to their testimony, Father clearly noted his opposition to counseling for Child in a text exchange from September 11, 2018. Mother's Ex. # 3. Later, in November 2018, Father softened his language by writing that he was not opposed to counseling if Child was interested in it, and that he believed Mother should be clear with Child about what Mother was enrolling Child in. Mother's Ex. #3. In February 2019, Father indicated to Mother that he felt the same about involving Child in Girls on the Run. The Court cannot find that Father violated this provision by stating his opposition to counseling in general or specifically to Child meeting with Rose Wooten for life coaching sessions. The Court believes that this provision only encompasses rules such as what Child can or cannot do in the home or what activities she can or cannot participate in outside the home, not whether a parent can involve the child in outside services such as counseling or life coaching. Mother was right to consult with Father before engaging Child in such outside services. But Mother was wrong to then engage Child with Ms. Wooten without telling Father.

However, the Court believes that choosing to engage Child in Girls on the Run is within Mother's discretion as contemplated by this Order.⁹ Although Girls on the Run aims to empower young girls, it seems to be more like being on a sports team or the Girl Scouts than counseling. Although Father expresses a reasonable desire that both parents communicate more openly with Child as she gets older, the Court believes that this provision does not permit Father to have definitive decision making authority on whether Mother does or does not enroll Child in Girls on

⁹ According to the organization's website, their mission is to “inspire girls to be joyful, healthy and confident using a fun, experience-based curriculum which creatively integrates running.” <https://www.girlsontherun.org/Who-We-Are/Our-Mission>

the Run. Furthermore, it is not Father's place to "denigrate [to Child] the activities" that Child engages in while at Mother's residence, such as Girls on the Run.¹⁰

There was also considerable testimony and documentary evidence presented about the conflict over Child's use of the phone that Father bought her. On September 4, 2018, Child and Stepmother exchanged text messages wherein Child wrote "my mom didn't let me bring my phone to school" and four hours later, in obvious conflict with that earlier statement, Stepmother wrote back "[t]ry taking your phone to school honey. [...] Its [sic] ok we got permission from your school." Mother's Ex. #6. Two months earlier, Mother informed Stepmother that it was Mother's rule that Child could not take her phone to school. Stepmother responded that she and Father wanted Child to have her phone with her at school and that their rule should govern because they pay for Child's phone plan. Mother's Ex. #6. The Court finds that Father (by association with Stepmother messaging on his behalf) has violated this provision on the issue of the Child's phone use. The provision clearly indicates that where there is a disagreement about a rule the residential parent gets to decide. That is, during the school year, Mother's rules apply to when and where Child can have her phone. Just as if Father bought Child an iPad or new soccer ball, Father could not set the rules for where Child played with the ball in Mother's house or what Child could look at on the iPad while at Mother's house, so too Father cannot set the rules for when and where Child has her phone while in Mother's care.

Provision A.2.i. sets out in relevant part that "[n]either party shall discuss or communicate about the child or legal proceedings between the parties within the presence or hearing of the minor child, if such communication might estrange the minor child from the other party or injure or impair the mutual love and affection of the minor child for either party." Mother alleges that Father talks to Child about matters related to child support and then Child calls Mother from Arizona and asks Mother to send her money. As evidence, on July 22 and 23, 2019, while Child was in Father's care, Mother engaged in text message exchanges with Child and Father separately. Child wrote "Mom can you send me some money because we are going shopping"? After Mother did not grant Child's request, Child wrote "you get 400 hundred per month. You should have money for me." Mother's Ex. #1. After that exchange with Child, Father wrote to Mother that Child "has the right to ask for her money so she could go shopping with us." Mother's Ex. #1. Father testified that the incident arose because Child said she wanted to go shopping in Arizona, despite Father saying she

¹⁰ See Permanent Consent Joint Custody Order Provision A.2.j.

would be going shopping with Mother after she returned to Delaware because Father gave Mother a monthly “allowance” for Child. He also denied telling Child that he sent \$400 per month to Mother, but rather told her that Mother should be able to afford \$300 to \$400 for school shopping. Father further denied that he told Child to ask Mother to send money. The Court finds that, despite Father’s testimony, there is clear documentary evidence of Father’s violation of the Court Order. It is completely inappropriate to tell a then ten-year-old that she should ask her mother for the money that he sends her mother every month, much less to tell such a young child how much money he sends every month.

Furthermore, the Court notes that Mother’s explanation to Father in a text message on July 22, 2018 is correct. The amount that one parent pays another is typically reduced based on the number of overnights the paying parent has with the child per year and the child support is equally spread throughout the year irrespective of when the receiving parent has care and control of the child. That is, Mother is *not* required to use his child support payments during the summer months for Child’s needs while she is in Arizona. Additionally, the child support payments are not to be used by Child as she wishes like she would an “allowance” and Father is incorrect to argue that Child has a “right” to ask Mother to give her the money. If Child knows Mother is receiving money for Child that Child feels entitled to because that is what Father has told her, that may only further impair Child’s view of Mother when Mother, by right, decides to not send any or all of it to Child so that she can spend it as she sees fit.

Provision C sets out in relevant part that “neither party shall deny the other parent reasonable telephone access to the child.” Both parties allege that the other party has, at times, blocked them from having contact with Child through Child’s phone. As discussed above, Father cites to the fact that Mother does not let Child take her phone to school. The Court declines to find that this is an example of Mother blocking Father’s contact with Child, but rather of Mother making a reasonable decision that there are certain times when Child will not be available to speak to Father. Furthermore, Mother presented no definitive evidence that she has been blocked, and Father and Stepmother both denied Mother’s allegations. Father added that Mother, at times, did not have contact with Child because Child’s phone is a pay per use phone and there have been times when the fee was not paid and the phone was disconnected. Although there is insufficient evidence that either party has denied the other reasonable access to Child, the Court believes that, based on the level of acrimony evident in the text messages and testimony of the parties, it would

not be beyond the parties to engage in such conduct. Regardless of who pays the phone bill, this conduct needs to stop. Even if this provision was not explicitly in the Order from 2017, both Mother and Father are entitled by statute to have reasonable access to Child.¹¹

Finally, although Mother did not expressly reference Provision A.2.f. in her Petition or testimony, she did present evidence that triggers this provision that reads that “[t]he parents shall not communicate through the child, or third parties, or use the child because they refuse to communicate.” Mother testified that if the parties disagree about something, then Father goes to ask Child what she wants and then Child talks to Mother about the issue. For example, on May 31st and June 2nd, 2019, Mother and Father exchanged messages about whether Child would be bringing extra luggage to Arizona for her upcoming summer visitation there. Mother first wrote “S---- said A----- told her bring the extra luggage.. [sic] that is something you need to bring up with me and not involve S----.” Mother’s Ex. #3. Father responded that “I don’t have to go through you for everything. And even if I wanted to you don’t communicate with me so I go through her.” Father is incorrect in his belief that he can simply go through Child if he and Mother cannot agree. The Order expressly provides that he has to go through Mother, and the Court expects parties to comply with orders. Therefore, the Court finds that Father has disobeyed this provision. However, the Court remains hopeful that, with the assistance of a co-parent counselor as described below, the parties can learn to work through their disagreements and find some basis for compromise.

As a result, the Court finds Father in contempt of Court for failing to abide by the express provisions of the Order of February 7, 2017. Mother is only asking that Father, going forward, abide by the provisions about flight information, return time at the end of the summer periods and communication between the parties and with Child. Therefore, the Court will not impose additional sanctions or remedies available to the Court under 13 *Del. C.* § 728(b) at this time.¹² Additionally,

¹¹ See 13 *Del. C.* § 727(a) in relevant part; “each parent and child has a right to reasonable access to the other by telephone or mail.”

¹² 13 *Del. C.* § 728(b) reads in relevant part: The Court shall also impose 1 or more of the following remedies or sanctions:

- (1) Extra visitation with the child to enable the child to make up any wrongfully denied visitation with a parent;
- (2) A temporary transfer of custody or primary residence or both of the child to a parent applying for relief under this section for up to 30 days without regard to the factors set forth in § 729 of this title;
- (3) A surcharge to be assessed against the parent with rights of visitation with the child or children for his or her unilateral failure, without just cause and/or without sufficient notice, to comply with the visitation schedule. Failure to comply consists of more than minimal violations, such as, but not limited to, slight

as described below, the Court was impressed by Child's positive relationship with both parents, such that the Court does not believe it is in Child's best interest to reduce Child's time with Father in subsequent summers to make up for her late returns to Delaware during past summers. However, the Court wishes to put Father on notice that it may not be so lenient next time if Father continues to violate the express provisions of governing Court Orders, specifically those that deal with communication between the parties and with Child, and Child's summer return date back to Delaware.

Modification of Custody

Pursuant to 13 *Del. C.* § 729(b), in making a determination on a request to modify the legal custody and residential arrangements for a child set out in a prior order entered by the Court by consent of the parties, the Court must consider all relevant factors including those set forth in 13 *Del. C.* § 722. The Court has held that some factors may be given more weight than others in the Court's analysis.¹³ The factors are as follows:

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

Mother is seeking to modify the prior Order from joint custody to sole custody in favor of Mother. Mother also wishes to reduce the duration of Father's summer visitation period to only the entire month of July but maintain the current length of his shorter holiday visitation periods. In support of her request for sole custody, Mother testified that she believes that Child needs counseling and Father is opposed to counseling. In support of shortening Father's summer visitation, she feels like from the first week after school gets out until the middle of August is "really long" and Child needs more time to adapt back to her schedule in Delaware before she returns to school. Mother further testified that Father works nights and Child sometimes stays up to hang out with him on the nights that Father is staying up to get ready for another night shift.

alterations in the times for visitation. The amount of the surcharge shall be up to 10 percent of the visiting parent's monthly child support obligation for each violation and shall be payable to the parent with whom the child resides or children reside;

(4) A fine in the discretion of the Court; or

(5) A term of imprisonment if a person is found to be in contempt of prior orders of the Court.

¹³ See *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.")

Mother also finds it difficult to get in contact with Child during the summer and therefore does not want such a long period of continuous separation.

Father is seeking to maintain joint legal custody and extend his summer visitation period from the day after Child gets out of school until three days before she returns to school.¹⁴ Father did not provide any explanation in support of his request.

Therefore, the Court finds this factor to be neutral as to legal custody and residential placement, because the parties have taken opposing positions.

(2) The wishes of the child as to her custodian(s) and residential arrangements;

The Court chose not to speak with Child about her wishes, and neither party requested that the Court hear from her. However, Father testified that Child has been asking about making Arizona her primary residence, for the last two years. But, modifying Child's primary residence to Arizona is not currently before the Court. Father did not file a Petition so requesting such that Mother would have been on notice that such an issue was before the Court for consideration. Therefore, the Court finds this factor is inapplicable as even if Child has an interest in changing her primary residence, it would not be necessarily also true that she would want only three days' of transition from Arizona back to Delaware before the resumption of another school year as Father is requesting.

(3) The interaction and interrelationship of the child with 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 person who may significantly affect the child's best interests;

Child's Relationship with Mother and Mother's Household

Mother testified that she has a "normal, healthy" relationship with Child; that they hang out, talk, draw, bake, and garden together, among others, and that Mother tries to take time to listen to Child's feelings. Mother added that when Child is in Arizona, she tries to talk to Child every day. Mother also lovingly described Child as very artistic and very bright, and someone who likes to look silly and make people smile. Mother also praised Child for being helpful with her half-sister C----. Furthermore, Mother testified that Child also has a "normal" relationship with

¹⁴ Initially, Father said he wanted Child to stay with him until the day before school resumed but when asked by the Court with "how would she settle in?," Father responded that having her return three days before school resumed "would be fine."

Stepfather; that they hang out and play video games together.

Stepmother said that Child describes Mother and Stepfather as “great parents” and that Child is happy in their home and loves her mother. Stepfather said he believes he has a “fatherly” relationship with Child.

Child’s Relationship with Father and Father’s Household

Father testified he has a “very close” and “really strong” bond with Child. He said that he feels they have much in common and that they do art, camp, take walks, and hike together. He believes that both he and Child make each other happy. Furthermore, Father said that Child and Stepmother have a “mother – daughter” relationship such as when they talk and go shopping together. He added that Stepmother has made a point to not treat Child any different than Stepmother’s biological children, and that she tries to maintain contact with Child while Child is in Delaware.

As noted above, Mother stated that Child and Father stay up late together hanging out. Stepmother added that Child is happy in their home and loves her father. Stepmother also testified that she loves Child, and that she enjoys talking to Child about life and taking her shopping.

Therefore, based on the presence of only positive testimony under this factor, the Court finds that this factor supports to continuation of the current custodial and residential arrangement.

(4) The child’s adjustment to her home, school and community;

There was very limited testimony related to this factor, perhaps in part because neither party has requested that the Court consider modifying who has primary residency. During the 2018-2019 school year, Child completed fifth grade at Brick Mill Elementary School. There was no testimony about what middle school Child will be attending during the 2019-2020 school year. Mother testified that Child struggles with reading and has an IEP in place that permits her to have small group classes. Although Child began flying unaccompanied during the Christmas 2017 holiday, Mother stated that she is still more comfortable having someone accompany Child during flights because she has suffered from motion sickness at times and she has had to sometimes handle long-term flight delays at airports in transit. However, there was no testimony how Child is currently handling flying to and from Arizona unaccompanied. Therefore, based on the absence of any testimony that Child is not adjusted to the current arrangement, the Court finds that this factor supports to continuation of the current custodial and residential arrangement.

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

Both Mother and Father said that they and Child are all in good physical health. Father testified that he has no mental health treatment history. Neither Stepfather, Stepmother nor any of the other children in the homes have any serious physical or mental health issues. However, Mother testified that she dealt with depression as a teenager at times, and she currently sees a life coach and church counselor on an as needed basis. Her primary care physician also recommended that she start taking a half pill of Zoloft every morning for depression. Mother also testified that she believes that Child is depressed and sad. Mother set Child up with seeing Rose Wooten from October 2017 until December 2017 for life coaching, but then sessions stopped after Father indicated he did not want Child seeing Ms. Wooten anymore. Since that time, Child has not engaged in any formal counseling or life coaching services. Mother testified that Father's opposition to Ms. Wooten in part was because he said counselors put ideas in people's heads that something is wrong with them and that perhaps Mother is the one who needs counseling and not Child. Mother added that Father has told her that if Child ever shows interest in speaking to Ms. Wooten again that Father would support Child's wishes. Mother expressed worry for Child's emotional health and a belief that if Child were provided with coping tools that she would be doing better. However, Stepmother disagreed with Mother's assessment and finds Child to be a happy and outgoing young person.

Ms. Wooten confirmed that she met with Child for "life coach services" for the last several months of 2017, but that Child simply knew her as a "talking friend."¹⁵ Ms. Wooten described Child as an obedient, intuitive and bright young lady. She also testified Child appeared protective of both her parents, reluctant to express her own feelings, and caught between trying to please two people "who are not on the same page." Ms. Wooten sensed that at least when Child was nine years old in 2017, she was terrified of the prospect of flying alone to Arizona for Christmas holiday, but that she was going to do it because that is what Father wanted her to do. Ms. Wooten has had no further sessions with Child since Christmas 2017 after Father expressed his desire that these services be discontinued. However, based on her assessment from 2017, Ms. Wooten believes Child would benefit from receiving counseling.

¹⁵ Ms. Wooten testified that she is a licensed mobile therapist in Pennsylvania for children in crisis but that she is not licensed in Delaware. However, she is working on a doctorate in pastoral care and Christian life coaching. She is also a certified co-parenting educator in Delaware for Court-approved classes.

Therefore, the Court finds that this factor favors a continuation of the current custodial and residential arrangement. Ms. Wooten's testimony was credible and with Mother's support as the primary residential parent, the Court believes that Child can receive the mental health services that she may need going forward. Although Father has historically been opposed to Child engaging in counseling, he has admitted that there can be some benefit to it, if Child is interested in engaging. As a result, the Court does not find there is enough evidence to grant Mother even final decision-making authority on all matters related to Child's physical and emotional health much less her requested sole legal custody.

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

Pursuant to 13 Del. C. § 701, even without a Court Order, parents are responsible for the support, care, nurture, welfare, and education of their children. Father is under an Arizona court order to pay \$440 per month in child support to Mother. He is current on his payments. Based on the testimony of the parties described in detail in the above discussion of Mother's Petition – RTSC, it appears to the Court that part of the issue that plagues the parties' co-parenting efforts may be that Father puts too much weight on Child's wishes and Mother puts too little weight. For example, Father finds it perfectly acceptable to use Child as a conduit for adult conversations whenever he and Mother cannot reach a mutual decision. In contrast, there is scant evidence that Mother even considers Child's wishes in making decisions. Therefore, there is insufficient evidence by which the Court could find in any way other than that this factor favors a continuation of the current custodial and residential arrangement.

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

Pursuant to 13 Del. C. § 706A, "(a)ny evidence of a past or present act of domestic violence, whether or not committed in the presence of the child, is a relevant factor that must be considered by the court in determining the legal custody and residential arrangements in accordance with the best interests of the child." There was no testimony about any domestic violence history for either party. Therefore, this factor is inapplicable in such a case as here where the parties cannot share residential placement.

(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.

The Court has independently reviewed the Delaware criminal histories of the parties and any household member residing with Child. Neither the parties nor their spouses have any criminal records in Delaware. However, Father testified that he has a DUI conviction in Arizona and Stepmother has a drug paraphernalia charge in Arizona from 11 years ago.¹⁶ Although the Court takes alcohol and drug-related convictions very seriously, without more information, the Court declines to weight Father's testimony in favor of further reducing his summer visitation periods. Therefore, this factor supports a continuation of the current custodial and residential arrangement.

In addition to the above express factors listed under 13 *Del. C.* § 722, the Court may consider other relevant factors in determining the legal custody and residential arrangements for Child. As a result, the Court also notes that the parties have an, at times, strained relationship that interferes with their ability to co-parent in the best interest of Child. Mother stated that their communication for decision-making is typically limited to text messages because Father gets loud on the phone and that makes Mother uncomfortable. The text messages cited above, no doubt, only provide a small glimpse into the challenges that plague their communication. Ms. Wooten testified that she believes it would be in Child's best interest if the parties engaged in co-parent counseling. Stepmother agreed. She testified that she notices they are both stressed and that it is putting stress on their families. Evidence of that is the long and accusatory messages that Stepmother sent Mother on September 11 and 12, 2018 wherein Stepmother wrote that she was going to be "filing for co guardianship" of Child in Arizona. Mother's Ex. #4. Stepfather also testified that, because of the parties' poor communication record, Child would benefit from having the parties utilize a neutral third-party go-between.

Conclusion

Based on the evidence presented, the Court finds that all the factors are either neutral (factor 1), inapplicable (factor 2 and 7), or weigh in favor of a continuation of joint custodial and residential placement arrangement. Upon consideration and weighing of the above factors and the evidence presented, the Court finds that there is overwhelming evidence in favor of continuing joint legal custody, primary residence with Mother and extended visitation with Father during the

¹⁶ Father did not testify what year he was convicted of the DUI.

summer months (along with shorter visitation during holiday periods). Although the parties have a strained relationship, both parents clearly love their child, and the Court believes they can overcome their present obstacles through participation in co-parent counseling. Additionally, there is little to no indication that either is incapable of effectively raising Child during their allotted residential periods, or that Child has a negative relationship with any of the parental figures in her life. The crux of this matter is not that either parent is in some way a bad parent. Rather, their serious communication problems and their widely divergent views on how to effectively parent a pre-teen pose potential harm to Child's emotional development and her relationship with the other parent, as it is not possible to hide the difficulty they are having with each other from Child all the time. As a result, the Court will require that the parties to engage in co-parent counseling so that they can learn to listen to each other, talk in a respectful manner, compromise, and come to mutual agreement on what is in Child's best interest. Due to the geographic distance that separates Mother and Father, Father will be permitted to participate in sessions by phone. Hopefully, the parties will find a counselor who can both challenge them in areas they can improve and also encourage them in areas they are already doing well.

ACCORDINGLY, IT IS HEREBY ORDERED AS FOLLOWS:

1. Mother's Petition requesting the Court find Father in Contempt of various provisions of the Permanent Consent Joint Custody Order of February 7, 2017 is hereby **GRANTED in part**.
2. Mother, A----- A-----, and Father, R----- C-----, shall continue to have joint legal custody of the minor child, S---- C----- born April --, 2008. As a result, Mother and Father are to confer together on all major decisions in the child's life such as her physical and mental health care. Additionally, the parties shall not discuss with Child at any time, either directly or indirectly (such as by reference to "allowance"), Father's child support obligation to Mother.
3. **Residential arrangement:** Mother shall have primary residence of S----. Father shall have contact with Child as follows:
 - a. **Summer:** From up to three days after the last day of school until no later than fourteen days before the beginning of the next school year.
 - b. **Other:** Every other Thanksgiving, Christmas/New Year's, Easter and Spring Break as described in the Permanent Consent Joint Custody Order of February 7, 2017.

- c. **Flights:** At the start of each of Father's contact periods in Arizona, Mother shall pay for all costs of Child's flight to Arizona. At the conclusion of each of Father's contact periods in Arizona, Father shall pay for all costs of Child's flight back to Delaware. If one but not the other parent desires to have Child fly accompanied, that parent who desires an accompanying passenger shall pay all costs of that additional passenger's flight whether it be at the start or conclusion of Father's contact periods. If both parents agree that Child should fly accompanied, then the parents will share the costs of the accompanying passenger as they do Child's fares.

The parties shall continue to send Child's flight itinerary as soon as they become aware of such information and well in advance of Child's departure time. They shall also immediately notify the other parent if the flight is experiencing any delays.

4. Due to the extreme distance that separates the parties, the parties shall exercise whatever holidays fall within their residential periods described above.
5. Mother and Father may have phone or video contact with Child up to once daily for a length as reasonably set by the parties between the hours of 4:00 PM and 9:00 PM based on the time zone where Child is residing. Aside from permitting such phone/video contact with Child and the non-residential parent, the residential parent may set whatever other rules pertaining to Child's use of her cell phone.
6. The parties may modify Child's residential visitation schedule by mutual agreement in writing.
7. Mother and Father shall engage in co-parent counseling with a licensed counselor. If the parties cannot reach an agreement on a counselor within 30 days, Mother shall provide Father with a list of three counselors within 10 days thereafter. Within 10 days of his receipt of Mother's list, Father shall select a counselor from that list. If Mother fails to timely provide Father with any names, then Father may select the licensed counselor of his choosing. If Father fails to timely select a counselor from Mother's list, then Mother may select the licensed counselor of her choosing. The cost of the co-parent counseling sessions not covered by insurance shall be shared by the parties. Father may be permitted to participate in sessions by phone or video contact.
8. Where not otherwise amended herein, the provisions of the Permanent Consent Joint Custody Order of February 7, 2017, a copy of which is attached, shall remain in effect.

The Court reminds the parties that each parent is entitled by statute to have reasonable access to his or her child by telephone, mail, and other means of communication and to receive all material information concerning the child.¹⁷ Each party shall foster a feeling of affection and

¹⁷ See 13 Del. C. § 727(a):

Whether the parents have joint legal custody or 1 parent has sole legal custody of a child, each parent has the right to receive, on request, from the other parent, whenever practicable in advance, all material

respect between the child and the other parent. Moreover, neither party shall do anything that may estrange the child from the other party, injure his or her opinion of the other party, or hamper the free and natural development of his or her love and respect for each party.

IT IS SO ORDERED.

/s/ **Robert Burton Coonin, Judge**

RBC/plr
Cc: File, parties
Mail Date:

information concerning the child's progress in school, medical treatment, significant developments in the child's life, and school activities and conferences, special religious events and other activities in which parents may wish to participate and each parent and child has a right to reasonable access to the other by telephone or mail. The Court shall not restrict the rights of a child or a parent under this subsection unless it finds, after a hearing, that the exercise of such rights would endanger a child's physical health or significantly impair his or her emotional development.