

# P E N N S Y L V A N I A LAW WEEKLY

## Splitting Siblings

*When does the child's preference tip the scales in determining custody?*

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Special to the Law Weekly

In a custody matter, when is the child's preference controlling? Can a court make a custody decision that will split siblings? According to the Superior Court, writing in *Saintz v. Rinker*, PICS Case No. 06-0765 (Pa. Super. June 1, 2006) Del Sole, J. (8 pages), the answer to both questions is "it depends."

The decision by a court to give significant weight to the preference of a child is extremely fact sensitive. Additionally, the age of the child is very important. If both parents' homes are equally suitable, the child's preference will tip the scales in favor of one side or the other. As to whether siblings can be split, there is a clear preference by courts not to split siblings; however, if the best interest of the child is served in the totality of all considerations by splitting siblings, a court may do so.

In *Saintz*, Kerry R. Saintz and Jennifer Rinker were married in 1992. Rinker gave birth to J.S. that year. She had two children from a prior relationship, B.N. and S.N., who were in Rinker's custody at the time of J.S.'s birth. Saintz and Rinker separated in 1993, attempted reconciliation, and divorced in 1995. For a period of four years, the parties were able to agree on the custody of J.S. In 1999, a custody order was entered where the parties shared legal custody of J.S. and Rinker was awarded primary physical custody, subject to Saintz's partial custody. In 1998, Rinker married J.R. and two children C.R. and A.R. were born from that union. At the time of hearing, Rinker's two children, B.N. and S.N., from her relationship prior to her marriage to Saintz were adults.

In 2004, Saintz filed a petition to modify custody and a motion to compel mental examinations of himself, Rinker and J.S. Saintz's petition was granted and psychological evaluations of Rinker, Saintz and J.S. were performed by Lynn Kagarise, a licensed psychologist whose reports were made part of the record at the custody hearing in February of 2005, where the parties, Kagarise and J.S.'s counselor, Mary Frontino testified. The trial court also conducted an in camera one-on-one interview with J.S. After trial, the court made an order continuing the shared legal custody of J.S. but transferred primary custody to Saintz, subject to the partial custody of Rinker. At the time of trial, J.S. was 12 years of age and Rinker was separated from J.R.

Regarding a child's express preference, the state Supreme Court held in *McMillan v. McMillan*, 602 A.2d 845 (Pa. 1992) that if both households were equally suitable, the child's stated preference is a factor which must be carefully considered in custody decisions, keeping in mind the child's maturity and intelligence as well as the reasons that the child offers for the preference.

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Even though the child was 12, the preference of much younger children has also been taken into evidence and given weight, in cases such as *In re Custody of Pearce*, 456 A.2d. 597 (Pa. Super. 1983) and *Gonzalez v. Gonzalez*, 486 A.2d. 449 (Pa. Super. 1984). While a child's expressed desire to remain with a particular parent is an important factor to consider in reaching a custody determination, the Superior Court has said in *Johns v. Cioci*, 865 A.2d. 931 (Pa. Super. 2004) that it is not the only controlling factor.

## **Emotional Retribution**

In *Saintz*, the psychologist and the child's counselor both testified that during their discussions with the child, she consistently indicated a desire to live with her father but was afraid to communicate that wish to her mother. The counselor further testified that when the mother was confronted with the child's desire to live with Saintz, Rinker abruptly dismissed the child's feelings and refused to discuss the matter further.

According to the opinion in the case, the psychologist also testified that when he performed a psychological examination of J.S. with the mother not present, J.S. spontaneously offered that she had wanted to live with her father for the previous two or three years but could not express this desire to her mother for fear of hurting her mother's feelings and for fear of emotional retribution. It is significant that during the in camera interview, J.S. stated that she wanted to live with Rinker but, later in that interview, she explained that after she informed her mother that she wanted to live with her father, Rinker said "You can live with your dad but I don't ever want to see you again."

The trial court determined that the spontaneous statements of J.S. to the psychologist and to her counselor that she wished to live with her father and had wished so for a number of years were far more credible than her statement that she wished to live with Rinker during the in camera interview because the child was aware that her mother would have access to her in camera testimony.

The Superior Court in *Johns v. Cioci* also addressed the issue of a child's preference, writing in its holding that "the trial court's factual conclusion that the parental households are not equally suitable was unreasonable and thus an abuse of discretion. Finally, we hold that the trial court did not give adequate consideration to the child's express preference to live with her Mother."

The *Johns* court found that the question of suitability of the household was particularly important because when the households are equally suitable, the preference of the child can tip the scales in favor of one or the other, citing *McMillan*.

The *Johns* court stated: "Even when the trial court gives little weight to a child's preference, that preference may still be determinative if the households are equally suitable."

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The *Johns* court reversed the trial court finding that the child's preference was clearly stated and that the child gave intelligent reasons. The court stated: "The child in the present case is an intelligent and articulate 12-year-old girl, who is academically gifted and excels in school. In essentially dismissing her testimony because of her youth or because it was deemed as not based on good or consistent reason, the trial court acted unreasonably and abused its discretion."

It is a fairly good rule of thumb that the older the child, the more weight a trial court will give to the child's preference. The preference of a 12 year old will usually be given more credence than that of a five year old. Of course, each case is determined on its facts. Both *Saintz* and *Johns* give evidence that the preference of a pre-teen is given significant weight.

## **Family Unity**

Regarding the separation of siblings, the policy in Pennsylvania is to permit siblings to be raised together, whenever possible. This is the doctrine of "family unity" or the "whole family doctrine," and it has been cited in *Wiskoski v. Wiskoski*, 629 A.2d. 996 (Pa. Super. 1993).

Absent compelling reasons to separate siblings, they should be reared in the same household to permit the "continuity and stability necessary for a young child's development," as the appeals court in *Pilon v. Pilon*, 492 A.2d. 59 (Pa. Super. 1985) said.

This policy does not distinguish between siblings who share biological parents and half-siblings, as the state Supreme Court ruled in *In re Davis*, 465 A.2d. 614 (Pa. 1983). However, the Superior Court, in *E.A.L. v. L.J.W.*, 662 A.2d. 1109 (Pa. Super. 1995) and *Cardomone v. Elshoff*, 659 A.2d. 575 (Pa. Super. 1995), has stated that the policy against separation of siblings is only one factor and not a controlling factor in the ultimate custody decision.

In most custody matters, the "whole family doctrine" has been invoked when the children have been reared together prior to separation or divorce of the parents, as in *Hockenberry v. Thompson*, 631 A.2d. 204 (Pa. Super. 1993) and *Ferdinand v. Ferdinand*, 763 A.2d. 820 (Pa. Super. 2000). Where the siblings have not been reared in the same household, the force of the doctrine is less compelling, as evidenced by the appeals court's treatment of *E.A.L.* and *M.D. v. B.D.* 485 A.2d 813 (Pa. Super. 1984).

In *Saintz*, the trial court found that it served J.S.'s best interest to be separated from her younger siblings. The testimony at trial indicated that at Rinker's home, J.S. almost served as a substitute mother for the younger children, feeling very responsible for their physical and emotional welfare. Therefore, in this particular case, it did not serve the best interest of the child to keep siblings together at the expense of J.S. The Superior Court noted that the trial court did structure the partial custody with Rinker to be on the same weekends when Rinker had custody of the younger children, C.R. and A.R.

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When does the preference of a child tip the scales in determining custody? A review of the case law indicates that when the child is a pre-teen or teenager, the weight that a court affords to the child's preference is significant. That preference can often tip the scales when the court finds both households are equally suitable. As a rule, the older the child and more mature the child, the more weight will be afforded to the preference.

As to the splitting of siblings, although the general rule has been to keep families together, the court in both *Johns* and *Saintz* decided that the best interests of the child superseded keeping siblings together. It is therefore fair to say that the older the child, the more weight the court will afford the child's preference and that in equally suitable households, the preference can tip the scales. In matters where a court is called upon to split siblings, the case will be very fact-sensitive and ultimately what is best for the child will trump the general rule to avoid splitting siblings. •

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