J-A35022-12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

K.K.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
W.K.,	:	
Appellee	:	
	:	No. 1027 WDA 2012

Appeal from the Order entered June 1, 2012,
in the Court of Common Pleas of Washington County,
Civil Division, at Docket Number 2011-622

BEFORE: PANELLA, ALLEN, and STRASSBURGER,* JJ.

MEMORANDUM BY ALLEN, J.: Filed: January 14, 2013

K.K. ("Mother") appeals *pro se* from the order entered on June 1, 2012, and modified by the order entered June 8, 2012. The order granted W.K. ("Father") primary physical custody, and granted Mother partial physical custody of T.K. (born in September of 1999), Ke.K. (born in March of 2004), and A.K. (born in July of 2007) (collectively "the Children"), in accordance with a schedule of supervised visits. We affirm.

The trial court provided the following factual and procedural history.[1] Mother and Father are the parents of three minor children. A divorce

[1] There is no transcript in this case. At oral argument, Mother explained that she did not pay the transcription fee, resulting in its unavailability. This Court has long held that it is the appellant's obligation to

*Retired Senior Judge assigned to Superior Court.

complaint has been filed separate from the instant action, but a decree has not yet been entered. In January of 2010, Mother filed for a protection from abuse order. A consent custody order was issued as a result, granting Mother primary physical custody of the Children, and granting Father partial physical custody. On January 31, 2011, Father filed a custody complaint. On April 29, 2011, a child custody conference was held before a conference officer. The conference officer recommended that Father have primary physical custody of the Children, and that Mother have supervised visitation. On June 27, 2011, the trial court issued an order, based upon the conference officer's recommendation. On July 13, 2011, Mother filed a request for a trial *de novo*, which the court granted. Trial Court Opinion, 7/24/12, at 1-2 (unpaginated).

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ensure an adequate record on appeal. ***See***, ***e.g.***, ***In re R.N.F.***, 52 A.3d 361, 363 (Pa. Super. 2012). It is well-settled that an appellate court cannot consider anything that is not a part of the record in the case. ***Smith v. Smith***, 637 A.2d 622, 623 (1993), ***appeal denied***, 539 Pa. 680, 652 A.2d 1325 (1994). The burden to produce a complete record for appellate review rests solely with the appellant. ***Commonwealth v. Chopak***, 532 Pa. 227, 236 n.5, 615 A.2d 696, 701 n.5 (1992). A failure by an appellant to ensure that the original record certified for appeal contains sufficient information to conduct a proper review constitutes a waiver of the issues sought to be examined. ***Smith***, ***supra***. If the appellant fails to take the action required … for the preparation of the transcript, the appellate court ***may*** take such action as it deems appropriate, which ***may*** include dismissal of the appeal. Pa.R.A.P. 1911(d) (emphasis added). In this case, we decline to dismiss Mother's appeal, and will decide her appeal on the record before us.

On February 29, 2012 and May 24, 2012, the trial court held hearings on the issue of custody. On June 1, 2012, the trial court entered its opinion and order, directing that Father have primary physical custody of the Children, and that Mother have partial physical custody, in accordance with a schedule. Additionally, Mother's custody is to be supervised by the maternal grandmother or another person agreed upon by Mother and Father. The trial court also directed that the Children have no contact with F.H., Mother's paramour. ***Id.*** at 2-3. The trial court noted that, in 2006, F.H. was charged, in the state of Florida, with lewd and lascivious battery for having sexual relations with a fourteen-year-old. F.H. pled guilty, and as a result, must register as a sex offender under Megan's Law. ***Id***. at 3.

On June 29, 2012, Mother filed her notice of appeal. Mother failed to simultaneously file her concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b). On July 2, 2012, the trial court directed Mother to file a concise statement of errors complained of on appeal within twenty-one days. ***See In re K.T.E.L.***, 983 A.2d 745, 747 (Pa. Super. 2009) ("[T]here is no *per se* rule requiring quashal or dismissal of a defective notice of appeal . . . ."). The trial court received Mother's concise statement, and filed its Pa.R.A.P. 1925(a) opinion on July 24, 2012, addressing each of Mother's issues.

Mother presents the following issues on appeal:

> 1. Whether the opinion and order of the court should be reversed as a matter of law because the lower court erroneously failed to

consider relevant evidence regarding W.K.'s abusive behavior which lead to a Protection From Abuse order being placed against W.K.?

2. Whether the opinion and order of the court should be reversed as a matter of law because the lower court erroneously failed to consider relevant evidence regarding K.K.'s paramour?

A. Did the lower court err by refusing to accept expert evidence about K.K.'s paramour?

B. Did the lower court err by refusing to accept additional evidence about K.K.'s paramour; evidence in the form of a state agency's decision on safety[?]

3. Whether the opinion and order of the court shall be reversed as a matter of law because the lower court erroneously failed to consider relevant evidence regarding the best interest of the minor children?

A. Did the lower court err in having the authority to appoint a Guardian ad Litem on their own recognizance due to the severity of the conflicts between W.K. and K.K.?

4. Whether the opinion and order of the court shall be reversed as a matter of law because the lower court erroneously failed to administer relevant information prior to the questioning of the minor children?

Mother's Brief at 3-4.

In custody cases, our standard of review is as follows:

> In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the

> conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

C.R.F., III v. S.E.F., 45 A.3d 441, 443 (Pa. Super. 2012) (citation omitted).

Pursuant to the Custody Act, 23 Pa.C.S.A. §§ 5321-5340, the paramount concern in ordering any form of custody, is the best interests of the child. In applying the Custody Act, the trial court determines a child's best interests through consideration of the following sixteen factors:

> **§ 5328. Factors to consider when awarding custody**
>
> **(a) Factors.**—In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:
>
> (1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.
>
> (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.
>
> (3) The parental duties performed by each party on behalf of the child.
>
> (4) The need for stability and continuity in the child's education, family life and community life.
>
> (5) The availability of extended family.
>
> (6) The child's sibling relationships.
>
> (7) The well-reasoned preference of the child, based on the child's maturity and judgment.

> (8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.
>
> (9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.
>
> (10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.
>
> (11) The proximity of the residences of the parties.
>
> (12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.
>
> (13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.
>
> (14) The history of drug or alcohol abuse of a party or member of a party's household.
>
> (15) The mental and physical condition of a party or member of a party's household.
>
> (16) Any other relevant factor.

23 Pa.C.S.A. § 5328.

In Mother's first issue on appeal, she argues that the trial court failed to consider evidence of past abuse by Father. Mother discusses two incidents, both of which implicate § 5328(a)(3) of the Custody Act, concerning "the present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child

or an abused party and which party can better provide adequate physical safeguards and supervision of the child."[2] First, Mother highlights a protection from abuse order the she obtained against Father in January of 2010. Second, Mother notes that Father was, at one point, charged with sexual contact with a minor. Mother admits that those charges were dismissed, but argues, "With this uncertainty, it raises the question of whether [Father] is guilty of the molestation of the minor child." Mother's Brief at 15. Mother's argument, in sum, is that the record weighs against Father on the issue of past abuse, and that, as a result, the trial court erred in concluding otherwise. ***See*** Mother's Brief at 12.

The trial court's opinion and order, as well as its opinion filed pursuant to this appeal, address both of the incidents that Mother seeks to re-raise on appeal. Regarding the PFA issue, the trial court specifically discussed and weighed the PFA in its analysis. Opinion and Order, 6/4/12, at 2. Regarding the incident involving Father's criminal charge, the trial court again specifically discussed the issue, and explained that it heard testimony from Father, Mother, and the alleged victim's mother, and received the criminal complaint as evidence. The trial court noted that Father testified that he did not commit the alleged sexual assault, which the trial court found credible. Finally, the trial court noted that the charges were dismissed. Trial Court

[2] Mother cites repealed 23 Pa.C.S.A. § 5303(a)(3) in her brief. We proceed with our analysis of her issue under the analogous section of the current law, 23 Pa.C.S.A. § 5328(a)(2).

Opinion, 7/24/12, at 6. "Therefore, the charges did not affect this [c]ourt's determination about which parent should have custody of the [C]hildren." ***Id.***

In weighing this factor of section 5328(a), the trial court also considered Mother's domestic situation. The trial court noted that Mother's paramour, F.H., "is a convicted sex offender and on Megan's List (having sexual relations with a fourteen-year[-]old child when he was twenty-one)." Opinion and Order, 6/1/12, at 2. The trial court further noted that Mother resides with F.H., in his home, and found that she had resided there since summer of 2011. ***Id.***; Trial Court Opinion, 7/24/12, at 3.

Our review reveals that the trial court weighed each of Mother's proffered issues of past abuse. Additionally, the trial court considered the continued risk of harm to the Children presented by Mother's decision to reside with F.H. The trial court found that, taken together, the evidence weighed against Mother. The trial court's conclusions are reasonable in light of the uncontested facts before it, and as such, we discern no abuse of discretion on this issue. ***See C.R.F., III.***, 45 A.3d at 443.

In her second issue on appeal, Mother argues that the trial court did not consider all evidence presented pursuant to 23 Pa.C.S.A. § 5329 (consideration of a criminal conviction) and § 5330 (consideration of a criminal charge). Mother's Brief at 16. Mother proceeds to detail F.H.'s criminal conviction, and his subsequent Megan's List registration

requirement. She argues, "The purpose of Megan's List is for notification to the public of individuals that have been convicted of certain crimes. Therefore, there is no legal basis for any restrictions being set forth against [F.H.] when it comes to contact with minor children, outside the provisions set forth as a condition of probation." Mother's Brief at 20. Mother additionally notes that F.H. "did not commit any crime towards the minor [C]hildren in question and that there was no evidence presented showing [F.H.] to pose a credible threat to minor children." ***Id.*** at 23.

Section 5329 requires a trial court to consider the criminal convictions of a party or a member of a party's household, in certain circumstances. 23 Pa.C.S.A. § 5329. Section 5330 requires a trial court to consider whether certain types of criminal charges implicate a risk of harm to the subject children, in evaluating whether to grant a request for temporary custody or a temporary modification of an existing custody order. 23 Pa.C.S.A. § 5330.

As noted above, F.H.'s criminal conviction was a principal concern in the trial court's order. The trial court's consideration of F.H.'s criminal conviction, as well as the criminal charges brought against Father and dismissed, are addressed fully and completely by the trial court, as explained in our discussion of Mother's first issue. Our review reveals that the trial court properly considered F.H.'s criminal conviction pursuant to section 5329. On this issue, we find no relief is due.

In Mother's third issue on appeal, she initially argues that the trial court erred in appointing a guardian *ad litem* for the Children. Within her brief on appeal, however, Mother argues that the trial court erred in **failing** to appoint a guardian *ad litem* for the Children. Mother argues that the instant litigation evinces such bitterness that the Children's interest could be "thrown aside," and that the trial court must appoint a guardian *ad litem* in such a situation. Mother's Brief at 24 (citing ***Lewis v. Lewis***, 414 A.2d 375, 379 (Pa. Super. 1979)).[3]

Section 5334, concerning the appointment of guardians *ad litem* in custody matters, provides, in pertinent part:

> **(a) Appointment.—**The court may on its own motion or the motion of a party appoint a guardian ad litem to represent the child in the action.

23 Pa.C.S.A. § 5334(a).

Mother cites ***Lewis*** to support her contention that the trial court's failure to appoint a guardian *ad litem* in the instant case was error. In ***Lewis***, however, we held:

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[3] The trial court, addressing Mother's misphrased concise statement of errors complained of on appeal, discussed Mother's proffered issue. In her concise statement of errors complained of on appeal, Mother asserted: "The trial court erred in appointing a Guardian ad Litem for the best interests of the children pursuant to Pa. C.S. 5334 [sic]." Mother's Concise Statement of Errors Complained of on Appeal, dated 6/29/12, at 1 (unpaginated). The trial court clarified that, "After a close review of the record, this [c]ourt did not appoint a Guardian for any of the three children. Further, there is no pleading requesting an appointment. Therefore, this [c]ourt is uncertain of [M]other's complaint." Trial Court Opinion, 7/24/12, at 6.

> [W]e agree that in some custody disputes the children do need someone to advance and protect their interests. We think, however, that the trial courts are sufficiently astute to appreciate the situation when it arises and act accordingly. Thus, we will refrain from a ruling which mandates counsel for children in all custody cases.

Lewis, 414 A.2d at 379.

Thus, while a trial court may appoint a guardian *ad litem*, such an appointment remains within the sound discretion of the trial court. ***See id.*** In the instant case, Mother did not file a motion requesting the trial court to appoint a guardian *ad litem*, and the trial court did not, upon its own motion, appoint a guardian *ad litem*. Neither statute nor case law makes such an appointment mandatory. ***See*** 23 Pa.C.S.A. § 5334(a); ***Lewis***, 414 A.2d at 379. As such, Mother's third issue is without merit.

In Mother's fourth and final issue on appeal, she argues, "the trial court erred in waiting on the testimony of all parties involved before questioning the minor children." Mother's Brief at 25. Mother, as in her previous issue, proceeds to argue an inverse proposition in her brief on appeal. Mother argues, instead, that it "serves the [C]hildren's best interest for all testimony to be heard prior to asking the minor [C]hildren any questions." ***Id.***

The trial court explained, "This [c]ourt is unaware of any statutory law requiring, directing, or suggesting the [c]ourt interview the [C]hildren at a certain time during the trial." Trial Court Opinion, 7/24/12, at 6. This Court, too, is unaware of any such requirement that binds a trial court in timing of

a child's testimony. Moreover, Mother fails to provide citation to any such authority. ***See Chapman-Rolle v. Rolle***, 893 A.2d 770, 774 (Pa. Super. 2006) ("It is well settled that a failure to argue and to cite any authority supporting any argument constitutes a waiver of issues on appeal."). We find no merit in Mother's final issue on appeal.

Accordingly, for the reasons stated above, we affirm the trial court's order granting Father primary physical custody, and granting Mother partial physical custody, in accordance with a schedule of supervised visits.

Order affirmed.