NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

M.M.,	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	
v.	
S.S.,	
Appellant	
v.	
S.A.S.,	
Appellee	No. 1064 WDA 2013

Appeal from the Order dated May 10, 2013,
in the Court of Common Pleas of Westmoreland County,
Civil Division, at No(s): 2053 of 2009 D

BEFORE: FORD ELLIOTT, P.J.E., OTT, and WECHT, JJ.

MEMORANDUM BY OTT, J.: FILED: December 24, 2013

S.S. ("Mother") appeals *pro se* from the final custody order in the Court of Common Pleas of Westmoreland County that granted M.M. ("Father") partial physical custody of the male children, M.S., born in August of 1996, and E.M.,[1] born in August of 1999. We affirm.

In a prior appeal by Father, this Court set forth the relevant facts and procedural history, as follows:

> . . . Mother and Father are the biological parents of M.S. and E.M. Mother resides in Pennsylvania and Father resides in

[1] In the certified record before this Court, E.M. is also identified as E.S. For purposes of this disposition, we refer to him as E.M.

> Idaho. On July 15, 2011, Father filed a motion to modify the existing custody order, which permitted M.S. and E.M. to visit with Father in Idaho during the summer. In said motion, Father sought to relocate M.S. and E.M. to Idaho and to obtain sole physical and legal custody of both children. Subsequently, on September 7, 2011, [S.A.S., maternal grandmother, ("Grandmother")] filed a petition to intervene in the custody proceedings. A hearing on Grandmother's petition to intervene and Father's motion to modify custody was held on November 14 and 17, 2011. On November 23, 2011, the trial court granted Grandmother's petition to intervene and entered an interim custody order awarding Grandmother temporary physical and legal custody of M.S. and E.M. pending trial in February of 2012.
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> The trial was subsequently continued to August 2012, and, in June 2012, Grandmother permitted M.S. and E.M. to visit Father in Idaho. On June 18, 2012, Grandmother filed an emergency petition for special relief to temporarily suspend Father's visitation to Idaho and reported that Father was drinking heavily and smoking marijuana in the presence of M.S. and E.M. Thereafter, on July 26, 2012, the trial court entered an interim custody order granting Grandmother's emergency relief petition and suspending the remainder of Father's summer visitation pending trial. . . .

M.M. v. S.S. v. S.A.S., 69 A.2d 1286 (Pa. Super. 2012) (unpublished memorandum) (footnote omitted) (quashing Father's appeal as interlocutory).

Pursuant to Mother's request, the custody trial was continued from August of 2012 to November of 2012. ***See*** Order, 8/13/12. In the interim, the record reveals that the parties appeared before the trial court on multiple motions, petitions for contempt, emergency petitions, and petitions for special relief, all of which resulted in additional interim orders.[2] By order

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[2] The order, dated September 18, 2012, indicated that E.M. had been placed in shelter care with the Westmoreland County Children's Bureau, and that

dated August 23, 2012, the court cancelled the trial scheduled for November of 2012, and subsequently scheduled a review of the custody matter for November 15, 2012, to immediately follow E.M.'s dependency hearing. ***See*** Order, 10/9/12. By order dated December 6, 2012, the court indicated that the custody trial was postponed pending the completion of custody evaluations.

Thereafter, by interim order dated December 11, 2012, and upon agreement of Mother and Grandmother, the court granted Mother physical and legal custody of E.M., and Grandmother physical and legal custody of M.S., *inter alia*.[3] The court then scheduled the custody trial on Father's motion to modify custody for January 31, 2013. Upon consent of the parties to a continuance request by Mother, the court rescheduled the trial for May 9, 2013.

At the trial on May 9, 2013, Father represented himself *pro se*. Mother and Grandmother were represented by separate counsel. M.S. and E.M. were represented by separate Guardians *ad litem* ("GAL"). The trial court interviewed the children *in camera*, in the presence of the GAL.

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his dependency hearing was pending. The order directed "[t]here shall be no contact by any of the parties or any family members until further Order of Court," *inter alia*. Order, 9/18/12. The record does not reveal whether E.M. was adjudicated dependent. Based on Mother's and Grandmother's custody agreement in December of 2012, discussed *infra*, we presume E.M. was not adjudicated dependent.

[3] The interim order reflects a custody agreement between Mother and Grandmother with respect to Grandmother's custody action. Father was not a party to this custody agreement.

E.M., who was then fourteen years old, stated upon questioning by the trial court that, with respect to school, "I have three A's. I think the rest are B's." N.T., 5/9/13, at 23. He stated that he was involved in extracurricular activities, including gymnastics and lacrosse. *Id.* at 22-23, 28. E.M. agreed with the court that "[t]hings [are] going okay [living] with [Mother]." *Id.* at 30. He stated that he sees M.S. and Grandmother at least once per week. *Id.* at 31-32, 38-39. On questioning by the GAL for M.S., E.M. agreed that Mother and Grandmother "are getting along fine." *Id.* at 44. With respect to a custody arrangement with Father, E.M. stated he would prefer to visit Father in Pennsylvania rather than Idaho because "all my sports [are] here[,] and all my friends are here." *Id.* at 34. E.M. stated, "I don't want to be forced to go [to Idaho]. . . . I might want to go to Idaho to see my dad, then that's when I want to see him." *Id.* at 37. E.M. stated that, if forced to visit Father in Idaho, he would want the visit to last no more than one week to ten days. *Id.* at 43.

M.S., who was then seventeen years old, and in eleventh grade, indicated to the court that, like E.M., he was doing well academically. *Id.* at 51. With respect to extracurricular activities, M.S. stated he is involved with track. *Id.* at 53-54. M.S. stated that Mother and E.M. visit him and Grandmother at Grandmother's house regularly, and he agreed with the court that Mother and Grandmother "are doing okay now [in their relationship]." *Id.* at 55. M.S. also agreed that he is "doing okay now with

[Mother] after all that was said and done." *Id.* at 57. M.S. told the court that, because of his summer job, it will be difficult for him to visit Father in Idaho during the summer. *Id.* at 58-59.

At the conclusion of the children's interviews, the trial court permitted Father and the children to speak privately regarding a partial physical custody arrangement. Thereafter, Mother's counsel stated on the record in open court that Mother requests legal custody of M.S., which, in effect, would modify the December 11, 2012 interim order. *Id.* at 67. Grandmother's counsel and the GAL for M.S. objected to Mother's request. *Id.* at 70-71.

The trial court subsequently directed Father to state on the record the custody arrangement arrived at by him and the children following their discussion. Father stated that he and the children "would like to be free to make plans amongst ourselves. We agree that, . . ., any order could be very loose without setting specific times or specific dates. [In] general as . . . a visit to Idaho in the summer and once or twice during the school year and let me and the boys work that out." *Id.* at 72. Upon questioning by the court regarding whether Mother agrees to a custody order as described by Father, Mother's counsel replied as follows:

> . . . [O]ur position would be as long as we're not definitively ordering specific times that they have to be in Idaho. As long as the order [is] open ended and leaves it up to the boys to work it out with the dad, then we don't have any problem with that order.

Id. at 78-79.

By final custody order dated May 10, 2013, the trial court directed that the order of December 11, 2012 shall remain in full force and effect with the following modifications: Father shall have partial physical custody of both children as he and the children agree, *inter alia*. With respect to E.M., the order specified that Father shall have partial physical custody of E.M. for one week during the summer and at least two times during the school year, the times of which are to be agreed upon by E.M. and Father. Mother timely filed, *pro se*, a notice of appeal and concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

On appeal, Mother raises two issues for our review:

> 1. Whether the Court of Common Pleas lost jurisdiction as a result of failing to comply with the time limits set forth in Pennsylvania Rule of Civil Procedure 1915.4?
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> 2. Whether the [trial c]ourt lacked venue over the proceeding where, at the time of the initiation of the petitions, neither child, mother, nor father resided in Westmoreland County,[] the case did not originate in Westmoreland County but was transferred in for convenience purposes no longer applicable at the time of the new petition, and where a timely objection was made via written motion and hearing?

Mother's brief at 2.[4]

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[4] In its opinion pursuant to Pa.R.A.P. 1925(a), the trial court states that appellate review of the subject order is precluded because the order was issued "with the consent of all parties, including Mother[]." Trial Court Opinion, 7/26/13, at 1. The subject order directed that the December 11, 2012 order shall remain in full force and effect, with modifications that involved Father's partial custody of the children. Because Father was not a party to the December 11, 2012 order, we disagree with the court that the

Mother's issues involve pure questions of law. Therefore, our standard of review is *de novo* and our scope of review is plenary. ***See Harrell v. Pecynski***, 11 A.3d 1000, 1003 (Pa. Super. 2011) (citation omitted).

In her first issue, Mother argues that, pursuant to ***Dietrich v. Dietrich***, 923 A.2d 461 (Pa. Super. 2007), the subject order should be vacated because the trial court failed to comply with the time constraints set forth in Pa.R.C.P. 1915.4, which provides as follows, in relevant part:

> **Rule 1915.4. Prompt Disposition of Custody Cases**
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> . . .
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> **(b) Listing Trials Before the Court.** Depending upon the procedure in the judicial district, within 180 days of the filing of the complaint either the court shall automatically enter an order scheduling a trial before a judge or a party shall file a praecipe, motion or request for trial, except as otherwise provided in this subdivision. If it is not the practice of the court to automatically schedule trials and neither party files a praecipe, motion or request for trial within 180 days of filing of the pleading, the court shall dismiss the matter unless the moving party has been granted an extension for good cause shown, which extension shall not exceed 60 days beyond the 180 day limit. A further reasonable extension may be granted by the court upon agreement of the parties or when the court finds, on the record, compelling circumstances for a further reasonable extension.
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> **(c) Trial.** Trials before a judge shall commence within 90 days of the date the scheduling order is entered. Trials and hearings shall be scheduled to be heard on consecutive days whenever possible but, if not on consecutive days, then the trial or hearing shall be concluded not later than 45 days from commencement.
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> . . .

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subject order was issued with the consent of all the parties. Therefore, we conclude that appellate review is not precluded.

Pa.R.C.P. 1915.4(b), (c).

In ***Dietrich***, this Court held that the father's petition for custody was subject to dismissal under Rule 1915.4(b) where the trial court did not schedule the trial, and the parties failed to file a praecipe, motion, or request for trial, within 180 days of the filing of the custody complaint. We held in ***Dietrich*** that the language of Rule 1915.4(b) is unambiguous and dictates automatic dismissal for noncompliance with subsection (b). In ***Harrell***, ***supra***, this Court relied on ***Dietrich*** in holding that the trial court properly dismissed the custody action *sua sponte* where the parties failed to comply with Rule 1915.4(b).[5]

In this case, the record reveals that, by order dated November 21, 2011, the court scheduled the trial for February 28 and 29, 2012. The November 21, 2011 order was issued well within 180 days of the filing of Father's motion to modify custody. Therefore, we conclude the trial court did not violate subsection (b), and it follows that Mother's reliance on ***Dietrich*** is misplaced.

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[5] Notably, ***Dietrich*** and ***Harrell*** involved the application of Rule 1915.4(b) prior to the rule's amendment on July 8, 2010, which became effective on September 6, 2010. The Rule, as amended, includes the final sentence, as set forth above: "A further reasonable extension may be granted by the court upon agreement of the parties or when the court finds, on the record, compelling circumstances for a further reasonable extension." Pa.R.C.P. 1915.4(b). As such, the amended rule expands the trial court's discretionary authority to grant a reasonable extension beyond 60 days.

Further, Mother argues that, pursuant to Rule 1915.4(c), Father's motion to modify should be dismissed and the subject order vacated because the trial did not commence within 90 days of the November 21, 2011 scheduling order. Mother baldly asserts that "[t]here exists no difference between Rule 1915.4(b) and 1915.4(c). The time limits are mandatory." Mother's brief at 18. We disagree. Contrary to Mother's assertion, unlike subsection (b), subsection (c) does not include express language mandating dismissal of an action for noncompliance with that subsection.

The record reveals that, on March 20, 2012, Mother filed, *pro se*, an "omnibus interim motion including emergency motion to remove children from Grandmother," wherein she requested, *inter alia*, that the court expedite the custody trial pursuant to Rule 1915.4(c). On April 28, 2012, the court denied Mother's motion and stated there were multiple reasons for continuing the trial, including, but not limited to, the request of the custody evaluator for more time to complete her reports and recommendations.[6] ***See*** Trial Court Opinion, 4/28/12, at 3-4. Based upon our review of the record, we discern no reversible error by the court pursuant to subsection (c). As such, Mother's first issue fails.

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[6] Further, on September 28, 2012, Mother filed a petition to dismiss pursuant to subsection (c). We note that the court continued the trial from August of 2012, to November of 2012, based on Mother's request. ***See*** Order, 8/31/12. Therefore, Mother's request to dismiss filed on September 28, 2012, is troubling in that the trial delay was caused, in part, by her request.

In her second issue, Mother argues the subject order should be vacated because the Court of Common Pleas of Westmoreland County did not have jurisdiction pursuant to Pa.R.C.P. 1915.2. We disagree.

The Rule provides as follows:

Rule 1915.2. Venue

(a) An action may be brought in any county

(1)(i) which is the home county of the child at the time of commencement of the proceeding, or

(ii) which had been the child's home county within six months before commencement of the proceeding and the child is absent from the county but a parent or person acting as parent continues to live in the county; or

(2) when the court of another county does not have venue under subdivision (1), and the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with the county other than mere physical presence and there is available within the county substantial evidence concerning the child's, protection, training and personal relationships; or

(3) when all counties in which venue is proper pursuant to subdivisions (1) and (2) have found that the court before which the action is pending is the more appropriate forum to determine the custody of the child; or

(4) when it appears that venue would not be proper in any other county under prerequisites substantially in accordance with paragraphs (1), (2) or (3); or

(5) when the child is present in the county and has been abandoned or it is necessary in an emergency to protect the child because the child or a sibling or parent of the child is subjected to or threatened with mistreatment or abuse.

(b) Physical presence of the child or a party, while desirable, is

> not necessary or sufficient to make a child custody determination except as provided in subdivision (a)(5) above.
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> (c) The court at any time may transfer an action to the appropriate court of any other county where the action could originally have been brought or could be brought if it determines that it is an inconvenient forum under the circumstances and the court of another county is the more appropriate forum. . . .

Pa.R.C.P. 1915.2.

The record reveals the underlying custody action was initiated in Allegheny County in 2002. In September of 2009, the Allegheny Court of Common Pleas transferred the custody action to Westmoreland County, due allegedly to Mother and the children having then resided in Westmoreland County for five years. On November 3, 2011, following Father's motion to modify custody and Grandmother's petition to intervene, Mother requested the action be transferred to Allegheny County, since she and the children had allegedly returned there four months earlier. ***See*** Mother's motion to transfer venue, 11/3/11.[7] Mother argues in her brief "neither the children, Mother, []or Father resided in Westmoreland County at the [time Father filed the motion to modify custody]. The only time the children resided in

[7] We are unable to find in the record an order by the trial court denying Mother's transfer request, although Mother states in her brief one was issued.

Westmoreland County was after the Court awarded interim custody to Grandmother."[8] Mother's brief at 20.

Assuming Mother and the children had relocated to Allegheny County four months before filing the motion to transfer venue, and Grandmother resided in Westmoreland County during the subject proceedings, we conclude the court properly maintained venue pursuant to Pa.R.C.P. 1915.2(a)(1)(ii), in that Westmoreland County had been the children's home county within six months before Father filed the motion to modify, and Grandmother, by interim order dated November 23, 2011, was granted physical and legal custody of the children. Further, as noted *supra*, the custody order, dated September of 2012, indicated that the Westmoreland County Children's Bureau filed a petition for dependency and conducted an investigation with respect to E.M. As such, the record evidence adequately demonstrates that the children were residing in Westmoreland County during the subject custody proceedings. Therefore, we conclude Mother's second issue is without merit. Accordingly, we affirm the order.

Order affirmed.

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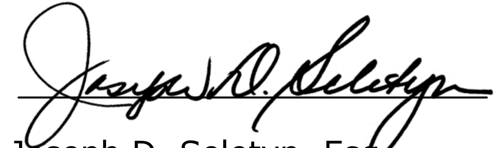
[8] We observe that, in Grandmother's petition to intervene, she indicated she resides in Allegheny County. It is not clear from the record in which county Grandmother was domiciled.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/24/2013