J. S78007/12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

A.D.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
W.E.D.,	:	No. 1074 MDA 2012
Appellant	:	

Appeal from the Order Entered May 14, 2012,
in the Court of Common Pleas of Lebanon County
Civil Division at No. 2011-20691

BEFORE: FORD ELLIOTT, P.J.E., PANELLA AND ALLEN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 3, 2013

In this custody matter, W.E.D. ("Father") seeks reversal of the order entered May 14, 2012 that awarded him shared legal and physical custody of his two minor children, ages 5 and 3, ("the Children") with A.D. ("Mother").

The factual and procedural history of this matter can be summarized as follows. The parties separated in July of 2011 following an incident of domestic violence. Mother filed a complaint for custody on August 9, 2011. Pursuant to local rules, a conciliation conference took place on September 16, 2011. At that conference, the parties were able to negotiate a resolution of their custody dispute and agreed to share legal and physical custody of the Children. Their agreement entailed Father having physical custody from 8:00 a.m. until 5:00 p.m. during weekdays when Mother was

working. Otherwise, Mother enjoyed physical custody during the week. The parties agreed to alternate custody on the weekends.

After leaving the marital residence, Father moved in with his parents in Wyomissing, Berks County, while Mother continued to live in the parties' home in Jonestown, Lebanon County. The agreed-upon custody arrangement became unworkable. Because of the approximate 40-mile distance each way, the daily travel between the two residences became difficult. As a result, Mother filed a petition for modification of custody on November 8, 2011. Soon after Mother filed her petition, the issue of where the parties' oldest child would attend school arose. On November 9, 2011, Father filed a petition for special relief in which he sought to enroll the child in a pre-school program located near his home in Wyomissing. A hearing occurred on January 12, 2012 before the Honorable Bradford H. Charles. Judge Charles concluded that the custody arrangement that the parties had agreed to was not sustainable. Judge Charles indicated that the custody order would not be changed until a full custody trial could take place. (Notes of testimony, 1/12/12 at 32-33.) The judge advised the parties to find a pre-school located somewhere between both residences. (***Id.***) Mother, however, compromised and the child was enrolled in a pre-school in Berks County located close to where Father resided. (***See*** trial court opinion, 7/2/12 at 10.)

Additionally, following the conclusion of the January 12, 2012 hearing, a pre-trial conference was held. After consultation with counsel, it was agreed that a Guardian ***Ad Litem*** should be appointed for the Children, and the trial court appointed Mary Burchik, Esq., to serve as Guardian ***Ad Litem***.

On May 3, 2012, a full day custody trial was conducted. Judge Charles advised the parties to return to court on May 14, 2012 for his decision. The order that was entered on May 14, 2012 awarded Mother and Father shared legal custody and shared physical custody of both children. Because of what the trial court described as the "parties' unique schedules," the court developed a custody schedule that afforded Father with physical custody on most weekdays and Mother with custody on most weekends. The order stated:

> 4. The intent of this Court is to create a custody schedule that is relatively equal. For the one year during which this custody order will remain in effect, we encourage the parties to work with the Guardian ad Litem as needed to resolve conflicts. When it comes time to create a more lasting custody arrangement during the early summer of 2013, we will give great weight to how the parties each act to make the custody arrangement we have ordered today work for the children.

Certified record, document #36, at 10. Mary Burchik, Esq., was re-appointed as Guardian ***Ad Litem***. (***Id***. at 8.) The court advised both parties that it would be watching with interest to see how each agreed to work with the other regarding issues and conflicts that would inevitably arise

in their parenting. (Notes of testimony, 5/14/12 at 11-12.) Father brings this appeal.

In his 70-page brief, Father raises six issues challenging the trial court's May 14, 2012 order. Preliminarily, we must determine whether this appeal is properly before us "because such a question goes to this court's jurisdiction and may be properly raised by the court ***sua sponte***." ***Mensch v. Mensch***, 713 A.2d 690, 691 (Pa.Super. 1998); ***Wagner v. Wagner***, 887 A.2d 282, 285 (Pa.Super. 2005). "Generally, appeals lie only from a 'final order.'" ***In re J.S.C.***, 851 A.2d 189, 190 (Pa.Super. 2004)(citing 42 Pa.C.S.A. § 742). This court has held "that a custody order will be considered final and appealable only after the trial court has completed its hearings on the merits and the resultant order resolves the pending custody claims between the parties." ***G.B. v. M.M.B.***, 670 A.2d 714, 715 (Pa.Super. 1996). "Generally, a custody order will be considered final and appealable only if it is both: (1) entered after the court has completed its hearings on the merits; and (2) intended by the court to constitute a complete resolution of the custody claims pending between the parties." ***In re F.B.***, 927 A.2d 268, 271 (Pa.Super. 2007), ***appeal denied***, 598 Pa. 750, 954 A.2d 577 (2008).

In the case ***sub judice***, it is clear that the order in question is not a final order.[1] At Paragraph J, the May 14, 2012 order states: "We will be entering an Order today that we will consider ***temporary***. This Order will remain in effect for a period of one year. A review hearing will be conducted in May or June of 2013. Our intent will be to establish a more permanent order at the next review hearing." (Certified record, document #36, at 7) (emphasis added). The certified record also contains an order of court dated and entered on May 15, 2012 which directs: "[I]n accordance with this Court's Order of May 14, 2012, a one day review hearing is hereby scheduled for Monday, June 17, 2013 commencing at 8:30 a.m. in Courtroom No. 3." (Certified record, document #37.) The fact that the trial court has already set a future hearing date further supports our determination that the May 14th order is not a final order. ***Cf. In re F.B.***, 927 A.2d at 271 ("If a custody Order anticipates further proceedings but

[1] We note that the 13-month delay before review in this case is significantly longer than other cases decided by this court. ***See Kassam v. Kassam***, 811 A.2d 1023 (Pa.Super. 2002) (where a custody order that scheduled a review hearing for eight months later was determined to be interlocutory and not appealable), ***appeal denied***, 573 Pa. 704, 827 A.2d 430 (2003); ***Sawko v. Sawko***, 625 A.2d 692 (Pa.Super. 1993) (where a custody order was deemed interlocutory where the trial court scheduled a review hearing four months later.) However, it is very clear the trial court wanted to monitor the parties' interactions for a significant period because it considered this case a close call. Also, the oldest child is enrolled in kindergarten during the 2012-2013 school year; the review hearing in this case will take place at the conclusion of the child's school year. We also observe that the May 14, 2012 temporary order continues to provide Father and Mother with relatively equal custody of the Children.

only upon application of a party, the Order is final and appealable.")(emphasis in original).

Additionally, we note that in the trial court's Rule 1925(a) opinion the court states at least four times that the May 14th order was a temporary order. (Trial court opinion, 7/2/12 at 4, 8-9, 18, 19.) The court wanted time to monitor Father and Mother; specifically, to determine if they could work together within the framework of the custody schedule it set up. Accordingly, we conclude the May 14, 2012 order was not intended by the court to constitute a complete resolution of the custody claims pending between the parties. Therefore, we quash Father's appeal.

Appeal quashed.