

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

T.J.F.,

Appellee

v.

P.F. F/K/A P.K.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1103 WDA 2013

Appeal from the Order entered June 7, 2013,
in the Court of Common Pleas of Armstrong County,
Civil Division, at No(s): 2011-1594-CIVIL

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

MEMORANDUM BY OTT, J.:

FILED DECEMBER 18, 2013

P.F. f/k/a P.K. ("Mother") appeals from the amended order dated June 6, 2013, and entered on June 7, 2013, in the Court of Common Pleas of Armstrong County, that vacated the temporary custody orders dated October 30, 2012, and November 8, 2012, and reinstated the custody order dated December 9, 2011.¹ We affirm.

The record reveals the following relevant facts and procedural history. Mother and T.J.F. ("Father") are the parents of E.F., a male child ("Child"), born in September of 2009. Father initiated a custody action in October of 2011. Upon consent of the parties, by order dated December 9, 2011, the trial court granted Mother primary physical custody and Father partial

¹ The subject order amended the custody order dated June 4, 2013, by correcting a typographical error.

custody on alternating weekends, and on alternating Wednesday evenings from 6:00 p.m. to 9:00 p.m., *inter alia*.² The court granted the parties shared legal custody.

On March 13, 2012, Mother filed a motion for special relief, wherein she alleged that Father physically abused Child, and requested primary physical custody. On the same date, Father filed a petition for contempt, wherein he alleged that Mother had failed to make Child available for his most recent period of partial custody. Following a hearing on March 20, 2012, on Mother's motion for special relief and Father's petition for contempt, the court denied both parties' respective requests.³

In addition to Mother's custody pleadings, the record reveals that, since January of 2012, Mother filed three separate Protection from Abuse ("PFA") petitions against Father on behalf of Child. N.T., 6/4/13, at 42-43. Further, Child's health care providers filed approximately six complaints with

² The court directed that, for a period of one month, Father's partial custody was to be supervised by Mother. Thereafter, Father's partial custody would be unsupervised. **See** Order, 12/9/11.

³ In addition, on March 19, 2012, Mother filed a petition to modify the existing custody order, *i.e.*, the December 9, 2011 order, wherein she alleged that, since Father's periods of partial custody commenced, she has noticed bruising on Child and changes in Child's behavior. Mother requested that Father be limited to supervised partial custody. To date, Mother's petition to modify the existing custody order remains pending in the trial court. However, Mother has not requested a hearing, and, therefore, none is scheduled.

the Westmoreland County Children's Bureau⁴ alleging physical and/or sexual abuse by Father against Child. *Id.* at 42.

Upon consent of the parties, by order dated October 30, 2012, the trial court directed that Father have as many periods of partial physical custody as he desired; however, his partial custody was to be supervised by the Holy Family Community Services Visit Coach Program ("the Visit Coach Program"). The order was amended on November 8, 2012, wherein the court maintained Father's supervised visits with the Visit Coach Program, but added a provision stating that the order "shall supersede any contrary provisions set forth in the Temporary Protection from Abuse Order dated October 31, 2012."⁵ Order, 11/8/12, at ¶ 4.

On March 1, 2013, Father filed a petition for contempt, wherein he alleged that Mother had stopped making Child available for his supervised visits. On March 11, 2013, Mother filed a reply and cross-petition against

⁴ The record is not clear regarding why the complaints alleging child abuse were lodged with the child welfare agency in Westmoreland County rather than Armstrong County. In her petition for special relief, Mother alleged that "[i]njury to child's face which prompted a visit to Allegheny Valley Hospital", and that Allegheny Valley Hospital reported the injury to the Westmoreland County Children's Bureau. Mother's petition, 3/13/12, at ¶ 5.

⁵ In her brief, Mother states that, "[o]n November 8, 2012, a [PFA] Petition was pending, and on the date that the hearing was scheduled, the parties agreed to" the above-described order. Mother's brief, at vii. Further, the certified record does not include the Temporary PFA order dated October 31, 2013. However, the record includes the Temporary PFA order dated January 17, 2013, which granted Mother's request for a continued PFA order against Father with respect to Child. The order awarded Mother temporary custody of Child pending the final PFA hearing.

Father for contempt of the Temporary PFA order, wherein she alleged that Father was continuing to abuse Child physically during the supervised visits. Following a hearing on March 14, 2013, the trial court issued an order finding Mother in civil contempt and sentencing her to a term of incarceration not to exceed six months. The order provided that Mother may purge herself of the contempt by complying with the November 8, 2012 order by producing Child for the supervised visits through April 29, 2013. The record reveals that Mother purged her contempt by complying with the order.

On May 3, 2013, Father filed a motion for special relief, wherein he alleged that he had successfully completed all periods of supervised visitation, and that the Visit Coach Program had determined not to continue supervised visitation after April of 2013. Further, Father alleged that, by order dated March 27, 2013, the trial court, following a hearing, dismissed Mother's PFA action.^{6 7} As such, Father requested that the court issue an order directing the parties to comply with the December 9, 2011 custody order. On May 3, 2013, the trial court scheduled a hearing on Father's motion for June 4, 2013. On May 24, 2013, Mother filed a motion to

⁶ The record reveals that the same trial judge who presided over the custody matter also presided over the final PFA hearing.

⁷ Mother filed a notice of appeal from the order dismissing her PFA action, which is pending before this Court and docketed at No. 698 WDA 2013.

continue and to compel psychological evaluations of her, Father, and Child, which the trial court denied the same date.

During the hearing on his motion for special relief, Father presented the testimony of Robert Flory, a family counselor and visit coach at the Visit Coach Program who supervised more than 80 percent of Father's visits. N.T., 6/4/13, at 11. Mr. Flory testified that Father's supervised visits commenced on December 1, 2012, and occurred at the Visit Coach Program facility. *Id.* at 7. Beginning on December 29, 2012, the supervised visits were held in Father's home. *Id.* at 8. Mr. Flory testified that the supervised visits fluctuated between three to six hours in length, for a total of more than 100 hours of supervised visits. *Id.* at 9-10, 20. He testified that Father and Child appeared during the visits "to have a close bond." *Id.* at 11. Mr. Flory testified that Father displayed appropriate parenting skills, and that he never observed improper behavior by Father. *Id.* at 12. As such, Mr. Flory testified the Visit Coach Program determined that Father does not need further supervised visitation, and, thus, no more are scheduled. *Id.* at 20-21.

Mother testified on her own behalf during the hearing on Father's motion for special relief. In contrast to Mr. Flory's testimony, Mother testified that Child is afraid of Father. *Id.* at 32. Mother testified that since the supervised visits began at Father's house, she has noticed "[m]arks on his eyes, [Child's] forehead." *Id.* at 35-36. Mother testified on cross-

examination that all of the complaints filed with the Children's Bureau, described above, have been determined to be unfounded. *Id.* at 42.

At the conclusion of the testimony, on the record and in open court, the trial court granted Father's motion for special relief and stated as follows, in part:

This Court has already ruled that abuse has not been proven and it would appear from the evidence offered today that the relationship between [Father] and [Child] is a perfectly normal relationship. I am basing that on Robert Flory's testimony on what he observed on a goodly number of occasions during which he supervised the visits between the two.

Id. at 47.

By amended order dated June 6, 2013, and entered on June 7, 2013, the court vacated the temporary custody orders dated October 30, 2012, and November 8, 2012, and reinstated the custody order dated December 9, 2011. Mother timely filed a notice of appeal; however, she did not concurrently file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 905(a)(2) and Pa.R.A.P. 1925(a)(2)(i). By order entered on July 3, 2013, the trial court directed Mother to file the concise statement, and she timely complied. Because no party claims any prejudice as a result of Mother's procedural violation, we will not quash or dismiss her appeal. ***See In re K.T.E.L.***, 983 A.2d 745 (Pa. Super. 2009).

Mother raises the following issues for our review:

1. Did the Trial Court err and/or abuse its discretion in reinstating a [c]ustody [o]rder that had been superseded by a consented-to Order by the parties, and there was no Petition for

Modification, allowance for psychological evaluations, home studies or any other procedural steps that are in the Armstrong County Local Rules of Court governing custody actions, or Pennsylvania Rule of Civil Procedure 1915.15?

2. Did the Trial Court err and/or abuse its discretion to deny a continuance to obtain psychological evaluations of the parties?

3. Did the Trial Court err and/or abuse its discretion to preclude evidence of physical or sexual abuse by Father before making a determination to allow Father to have unsupervised visitation?

Mother's brief, at vi.

Our standard of review in custody cases is well-established:

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).

The primary concern in any custody case is the best interests of the child. The best-interests standard, decided on a case-by-case basis, considers all factors that legitimately have an effect upon the child's physical, intellectual, moral, and spiritual well[-]being. **Saintz v. Rinker**,

902 A.2d 509, 512 (Pa. Super. 2006), *citing* **Arnold v. Arnold**, 847 A.2d 674, 677 (Pa. Super. 2004).

Instantly, we observe that Mother's assertions are not supported by legal argument or citation to relevant legal authority. Although Mother's issues could be waived as a result of her failure to support her assertions, we review her issues insofar as we understand them in deference to the best interests of Child. **See In re W.H.**, 25 A.3d 330, 339 n.3 (Pa. Super. 2011) (stating that issues are waived if appellate brief fails to provide meaningful discussion with citation to relevant authority); **see also** Pa.R.A.P. 2119(b).

Mother's issues are interrelated, and so we review them together. Mother argues the trial court abused its discretion in denying her motion for continuance of the June 4, 2013 hearing and for psychological evaluations, filed on May 24, 2013. The crux of her argument is that Father's request in his motion for special relief, *i.e.*, for reinstatement of the December 9, 2011 order, was, in effect, a request to modify the November 8, 2012 order requiring supervised visits by the Visit Coach Program. Mother baldly asserts that the November 8, 2012 order "was a Final Order entered by consent of the parties and should have been only modifiable by following the procedures set forth in the Pennsylvania Rules of Civil Procedure for modification of custody." Mother's brief, at 4. Mother does not cite any specific procedural rule in the argument section of her brief. Although unclear, we discern that Mother argues that psychological evaluations are

“procedures” permitted in custody modification matters. **See** Pa.R.C.P. 1915.8 (Physical and Mental Examination of Persons). She argues that the court needed psychological evaluations in this case to ensure a full evaluation regarding her allegations of Father’s physical and sexual abuse⁸ of Child and/or whether Father has adequately supervised Child subsequent to the December 9, 2011 order. Finally, Mother argues the trial court abused its discretion in limiting her testimony regarding her allegations of Father’s abuse of Child.

At the beginning of the hearing on June 4, 2013, Mother’s counsel reasserted on the record her motion for a continuance so that psychological evaluations may be obtained. **See** N.T., 6/4/13, at 3-4. The trial court again denied her request on the basis that the November 8, 2012 order was a temporary order because Mother’s motion to modify the existing custody order, *i.e.*, the December 9, 2011 order, filed on March 19, 2012, remains pending before the trial court. **See id.** at 4-5; **see also** n. 3, *supra*. The court explained on the record, in part:

Any order entered since March 19, 2012, has been a temporary one. There has never been a final hearing on the petition to modify filed by [Mother].

. . . If you want a final hearing on that petition [to modify], . . . , you may praecipe the case to the pretrial list, but there has only been temporary orders entered.

⁸ Mother states in her brief that, in addition to physical abuse, she alleged sexual abuse of Child by Father in her PFA petitions. She did not allege sexual abuse of Child by Father in the custody action.

. . . I overrule any objection that you have to the procedure that this Court is employing.

Id. at 5. In short, the court disagreed that Father's motion for special relief was, in effect, a request to modify, and that psychological evaluations were therefore necessary and relevant.

Based on the procedural posture of this case, we discern no abuse of discretion by the court in denying Mother's motion to continue and for psychological evaluations. Indeed, the certified record supports the court's determination that the November 8, 2012 order was temporary pending Mother's petition to modify, filed on March 19, 2012. Moreover, we discern no abuse of discretion by the court in limiting Mother's testimony with respect to her abuse allegations. The court did not permit Mother to testify with respect to the allegations because the court had already decided the same allegations in the PFA hearing on March 27, 2013, which was approximately ten weeks before the hearing on Father's motion. **See** N.T., 6/4/13, at 37-40. The court explained as follows, in part:

. . . the Court declined to permit such evidence because the Court heard extensive testimony on the subject in the related PFA case, which the Court found to be insufficient to warrant a finding of abuse.^[9] Rehearing of the same evidence was

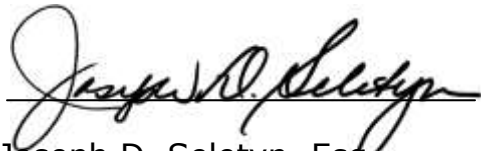
⁹ We note that, "the Protection From Abuse Act does not seek to determine criminal culpability. A Petitioner is not required to establish abuse occurred beyond a reasonable doubt, but only to establish it by a preponderance of the evidence." **Snyder v. Snyder**, 629 A.2d 977, 982 (Pa. Super. 1993). "A preponderance of the evidence is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly is the [criterion] or requirement for preponderance of the evidence." **Karch v. Karch**, 885 A.2d 535, 537 (Pa. Super. 2005) (internal citation and quotation marks omitted).

unnecessary particularly for purposes of ruling on Father's motion for special relief, which requested only that the prior order of December 9, 2011 be reinstated.

Trial Court Opinion, 7/30/13, at 3. Upon thorough review, we discern no abuse of discretion. The trial court advised Mother during the hearing on June 3, 2013, that she may seek to modify the December 9, 2011 custody order by pursuing her petition to modify pending before the court. Accordingly, we affirm the order.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/18/2013