

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

R. L.,

Appellee

v.

G. L.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1282 EDA 2012

Appeal from the Order April 4, 2012
In the Court of Common Pleas of Monroe County
Domestic Relations at Nos.: 2010 DR 677 & 2010 CV 6637

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

Filed: January 29, 2013

G.L. (Mother) appeals from the order entered on April 4, 2012, in the Court of Common Pleas of Monroe County, granting Mother and R.L. (Father) shared legal custody of their daughter, J.I.L., born in July of 2007, and son, R.A.L., born in June of 2009 (the Children), granting Father primary physical custody, and granting Mother partial physical custody, in accordance with a schedule. We affirm.

Mother and Father were married in December of 2000 and separated in June of 2010. Mother was born in Ecuador and is now a United States citizen. Prior to their separation, the parties shared a marital home in Monroe County. Throughout most of the proceedings in this case, Father

* Retired Senior Judge assigned to the Superior Court.

resided with his paramour, E.B., in Pike County, along with E.B.'s two children. Mother continued to reside in the marital home with the parties' Children.

On July 19, 2010, Father filed a complaint for custody in the Monroe County Court of Common Pleas. At the time the complaint was filed, Mother, Father, and the Children lived in Monroe County. On August 25, 2010, the parties attended the first of several custody conciliation conferences. On September 3, 2010, the trial court adopted the recommendation of the custody conciliator as the initial custody order in this case.

In October of 2010, the parties attended a second custody conciliation, which produced a modified custody order, granting Mother the right to travel with the Children to Ecuador from mid-December 2010 until mid-January 2011. The trial court adopted the conciliator's recommendation by order entered October 18, 2010. In December of 2010, Mother and the Children travelled to Ecuador, but she failed to return with them in January of 2011. On February 7, 2011, Father filed a petition alleging contempt. The trial court scheduled a hearing on the petition for March 3, 2011. Mother and the Children returned to Pennsylvania for the hearing. After returning from Ecuador, Mother took up residence in Lackawanna County, Pennsylvania.

On March 4, 2011, the trial court entered an order, finding Mother in contempt. The order directed that Mother may purge herself of this

contempt by complying at all times with all custody provisions of the March 4, 2011 order, and subsequent custody orders.

On May 3, 2011, the parties attended a further custody conciliation conference in Monroe County, from which the trial court adopted the conciliator's recommendations by order entered May 6, 2011.

On June 28, 2011, Mother filed a petition for an evidentiary hearing in the Court of Common Pleas of Monroe County, and, on August 5, 2011, she filed the instant petition for modification of custody. In the petition, Mother averred that Father abused the Children, and attached the report of a medical doctor who examined both Children. The trial court held hearings on the petition on August 23, 2011, November 29, 2011, January 27, 2012, and April 3, 2012.

Between the November hearing and the January hearing, Mother filed for a Protection From Abuse (PFA) order in the Court of Common Pleas of Lackawanna County, which the court granted by order dated January 6, 2012. The PFA order contained a stipulated custody agreement of the parties, directing that "Both parties will have shared legal and physical custody until further order of court exercising one week on one week off." (Order, 1/6/12).

On April 4, 2012, the Monroe County trial court entered its order, granting Father primary physical custody, and granting Mother partial physical custody, in accordance with a schedule. On April 27, 2012, Mother

filed notice of appeal. On May 9, 2012, the trial court entered an order, which found that Mother's appeal was defective, in that she failed to file simultaneously her concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)(2)(i) and (b). On May 15, 2012, Mother filed her concise statement of errors complained of on appeal. Despite Mother's failure to satisfy the simultaneous filing requirement of Pa.R.A.P. 1925(a)(2)(i), we proceed to address her issues on appeal. ***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").

Mother presents the following issues for our review:

1. Did the trial court err in exercising and retaining jurisdiction over the above-captioned matter after the trial court became aware that neither one of the parties continued to reside in Monroe County and therefore were no longer subject to the trial court's jurisdiction?
2. Did the trial court commit an error of law and abuse its discretion in granting father primary physical custody of the parties' minor children based upon the facts and evidence presented?
3. Did the trial court commit an error of law and abuse its discretion because it failed to consider the best interests and welfare of the minor children?
4. Did the trial court err and abuse its discretion in granting father primary physical custody of the parties' minor children based upon the evidence presented that [M]other was the primary physical caretaker of the minor children and also the primary custodian of their emotional and intellectual development for the majority of the minor children's lives?

5. Did the trial court err and abuse its discretion in granting father primary physical custody of the minor children because the children were thriving under the terms and conditions of the previous custody arrangement and there was no evidence submitted supporting a modification?

(Mother's Brief at v).

In Mother's first issue on appeal, she argues that the trial court lacked jurisdiction to enter its custody order, because the trial court was aware that neither party continued to reside in Monroe County. (Mother's Brief at 1). Alternatively, Mother argues that a PFA order entered in Lackawanna County divested Monroe County of jurisdiction over the custody matter. (Mother's Brief at 7-8).

Initially, we note that the trial court and Father assert that Mother waived the issue of jurisdiction, because she failed to raise it before the trial court. (**See** N.T. Hearing, 5/30/12, at 36-39;¹ Father's Brief at 6-8). The issue of subject matter jurisdiction, however, may be raised at any time, by any party, or by the court *sua sponte*. **M.E.V. v. R.D.V.**, ___ A.3d ___, ___, 2012 WL 5205618 at *2 (Pa. Super. 2012) (citing **B.J.D. v. D.L.C.**, 19 A.3d 1081, 1082 (Pa. Super. 2011)).

¹ The trial court issued its opinion pursuant to Pa.R.A.P. 1925(a) on June 19, 2012. Therein the trial court explained that, given the uniquely complicated history and procedure, it chose to issue its decision in two oral hearings, held on April 3, 2012 and May 30, 2012. The trial court incorporated those hearings into its opinion.

In addressing Mother's first issue, we apply the following standard of review:

A court's decision to exercise or decline jurisdiction is subject to an abuse of discretion standard of review and will not be disturbed absent an abuse of that discretion. Under Pennsylvania law, an abuse of discretion occurs when the court has overridden or misapplied the law, when its judgment is manifestly unreasonable, or when there is insufficient evidence of record to support the court's findings. An abuse of discretion requires clear and convincing evidence that the trial court misapplied the law or failed to follow proper legal procedures.

Lucas v. Lucas, 882 A.2d 523, 527 (Pa. Super. 2005) (citation omitted).

Section 5421 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 23 Pa.C.S.A. §§ 5401-5482, provides, in pertinent part:

(a) General rule.—Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth has jurisdiction to make an initial child custody determination only if:

(1) this Commonwealth is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this Commonwealth but a parent or person acting as a parent continues to live in this Commonwealth;

* * *

23 Pa.C.S.A. § 5421(a)(1).

Section 5422 provides, in pertinent part:

(a) General rule.—Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth which has made a child custody determination consistent with section 5421 (relating to initial

child custody jurisdiction) or 5423 (relating to jurisdiction to modify determination) has exclusive, continuing jurisdiction over the determination until:

(1) a court of this Commonwealth determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this Commonwealth and that substantial evidence is no longer available in this Commonwealth concerning the child's care, protection, training and personal relationships; or

(2) a court of this Commonwealth or a court of another state determines that the child, the child's parents and any person acting as a parent do not presently reside in this Commonwealth.

23 Pa.C.S.A. § 5422(a).

Intrastate application of the UCCJEA between counties operates analogously to interstate application between states. **See** 23 Pa.C.S.A. § 5471 ("The provisions of this chapter allocating jurisdiction and functions between and among courts of different states shall also allocate jurisdiction and functions between and among the courts of common pleas of this Commonwealth.").

Instantly, the trial court made its initial custody determination on September 3, 2010. The trial court found that all parties and the children resided in Monroe County at the time of filing of the initial custody complaint. (**See** N.T. Hearing, 5/30/12, at 18-19, 20).

The trial court found that Monroe County was the home county of the children on the date of the commencement of the proceeding, and was the home county of the children in the six months before the commencement of

the proceeding. Based upon this finding, the trial court properly exercised initial custody jurisdiction in this matter. **See** 23 Pa.C.S.A. § 5421(a)(1).

Mother, however, also argues that the trial court's jurisdiction was subsequently extinguished when the Court of Common Pleas of Lackawanna County entered a PFA order in January of 2011, which included a provision on the issue of custody. (**See** Mother's Brief at 7-8).

As noted above, a trial court vested with initial custody jurisdiction maintains exclusive continuing jurisdiction until a court determines that significant connections no longer exist in—or determines that the child and parties are no longer residents of—the initial state or county. **See** 23 Pa.C.S.A. § 5422. Relevant to the facts of the instant case, the comment to section 5422 notes, "Jurisdiction attaches at the commencement of a proceeding. If state A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding." 23 Pa.C.S.A. § 5422, Comment.

Mother argues that the Lackawanna County PFA order, issued five months after her filing of the petition for modification, and four and one half months after the first hearing on that petition, extinguished Monroe County's jurisdiction of the ongoing proceeding in its court. As noted above, however, jurisdiction attaches at the commencement of the proceeding. Accordingly, even if the Lackawanna County order could divest the trial court of its

continuing exclusive jurisdiction, jurisdiction had already attached in Monroe County for the purpose of the modification that Mother now appeals. **See id.** Thus, we find no merit in Mother's first issue.

In each of Mother's remaining issues, she argues that the trial court committed an error of law and abused its discretion in granting Father primary physical custody of the Children. (**See** Mother's Brief at 8-19). We address these issues together.

Mother argues that the trial court's opinion pursuant to Pa. R.A.P. 1925(a), which incorporated the transcripts of two hearings, omitted findings of fact, analysis of evidence, and explanation of the reasons for the trial court's conclusions. (**See id.** at 11). She also argues that the trial court failed to consider the parental duties she performed for the Children, and erred in finding that the best interests of the Children weighed in favor of modifying the existing custody arrangement. In sum, Mother argues that the trial court failed to properly apply the requisite "best interests of the child" analysis. (**See id.** at 8-19).

In considering appeals from custody orders, 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 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(a).

In the instant case, the trial court considered each of these factors in making its custody determination. On the first element of section 5328(a), the court found that it was "very clear that [F]ather" was more likely to encourage and permit frequent and continuing contact between the Children

and Mother. (N.T. Hearing, 5/30/12, at 43-44). The court found that the second factor, present and past abuse committed by a party, weighed “heavily” in favor of Father. (*Id.* at 40-41). The trial court premised this conclusion on its finding that Mother filed false allegations that Father sexually molested the parties’ daughter, and that Mother subjected their daughter to several interviews by medical doctors in fabricating the claim. (*Id.*).

As to the parental duties performed by each party on behalf of the children, the court found that this factor weighed evenly for both parties. (*See id.* at 44-45, 47-48). On the issue of the need for stability and continuity in the children’s education, family life, and community life, the court found that this factor weighed slightly in favor of Father. (*See id.* at 41-42). As to the availability of extended family, the court found that this factor weighed “fairly evenly” between the parties, but ultimately weighed slightly in favor of Father. (*See id.* at 42, 45-46). As to the children’s sibling relationships and their well-reasoned preferences, the trial court found both factors to be inapplicable in the instant case. (*See id.* at 43). On the issue of attempts by a parent to turn a child against the other parent, the trial court found that this issue weighed heavily in favor of Father, again premised on the finding that Mother subjected the Children to filing false allegations of molestation against Father. (*See id.* at 42, 43-44). As to which party is more likely to maintain a loving, stable, consistent and

nurturing relationship with the children, the court found that this factor weighed in favor of Father. (*See id.* at 43).

On the issue of which party is more likely to attend the daily physical, emotional, developmental, educational, and special needs of the children, the court considered the factor, but made no specific finding in favor of either party. (*See id.* at 43-45, 47). As to the issue of proximity of the parties' residences, the court found that this factor did not weigh in favor of either party. (*See id.* at 45). On the issue of each party's availability to care for the children or ability to make appropriate child-care arrangements, the court found that this factor "really doesn't tip in favor of either party," but that "it probably tips slightly in favor of [F]ather because of his sort of built-in and family-based child care possibilities." (*See id.* at 45-46, 47). As to the level of conflict between the parties and the willingness and ability of the parties to cooperate with one another, the court found that this factor weighed heavily in favor of Father. (*See id.* at 43-44, 46). Finally, as to any history of drug or alcohol abuse, or the mental and physical condition of a party or member of a party's household, the court found that these factors were not implicated by the facts of this case. (*See id.* at 43).

Our review of the trial court's opinion, including its incorporation of two hearings, reveals that the court explicitly addressed each requisite factor of section 5328(a) in determining the best interests of the Children. Moreover, while Mother argues that the trial court's opinion fails to provide

sufficiently detailed factual findings to explain its holding, our review of the certified record, the testimony of the parties, as well as the trial court's opinion, reveals that the court's findings are supported by competent evidence of record. In light of the applicable standard of review, we find no merit in Mother's remaining issues on appeal. **See C.R.F., III**, 45 A.3d at 443.

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

Order affirmed.