

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

R.L.C.,

Appellee

v.

J.M.C.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1333 EDA 2013

Appeal from the Order entered April 9, 2013,
in the Court of Common Pleas of Lehigh County,
Civil Division, at No(s): 2006-FC-0884

BEFORE: ALLEN, MUNDY, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.:

FILED DECEMBER 19, 2013

J.M.C. ("Father") appeals from the order that granted the petition for modification of the existing custody order filed by R.L.C. ("Mother"), with respect to the parties' children born during their marriage.¹ We vacate and remand.

The record reveals that Mother initiated the underlying custody matter in July of 2006, approximately three months after marital separation. Upon consent of the parties, by order dated November 20, 2006, the trial court granted the parties shared legal custody, with Mother having primary physical custody, and Father having partial physical custody. Protracted

* Former Justice specially assigned to the Superior Court.

¹ The parties' children are a female, K.C., born in December of 2000, and three males, M.C., S.C., and D.C., born in October of 2002, November of 2003, and October of 2005, respectively (collectively, "the children").

custody litigation ensued between the parties, the relevant history of which we set forth as follows.

By order dated July 16, 2010, following a hearing on Father's petition to modify custody, the trial court granted Mother sole legal custody and primary physical custody, and Father partial physical custody. Seven months later, by order dated February 15, 2011, following a hearing on Father's petition for special relief in which he objected to Mother's proposed relocation with the children to Bernville, in Berks County, the trial court granted Father sole legal and primary physical custody and Mother partial custody on alternating weekends and one weekday evening, *inter alia*.^{2 3}

On January 30, 2013, Mother filed a petition for modification of custody, where she alleged that the children's paternal grandfather ("Grandfather") physically and emotionally abused the two youngest children, S.C. and D.C., by hitting, slapping, pushing, throwing, and kicking them.⁴ In addition, Mother alleged that Father and Grandfather curse at the children and call them names. Further, Mother alleged that Father punches himself on both sides of his face in front of the children and utters curse

² Throughout the history of this case, Father has remained living in the marital home, which is located in Catasauqua, in Lehigh County.

³ The record reveals that Mother relocated with the children to Bernville in violation of a temporary order prohibiting her from doing so until further order of court.

⁴ The record reveals that Grandfather lived separately from Father but cared for the children in Father's home on a daily basis.

words about her. **See** Petition, 1/30/13, at Exhibit B. Mother requested sole legal and primary physical custody.

Related to Mother's petition for modification is a Protection From Abuse ("PFA") order issued by the court against Grandfather on January 29, 2013, which granted Mother physical custody of the children, following a hearing on Mother's PFA action on behalf of the children. Father was not a party to the PFA action. **See** N.T., 2/15/13, at 3-7.

In light of this procedural posture, on February 15, 2013, the trial court held an emergency hearing so that Father could testify with respect to what actions, if any, he has taken to address the children's safety in his home.⁵ **See** *id.* at 9. During the emergency hearing, the court incorporated into the record the notes of testimony from the PFA hearing on January 29, 2013.⁶ In addition, the trial court interviewed all of the children, and Father and Mother testified on their own behalf. At the conclusion of the testimony, the court issued an *interim* order granting the parties shared legal custody, Mother primary physical custody, and Father partial custody on alternating weekends, *inter alia*. **See** Interim Order, 2/15/13.

⁵ The record reveals that the same trial judge who presided over the PFA hearing also presided over the custody proceedings.

⁶ The notes of testimony from the PFA hearing are not included in the certified record before this Court. The trial court noted on the record that, as part of the PFA proceeding, it interviewed three of the children at length, and that Father was present as a witness, but not as a party. **See** N.T., 2/15/13, at 3.

On March 14, 2013, and April 2, 2013, the court held a custody trial on Mother's petition for modification, during which the following witnesses testified: Dana Greene, a licensed professional counselor who provides counseling to the children; Elaine Civic, the children's school nurse; Roseanne B. McGinn, a licensed psychologist who treats Father; Taryn Bielecki, S.C.'s teacher; Patricia Johnson, the children's school counselor; Pamela Caton, the kindergarten teacher of K.C., M.C., and D.C.; Donald M. McMullen, Mother's paramour, with whom she resides; Mother; and Father. In addition, the trial court incorporated into the record the notes of testimony from the emergency custody hearing on February 15, 2013.

By order dated April 9, 2013, and entered on April 10, 2013, the trial court granted Mother's petition for modification. The court granted Mother sole legal custody and primary physical custody, and Father partial physical custody on alternating weekends, *inter alia*. In addition, the court granted Mother's request to transfer the children to the Hamburg Area School District, in Berks County, for the academic year beginning in August or September of 2013.⁷ Further, on April 9, 2013, the court placed its reasoning for the custody award on the record in open court. Father timely filed 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).

⁷ The children had been attending St. Ann's Elementary School in Emmaus, in Lehigh County.

On appeal, Father presents the following issues for our review:

- A. Did the Trial Court [] err or abuse its discretion in making a custody determination in the [PFA] action between [Mother] and [Grandfather] to which action [Father] was not a party and in which action [Father] did not participate?
- B. Did the [trial court] err or abuse its discretion in modifying the parties' custody order to award Mother sole legal and primary physical custody and finding that it is in the best interest and permanent welfare of the children on the basis of the facts presented?
- C. Did the [trial court] err or abuse its discretion in limiting the testimony of Dana Greene, M.Ed., by preventing her from testifying as to statements made to her by the children?
- D. Did the [trial court] err or abuse its discretion in failing to give proper weight to important issues of record including but not limited to the testimony of School Counselor, Patricia Johnson, and making findings of fact which are not supported by the record[?]

Father's Brief at 9.

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).

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).

The Child Custody Act ("Act"), 23 Pa.C.S.A. §§ 5321-5340, requires that, when making a custody award, "[t]he court shall delineate the reasons for its decision on the record in open court or in a written opinion or order." 23 Pa.C.S.A. § 5323(d). In determining the best interests of a child, the trial court must consider the sixteen factors set forth in Section 5328(a) of the Act, which provides as follows:

§ 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.

This Court has held that “[a]ll of the factors listed in section 5328(a) are required to be considered by the trial court when entering a custody order.” *J.R.M. v. J.E.A.*, 33 A.3d 647, 652 (Pa. Super. 2011) (citation omitted) (emphasis in original); *see also C.B. v. J.B.*, 65 A.3d 946, 955 (Pa. Super. 2013) (holding prospectively that trial courts must set forth consideration of the section 5328(a) factors “prior to the deadline by which a litigant must file a notice of appeal”).

Instantly, pursuant to Section 5323(d), the trial court delineated the reasons for its decision on the record in open court at the time it issued the custody order. Our review indicates the court did not consider the Section 5328(a) best interests factors; rather, the court considered, at length, the relocation factors set forth in Section 5337(h).⁸ The court explained as follows:

⁸ Section 5337(h) of the Act provides:

(h) Relocation factors.--In determining whether to grant a proposed relocation, the court shall consider the following factors, giving weighted consideration to those factors which affect the safety of the child:

(1) The nature, quality, extent of involvement and duration of the child’s relationship with the party proposing to relocate and with the nonrelocating party, siblings and other significant persons in the child’s life.

(2) The age, developmental stage, needs of the child and the likely impact the relocation will have on the child’s physical, educational and emotional development, taking into consideration any special needs of the child.

We will consider the relocation factors because under the statute "relocation" means a change in the residence of the Child which significantly impairs the ability of a non-[re]locating party to exercise custodial rights.

Mother used to live in Lehigh County and now resides in neighboring Berks County. . . . Given this distance, we will consider this to be a relocation because it could be considered to impair the ability of a non-relocating party to exercise custodial

(3) The feasibility of preserving the relationship between the nonrelocating party and the child through suitable custody arrangements, considering the logistics and financial circumstances of the parties.

(4) The child's preference, taking into consideration the age and maturity of the child.

(5) Whether there is an established pattern of conduct of either party to promote or thwart the relationship of the child and the other party.

(6) Whether the relocation will enhance the general quality of life for the party seeking the relocation, including, but not limited to, financial or emotional benefit or educational opportunity.

(7) Whether the relocation will enhance the general quality of life for the child, including, but not limited to, financial or emotional benefit or educational opportunity.

(8) The reasons and motivation of each party for seeking or opposing the relocation.

(9) The present and past abuse committed by a party or member of the party's household and whether there is a continued risk of harm to the child or an abused party.

(10) Any other factor affecting the best interest of the child.

rights even though it is close enough for the non-relocating party to exercise partial custody on weekends.

Trial Court Opinion, 4/9/13, at 1-2.

We conclude the trial court committed an error of law in considering the relocation factors because the proceeding was not before the court on an objection to a proposed relocation.⁹ **See** 23 Pa.C.S.A. § 5337(g). Rather, the proceeding was before the trial court on Mother's petition for modification of the existing custody order, *i.e.*, the order of February 15, 2011, which granted Father sole legal and primary physical custody.

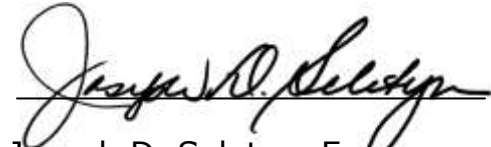
Further, we conclude that even if the trial court properly considered the relocation factors, it committed an error of law by failing to expressly consider all of the Section 5328(a) factors. **See J.R.M., supra; see also E.D. v. M.P.**, 33 A.3d 73 (Pa. Super. 2011) (vacating and remanding the order granting permission for the father to relocate with the parties' child and entering a revised custody schedule where the trial court failed to consider both the Section 5337(h) relocation factors and the Section 5328(a) best interests factors). To the extent the court did consider the Section 5328(a) factors, it did so without reference to all of the factors, which we have held is an error of law pursuant to **J.R.M., supra**. As such, we are constrained to remand the matter to the trial court to explain its consideration of the Section 5328(a) factors.

⁹ Indeed, Mother is not seeking to relocate. The record reveals she has resided in Bernville, Berks County, since December of 2010.

Accordingly, we vacate the order, and remand the matter for proceedings consistent with this Memorandum. On remand, the trial court may address the Section 5328(a) custody factors on the record or in a written opinion. We further note that the Custody Act "requires only that the trial court articulate the reasons for its custody decision in open court or in a written opinion or order taking into consideration the enumerated factors ... there is no required amount of detail for the trial court's explanation; all that is required is that the enumerated factors are considered and that the custody decision is based on those considerations." ***M.J.M. v. M.L.G.***, 63 A.2d 331, 336 (Pa. Super. 2013).

Order vacated. Case remanded with instructions. Jurisdiction relinquished.

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: 12/19/2013