J-A09022-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

T.T., SR.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
M.J.T., a/k/a M.J.O.,	:	
	:	
Appellee	:	No. 1381 WDA 2012

Appeal from the Order August 14, 2012,
Court of Common Pleas, Allegheny County,
Family Court at No. FD-00-07941-004

BEFORE: BOWES, DONOHUE and MUNDY, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED MAY 14, 2013**

T.T., Sr. ("Father") appeals from August 14, 2012 order of the Court of Common Pleas, Allegheny County, denying his petition to modify custody so that his son, T.T., Jr. ("Child"),[1] could attend Plum School District. After careful review, we affirm.

The trial court summarized the background of this case as follows:

> This matter had its genesis on January 21, 2000, when [Father] filed a Complaint in Custody regarding the parties' only child […] . On January 28, 2000, an order was entered granting primary physical custody to Mother. An interim custody order was entered on February 28, 2002, granting partial custody of [Child] to Father. Then, in April 2000, Father filed a complaint in divorce and for other relief. Multiple other pleadings and motions were filed or presented

[1] Child was born in September of 1997. By the time of the first hearing on Father's petition to modify custody, Child was almost 15 years old. In addition, Child has ADHD and a low IQ. N.T., 5/14/2012 at 160; N.T., 5/15/2012, at 115-16.

related to custody, support and divorce. The parties continued to battle over custody and other matters. A detailed interim consent custody order was entered on September 1, 2000, which provided that Father would have partial custody of [Child] every Monday and Thursday for four and one-half hours and every Friday for eight hours and every other Sunday from noon until 8:00 p.m. In addition, provisions were made for a holiday schedule.

On October 19, 2000, another interim custody order was entered. That order provides that the parties would have shared legal and physical custody of [Child]. At that time, the parties lived in close proximity to each other. The parties' litigation regarding custody and other matters continued through 2001 and into 2002. The parties were ordered on September 19, 2002, to participate in co-parenting counseling. On October 15, 2002, an order requiring the child to be withdrawn from kindergarten was entered and mother was ordered to schedule counseling services for [Child] related to behavioral issues. On June 11, 2004, after a three day custody trial, the court allowed Mother to relocate to Belle Vernon, Westmoreland County and granted Mother primary physical custody. Legal custody was to be shared. This order remained in effect until 2008 when Father filed a [p]etition for [m]odification of [c]ustody.

Father presented a motion on April 12, 2011, requesting that the court schedule a hearing to determine whether [Child] should be required to change school districts. The court denied that motion, but treated it as a motion to modify custody and scheduled it for conciliation through Generations. This case was assigned to this member of the court on June 6, 2011. The court ordered psychological evaluations of [Child] and the parties to be conducted by Allegheny Forensic Associates. Father's petition for modification of custody was dismissed for procedural reasons, but reinstated by order dated August 26, 2011. The parties continued

> to spar over various custody related matters, and the court made several unsuccessful attempts to conciliate this matter prior to trial.
>
> A three day custody trial was conducted beginning on April 13, 2012, and continuing on May 14, 2012, and May 15, 2012. The parties were directed to submit proposed findings of fact and conclusions of law, which they did. On August 14, 2012, the court entered an order along with a memorandum,[2] which provided that the parties will have shared legal custody and Mother will continue to have primary physical custody. Father will have partial physical custody from Friday after school until Monday morning when Father returns [Child] to school and then every other Sunday from 1:00 pm until Monday morning when Father will return [Child] to school. Further, in the event that any of Father's partial custody falls on a weekend when [Child] has either Friday or Monday off from school, then the custody shall begin on Thursday after school (if Friday is a day off) or extend until Tuesday morning (if Monday is a day off). Likewise, if on his Sunday overnight visit [Child] has no school on Monday, then the return shall be on Tuesday morning to school. In addition, during the summer months, the parties will share custody of [Child] on alternate weeks as provided by prior orders. The holiday schedule will continue to be shared by the parties as provided by prior orders.

Trial Court Opinion, 11/5/2012, at 1-4 (footnote added).

Father filed a timely notice of appeal and a concise statement of matters complained of on appeal. The trial court filed an opinion pursuant to Pa.R.A.P. 1925(a) on November 5, 2012.

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[2] We note that the trial court's August 1, 2012 memorandum addresses each of the 16 factors to be considered in a determination of custody, as required by 23 Pa.C.S.A. § 5328(a).

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

> 1. Whether the determination that [Child] should remain in the primary physical custody of Mother should be reversed as a matter of law because the lower [c]ourt failed to consider Pennsylvania [c]ases ***Cichocki v. Mazurek-Smith,*** 2009 Pa. Dist. & Cnty. Dec. LEXIS 45 (Pa. County Ct. 2009) and ***Younkins v. Younkins,*** 400 Pa. Super. 633 (Pa. Super. [] 1990) [(unpublished memorandum),] which have nearly identical fact patterns to the case at hand and hold that a change is custody is warranted when the child is not receiving proper education while in the care of the custodial parent.
>
> A. Given the standards as outlined in Pennsylvania case law cited above, did the lower court compound its error by refusing to consider the testimony from two of the [C]hild's teachers, the [C]hild's Sylvan instructor, and the [C]hild's guidance counselor regarding the [C]hild showing no measurable improvement in his education level while in Mother's primary custody.
>
> B. Did the lower court compound its error by refusing to consider additional evidence of Belle Vernon School district being ill equipped to address the [C]hild's specific educational needs thus stunting his academic growth.
>
> C. Did the lower court compound its error by refusing to consider the parents' role or lack thereof in the [C]hild's education.
>
> 2. Whether the lower court's order is defective where it fails to make detailed findings of fact from which the appellate court can determine that the order is in the best interest of the [C]hild when the findings of fact consist of mere conclusional statements and are void of supporting case law.
>
> 3. Whether the lower court erred as a matter of law in failing to consider the parties' total lack of

> communication, failed attempts at co-parenting counseling and the unilateral decision making by Mother as factors when determining legal custody of the [C]hild.

Appellant's Brief at 3.

When reviewing an order regarding modification of custody, the following principles govern our review:

> [O]ur scope is of the broadest type and our standard is abuse of discretion. This Court 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, this Court must defer to the trial judge who presided over the proceedings and thus viewed 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.

E.D. v. M.P., 33 A.3d 73, 76 (Pa. Super. 2011).

Furthermore, when a trial court is faced with a decision regarding the modification of an existing custody order, we are mindful that its paramount consideration is the best interests of the child. ***Id.*** at 79-80 (citing 23 Pa.C.S.A. § 5338, 5328(a)). In this regard, the sixteen factors listed in

Section 5328(a)[3] of the Child Custody Act "must be considered in a best interest of the child analysis in making any custody determination." ***Id.***

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[3] Section 5328(a) states:

> **§ 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

In his first issue, Father argues that two cases, *i.e.*, ***Cichocki v. Mazurek-Smith,*** 2009 Pa. Dist. & Cnty. Dec. LEXIS 45 (Pa. County Ct. 2009) and ***Younkins v. Younkins,*** 400 Pa. Super. 633 (Pa. Super. 1990) (unpublished memorandum), control the outcome of this case. Appellant's Brief at 9. According to Father, both cases "establish that a change in

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> 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).

custody is warranted in the instant case as the [C]hild is not receiving a proper education while in the care of the custodial parent." ***Id.*** In its Rule 1925(a) opinion, the trial court notes that it did not rely on the cases cited by Father because neither case constituted binding precedent. Trial Court Opinion, 11/5/2012, at 6. With respect to the ***Cichocki*** case, the trial court stated that "it was considered by the court, but it is a decision of a court of equal jurisdiction and not an authority to which this court must defer." ***Id.*** Regarding ***Younkins***, the trial court reasoned that "this is a non-precedential memorandum opinion, which with a few exceptions, none of which are applicable here, may not be cited for any purpose." ***Id.*** (citing I.O.P. 65.37(A)).[4]

[4] Published Superior Court I.O.P. 65.37 provides:

> A. An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding, except that such a memorandum decision may be relied upon or cited (1) when it is relevant under the doctrine of law of the case, res judicata, or collateral estoppel, and (2) when the memorandum is relevant to a criminal action or proceeding because it recites issues raised and reasons for a decision affecting the same defendant in a prior action or proceeding. When an unpublished memorandum is relied upon pursuant to this rule, a copy of the memorandum must be furnished to the other party and to the Court.

I.O.P. 65.37(A). We admonish Father's counsel for his persistent citation to an unpublished memorandum of this Court in disregard of I.O.P. 65.37(A).

We find no abuse of discretion in the trial court's conclusion. Neither a published decision of a court of common pleas, nor an unpublished memorandum of this Court have precedential value. ***Commonwealth v. Phinn,*** 761 A.2d 176, 179-80 (Pa. Super. 2000), *appeal denied*, 567 Pa. 712, 785 A.2d 89 (2001) (citation omitted). Therefore, the trial court was not bound to apply them in its resolution of this case.

In the context of his first issue, Father also raises three subsidiary claims, which are premised on his belief that ***Cichocki*** and ***Younkins*** are binding precedent. As discussed above, the ***Cichocki*** and ***Younkins*** cases, as a matter of law, do not bind this Court (***Phinn,*** 761 at 179-80), and his subsidiary claims necessarily fail.[5]

In his second issue, Father asserts that although the trial court relied on the sixteen factors listed in Section 5328(a), it failed to weigh certain factors correctly and misapplied or ignored controlling case law in rendering its decision. Appellant's Brief at 25. Father notes that the trial court gave greater weight to factors four, seven, and ten, but he argues that it did so in

[5] Moreover, Father's claims are based upon his evaluation of how the trial court should have considered and weighed the evidence presented below in reaching its decision, which would require this Court to reassess and reweigh the evidence. Our standard of review prohibits this Court from doing so. ***M.P.,*** 33 A.3d at 76 (stating that "with regard to issues of credibility and weight of the evidence, this Court must defer to the trial judge who presided over the proceedings and thus viewed the witnesses first hand"). Where, as here, the record supports the trial court's findings and its conclusions are not unreasonable, we cannot conclude that the trial court abused its discretion. ***Id.***

error. According to Father, factor four, which involves consideration of stability and continuity in family life, community life and education, is greater when a child is young. ***Id.*** at 23-24. Father argues that the trial court should not have given weight to factor four and should have instead relied on the testimony of the court appointed psychologist, Dr. McGroarty, who opined that Child would be able to adjust to a change in primary custody from Mother to Father. ***Id.*** at 24. Father also claims that if Child stays with Mother, Child's "academic future will remain bleak," which "should trump a stability argument." ***Id.***

Father again asks this Court to look to Dr. McGroarty's testimony in relation to factor seven, which requires consideration of [Child's] preference. ***Id.*** Father characterizes Child's main concern regarding a change in primary custody as Child's ability to make new friends. ***Id.*** Father then points to Dr. McGroarty's testimony that Child "was a psychologically resilient young adolescent and would not have a hard time making friends." ***Id.*** In Father's view, Dr. McGroarty's testimony contravenes the trial court's conclusion that Child would be harmed by a change in custody. ***Id.***

With respect to the tenth factor, Father argues that the trial court's finding that both parents are equally likely to attend to the daily physical, emotional, developmental, and special needs of Child, would be true regardless of which parent obtained primary custody of Child. ***Id.***

Father's arguments, in essence, ask this Court to reject the trial court's determinations of credibility, re-assess the evidence, and adopt Father's view of how certain evidence should have been credited and weighed by the trial court. We cannot do as Father requests. As an appellate court, we are constrained by our standard of review, which requires that we

> 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, this Court must defer to the trial judge who presided over the proceedings and thus viewed the witnesses first hand.

M.P., 33 A.3d at 76.

In its Rule 1925(a) opinion, the trial court did consider the fourth, seventh, and tenth factors, at length (***see*** Trial Court Opinion, 11/5/2012, at 9-13, 116-23). Based upon our review, we conclude that the record thoroughly supports the trial court's findings. Over the course of three days, the trial court observed and listened to testimony from Father, Mother, Child, a court appointed psychologist, Child's Belle Vernon School District teachers and an instructor from Sylvan Learning Center, among others. In particular, the trial court clearly credited the testimony of Dr. McGroarty, the court appointed psychologist, who testified that it was possible that Child, a resilient young adolescent, could adapt to a change in primary custody to

Father. N.T., 5/14/2012, at 116, 129. Ultimately, however, Dr. McGroarty did not recommend that custody be modified because Child was doing well under the current custody plan and it would result in significant changes for Child. ***Id.*** at 130, 132-33. Specifically, the amount of time Child could spend with Mother during the school year would be reduced, and Child would have to adjust to a new school district (Plum School District) with new teachers and new classmates. ***Id.*** at 132-22. It was Dr. McGroarty's concern that these changes could be psychologically distressing to Child, and he had no documentation to support a conclusion that the academic program at Plum School District would significantly improve Child's learning. ***Id.*** at 116, 130, 132-33. We likewise find no evidence in the record, beyond Father's own opinion, to show that Plum School District would actually improve Child's learning. ***See*** N.T., 5/14/2012, at 164-66. Thus, we find no abuse of discretion in the trial court's determination.

In his final issue, Father asserts that the trial court erred by failing to consider the degree of cooperation between the parents in relation to its decision regarding legal custody of Child. Appellant's Brief at 25. Pursuant to the Custody Act, if it is in the best interest of the child, a court may award shared legal custody after a consideration of the sixteen factors listed in Section 5328(a). 23 Pa.C.S.A. § 5323. In particular, the thirteenth factor listed in Section 5328(a) encompasses the cooperation between parents, as it requires the trial court to consider, "[t]he level of conflict between the

parties and the willingness and ability of the parties to cooperate with one another." 23 Pa.C.S.A. § 5328(a)(13).

According to Father, "the parties' inability to communicate on the most basic level should have precluded the lower court from finding that sufficient cooperation existed upon which to award shared legal custody." Appellant's Brief at 26. In support of his claim, Father points to his evaluation of the testimony of Dr. McGroarty, Mother and himself. ***Id.*** at 26-27.

Once again, Father asks us to reweigh the evidence and reach a different conclusion. As already noted, this Court is unable to do so. ***M.P.,*** 33 A.3d at 76. Furthermore, the trial court did consider the ability of Mother and Father to cooperate as follows:

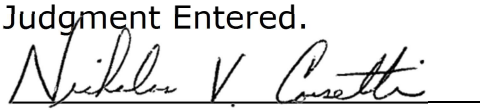
> This court believes that this factor is very important for [Child's] physical, emotional, developmental, educational and special needs. The parties' conflict with each other has a negative effect on their son, especially emotionally. [Child] does not want to be in the middle of his parents' arguments and he does not want to hurt any of their feelings. The parents have shared legal custody, but Mother made unilateral decisions on the child's behalf. In addition, there were email exchanges in which Mother's response was negative about Father instead of addressing the problem. Mother also withheld information about [Child's] medical and dental providers and other medical information. Mother was not in complete compliance when the court ordered her to take [Child] to Sylvan Learning Center to address his educational deficits.

Trial Court Opinion, 11/5/2012, at 15.

Thus, contrary to Father's claim, it is evident that the trial court was well aware of Mother and Father's historical interaction and considered its importance in rendering a decision. While acknowledging, *inter alia*, Mother's failure to provide Father with information and Mother's past non-compliance with taking Child to Sylvan Learning Center (***id.*** at 20, 22), the trial court still concluded that it was in the best interest of Child for Mother and Father to continue to share legal custody of Child. This conclusion is not unreasonable. The record shows that, despite initial resistance, Mother has cooperated by taking Child to Sylvan Learning Center for the required number of hours. N.T., 5/14/2012, at 38-39. We also point out that Dr. McGroarty was unwilling to conclude that Mother and Father could not co-parent Child. ***Id.*** at 112. Dr. McGroarty also positively stated that he attributed Child's enthusiasm for learning to parents, and believed that both parents were to be commended for how Child knows that each of his parents love him and want him to spend time with the other parent. ***Id.*** at 71, 78. Thus, the record supports the trial court's determination, and we find no abuse of discretion in the award of shared legal custody.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/14/2013