

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

P.K.C., : IN THE SUPERIOR COURT OF
Appellant : PENNSYLVANIA
v. :
D.A.C., : No. 1497 WDA 2012
Appellee

Appeal from the Order entered August 31, 2012,
in the Court of Common Pleas of Venango County,
Civil Division, at No. 1411-2011

BEFORE: ALLEN, WECHT, and STRASSBURGER*, JJ.

MEMORANDUM BY ALLEN, J.:

Filed: March 1, 2013

P.K.C. ("Mother") appeals from the order granting D.A.C. ("Father") primary physical custody and Mother partial custody with respect to the parties' daughter, M.K.C. ("Child"), born in May of 2006. We remand in accordance with the following decision.

The relevant facts and procedural history are as follows. As a result of a Protection From Abuse ("PFA") order, dated November 2, 2011, Father was granted primary physical custody, and Mother was granted partial custody every Wednesday from 4:00 p.m. to 8:00 p.m, and every Friday from 4:00 p.m. until Saturday at 4:00 p.m., to be supervised by Child's maternal grandmother.¹ **See** Order, 11/2/11, at ¶ 5. On November 9, 2011, Mother

¹ Father filed a PFA petition against Mother, his wife, alleging that she physically abused him. Thereafter, the court issued the PFA order "[b]y agreement of the parties without an admission of liability, without an

initiated the underlying custody action and requested primary physical custody and shared legal custody of Child. By order dated February 17, 2012, following a judicial conciliation conference, the trial court scheduled the matter for trial. Further, the trial court amended the PFA order “whereby Mother shall be allowed to exercise her periods of partial physical custody unsupervised.” Order, 2/17/12. In addition, the trial court granted the parties shared legal custody.

The custody trial occurred on June 20, 2012, August 21, 2012, and August 24, 2012. The following witnesses testified: Mother; Monica Chatham, Mother’s friend; K.C., Child’s maternal grandmother; K.C., Father’s adult son from a prior relationship; Tara Nichols, Child’s school counselor; C.B., Father’s aunt; J.C., Child’s paternal grandmother; Father; and J.L., Mother’s adult daughter from a prior relationship.

By order dated August 29, 2012, and entered on August 31, 2012, the trial court directed that Father retain primary physical custody subject to Mother having partial physical custody during the school year on alternating weekends, and on Wednesdays following her custodial weekends from 4:00 p.m. to 8:00 p.m. The trial court directed that the parties share physical custody during the summer on an alternating weekly basis. The trial court also set forth a holiday schedule and directed that the parties share legal custody. On September 12, 2012, Mother filed a motion for reconsideration

evidentiary hearing and without a finding of abuse by this Court.” **See** Order, 11/2/11.

in which she requested modification of the order to provide for the parties to share physical custody on an alternating weekly basis during the school year, or in the alternative, increased partial custody. **See** Motion for Reconsideration, 9/12/12. By order dated September 20, 2012, and entered on September 21, 2012, the trial court modified the August 29, 2012 order by directing that Mother's physical custody be from 4:30 p.m. to 8:30 p.m. on Wednesday evenings following her custodial weekends.

On September 27, 2012, Mother timely filed a notice of appeal from the August 29, 2012 order, as amended by the September 20, 2012 order. Mother did not concurrently file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b). On October 3, 2012, Mother again filed a notice of appeal from the August 29, 2012 order, as amended by the September 20, 2012 order, along with a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).²

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

1. Did the lower court commit an error of law and/or abuse of discretion in finding that the mother had an alcohol problem

² Although Mother did not concurrently file the concise statement of errors complained of on appeal with the notice of appeal on September 27, 2012, we decline to dismiss or quash her appeal. Mother filed the concise statement on October 3, 2012. We conclude Mother's procedural error did not prejudice Father, and therefore, it was harmless. **See *In Re K.T.E.L.***, 983 A.2d 745, 747 (Pa. Super. 2009) (holding that the failure to file a concise statement of errors complained of on appeal with the notice of appeal will result in a defective notice of appeal, to be disposed of on a case by case basis).

that in some way would limit her ability to parent the child during the school year?

2. Did the lower court commit an error of law and/or abuse of discretion in finding that the week on/week off custody would not be appropriate during the school year?
3. Did the lower court commit an error of law and/or abuse of discretion in finding that the mother would not promote the relationship between the child and the father?
4. Did the lower court commit an error of law and/or abuse of discretion in finding that the periods of physical custody the mother [was granted] during the school year should be reduced?

Mother's Brief at 4.

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).

Our Legislature adopted a new Child Custody Act ("Act"), 23 Pa.C.S.A. §§ 5321-5340, which became effective on January 24, 2011. Because the proceedings in this matter occurred after the effective date of the Act, the Act is applicable. *See C.R.F., III, supra* (discussing the applicability of the Act). Relevant to this case are the best interest factors set forth in section 5328(a) of the Act, which provides:

§ 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). 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).

We observe that in this case, although the trial court issued a thoughtful and comprehensive opinion pursuant to Pa.R.A.P. 1925(a), it did not specifically articulate all of the factors set forth in 23 Pa.C.S.A. § 5328(a). **See** Trial Court Opinion, 11/2/12. Pursuant to this Court's decision in ***J.R.M., supra***, we are constrained to remand this case for the trial court to issue an opinion within 30 days, wherein it shall expressly consider and address all of the section 5328(a) factors.

Case remanded. Jurisdiction retained.