

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

J.M.,

Appellant

v.

K.L.A.,

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1519 MDA 2012

Appeal from the Order entered July 20, 2012,
in the Court of Common Pleas of Susquehanna County,
Civil Division, at No(s): 2011-573CP.

BEFORE: FORD ELLIOTT, P.J.E., PANELLA and ALLEN, JJ.

MEMORANDUM BY ALLEN, J.:

Filed: January 3, 2013

J.M., ("Father"), appeals from the trial court's custody order denying Father's request for modification. The trial court maintained the status quo by granting Father and K.L.A. ("Mother") shared legal custody of their son, N.A. ("Child"), and granting Mother primary physical custody. We affirm.

The trial court summarized its factual findings as follows:

[The parties] are the natural parents of a minor son, [Child], DOB 08/04/10. [Child] has always been in the primary physical custody of [Mother] since birth.

[Father] is under a final protection from abuse order of September 15, 2012, which expires September 14, 2013. The order provides protection from abuse for [Mother], providing her with 150' prohibited contact space as well as a prohibition against violence, harassment, threats of violence by [Father]. Other provisions of the final order prohibited [Father] from possessing, transferring, or acquiring firearms during the effective periods of the P.F.A. order.

A later order at No. 2010-1288 CP by stipulation provided for an additional six months protection bringing the expiration date of the PFA order to March 14, 2014.

Additionally, the same stipulation and order extended an accelerated disposition program probation period for an additional six months to April 20, 2013. Hence, [Father] remains under supervision of the probation department until April 20, 2013 and is subject to the provisions of a PFA order in favor of [Mother] until March 14, 2014.

The criminal history of [Father] shows, in part, that on or about November 13, 2010, [he] was arrested for possession of a firearm by a minor, a felony of the third degree, persons not to possess firearms, misdemeanor one, and corruption of [a] minor, a misdemeanor one, in connection with delivering a .25 caliber semi-automatic pistol to his minor son and instructing him to hide the loaded weapon.

[Father] continues to reside [in] Lenoxville, Pennsylvania, with three of his children by a prior common law marriage – [J.J.M.] age 18, [K.M.] age 17, and [M.M.] age 11. The [oldest] child will be attending a higher education institution this autumn. The children do get along well with their half-brother [Child] and have a close relationship with him.

Presently [Father] is disabled and was on a form of disability from the railroad where he received a back injury in the scope of his employment. As a result, he underwent surgery with the placement of 8 screws placed into his back. For whatever reason, his disability payments are now stopped and he is borrowing money to support his household. At the time of his appearance before the court, he was wearing a good sized back brace and did appear in some level of discomfort and/or pain when sitting at counsel table with his lawyer.

Testimony indicates that [Child] is happy when [he] is visiting [Father,] who supervises him on the swing set, at the sandbox and while playing in the house with his toys. Also, [Father] goes for walks with [Child] and takes him fishing.

[G.F.], retired District Justice, step-father of [Mother], offered credible testimony that on at least one occasion, [Father] had been arrested for putting a gun to a woman's head. The charges were later dismissed as the alleged victim failed to attend the preliminary hearing.

[G.F.] acts as [Child's] caregiver on occasions as needed, many times for about one hour before [Mother] returns from her employment. [G.F.] also has a close relationship with [Child] who calls him, "Daddy". They are ["buddies" and engage in activities such as walking, fishing, playing together and attending church.

[L.F.], maternal grandmother, last employed as a lunch monitor at a local school, does not intend to return to such employment this year. She opines that [Mother] is a better mother at her age than she herself was at the same age. In extolling praise upon [Mother], [L.F.] stated that [Mother] talks to [Child] prior to his visits with [Father], and talks to him as a form of discipline.

[L.F.] related in her testimony that, one time upon his return from [Father's] partial custody and visitation, [Child] was observed to have a "handprint" in the form of three fingerprints on his calf. This allegation was disputed by [Father] who claimed it was visible upon [Child's] return from [Mother's] physical custody.

[Mother] had an eighteen month relationship with [Father] which resulted in the birth of [Child]. During her live-in relationship with [Father], [Mother] observed hard partying at his house.

Presently, [Mother and Child] live with the [maternal grandparents] in Susquehanna County in a two bedroom ranch house where she and [Child] presently share a bedroom. When she is not engaged in her employment in the healthcare field, [Mother] provides the daily care needed by [Child], not then relying upon [the maternal grandparents] to provide care for [Child].

Upon his return from [Father's] partial custody and visitation periods, [Child] is observed to take about 1½ days to normalize his routine, appears to be very thirsty and sleeps a lot. It was a half[-]brother's testimony that

when [Child] is at [Father's], the children try to do a lot with him.

[Mother] has raised concerns that, due to his present medical condition, [Father] cannot promote a safe environment for [Child], a very young boy full of energy.

Presently, under agreement and order of this court, [Child] is in [Father's] physical custody for partial custody and visitation Thursday from 2:00 PM to Saturday at 6:30 PM one week and the opposite week from Tuesday at 9:00 AM to Thursday at 9:00 AM[.]

Trial Court Opinion, 7/24/12, at 1-4 (unnumbered).

Given these factual findings, the trial court concluded that "the existing custodial arrangements" were "appropriate and in [Child's] best interests." *Id.* 5. Father filed this timely appeal. Both Father and the trial court have complied with Pa.R.A.P. 1925.

Father raises the following issue:

1. DID THE ORDER OF THE SUSQUEHANNA COUNTY COURT OF COMMON PLEAS IMPROPERLY CONSIDER HEARSAY EVIDENCE IN THE HEARING TO MODIFY CUSTODY AND THEREFORE VIOLATE 23 PA.C.S.A. §5328(a) WHEN RELYING UPON THE TESTIMONY IN DENYING INCREASED PARTIAL CUSTODY AND VISITATION TO [FATHER]?

Father's Brief at 5.

This Court has recently summarized our scope and standard of review in custody cases as follows:

[O]ur scope is of the broadest type and our standard of review 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) (citation omitted).

In support of his claim, Father asserts that the trial court improperly relied upon the hearsay testimony from G.F., regarding Father's arrest in the mid-1990s for putting a gun to a woman's head. Before addressing the merits of Father's claim, we consider whether it is properly before us.

Issues not raised in the trial court are waived and cannot be raised for the first time on appeal. Pa.R.A.P. 302(a); ***E.D.***, 33 A.3d at 78. Although Father initially objected to G.F.'s testimony, he did not state the basis for his objection. ***See*** N.T., 7/13/12, at 84. In response to further questioning, Father objected to "leading" and "form of the question." ***Id.*** at 85. Because Father did not identify his objection on hearsay grounds, his request for relief on this basis is waived. ***See Boykin v. Brown***, 868 A.2d 1264, 1267 (Pa. Super. 2005) (holding that complainant waived her claim that the trial court erred in refusing to permit witnesses under the "excited utterance" to the hearsay rule, when she "did not raise this theory to support her proffer of the testimony").

Even if not waived, Father's claim is without merit. In denying relief, the trial court stated:

Firstly, that former District Justice [G.F.] testified as to [Father's] past alleged criminal conduct was not hearsay – it was not an out of court statement offered for the truth of the matter asserted. Instead, District Justice [G.F.] related information he knew of concerning [Father] as a result of his being personally and professionally involved with the case. The reference by this court to [Father's] alleged criminal misconduct consisted of two sentences in a single paragraph of our opinion. Obviously, we did [not] base our findings solely on [G.F.'s] testimony concerning [Father's] run-in with the law.

Trial Court Opinion, 8/30/12, at 1.

Our review of the record supports the trial court's conclusions. Moreover, the evidence presented at the modification hearing revealed that Father's ex-wife had been granted a PFA order against Father, and that Mother's PFA order had been recently extended. G.F. testified to impeach the testimony from Father and his witnesses that he was not abusive toward women. Even if any of G.F.'s testimony is considered hearsay, the trial court was fully aware of Father's past and present PFA petitions, and is presumed to have disregarded any inadmissible evidence. ***See Commonwealth v. Galindes***, 786 A.2d 1004, 1014 (Pa. Super. 2001) (explaining that trial court, when acting as fact finder, is presumed capable of disregarding inadmissible evidence).

Father also argues that the trial court "placed undue weight upon present and past abuse allegedly committed" by Father when considering

section 5328(a) custody factors. As noted above, the weight the trial court assigned this evidence, as well as all the other section 5328(a) factors, cannot be disturbed by this Court. *E.D., supra.*

In sum, Appellant's claim is not properly preserved on appeal and is otherwise without merit. We therefore affirm the trial court's custody order.

Order affirmed.