

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

D.D.,

Appellant

v.

A.D.,

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 16 WDA 2013

Appeal from the Order November 29, 2012
In the Court of Common Pleas of Blair County
Civil Division at No(s): No. 4712 GN 2005

BEFORE: STEVENS, P.J., BOWES, J., and MUSMANNO, J.

MEMORANDUM BY STEVENS, P.J.

FILED: May 6, 2013

D.D. ("Father") appeals from the order of the Court of Common Pleas of Blair County dated November 28, 2012, and entered on November 29, 2012, which denied Father's Petition to Modify Custody to equally shared time throughout the year, and reinstated the existing custody order with respect to Father's and A.D.'s ("Mother's") sons, S.T.D., born in September of 1997, and S.D.D., born in August of 2003 (collectively, "the Children"), with a slight increase in Father's overnight times. We affirm.

The relevant facts and procedural history are as follows: The Children were born during the marriage of Father and Mother. The parties are currently divorced, and both live in the Hollidaysburg School District. Father lives alone, while Mother remarried in March of 2012. Trial Court Opinion, 11/29/12, at 1.

The Children have primarily resided with Mother, and Father has custody every other weekend beginning on Thursday until Monday mornings, when he transports the Children to school. Father also has custody every Tuesday and Thursday evening, when the Children are involved in Boy Scouts. Father and Mother share custody equally in the summer on a week on/week off basis. ***Id.*** Both parents share legal custody of the Children.

On February 28, 2012, Father filed a Petition to Modify Custody, requesting that the summer agreement of equal time be extended year around. On the other hand, Mother sought to diminish Father's time with the Children. On October 31, 2012, the trial court held a hearing. During the hearing, Father and Mother testified, and the Children testified *in camera*. By order dated November 28, 2012, and entered on November 29, 2012, the trial court denied Father's Petition to Modify Custody and reinstated the current custody order.

Father timely filed a notice of appeal and a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

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

Whether the trial court failed to properly weigh the evidence in relation to the custody factors contain[ed] in 23 Pa.C.S.A. [§] 5328(a)[,] and [,] as a result[,], is the decision of the trial court not supported by the sufficiency of the evidence?

Father's Brief, at 1.

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) (quotation 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). In determining best interests under the Child Custody Act, 23 Pa.C.S.A. §§ 5321-40, the trial court must consider the following 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) (bold in original).

Contrary to Father's argument, in its opinion that accompanied the subject order, the trial court clearly considered the factors set forth in section 5328(a). Trial Court Opinion, 11/29/12, at 3-7. Specifically, the court found that Father is more likely to encourage and permit frequent and continued contact between the Children and Mother. Moreover, Father is better able than Mother to insulate the children from the psychological or emotional consequences of said conflict. The trial court found that Mother's testimony contained constant criticism, even when the testimony had little bearing or impact on the important matters in the case. Father, however, took the "high road," acknowledging his faults and providing Mother with credit for being a good mother. **Id.** 3-5. The court found that there was no abuse committed by a party or member of a party's household. **Id.** 4. The trial court found that both parents are capable of performing their parental responsibilities. The court noted that Mother had more of an advantage since she has been doing it for a longer period of time. **Id.** at 4. The trial court also determined that both Father and Mother are capable of ensuring stability and continuity in the Children's education, family and community

life, and in ensuring the stability and consistency necessary for their physical, intellectual and emotional well-being. Mother is especially concerned with the Children's education in light of S.T.D.'s educational obstacles, especially his problems with reading, and the trial court determined that Mother's involvement met the Children's needs with regard to education in a better fashion than Father. **Id.** at 4-6.

As to whether there was a history of drug or alcohol abuse, the evidence revealed that Father did have a Driving Under the Influence conviction approximately five years ago. Originally, Father did not admit the conviction on direct examination during the hearing, but confirmed it later when it was brought up by Mother during her testimony. The trial court found Father's conviction to be ameliorated by Father's decision to stop drinking alcohol following his arrest, and there was no evidence presented that Father has resumed drinking. **Id.** at 7. Further, the court found no evidence that the mental and physical health of Father and Mother or a member of their households was a factor in the case. **Id.** at 7.

In reaching its decision, the trial court reviewed the evidence concerning the availability of extended family on both sides. Father's parents are frequently involved with the Children's care. Also, Stepfather, an engineer, has provided help to the Children with their homework while in Mother's custody. **Id.** at 4.

Next, the trial court acknowledged that the Children, who are the only siblings involved, get along well with each other. The evidence reveals that both Children interact well with their parents and vice versa. The trial court interviewed the Children separately, and each child stated his satisfaction with the status quo. ***Id.*** at 5.

The trial court also determined that both Father and Mother are able to meet the daily needs of their Children, including the physical, emotional, developmental, and special educational needs of the Children. Although Mother has an advantage because she has cared for the Children for a longer period of time, Father has shown that he is very capable of handling the needs of the Children while in his care. ***Id.*** at 6. Since the Children are 9 years old and 15 years old, there appears to be no need for daycare in this case. The evidence reveals that Mother and Father are able to handle most situations with the aid of paternal grandparents and stepfather. ***Id.*** at 6. Finally, the trial court found no other relevant factors.

In its opinion, the trial court undertook an extensive, detailed statutory analysis pursuant to 23 Pa.C.S.A. § 5328(a)(1-16). Although Father is not satisfied with the weight that the trial court afforded to each of the factors in rendering its custody decision, the trial court's conclusions are not unreasonable as shown by the evidence of record. Therefore, we are constrained to defer to the trial court's custody decision. ***C.R.F.***, 45 A.3d at 443. We simply will not retry the case.

Our Supreme Court has instructed as follows.

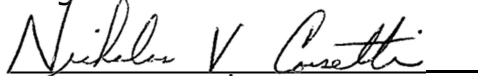
[A]ppellate courts must employ an abuse of discretion standard of review, as we are not in a position to make the close calls based on fact-specific determinations. Not only are our trial judges observing the parties during the hearing, but usually, as in this case, they have presided over several other hearings with the same parties and have a longitudinal understanding of the case and the best interests of the individual child involved. Thus, we must defer to the trial judges who see and hear the parties and can determine the credibility to be placed on each witness and, premised thereon, gauge the likelihood of the success of the current permanency plan. Even if an appellate court would have made a different conclusion based on the cold record, we are not in a position to reweigh the evidence and the credibility determinations of the trial court.

In re R.J.T., 608 Pa. 9, 27-28, 9 A.3d 1179, 1190 (2010). ***See In re Adoption of S.P.***, ___ Pa. at ___, 47 A.3d 817, 826-827 (2012).

Accordingly, we affirm the order denying Father's Petition to Modify Custody to include equally shared time throughout the year, and reinstating the current custody order with a slight increase in Father's overnight times.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/6/2013

