

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

M.H.

Appellee

v.

J.L.H.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1725 EDA 2012

Appeal from the Order of June 4, 2012
In the Court of Common Pleas of Philadelphia County
Domestic Relations at No(s): OC0900279

BEFORE: PANELLA, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY WECHT, J.:

Filed: January 31, 2013

J.L.H. ("Mother") challenges the trial court's order dated June 4, 2012. That order granted M.H. ("Father") partial unsupervised custody of the parties' minor child, G.H. ("Child"). We affirm.

The instant dispute concerns Father's Petition for Modification of Custody. Following a hearing on the petition held on June 4, 2012, and over Mother's opposition, the trial court granted Father unsupervised partial physical custody. Mother filed a timely appeal and attached to same her statement of errors complained of on appeal, as required by Pa.R.A.P. 1925(a)(2)(i). On August 8, 2012, the trial court entered its opinion pursuant to Pa.R.A.P. 1925(a)(1).

Therein, the trial court set forth the factual history underlying this matter at length as follows:

Father and Mother are currently married but separated with a divorce action pending at the time of the custody hearing. The parties are the parents of [Child], age six Since the parties' separation in 2009, Mother has maintained primary physical and legal custody of [Child] and Father has had supervised custody.

Father testified that he is employed as a union carpenter and has worked at the Philadelphia airport for the last six years. ([Notes of Testimony ("N.T.")] p. 15). Father's work schedule is Monday through Friday, as well as occasional Saturdays from 7:00 a.m. to 3:30 p.m. (N.T. pp. 16-17). Father currently lives alone in a two bedroom apartment in a condominium complex with grounds that include a swimming pool, golf course, basketball court and a little playground. (N.T. pp. 12-14).

Father presently owns a vehicle but does not have a driver's license, which was revoked in 2009 due to his conviction under [75 Pa.C.S. § 3802] ("DUI"). (N.T. pp. 14-15, 29-30), (See Ex. C-4). As a result of his DUI conviction, Father stated that his primary form of transportation was by bus or train. (N.T. pp. 15-16). However, Father admitted to having driven since the revocation of his license. (N.T. p. 30). Although Father stated that he did not stop drinking alcohol as a result of his conviction for a DUI nor has he ever attended Alcoholics Anonymous, he did attend twelve sessions of psychotherapy under the terms of his sentence for DUI as was reported to the court psychologist in his [mental health assessment ("MHA")] (N.T. pp. 42-43), (See Ex C-5). In his MHA interview, Father stated that he "consumes alcohol on the weekends and would have six to eight lite beers per sitting." (See C-5). Father stated that in spite of his DUI conviction, he does not believe he has a substance abuse issue and that since his meeting with the court psychologist he has refrained from drinking entirely. (N.T. p. 43).

After the parties' separation, Father had court-ordered supervised custody with [Child] at the home of his sister as arranged between the parties pursuant to an interim order entered on March 13, 2009. Father stated that these visits were terminated by Mother when she learned that Father went to Dave and Buster's with [Child] without the supervision of his sister, who dropped them off to eat dinner while she went shopping at the mall. (N.T. pp. 25-26). Father testified that he had previously taken [Child] to Dave and Buster's on numerous

occasions, with Mother's knowledge, and it had never been an issue. (N.T. pp. 25-26). Conversely, Mother testified that she was usually not informed in advance when the visitations would occur outside Father's sister's home. (N.T. p. 48). On the occasion of the Dave and Buster's incident, Mother had the flu and Father's sister had offered to take [Child] to Dave and Buster's and asked if Father could join them, but then failed to supervise the visit as required by the terms of the existing court order. (N.T. pp. 48-49). After this incident, Father filed a Motion for Expedited Relief and as a result the court entered its interim order of November 9, 2011, for supervised visits at the court nursery every Sunday from 9:30 a.m. until 11:30 a.m.

Mother teaches in the Philadelphia School District and works from 8:30 a.m. to 3:30 p.m. during the school year (N.T. p. 44). Mother does not usually work in the summer. (N.T. pp. 46-47). Mother and [Child] moved to a two-bedroom apartment in Huntingdon-Valley, Pennsylvania after the parties' separation so that [Child] could attend the Abington School District. (N.T. p. 46). Mother testified that she suffers from an autoimmune disease, sarcoidosis, for which she is prescribed fifteen different medications, including Percocet. (N.T. p. 109). Mother stated that her medications do not inhibit her ability to function both professionally and in her role as a parent. (N.T. pp. 109-110).

[Child] presently attends kindergarten and will be entering the first grade in September 2012. (N.T. p. 52). Mother testified that [Child] started to have behavioral problems in preschool and most recently has been exhibiting self-deprecating behavior, such as saying "I hate myself" or "Do you want a new son?" and being aggressive, biting other children or punching walls and slamming doors. (N.T. pp. 53-54). In order to monitor [Child]'s behavior, Mother is working together with his teacher and receives daily reports. (N.T. pp. 53-54). Mother stated that when [Child] refrains from acting out and gets good reports, he gets a reward. (N.T. p. 54). [Child] is currently being evaluated for attention deficit hyperactivity disorder and oppositional defiant disorder. (N.T. p. 54). Mother testified that she has seen several doctors to address [Child]'s behavioral issues and has received various treatment alternatives from behavior modification to intense psychotherapy. (N.T. pp 54-55). Further, Mother stated that [Child] has not received any medication up to this point. (N.T. p. 55). Mother testified that [Child] is currently seeing Dr. Paul DiKun, a pediatric

Psychologist with whom Mother was acquainted as the result of her previous counseling sessions[]during the separation with Father. (N.T. pp. 49-50). Mother stated that prior to Dr. DiKun, she had taken [Child] to another psychologist and informed Father via a certified letter attaching a copy of [Child]'s treatment plan. (N.T. p. 86-87), (See Ex. M-6). Mother stated that the letter was never claimed by Father. (N.T. p. 86-87). Further, Mother testified that, in spite of continuing to send text messages to update Father, he did not express any interest in participating in [Child]'s ongoing therapy and is not currently involved in the sessions with Dr. DiKun. (N.T. pp. 50-51, 56-57). Father testified that he was not aware that [Child] was having behavior problems in school. (N.T. p. 38). Furthermore, Father stated that he had never been to [Child]'s school . . . nor had he spoken with his teacher, but that [Child] had informed him that he was doing well in school. (N.T. p. 38). Father was also unaware that [Child] was seeing Dr. DiKun and was being evaluated for attention deficit hyperactivity disorder or oppositional defiant disorder and stated Mother had never made him aware of these issues. (N.T. pp. 39-40).

The court nursery report reflects that the parties and [Child] have attended all visits since November 13, 2011, when the supervised custody at the court nursery went into effect, except for one when Mother and [Child] failed to appear. (See Ex. C-3). In her testimony, Mother indicated that [Child] has had difficulties as the result of several incidents at the court nursery. This was confirmed to some extent by Dr. DiKun's session notes with [Child]. (See Ex. M-5). Mother testified regarding an incident involving Hulk gloves (boxing gloves), where [Child] told her a child at the nursery named Jason was wearing one glove and Father was wearing the other glove and they were both punching him. (N.T. pp. 66-67). When [Child] asked them to stop and they failed to, [Child] became upset. Mother stated that [Child] told her that his Father's response was to pick him up and start rocking him like a baby and this upset and embarrassed [Child]. (N.T. pp. 66-67). When Mother arrived to pick [Child] up after the visit, he ran up to her visibly upset and was disruptive in school and acting out at home over the next few days. (N.T. pp. 66-68). Mother further stated that [Child] told her that during some of the visits Father did not have any significant interaction with him at the court nursery, but instead socialized with the other fathers and left [Child] to play on his own with the other children. (N.T. pp. 68-69). Mother stated

that this would result in [Child] becoming angry and crying after the court nursery visit and acting out in school. (N.T. pp. 70-71). However, Mother indicated that during [Child]'s most recent visits to the court nursery, Father seemed to be more engaged with [Child] and paying more attention to him. (N.T. pp. 70-71). Mother testified that she had attempted to contact Father via text message or by calling his cell phone about the incidents at the court nursery, as reported to her by [Child], but that Father did not respond or she was unable to leave a message because his voice mail was full. (N.T. p. 56-58).

Father testified that he was unaware that [Child] was acting out in school following the court nursery visitations. (N.T. p. 30). Father also denied that during the court nursery visitations he spent more time socializing with other fathers than interacting with [Child]. (N.T. p. 31). Father stated that he would often bring toys to the court nursery to occupy [Child]. (N.T. p. 30).

Father expressed frustration with the limitations of his two-hour visits at the court nursery with [Child] and stated that he is seeking unsupervised custody of his son because he wants to . . . spend more time with him and be more involved in his life. (N.T. p. 12, 78). Father stated that if he had unsupervised custody, he would like to take [Child] to the shore, where his parents live. (N.T. p. 19). Although Father does not have a driver's license, he indicated that he would travel with [Child] either by bus or his parents would drive them. (N.T. p. 19). In addition, Father has other family members in the area with whom he maintains contact and with whom he wants [Child] to maintain a relationship. (N.T. p. 18).

Mother stated that she had reservations about Father's having unsupervised custody of [Child] due [to] her concerns regarding Father's "alcoholism." (N.T. p. 60). Mother further stated that she did not feel that Father had any experience taking care of [Child]'s day-to-day needs or that he would be able to discipline [Child], if it became necessary. (N.T. p. 61). Mother's overriding concern was that she did not feel that Father would stay sober and that he would start drinking again and potentially put [Child] in a harmful situation. (N.T. p. 61-62). Mother also expressed concern to Dr. DiKun that [Child] might turn out to be like his father. (See Ex. M-5 for 05/07/12).

Trial Court Opinion ("T.C.O."), 8/8/2012, at 5-12.

Based on this recitation of the evidence, the trial court proceeded in its opinion to review the sixteen factors enumerated by the governing statute, 23 Pa.C.S. § 5328.¹ The court found, *inter alia*, that Father was more likely

¹ Section 5328 provides, in relevant part:

(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.

(Footnote Continued Next Page)

to encourage continuing contact between the child and Mother than vice-versa, T.C.O. at 14; that both parties have extended family members available, and that each party promotes stability and continuity in the child's education, family life, and community life, *id.* at 14-15; that Child expressed "deep affection" for both parents and expressed a desire to have more frequent unsupervised visitation, *id.* at 15; that "Mother's sensitivity to the issue of alcohol usage caused her to be overly protective of Child and to circumscribe Father's contact with the child," *id.*; that there was "no issue with the adequacy of each party's housing or their ability to care for the child during their designated custody periods," *id.* at 15-16; and that "neither

(Footnote Continued) _____

(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. § 5328.

party presents with any major mental health issues," *id.* at 17. The court also noted the extensive history of conflict between Mother and Father: For her part, the trial court found that Mother was fixated on Father's alleged drinking problem. The court also noted that Father refused to communicate with Mother except through intermediaries. The court indicated that the court's psychologist's mental health assessment ("MHA") recommended estranged couple counseling in furtherance of establishing a more amicable "working relationship for purposes of raising their son." *id.* at 16.

Regarding the allegations of substance abuse, the court cited the MHA's findings that "[a]t the present time it does not appear that [Father] would intentionally harm his son. However, it may be prudent to have him demonstrate a reasonable period of sobriety before revisiting custody issues." *id.* at 17. The court found Father "to be credible in that he has abstained from alcohol since his meeting with the court psychologist" on March 29, 2012, and cited two negative drug and alcohol screens, including one that occurred approximately two months after his meeting with the court psychologist. *id.*

The court also noted Mother's diagnosis for sarcoidosis and the "significant amount of medication" she was prescribed to treat that disorder, including Percocet. *id.* at 17-18. As well, Mother suffers from migraines. The Court continued:

Mother testified that she is receiving treatment for her condition and it does not impair her ability to function. The court notes that Mother tested positive for benzodiazepine. When

questioned by her attorney, Mother testified that Percocet (an opiate) would be positive on the drug and alcohol test, but neglected to inform the court of her use of benzodiazepine which was in excess of the therapeutic range.

Id. at 18 (citations to the record omitted).

In concluding, the court explained:

[T]his court took into consideration the relevant factors under Section 5328, the lack of any evidence that Father's problems with alcohol are ongoing, including the finding of the court psychologist that Father does not present a risk of harm to the child, assessed the credibility and demeanor of the parties, and considered the child's well[-]reasoned preferences in arriving at its determination that Father met his burden to show that a modification of the custody arrangements was in the child's best interests.

Id. at 20.

On appeal of the trial court's order modifying custody to provide Father with unsupervised partial physical custody of Child, Mother asserts the following issues:

1. Whether the Trial Court erred as a matter of fact and law, and/or abused its discretion, in entering an Order which was in direct contravention to the evidence adduced at trial, including, but not limited to, the recommendations of both expert witnesses, and the testimony of [Father][?]
2. Whether the Order of the Trial Court failed to take into consideration provisions of [23 Pa.C.S. § 5328], dealing with the factors to consider when awarding custody, and therefore failed to consider the best interests of the child?

Brief for Mother at 2. Mother's argument relative to her second issue as stated is negligible at best, comprising two paragraphs that are redundant with her argument in support of her first issue. Thus, we review these

issues as a general challenge to the trial court's weighing of the evidence in light of the applicable multi-factor analysis prescribed by section 5328.

Our standard of review is well-settled:

In reviewing a custody order, our 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 not interfere with the trial court's factual conclusions unless they are unreasonable in light of the factual findings, and thus represent a gross abuse of discretion.

With any child custody case, including petitions for modification or relocation, the paramount concern is the best interests of the child. This standard requires a case[-]by[-]case determination of all the factors that may legitimately affect the physical, intellectual, moral and spiritual well-being of the child.

Johns v. Cioci, 865 A.2d 931, 936 (Pa. Super. 2004) (internal quotation marks and citations omitted).

Mother cites *Meyers v. DiDomenico*, 657 A.2d 956 (Pa. Super. 1995) for the proposition that "an appellate court is empowered to determine whether the trial court's incontrovertible factual findings support its factual conclusions." *Id.* at 957. (quoting *McMillen v. McMillen*, 602 A.2d 845, 847 (Pa. 1992)). Mother argues that the trial court in this case "drew a number of conclusions that are 'manifestly unreasonable' in the face of its factual findings." Brief for Mother at 5. Mother cites the trial court's findings

that Father had admitted driving since his license was revoked for DUI, T.C.O. at 6; that he did not stop drinking as a result of his DUI conviction, nor attend Alcoholics Anonymous meetings (citing N.T. at 42-43); that he admitted continuing to drive on weekends and drinking six to eight light beers per sitting, T.C.O. at 6; that Father maintained that he did not have a substance abuse problem, T.C.O. at 6; that Father had stated that he had stopped drinking following his meeting with a court psychologist; and that Mother's overriding concern was that Father would not stay sober, potentially putting Child at risk of harm, T.C.O. at 11-12. Brief for Mother at 6. She contends that these factual findings "in no way can be said to support the factual conclusions made by the Trial Court." *Id.*

Synthesizing these findings with her own contentions, Mother offers various conclusions that, she argues, the trial court could not reasonably have drawn based on the court's own findings and the testimony. Regarding father's alcohol use, Mother offers: "To find that Father is credible and not simply in denial as to his drinking problem when he has had several DUI arrests, [has had his] license revoked, has never sought professional help, and admits that he continues to drink strains all credulity." *Id.* at 7. Similarly, Mother argues that the trial court erred in concluding that "the real problem in this case was Mother's belief that Father is an alcoholic, and not that Father has an unacknowledged drinking problem." *Id.* That he has such a problem "is the only reasonable conclusion which can be drawn from the facts at hand." *Id.*

Mother also argues that the trial court's conclusions were manifestly unreasonable in light of the reports of court-appointed psychologist Thomas Kenny and Child's treating psychologist, Dr. DiKun. Mother notes that the trial court read much of Mr. Kenny's MHA into the record at the June 4, 2012 hearing, and relied upon that MHA and the report of Dr. DiKun in its opinion. *Id.* at 7-8. However, the trial court downplayed the relevance of each report, "seeming to conclude that the admissibility and/or weight of either report is limited due to the fact that neither expert testified in person." *Id.* at 8 (citing T.C.O. at 18-19). "In its Opinion, the Trial Court seems to veer between relying on the expert reports where they support its conclusions, but to discount the same reports where the specifics of same contradict its conclusions." *Id.*

Finally, Mother contends that the trial court cited, but afforded insufficient weight to, the evidence of difficulties Child had with other children during his supervised visits in the court nursery. Mother takes issue with the trial court's conclusion that "the solution is to do away with the supervised visits entirely as opposed to merely shifting the visits to a different time period while Father dealt with his underlying issues." *Id.* at 9.

We are unable to detect anything in Mother's argument that would warrant the abandonment of our prescribed deference to trial court fact-finding when supported by competent evidence, or that would justify an intrusion by this Court upon the trial court's discretion in reaching the

conclusions that led it to award father limited unsupervised physical custody of Child. No case cited by Mother dictates a contrary result.

First, the trial court amply addressed its basis for concluding that Father's historic alcohol consumption did not warrant restricting Father only to supervised custody of Child. Her argument that the trial court's conclusion in this regard "strains all credulity" is based upon a selective reading of the evidence of record and effective disagreement with the trial court's conclusion drawn therefrom: That Father had abstained for months, in keeping with Mr. Kenny's suggestion that Father demonstrate sobriety over a reasonable period of time.

Mother also maintains that the negative drug tests of Father relied upon by the court are not to be trusted, because they were predictable and/or scheduled in advance due to the instant litigation. Notably, the court also found credible Father's testimony that he had abstained. Given the testimony itself as well as the negative drug tests, we must defer to the trial court's findings and conclusions in this regard, as they are supported by competent evidence, and fall within the trial court's province as fact-finder.

Regarding the court's allegedly selective reliance upon the reports of Mr. Kenny and Dr. DiKun, Mother overlooks the fact that determinations of credibility and relevance are not an all-or-nothing proposition. Rather, the trial court as fact-finder "is free to accept or reject the credibility of both expert and lay witnesses, and to believe all, part, or none of the evidence." *Gunn v. Grossman*, 748 A.2d 1235, 1240 (Pa. Super. 2000). In effect,

Mother complains of the very essence of a trial court's fact-finding function. Moreover, we note that nothing the trial court drew from the expert reports, or disregarded in them, was viewed in isolation: In virtually all instances, the trial court's conclusions were explained within the developed context of other complementary or contradictory evidence in the record.

Finally, Mother's argument that the trial court erred in ordering unsupervised partial physical custody because this somehow was predicated on Child's troubles with another child in the court nursery seems to us entirely beside the point. Mother treats this as though it was a core premise underlying the court's order. We differ with that perspective. Plainly, the trial court concluded that increasing Father's partial physical custody and removing supervision was in Child's best interests, a conclusion drawn from an extensive matrix of documentary and testimonial evidence. Mother's surmise in this regard warrants no further discussion.

For the foregoing reasons, we can only conclude that each of the trial court's findings of fact was supported by substantial competent evidence. Moreover, none of the court's findings, credibility determinations, or conclusions of fact was manifestly unreasonable, and neither were the terms of its custody modification. The trial court neither erred as a matter of law nor abused its discretion.

Order affirmed. Jurisdiction relinquished.