NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

D.M.M., Appellee v. J.C.O., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 101 EDA 2014

Appeal from the Order November 20, 2013
in the Court of Common Pleas of Monroe County
Civil Division at Nos.: 242 DR 2011, 9278 CV 2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.: **FILED JUNE 25, 2014**

J.C.O. (Father) appeals the order of the trial court entered November 20, 2013, awarding shared physical custody of the parties' two minor children: a son, D.O., born in November of 2002, and a daughter, N.O., born in April of 2005 (Children), to Father and D.M.M. (Mother). The parties share legal custody. We affirm.

The family, including Mother's adult daughter from a previous relationship, V., moved to Pennsylvania in 2004. The parties married on February 19, 2005. In October of 2009, Father moved to the State of Indiana to pursue employment where he resided for approximately eleven

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* Retired Senior Judge assigned to the Superior Court.

months, returning to Pennsylvania for one week each month. Mother, the Children, and V., remained in Pennsylvania while Father lived in Indiana.

In October 2011, a physical altercation occurred between the parties and Mother filed a protection from abuse (PFA) action against Father in the trial court. The court granted Mother exclusive possession of the marital home and a PFA order against Father for six months. Father moved to his parents' home in New Jersey while the PFA order was in effect. During that time, the Children resided with Mother on Monday through Friday and with Father on Saturdays and Sundays. Following a custody conference, the trial court entered an order reflecting that schedule on November 3, 2011. The order also provided that, when Father moved back to the marital residence pursuant to a pre-nuptial agreement which provided that Father owned the real estate, the Children would reside with Father from Sunday at 6:00 p.m. until Thursday at 3:00 p.m. and would reside with Mother from Thursday at 3:00 p.m. until Sunday at 6:00 p.m.

When the PFA order expired in March of 2012, Mother, V., and the Children moved out and Father moved back into the home. When Father moved back into the marital residence, the custody schedule shifted as provided in the November 3, 2011 order, whereby the Children resided with Father from Sunday to Thursday and Mother Thursday to Sunday.

Mother has remained in the same residence since she moved out of the marital residence in March of 2012, and works at the same job. V., a

full-time college student, continues to reside with Mother, and to work part-time.

On September 10, 2013, Father filed a motion for an evidentiary hearing on the question of the custody of the Children. In his prehearing statement, filed October 11, 2013, Father asked the trial court to modify the existing schedule only to the extent that each party would alternate custody each weekend from Saturday at 8 a.m. to Monday at 8 a.m. Father also proposed a detailed holiday schedule.

At the evidentiary hearing held on October 31, 2013, the trial court took testimony from Mother and Father, and received a variety of exhibits that included home studies, home questionnaires, photographs of Mother's home, financial records, and the educational records of the Children.

The trial court issued an order on November 20, 2013, that grants shared legal custody, and provides that the parties will share physical custody of the Children on a schedule by which one parent will have physical custody from Thursday through Wednesday on alternate weeks, so that each parent has physical custody every other weekend. The order did not adopt Father's detailed holiday schedule, but it does provide that the parties shall have physical custody on alternate major holidays.

The trial court denied Father's petition for reconsideration and his motions to stay the order and for expedited relief on December 17, 2013. Father timely filed his notice of appeal and statement of matters complained of on appeal on December 18, 2013. ***See*** Pa.R.A.P. 1925(a)(2)(i).

Father presents the following three questions for our review:

> 1. Whether the trial court erred and abused its discretion when it changed primary physical custody and granted a significant change in the [C]hildren's weekly schedule by misapplying and/or ignoring the factors outlined in 23 Pa.C.S.A. §5328 (a) when determining the best interest of the [C]hildren?
>
> 2. Whether the trial court erred and abused its discretion by making findings of fact and conclusions of law unsupported by the record to significantly change physical custody and the weekly schedule that for two years provided stability and consistency to the [C]hildren and afforded them frequent contact with both parents?
>
> 3. Whether the trial court erred and abuse [sic] its discretion in making the determination that ignoring the request of both parties for a comprehensive holiday schedule was in the [C]hildren's best interest?

(Father's Brief, at 10).

Our scope and 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).

We have stated,

> [T]he discretion that a trial court employs in custody matters should be accorded the utmost respect, given the special nature of the proceeding and the lasting impact the result will have on the lives of the parties concerned. Indeed, the knowledge gained by a trial court in observing witnesses in a custody proceeding cannot adequately be imparted to an appellate court by a printed record.

Ketterer v. Seifert, 902 A.2d 533, 540 (Pa. Super. 2006) (citing ***Jackson v. Beck***, 858 A.2d 1250, 1254 (Pa. Super. 2004)).

The primary concern in any custody case is the best interests of the children. "The best-interests standard, decided on a case-by-case basis, considers all factors that legitimately have an effect upon the child[ren]'s physical, intellectual, moral, and spiritual wellbeing." ***Saintz v. Rinker***, 902 A.2d 509, 512 (Pa. Super. 2006) (citing ***Arnold v. Arnold***, 847 A.2d 674, 677 (Pa. Super. 2004)).

We must accept the trial court's factual findings that are supported by competent evidence of record, and we defer to the trial court on issues of credibility and weight of the evidence. If competent evidence supports the trial court's findings, we will affirm even if the record could also support the opposite result. ***See In re Adoption of T.B.B.***, 835 A.2d 387, 394 (Pa. Super. 2003).

Additionally,

> The parties cannot dictate the amount of weight the trial court places on evidence. Rather, the paramount concern of the trial court is the best interest of the child[ren]. Appellate interference is unwarranted if the trial court's consideration of the best interest of the child[ren] was careful and thorough, and we are unable to find any abuse of discretion.

S.M. v. J.M., 811 A.2d 621, 623 (Pa. Super. 2002) (citing ***Robinson v. Robinson***, 645 A.2d 836, 838 (Pa. 1994)).

Here, the trial court examined each of the sixteen statutory factors enumerated in 23 Pa.C.S.A. § 5328(a). (***See*** Trial Court Opinion, 1/17/14); ***see also C.B. v. J.B.***, 65 A.3d 946, 955 (Pa. Super. 2013), *appeal denied*, 70 A.3d 808 (Pa. 2013) (holding, *inter alia*, that the trial court must set forth its mandatory assessment of the sixteen best interest factors in 23 Pa.C.S.A. § 5328(a)).

We will discuss Father's first two questions together because they are interrelated, and we will discuss them in the order Father presents them in his brief. (***See*** Father's Brief, at 10, 23-50).

Father first complains that the trial court found that factor two, the past and present abuse committed by a party, weighed against Father by considering only the PFA petition Mother filed against Father, while ignoring the two petitions for PFA orders that Father sought against Mother. (***Id.*** at 24-28); ***see also*** 23 Pa.C.S.A. § 5328(a)(2). The trial court explained that it did not consider the PFA petitions Father filed against Mother because they did not result in a final order. (***See*** Trial Court Opinion, 1/17/14, at unnumbered pages 3-4). In his brief, Father also revisits the evidence presented in an attempt to convince us that there was sufficient evidence to find that Mother abused Father at least as much as he abused Mother; this is the same evidence that the trial court considered when it made its finding

regarding abuse. (***See*** Father's Brief, at 24-28; Trial Ct. Op., at unnumbered pages 3-4).

We will not revisit evidence and reach a conclusion different from that reached by the trial court absent an abuse of discretion. If competent evidence supports the trial court's findings, we will affirm even if the record could also support the opposite result. ***See In re Adoption of T.B.B.***, 835 A.2d 387, 394 (Pa. Super. 2003). The parties cannot dictate the amount of weight the trial court places on evidence. Rather, the paramount concern of the trial court is the best interest of the Children. Appellate interference is unwarranted if the trial court's consideration of the best interest of the Children was careful and thorough, and we are unable to find any abuse of discretion. ***See S.M.***, ***supra*** at 623. We find no abuse of discretion in the trial court's reasoning supporting its finding that factor two weighs against Father.

Father next finds fault with the trial court's finding that factor six, sibling relationships, weighs in favor of Mother because her adult daughter, the Children's half-sister, V., lives with her. (***See*** Father's Brief, at 28-30); ***see also*** 23 Pa.C.S.A. § 5328(a)(6). Father relies on this Court's decision in ***E.A.L. v. L.J.W.***, 662 A.2d 1109 (Pa. Super. 1995), to argue that "[t]he policy regarding siblings is not controlling, but is only one factor to be considered in determining the best interest of the child[ren]. Every custody case must be resolved under its own particular circumstances." (Father's Brief, at 29). We agree. As stated in ***E.A.L.***, ***supra***, "That policy [of raising

siblings together] is only one factor which the court must consider and it is not controlling. In this case, the trial court placed great reliance on this factor to the exclusion of other equally important ones." ***Id.*** at 1118 (citations omitted).

However, there is no evidence that the trial court "placed great reliance on this factor to the exclusion of other equally important ones" in this case. ***Id.*** Father's real complaint is that:

> [t]he trial court failed to consider that [V.] is a 22[-]year[-]old adult and not a child being "raised" with the [C]hildren as contemplated by the law. [V.] is in her last semester of a bachelor's degree in business and finance. She also works as a manager in the evenings and weekends. By her own testimony, [V.] is more of a surrogate parent to the [C]hildren than that of a sister [sic].

(Father's Brief, at 29 (record citations omitted)). Father again also directs us to the record and asks us to reach a conclusion different from that reached by the trial court. (***Id.*** at 30). Again, we decline. ***See In re Adoption of T.B.B.***, ***supra*** at 394.

Here, the trial court found: "[V.] is the sibling of the [C]hildren and appears to be very close with the [C]hildren. We consider these relationships to be very important to the [C]hildren. We believe these relationships need to be maintained and accordingly, we weigh this factor in favor of Mother." (Trial Ct. Op., at unnumbered page 5 (record citation omitted)). V. may be an adult and she may be living the life of an adult, but she is still the Children's half-sibling whom the trial court found to be "very important to the [C]hildren." (***Id.***). The trial court did not abuse its

discretion in finding that factor six, sibling relationships, favored Mother. ***See E.A.L.***, ***supra*** at 1118.

Next, Father challenges the court's finding that factor three, the parental duties performed by each parent, "weighs slightly in favor of Father." (Trial Ct. Op., at unnumbered page 4); ***see also*** 23 Pa.C.S.A. § 5328(a)(3). Father contests this assessment, reexamines the evidence and asks us to give this factor as much weight in favor of Father as the trial court gave to the factors it found to favor Mother. (***See*** Father's Brief, at 31-34). We have examined the trial court's opinion in light of the record, and we are satisfied that the trial court did not abuse its discretion when it found that factor three slightly favors Father. We decline to disturb the findings of the trial court. ***See In re Adoption of T.B.B.***, ***supra*** at 394.

Father also challenges the court's findings in regards to factors four and ten. (***See*** Father's Brief, at 34-40). After considering factor four, stability and continuity in the lives of the Children, the trial court found, that "[t]here was no evidence to suggest that there is a lack of stability or continuity in the [C]hildren's lives in education, family life or community with either parent." (Trial Ct. Op., at unnumbered page 5); ***see also*** 23 Pa.C.S.A. § 5328(a)(4). Father contends, however, that this is due to his efforts and the "schedule that has been in place for two years." (Father's Brief, at 35). Father then reexamines the evidence and asks us to alter the findings of the trial court. (***Id.*** at 35-40). Once again, we have examined the record and we are once again unable to find any abuse of discretion on

the part of the trial court. The evidence presented supports the trial court's conclusion that there is no lack of stability and continuity in the lives of the Children with either parent. We will not disturb the trial court's findings. ***See In re Adoption of T.B.B.***, ***supra*** at 394.

Father next asks us to find that the record does not support the trial court's conclusion regarding factor ten, that "[b]oth parents provide [for] the physical, emotional, developmental, and educational needs of their [C]hildren." (Trial Ct. Op., at unnumbered page 5); ***see also*** 23 Pa.C.S.A. § 5328(a)(10). The trial court explained:

> Father may not like the parenting skills of Mother and similarly, Mother may not like Father's methods of parenting. Father is concerned that Mother does not have the skills necessary to assist the [C]hildren academically and Mother believes that Father is too forceful and demanding. However, we believe that both parents attend to the daily needs of the [C]hildren and without more, we give equal weight to the parents on this factor.

(***Id.***). Our review of the record reveals that the trial court did not abuse its discretion in finding that factor ten did not favor either parent.

Finally, in addressing the enumerated factors, Father objects to the trial court's failure to find that factor one, which party is more likely to encourage and permit contact with the Children, favored him. (***See*** Father's Brief, at 40-42); ***see also*** 23 Pa.C.S.A. § 5328(a)(1). The trial court gave "limited weight" to factor one as well as a number of the other factors[1]

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[1] ***See*** 23 Pa.C.S.A. § 5328(a)(5), (7), (9), (11), (12), (14)-(16).

because they "do not affect the safety of the [C]hildren and none of those factors favored either parent." (Trial Ct. Op., at unnumbered page 3). Father's recounting of the evidence presented in this matter fails to convince us that the trial court abused its discretion in assigning limited weight to factor one. ***See In re Adoption of T.B.B.***, ***supra*** at 394. Father's first two questions, challenging the court's discretion in applying the factors enumerated in 23 Pa.C.S.A. § 5328(a), do not merit relief.

Father's third issue regards the holiday schedule. (***See*** Father's Brief, at 50-54). Father asked the trial court for two changes to the custody schedule, more time for him on weekends and a very specific holiday schedule. (***See id.*** at 51-52). He is upset that the trial court chose to take a clean sheet of paper and write new custody and holiday schedules rather than simply pen his changes in the margins of the old one. (***See id.*** at 54-55). If the trial court had amended the old schedule in that way, it would have served Father's best interests. However, by starting fresh and considering all the statutory factors, the trial court served the Children's best interest and that is the very purpose of our custody law. ***See Saintz***, ***supra*** at 512. The trial court expressed this quite well in the concluding paragraph of its opinion; we quote that paragraph, with approval:

> There is no magic formula in setting a custody order when two separate and distinct households exist. We considered all the factors and fashioned an Order to be what we think is in the [C]hildren's best interests. We believe that it is in the [C]hildren's best interest to spend equal amounts of time with both parents. Our custody Order of November 20, 2013, provides only a minor adjustment to the schedule allowing

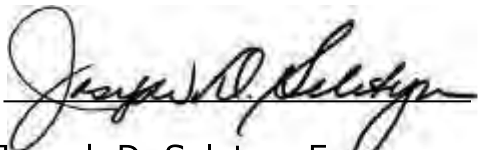
> Father additional weekend time with the [C]hildren, as he requested. The prior schedule was very similar in the division of time between the parents. In addition, Father sought to include school holidays into the holiday schedule and allocate that time equally. Our November 20, 2013, Order did precisely that. Although Father may not like the new custody schedule, and it does not reflect the schedule he proposed, we believe that it is in the [C]hildren's best interest to spend an equal amount of time with each parent. Father overlooks that for several years of the [C]hildren's lives the [C]hildren spent a majority of their time with Mother. Mother was the primary physical custodian of the [C]hildren for some time even after the parties separated. Further, Father did not object to Mother caring for the [C]hildren even when he was away for business reasons for the majority of each month as testified to by Mother. We find that the change to the custody schedule to be minor and, more importantly, to be in the best interests of the [C]hildren.

(Trial Ct. Op., at unnumbered pages 6-7 (record citation omitted)).

Accordingly, for the reasons stated, we affirm the order of the trial court entered November 20, 2013.

Order affirmed.

Judgment Entered.



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Prothonotary

Date: 6/25/2014