NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

A.T.G. Appellee v. D.S.G. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2092 MDA 2013

Appeal from the Order October 25, 2013
In the Court of Common Pleas of Berks County
Civil Division at No(s): 10-7013

BEFORE: OTT, J., STABILE, J., and MUSMANNO, J.

MEMORANDUM BY OTT, J.: **FILED JUNE 24, 2014**

D.S.G. ("Father") appeals from the custody order entered on October 28, 2013, in the Court of Common Pleas of Berks County, that directed him to participate in reunification counseling, at his expense, with his female child, L.P.G., born in July of 2008, and directed that his future contact with L.P.G. "shall be as recommended by" the reunification counselor. We vacate and remand.

The record reveals the relevant procedural history as follows. On May 13, 2010, A.T.G. ("Mother") initiated the underlying custody action following the parties' separation in February of 2010. By order dated May 14, 2010, upon agreement of the parties, the trial court granted the parties shared

legal custody, Mother primary physical custody, and Father partial custody on alternating weekends and one overnight per week.[1]

On November 2, 2011, Father filed a petition to modify the custody order, wherein he requested an additional overnight of custody per week, *inter alia*. By order dated November 7, 2011, the court directed the parties and L.P.G. to participate in a custody evaluation with Peter Thomas, Ph.D. By order dated May 14, 2012, the trial court dismissed Father's petition and directed that the May 14, 2010 custody order remain in full force and effect.

Soon thereafter, on August 17, 2012, Mother filed a petition to modify the custody order, wherein she alleged that Father has not had any contact with L.P.G. for four months, and she requested sole legal and physical custody. Following a custody conciliation conference, the court issued a temporary order, dated November 30, 2012, granting Mother sole legal and primary physical custody. Further, the court directed that L.P.G. participate in counseling with Spring Psychological, and that L.P.G.'s counselor supervise all of Father's contact with her. ***See*** Temporary Custody Order, 11/30/12, at ¶ 1. In addition, the court scheduled an additional conciliation conference for March 12, 2013, and directed that L.P.G.'s counselor submit a

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[1] The order provided Father's weekend custody schedule would commence on May 21, 2010, and his custody schedule was conditioned upon Mother being allowed "to inspect [Father's] residence and ensure that [L.P.G.] has her own bedroom and proper sleeping arrangements." Order, 5/14/10, at ¶ 3.

report prior to the next conference.[2] ***See*** *id.* at 2. The temporary order was amended on January 18, 2013, due to "Spring Psychological's inability to perform counseling in this case." Amended Temporary Custody Order, 1/18/13. The court appointed Alison Hill, Ph.D., as L.P.G.'s counselor, and directed that Father's contact with L.P.G. shall be under the supervision of Dr. Hill. *Id.*

On April 30, 2013, Father, acting *pro se*, filed an "emergency petition for relief of modification of custody," wherein he alleged that Mother was alienating L.P.G. from him, *inter alia*.[3] Father requested equally shared custody. By order the same date, the trial court denied Father's emergency petition.[4]

On May 6, 2013, following the next conciliation conference, the conciliation officer issued a recommended final order, granting Mother sole legal and primary physical custody and Father partial custody "at such times

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[2] The conciliation conference was subsequently rescheduled for May 2, 2013.

[3] To support his parental alienation allegation, Father attached to his emergency petition three letters from the Berks County Office of Children and Youth Services ("CYS") indicating that, on November 15, 2012, it received a report alleging L.P.G. was a victim of child abuse, and that CYS investigated the allegation and concluded it was unfounded.

[4] In its opinion pursuant to Pa.R.A.P. 1925(a), the trial court stated it denied Father's emergency petition "on the basis that was not an emergency and further that it was really an improperly filed petition to modify, because a petition to modify was already pending in the case: Mother's [August] 17, 2012 petition to modify was still before the Master. . . ." Trial Court Opinion, 12/18/13, at 3.

and under such conditions as recommended by Alison Hill, Ph.D." Order, 5/6/13. Father, acting *pro se*, timely filed exceptions, and a pretrial conference was held on August 6, 2013.

On August 14, 2013, Father, acting *pro se*, filed a "motion to correct the record and request recusal" relating to the pretrial conference which had been transcribed. In the motion, Father alleged that, since the pretrial conference, he has hired counsel to represent him with respect to Mother's petition to modify. Further, Father alleged that he participated in the custody evaluation with Peter Thomas, Ph.D., as directed by the court in November of 2011, and that Dr. Thomas recommended he have more custody time with L.P.G. Father also alleged that he is unable to afford the services of Dr. Hill, and, as a result, he has had no contact with L.P.G., *inter alia*.

On October 24, 2013, the court held a hearing on Father's August 14, 2013 motion, during which he was represented by counsel. Father's counsel requested on the record and in open court the dismissal of Mother's petition to modify, filed on August 17, 2012, for failure to comply with Pa.R.C.P. 1915.4(b) (prompt disposition of custody cases) as interpreted by ***Dietrich v. Dietrich***, 923 A.2d 461 (Pa. Super. 2007) (holding the petition for custody was subject to dismissal under Rule 1915.4(b) where the trial court did not schedule the trial, and the parties failed to file a praecipe, motion, or

request for trial, within 180 days of the filing of the custody complaint).[5] The trial court, on the record and in open court, granted the request of

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[5] Since our decision in ***Dietrich***, ***supra***, Rule 1915.4(b) was amended on July 8, 2010, which became effective September 6, 2010, and again on June 25, 2013, which became effective July 25, 2013. At the time of the hearing in this matter, Rule 1915.4(b) provided as follows:

> **Rule 1915.4. Prompt Disposition of Custody Cases**
>
> . . .
>
> **(b) Listing Trials Before the Court.** Depending upon the procedure in the judicial district, within 180 days of the filing of the complaint either the court shall automatically enter an order scheduling a trial before a judge or a party shall file a praecipe, motion or request for trial, except as otherwise provided in this subdivision. If it is not the practice of the court to automatically schedule trials and neither party files a praecipe, motion or request for trial within 180 days of filing of the pleading, the court shall, sua sponte or on motion of a party, dismiss the matter unless a party has been granted an extension for good cause shown, or the court finds that dismissal is not in the best interests of the child. The extension shall not exceed 60 days beyond the 180 day limit. A further reasonable extension may be granted by the court upon agreement of the parties or when the court finds, on the record, compelling circumstances for a further reasonable extension. If an extension is granted and, thereafter, neither party files a praecipe, motion or request for trial within the time period allowed by the extension, the court shall, sua sponte or on the motion of a party, dismiss the matter unless the court finds that dismissal is not in the best interests of the child. A motion to dismiss, pursuant to this rule, shall be filed and served upon the opposing party. The opposing party shall have 20 days from the date of service to file an objection. If no objection is filed, the court shall dismiss the case. Prior to a sua sponte dismissal, the court shall notify the parties of an intent to

(Footnote Continued Next Page)

Father's counsel to dismiss Mother's petition to modify. ***See*** N.T., 10/24/13, at 16. Thereafter, Father's counsel stated on the record, "my client . . . would like to just give everybody notice he would like to pick up his child pursuant to the [May 14, 2010] order at 4 p.m. on Friday afternoon tomorrow."[6] *Id.* at 18. Mother's counsel immediately responded,

> [MOTHER'S COUNSEL]: I will be representing this man has not had any contact with this child for over a year and a half. She is 5. If he thinks he can show up and pick this child up for a third of her life, I don't even know if she remembers him. I will be presenting to the emergency motions judge to hold [the May 14, 2010] order in abeyance. It was his voluntary choice to stop seeing this child . . . .
>
> [THE COURT]: I don't know if [] your filing a[n emergency] petition tomorrow might be premature because if, number 1, if mother doesn't comply, then [Father's] remedy is to file a petition for contempt.
>
> [MOTHER'S COUNSEL]: My fear is that this gentleman will appear at this child's school and try to take her from school telling them this is the order in effect.
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> [THE COURT]: Then I understand your position.
>
> [MOTHER'S COUNSEL]: That's my fear.

(Footnote Continued)

> dismiss the case unless an objection is filed within 20 days of the date of the notice.

Pa.R.C.P. 1915.4(b).

[6] On appeal, the parties do not dispute that pursuant to ***Dietrich***, ***supra***, because the court dismissed Mother's petition to modify filed in August of 2012, the immediately preceding custody order, the order of May 14, 2010, was to be reinstated, granting Father partial custody.

Id. Thereafter, Father's counsel requested on the record 48 hours of notice to prepare for the emergency hearing pursuant to the Berks County Local Rules of Civil Procedure. *Id.* at 19-20. Further, Father's counsel argued there was no emergency in this matter that would justify providing less than 48 hours of notice. *Id.* at 19. The trial court denied Father's notice request and scheduled the hearing on Mother's petition for emergency relief for the next morning, October 25, 2013, at 9:30 a.m. *Id.*

The next day, on October 25, 2013, Mother filed a petition for emergency relief, wherein she alleged Father has not had any contact with L.P.G. since April 8, 2012, which was a period of eighteen months. Mother alleged that Dr. Thomas indicated in his custody evaluation that Father has suffered from mental health issues, including "very significant emotional distress." Petition for Emergency Relief, 10/25/13, at ¶ 12. Mother alleged that unsupervised contact with Father would be emotionally traumatic for L.P.G. and "may also place the child in the risk of physical danger because of Father's mental health issues." *Id.* at ¶ 13. As such, Mother requested primary physical custody, and that Father be required to participate in reunification counseling "prior to the resumption of any partial custody." *Id.* at ¶ 14. The trial court held oral argument on Mother's petition for emergency relief the same date, on October 25, 2013, during which counsel for the parties participated. Thereafter, the trial court issued the order that is the subject of this appeal, as follows in its entirety:

> AND NOW, this 25th day of October, 2013, upon consideration of the foregoing Petition for Emergency Relief in Custody, it is hereby ORDERED that:
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> A. Father and the minor child shall participate in reunification counseling with Alison Hill, Ph.D. and any future contact shall be as recommended by Dr. Hill.
>
> B. The cost of this counseling shall be paid by Father.

Order, 10/25/13. The court entered the order on October 28, 2013. 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 issues for our review:

> 1. Did the court err when it allowed [Mother] to file an emergency petition where no emergency existed, waived the court rule requiring a 48 hour notice to [Father] prior to said hearing, and modified the custody order without a petition to modify before it and where no actual emergency existed?
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> 2. Did the [] court err when it terminated Father's periods of custody, ordered reconciliation counseling, failed to address any of the factors in 23 Pa.C.S.A. §5328 [f]or the best interest of the minor child, and absent a formal petition to modify before the court?
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> 3. Did the court err when it allowed [Mother] to choose the counselor to conduct reconciliation counseling, at Father's expense, without consideration of Father's concerns of a conflict of interest?

Father's brief at 5.

The scope and standard of review in custody matters is well-established:

> [T]he appellate court is not bound by the deductions or inferences made by the trial court from its findings of fact, nor must the reviewing court accept a finding that

> has no competent evidence to support it. . . . However, this broad scope of review does not vest in the reviewing court the duty or the privilege of making its own independent determination. . . . Thus, an appellate court is empowered to determine whether the trial court's incontrovertible factual findings support its factual conclusions, but it may not interfere with those conclusions unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion.

> ***R.M.G., Jr. v. F.M.G.***, 2009 PA Super 244, 986 A.2d 1234, 1237 (Pa. Super. 2009) (quoting ***Bovard v. Baker***, 2001 PA Super 126, 775 A.2d 835, 838 (Pa. Super. 2001)). . . . The test is whether the evidence of record supports the trial court's conclusions. ***Ketterer v. Seifert***, 2006 Pa. Super. 144, 902 A.2d 533, 539 (Pa. Super. 2006).

A.V. v. S.T., 87 A.3d 818, ___ (Pa. Super. 2014).

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)).

Initially, we address whether Father's appeal is properly before this Court pursuant to 42 Pa.C.S.A. § 742 (appeals from courts of common pleas). In its opinion pursuant to Pa.R.A.P. 1925(a), the trial court states that Father's appeal should be quashed as interlocutory. The court explained:

> The order appealed here simply requires Father to attend reunification counseling, for the purpose of ultimately reinstating

> Father's custodial time with [L.P.G.]. Although there is no present Petition to Modify pending, at the time of the hearing the parties expressed their intention to continue litigating the ultimate issue of custody of [L.P.G.]. Because the issue of custody has not been fully resolved, Father is appealing an interim ruling. Moreover, Father is appealing an order that was entered to protect [L.P.G.] while facilitating Father's stated goal, which is to resume regular periods of custody with [L.P.G.].

Trial Court Opinion, 12/18/13, at 7. Likewise, Mother, in her appellee brief, argues the order is interlocutory because the order "was interim relief intended to reunite Father and the child so that there could be a return to the [May 14, 2010] Custody Order." Mother's brief at 11. We are constrained to disagree.

This Court has summarized:

> Under Pennsylvania Law, an appeal may be taken from: (1) a final order or an order certified by the trial court as a final order (Pa.R.A.P. 341); (2) an interlocutory order as of right (Pa.R.A.P. 311); (3) an interlocutory order by permission (Pa.R.A.P. 312; 1311; 42 Pa.C.S.A. § 702(b)); or a collateral order (Pa.R.A.P. 313). The question of the appealability of an order goes directly to the jurisdiction of the Court asked to review the order. A final order is any order that: (1) disposes of all claims and of all parties; or (2) any order that is expressly defined as a final order by statute; or (3) any order entered as a final order pursuant to subdivision (c) of this rule. Pa.R.A.P. 341(b). Subdivision (c) allows the trial court, in multi-claim or multi-party actions, to enter a final order as to one or more but fewer than all of the claims and parties upon an express determination that an immediate appeal would facilitate resolution of the entire case, and also allows a party to apply for a determination of finality. Pa.R.A.P. 341(c). *Furthermore, a custody order is considered final and appealable only if it is both: (1) entered after the court has completed its hearings on the merits; and (2) intended by the court to constitute a complete resolution of the custody claims pending between the parties.*

Moyer v. Gresh, 904 A.2d 958, 963 (Pa. Super. 2006) (*citing* ***G.B. v. M.M.B.***, 670 A.2d 714, 720 (Pa. Super. 1996) (*en banc*) (emphasis added)).

Custody orders are unique in that they are never final but always subject to change. Our appellate courts have long held that "the finality of custody orders is analyzed differently from other civil orders" because custody orders "have significant, important and immediate impact upon the welfare of children," in whom the state has a "singular interest." ***G.B.***, ***supra*** at 718. As such, important policy reasons require "prompt and comprehensive review of custody determinations." ***Id.***

In ***G.B.***, an *en banc* panel of this Court concluded the order, which granted partial physical custody to the father, was interlocutory because it was entered before the court had completed the hearings on the merits of the underlying custody matter. In fact, at the time the order was entered, the court had already scheduled a date to continue the custody hearing. In addition, the order expressly stated the father's periods of partial custody were to continue only until further order of the court. As such, we concluded the order was not intended to constitute a complete resolution of the parties' custody dispute. In doing so, we distinguished the facts in ***Parker v. MacDonald***, 496 A.2d 1244 (Pa. Super. 1985), and ***Cady v. Weber***, 464 A.2d 423 (Pa. Super. 1983), wherein we concluded the custody orders were final in that they completely resolved the issues raised by the parties unless and until further proceedings were initiated by a party.

Instantly, reviewing the order in the context of the procedural posture of this case, we conclude the order is final and appealable. At the time of entry of the order, there were no further custody claims pending before the court. The order completely resolved the only matter before it, Mother's petition for emergency relief, with no additional review by the court unless and until further proceedings were initiated by a party. Indeed, the court acknowledged in its Rule 1925(a) opinion that there was no petition to modify custody pending at the time it entered the subject order. Nevertheless, the court stated that the parties "expressed their intention to continue litigating the ultimate issue of custody. . . ." Trial Court Opinion, 12/18/13, at 7. We conclude the order, both on its face and as described by the trial court in its Rule 1925(a) opinion, is no more temporary than any other custody order and constituted a complete resolution of the parties' dispute at that time. Therefore, Father's appeal is properly before us.

In his first and second issues on appeal, Father argues the trial court abused its discretion and/or committed an error of law by modifying his

> periods of partial custody [in the May 14, 2010 custody order], consisting of alternate weekends and one overnight per week, to visits with the child in reconciliation counseling for an undisclosed period of time; leaving any future periods of custody between Father and child at the discretion of a counselor chosen by Mother, with no report required from the counselor and no future hearing pending before the court.

Father's brief at 14. In addition, Father argues the court abused its discretion by failing to provide an adequate opportunity for him to prepare

for the hearing, and without conducting an evidentiary hearing. We are constrained to agree.[7]

Initially, we discern no abuse of discretion by the trial court in ordering reunification counseling prior to the resumption of Father's partial custody set forth in the May 14, 2010 order given L.P.G.'s young age and the length of time she has not had contact with Father. Indeed, at the hearing on Mother's petition for emergency relief, there was no dispute that Father has not had any contact with L.P.G., then age five, since April 8, 2012, a period of eighteen months. As such, we conclude the trial court acted appropriately in the best interest of L.P.G. by ordering reunification counseling.

Nevertheless, we observe that, although the trial court may have intended to make a final determination on Father's partial custody following a period of reunification counseling, the order does not provide for such review by the court. Rather, the order effectively places all future custody determinations within the discretion of the reunification counselor. We conclude the court abused its discretion in making a final custody determination without a recommendation from the reunification counselor and any other relevant evidence pertinent to Father's partial custody.

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[7] As a result of our disposition, we need not review Father's remaining issues.

Further, we conclude the trial court violated Father's right to due process by failing to give him an adequate opportunity to prepare for the hearing on Mother's petition for emergency relief and in modifying the custody order without a hearing tailored specifically to modification. This Court has explained,

> Notice, in our adversarial process, ensures that each party is provided adequate opportunity to prepare and thereafter properly advocate its position, ultimately exposing all relevant factors from which the finder of fact may make an informed judgment. [***Choplosky v. Choplosky**,* 584 A.2d 340, 342 (Pa. Super. 1990).] Without notice to the parties that custody was at issue, the trial court could not "assume that the parties ha[d] either sufficiently exposed the relevant facts or properly argued their significance. Consequently neither we nor the trial court can make an informed, yet quintessentially crucial judgment as to whether it was in the best interests of the [child] involved to give sole legal [and physical] custody to the mother." ***Id.*** at 343.

P.H.D. v. R.R.D.**,* 56 A.3d 702, 707-708 (Pa. Super. 2012) (*citing* ***Langendorfer v. Spearman, 797 A.2d 303, 308-309 (Pa. Super. 2002) (footnotes omitted)).

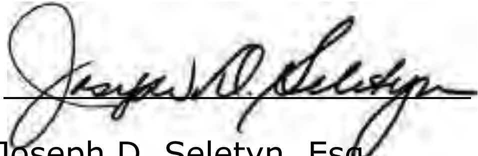
In his appellate brief, Father states that the hearing occurred in the late afternoon on October 24, 2013. Father continued,

> The judge scheduled the matter [on Mother's petition for emergency relief] for 9:30 a.m. the following morning. Although Mother's counsel emailed a copy of the petition she was presenting prior to the hearing, there was no time for Father and his counsel to meet to go over the accusations and prepare for a hearing. The lack of time prevented Father the opportunity to bring in witnesses and present evidence.

Father's brief at 16 (citations to reproduced record omitted). We agree with Father that he was not provided an "adequate opportunity to prepare and thereafter advocate his position" with respect to custody. ***P.H.D.***, ***supra*** at 707. In this case, the trial court effectively modified the custody order of May 14, 2010, following oral argument and without an evidentiary hearing. As a consequence, "neither we nor the trial court can make an informed, yet quintessentially crucial judgment as to" the best interests of L.P.G. with respect to when, if at all, Father may exercise his partial custody pursuant to the May 14, 2010 order. ***P.H.D.***, ***supra*** at 707-708 (concluding the trial court violated the father's right to due process by modifying the custody order without notice and a hearing tailored specifically to custody modification). Accordingly, we vacate the order dated October 25, 2013, and entered on October 28, 2013, and remand the matter for proceedings consistent with this Memorandum. On remand, the trial court is instructed to schedule an evidentiary hearing during which it shall consider the recommendation of the reunification counselor and any other relevant evidence pertinent to L.P.G.'s best interest as related to Father's partial custody.

Order vacated. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014