NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

J.L.A., Appellee v. A.M., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3311 EDA 2013

Appeal from the Order Entered October 24, 2013
In the Court of Common Pleas of Lehigh County Domestic Relations at
No(s): 2013-FC-0381

BEFORE: SHOGAN, J., JENKINS, J., and PLATT, J.*

MEMORANDUM BY JENKINS, J. **FILED APRIL 22, 2014**

A.M. ("Father") appeals from an order entered on October 24, 2013 awarding J.L.A. ("Mother") primary physical and full legal custody of their minor daughter, J.M. We affirm.

Mother filed this custody action against Father, who is in state prison. On October 24, 2013, following a hearing, the lower court entered an order awarding custody of J.M. to Mother and directing Mother to (1) provide annual school and holiday pictures to Father, (2) permit J.M. to speak to Father once each week on Sunday for 15 minutes, and (3) send copies of J.M.'s report cards to Father. On November 21, 2013, Father filed a notice of appeal. We affirm.

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* Retired Senior Judge assigned to the Superior Court.

As the lower court correctly reasons, Father's issues on appeal "distill into two central points": first, the court abused its discretion in not permitting Father to attend the custody hearing in person or electronically, and second, the court abused its discretion in granting Mother custody of J.M.[1]

With regard to Father's first central point, incarcerated prisoners who petition the court for visitation rights are entitled to a hearing, to notice of this hearing, and to notice of their right to request that they be present at the hearing, by means of a writ of *habeas corpus ad testificandum.* ***Vanaman v. Cowgill****,* 363 Pa.Super. 602, 526 A.2d 1226 (1987). A court need not grant the *habeas* petition and order the prisoner's presence, but it may not ignore it either. Rather, the court must weigh the costs of a bring-down against the prisoner's interests in presenting testimony in person. ***Salemo v. Salemo****,* 381 Pa.Super. 632, 634, 554 A.2d 563, 564 (1989) (citing ***Jerry v. Francisco****,* 632 F.2d 252 (3d Cir.1980)).

The lower court's opinion reflects that it carefully balanced the costs and the benefits of procuring Father's presence and properly

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[1] Father filed a second appeal from the court's November 7, 2013 order denying Father's *in forma pauperis* request for transcripts from the custody proceedings. This appeal is moot, for as the lower court observed: "At the time [Father] requested the transcripts, he did not have a pending appeal. When he filed an appeal, the transcripts were furnished to him. . ." Lower Court Opinion, p. 3.

concluded that (1) Father failed to take reasonable steps to facilitate in-person attendance in person or by telephone, and (2) Father's attendance by telephone would do more harm than good.

Turning to Father's second central point, 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 lower 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.
>
> With any child custody case, the paramount concern is the best interests of the child. This standard requires a case-by-case assessment of all the factors that may legitimately affect the physical, intellectual, moral and spiritual well-being of the child.

J.R.M. v. J.E.A., 33 A.3d 647, 650 (Pa. Super. 2011). The Custody Act, requires that that when making a custody award, "[t]he court shall delineate the reasons for its decision on the record in open court or in a written opinion or order." 23 Pa.C.S. § 5323(d). This Court has previously interpreted this mandate as requiring a trial court to state the reasons for its custody decision prior to the filing of an appeal.

***M.J.M. v. M.L.G.*,** 63 A.3d 331, 335 (Pa. Super. 2013). With respect to the custody order, 23 Pa.C.S. § 5328(a) provides as follows:

> **(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. § 5328(a).

The lower court's opinion demonstrates that it carefully reviewed these factors in the course of determining the custody issue.

In short, we conclude that the lower court's opinion addresses each issue raised by Father on appeal fully and completely. We adopt the court's opinion as our own and attach it as an exhibit to this opinion[2].

Custody order affirmed.

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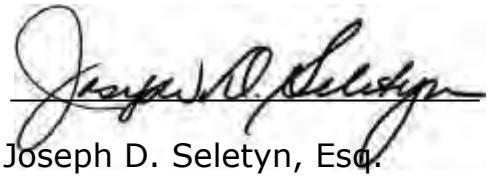
[2] There are several handwritten notations on the opinion. They are not ours and do not appear to be by the trial court. We do not adopt these notations.

Judge Shogan concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014

COPY

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

JLA

[redacted]

Plaintiff

vs.

[redacted]

AM

Defendant

Case No.: 2013-FC-0381

CUSTODY

FILED
2013 DEC 23 PM 3:28
CLERK OF JUDICIAL RECORDS
LEHIGH COUNTY, PA

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APPEARANCES:

Plaintiff, *pro se*

Defendant, *pro se*

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OPINION

CAROL K. McGINLEY, P.J.

This case began as a complaint for custody, filed by Mother, seeking an order for custody of the parties' child[1].

The Defendant filed two notices of appeal on November 21, 2012, one from an order entered on October 24, 2013, wherein we granted primary physical and sole legal custody to Mother, and one from an order entered November 7, 2013, wherein we denied the Defendant's IFP request for the purpose of obtaining transcripts of the proceedings.

[1] There was a custody action between the parties at 2012-FC-0055, wherein the Father filed an action seeking phone calls and letters from Mother, but the action was withdrawn. When the Mother filed an action for custody, the existence of the pending action was apparently not made known to the custody office, and a new action was filed. We considered that Father sought the same relief in this action.

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This judge was served only with notice of one appeal (the one from the order of October 24, 2013), and we ordered the Defendant to file a 1925(b) Statement with regard to that appeal. We did not notice him to file a 1925(b) Statement with regard to the other appeal because we did not receive notice of that appeal. However, Defendant filed a 1925(b) Statement received by us on December 4, 2013, and also a Supplemental Statement received by us on December 9, 2013, and another Supplemental received by us on December 11, 2013, which pretty much cover all issues.

In his first 1925(b) Statement, the Defendant complains that:

1. He was denied the opportunity to be heard at the trial.
2. That numerous motions and affidavits were ignored or denied, and certain proffers of evidence were ignored or denied.
3. That the court "turned an amended complaint I filed for a custody claim at 2012-FC-0055, and made it a counterclaim at 2013-FC-381, and then his counterclaim filed April 12, 2013 was ignored".
4. That we ignored petitions about certain actions of the Plaintiff.
5. That we refused to obtain the daughter's home address.
6. That we failed to order visits.
7. That we ordered full legal custody to Mother despite Father's interest in child.
8. That the Order that Mother send report cards to Father apparently was unnecessary because he sees the report cards on line.
9. That we concluded that Mother has been the "only influence in the child's life".
10. That the Mother lied to the judge and that the judge made an error in the daughter's age.
11. That the Defendant's petitions, motions, letter and phone calls to the courts to somehow participate in this trial dated 7/16/13, 8/7/13, 9/8/13, 10/18/13, 10/23/13, 10/24/13 were either ignored or denied.
12. That the Defendant has a constitutional right to be a parent to his own child.

He followed with a supplemental statement.

1. "Clarify" dates – which is a lengthy list of filings, and letters and notices, which is mostly a recitation about a former boyfriend of the mother, now deceased.
2. He wants to know daughter's address.
3. He wants to participate in life and death decisions regarding his daughter.
4. He wants to preserve his rights because he does not have the trial transcripts.

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On December 11, 2013 he filed "Pa R.A.P. 1925(b)(2) appeal statement amend/(supplement) nunc pro tunc", which contained the following points.

1. The court erred in allowing a judgment after ordering both parties to attend Co-Parent Program, which turns into a long description of the Plaintiff's now deceased boyfriend; and erred in advising how to keep daughter's home address private from the Defendant, concluding with a request for a reversal and assignment of a new judge.

We first address the Defendant's second appeal, from our Order of November 7, 2013, wherein we denied his request to proceed in forma pauperis for the purpose of transcripts. It has continuously been held that there is no need to furnish free transcripts merely for "curiosity or perusal" in the absence of a pending appeal, for to so would severely tax the judicial system, *U.S. ex rel. Hansler v. Pennsylvania*, 294 F. Supp. 542 (E.D.Pa. 1968); *Commonwealth v. Ballem*, 334 Pa. Super. 255, 482 A.2d 1322 (1984); *Commonwealth v. Martin*, 705 A.2d 1337 (Pa. Super. 1998). At the time the Defendant requested the transcripts, he did not have a pending appeal. When he filed an appeal, the transcripts were furnished to him, and that issue is moot.

With regard to the first appeal, from our Order of October 24, 2013, the lengthy lists of complaints from [redacted]. M[redacted]s distill into two central points.

One complaint is his claim that he was denied the opportunity to be heard at trial.

Prisoners incarcerated in State Correctional Institutions cannot just walk into the courthouse, or be transported from their local prison, for the purpose of a custody hearing (or its appeal) and are at a disadvantage in that regard. A prisoner has a right to participate in a reasonable fashion in a custody hearing, or in his appeal. but does not have an unlimited right.

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Incarcerated prisoners who petition the court for visitation rights are entitled to a hearing, to notice of this hearing, and to notice of their right to request that they be present at the hearing, by means of a writ of *habeas corpus ad testificandum*. *Vanaman v. Cowgill*, 363 Pa. Super. 602, 526 A.2d 1226 (1987). A court need not grant the *habeas* petition and order the prisoner's presence, but it may not ignore it either. Rather, the court must weigh the costs of a bring-down against the prisoner's interests in presenting testimony in person. *Salemo v. Salemo*, 381 Pa. Super. 632, 634, 554 A.2d 563, 564 (1989), citing *Jerry v. Francisco*, 632 F.2d 252 (3d Cir.1980); *Sullivan v. Shaw*, 437 Pa. Super. 534, 650 A.2d 882 (1994).

At the time we scheduled the custody matter for a hearing, we took into consideration that the Defendant was incarcerated at Rockview, which is some distance from Lehigh County, and that he would need some time to make arrangements. Therefore, we scheduled the hearing for a deferred time, to allow him to make arrangements.

✳ We also considered the nature of the proceeding. The proceeding was a request from Mother to have her custody rights legally clarified. Father had filed a petition a year earlier, with regard to partial custody rights, especially the right to communicate with his daughter. He had withdrawn that petition. It was unlikely that we would expand his rights beyond that request, since he is presently incapable of exercising anything of much more substance while he remains incarcerated. We also considered that he is scheduled for parole consideration in June of 2014, and if granted parole, would be better situated both to seek, and, if appropriate, exercise partial custody of his daughter.

Moreover, we specifically directed the Defendant on the steps he needed to take in order to appear at the hearing. We specifically directed him what to do. "Father shall make

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arrangements for his own transport with the Lehigh County Sheriff and request a writ from this court. Father shall complete and return the enclosed Affidavit of Criminal History by July 21, 2013." Order of July 9, 2013.

The instructions were clear. Instead of complying, on July 24, 2013, Defendant filed a motion complaining of his ignorance of the law. He followed up on August 16, 2013, with a completely incomprehensible "affidavit" about Stockton, California. He followed up on August 16, 2013, with a Petition for Special Relief stating that it was an emergency for him to have contact with his daughter. Also on August 16, 2013, he filed another affidavit about Stockton, California, another affidavit on phone calls to his daughter not being answered, and on August 23, 2013, filed a petition alleging he had insufficient means to pay the sheriff for transport and requested to participate in the trial by electronic means. On August 27, 2013, he filed another Petition for Emergency Relief, and again on August 29, 2013. On September 17, 2013, he filed another affidavit about phone calls to his daughter being ignored. On September 24, 2013, he filed another affidavit of phone calls to his daughter being ignored, but in fact, he recites many instances of times when the phone calls were not ignored.

The above summary is only a sampling of the multiple filings of the Defendant. At no time, did the Defendant file the Affidavit of Criminal History as directed. At no time did he file a pleading which revealed that he had made any effort whatsoever to comply with our directive to contact the Sheriff for a bring-down.

We did not grant his request for an electronic participation in the proceeding. Such arrangements are not without their cost to the courts, and to the institution in which he is housed.

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Arrangement of phone calls between the two institutions requires employee time and planning, all of which are in short supply.

Furthermore, we reasonably concluded that such a call would not serve any purpose. Clearly the Defendant had his own agenda, and was not willing to follow the directions of the court. He did not even attempt to arrange transportation with the sheriff. He did not complete the Affidavit of Criminal History, which, considering his incarceration for a lengthy sentence in a State Correctional Institution would likely be of importance. This court was not inclined to establish a telephone communication with the Defendant when he has, from the beginning, followed a course of action wherein he has tried to control the proceedings, rather than permitting the judge to do so. The court has no obligation to continually subject the justice system to control struggles with a litigant.

Because he is not in a position to participate in his daughter's life in an on-going role, and because his needs and desires and complaints were already well-documented, there was no need for him to be present, either in person or electronically, in order for the court to address his concerns.

As to the second set of issues that the Defendant raises, those issues go to the order we entered and the reasons for that order.

> This Court, after a hearing on this matter, enters the foregoing order after analyzing the 15 factors. Mother permits and has permitted contact between the child and Father despite the fact that apparently Father calls repeatedly each day. Child is allowed to talk to her dad about two times a week for a period of 15 minutes.
>
> We believe Mother's testimony in this regard because the Defendant has besieged the Court with numerous writings and petitions and clearly is overly aggressive in his efforts to address his issues. There is no history of abuse.

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All the parental duties have been performed primarily for the child by the Mother. The Father has only lived with the child out of the child's six years for a period of two months and has otherwise been incarcerated.

The child needs the stability of her mother, who has been her primary caretaker for her entire life. Mother's entire family lives in the area and the extended family is available to assist her. Child lives with three half siblings, three boys, ages 15, 14 and 12.

We did not consider the preference of the child given her tender years. We do not feel that either party has attempted to turn the child against the other. In fact, we feel that Mother has been patient with the difficult circumstances of Father's aggressive attempts to involve himself in his daughter's life when he, himself, has made himself unavailable by committing crimes which have resulted in his incarceration.

Clearly, Mother is the stable influence in the child's life, the only influence in the child's life until now, and primary custody and full legal custody should remain with her.

The proximity of the residences of the parties and the parties' availability to care for child are inapplicable here because Father is incarcerated. Father is incarcerated because of a history of drug abuse of crack cocaine. Whether or not he will resume that habit when he is released from prison remains to be seen.

The other factors have not been addressed because they are inapplicable to this particular situation. The Court and the Plaintiff realize that once the Defendant is released from state prison that the situation more likely than not will be readdressed upon the filing of a petition by one of the parties.

N.T., 10/24/13 p. 12:14 – p. 14:12

We emphatically point out that the Defendant was given what he requested, which was the ability to communicate with his daughter and to access school information concerning her.

The Defendant appears to be upset that we concluded that he has not had much personal contact with his daughter. However, if the daughter is now 7 (6 at the time of the filing of the

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petition), and Father has been incarcerated for 6 years, it is hardly possible that he has been deeply involved with her daily needs and rearing.

Father has a particular complaint about our advising the Plaintiff on how to keep her address confidential. The mechanism to keep an address confidential is a decision which is usually administrative, and subject to change only after a court hearing and order. We did not order that her address be confidential, but only advised her on where to go to take the usual administrative steps.

- Because we had only the Mother's word on the Father's criminal history (Father having failed to file the requested affidavit), we concluded that between Father's unknown criminal record and his aggressive behavior toward Mother in repeated phone calls, that a hearing will be required once the Defendant has been released from prison, at which time he may file a petition to revisit the current custody order. Mother's complaints about his aggressiveness about communication was confirmed by the aggressiveness with which he has besieged this court with filings.

- There is no need for him to have additional information right now. In the event he wishes to send mail, pictures or packages to his daughter, he may also petition the court from prison to assist him in that regard (once this appeal has concluded).

Respectfully submitted,

Date: December 23, 2013

Carol K. McGinley

CAROL K. McGINLEY, P.J.