NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

F.P.M.,

Appellant

v.

F.P.M., III AND H.O.M.,

Appellee

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2529 EDA 2015

Appeal from the Order Entered July 15, 2015
In the Court of Common Pleas of Bucks County
Civil Division at No(s): A06-13-61732-C-35

BEFORE: OLSON, J., OTT, J., and STEVENS, P.J.E.*

MEMORANDUM BY STEVENS, P.J.E.: **FILED April 21, 2016**

Appellant, F.P.M. ("Paternal Grandfather"), the paternal grandfather of M.M. (born March of 2009) ("Child"), appeals from the order entered on July 15, 2015, denying his petition for partial custody. Paternal Grandfather argues the trial court erred in denying his petition for partial custody and failing to find that partial custody was in the best interest of Child. We vacate the order and remand for further proceedings.

In its opinion, the trial court has adequately set forth the relevant factual and procedural history underlying the instant matter, and we adopt it for purposes of this appeal. ***See*** Trial Court Pa.R.A.P. 1925(a) Opinion, 10/19/15, at 1-3.

In custody cases,

*Former Justice specially assigned to the Superior Court.

> 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. v. S.E.F., 45 A.3d 441, 443 (Pa.Super. 2012) (citation omitted).

Additionally,

> [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) (citation omitted).

Section 5328(c)(1) of the Child Custody Act requires a court to consider the following factors in considering custody complaints filed by grandparents and great-grandparents:

> (i) the amount of personal contact between the child and the party prior to the filing of the action;
>
> (ii) whether the award interferes with any parent-child relationship; and
>
> (iii) whether the award is in the best interest of the child.

23 Pa.C.S. § 5328(c)(1)(i)-(iii). Section 5328(a) provides a non-exhaustive list of factors that trial courts **must** consider when making a "best interests of the child" analysis for a custody determination. ***See*** 23 Pa.C.S. § 5328(a)(1)-(16). Specifically, Section 5328(a) provides as follows:

> **§ 5328. Factors to consider when awarding custody**
>
> **(a) Factors.**—In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:
>
> (1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.
>
> (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.
>
> (3) The parental duties performed by each party on behalf of the child.
>
> (4) The need for stability and continuity in the child's education, family life and community life.
>
> (5) The availability of extended family.
>
> (6) The child's sibling relationships.
>
> (7) The well-reasoned preference of the child, based on the child's maturity and judgment.
>
> (8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.
>
> (9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.

> (10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.
>
> (11) The proximity of the residences of the parties.
>
> (12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.
>
> (13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.
>
> (14) The history of drug or alcohol abuse of a party or member of a party's household.
>
> (15) The mental and physical condition of a party or member of a party's household.
>
> (16) Any other relevant factor.

23 Pa.C.S. § 5328(a) (bold in original).

In deciding Paternal Grandfather's petition for partial custody, the trial court was required to conduct a thorough analysis of the best interests of Child. "All of the factors listed in section 5328(a) are required to be considered by the trial court when entering a custody order." ***J.R.M. v. J.E.A.***, 33 A.3d 647, 652 (Pa.Super. 2011) (emphasis omitted).

Our review of the record confirms that the trial court did not address the factors set forth in Section 5328(a). Rather, the trial court primarily focused on the hostilities between the parties, as well as the fact that, because Father is a fit parent, it is within Father's right as a parent to decide the manner in which Paternal Grandfather may visit Child. However, as this Court has recently held:

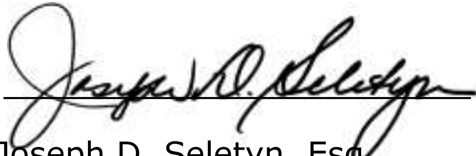
> "[I]n the recent past, grandparents have assumed increased roles in their grandchildren's lives and our cumulative experience demonstrates the many potential benefits of strong inter-generational ties." ***Hiller v. Fausey***, 588 Pa. 342, 360, 904 A.2d 875, 886 (2006), *cert. denied,* 549 U.S. 1304, 127 S.Ct. 1876, 167 L.Ed.2d 363 (2007). Thus:
>
>> While acknowledging the general benefits of these relationships, we cannot conclude that such a benefit always accrues in cases where grandparents force their way into grandchildren's lives through the courts, contrary to the decision of a fit parent. In contrast, however, **we refuse to close our minds to the possibility that in some instances a court may overturn even the decision of a fit parent to exclude a grandparent from a grandchild's life**[.]
>
> ***Id.*** at 360, 904 A.2d at 886–87 (internal footnote omitted) (emphasis added).
>
> Additionally, in the context of custody proceedings, "[h]ostilities between the [parties] are relevant only insofar as they constitute a threat to the child or affect the child's welfare." ***Nancy E.M. v. Kenneth D.M.***, 316 Pa.Super. 351, 462 A.2d 1386, 1388 (1983) [(*per curiam*)].

K.T. v. L.S., 118 A.3d 1136, 1160-61 (Pa.Super. 2015) (citation omitted) (emphasis in original).

Based on the aforementioned, we conclude the trial court did not adequately explain the application of the Section 5328(a) factors to the specific facts and circumstances of the instant case. Thus, we are constrained to vacate the trial court's order, and remand for application of the Section 5328(a) best interest factors and further proceedings, if necessary.

Order vacated. Case remanded for further proceedings consistent with this decision. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/21/2016

Circulated 04/07/2016 10:40 AM

SUPERIOR COURT OF PENNSYLVANIA

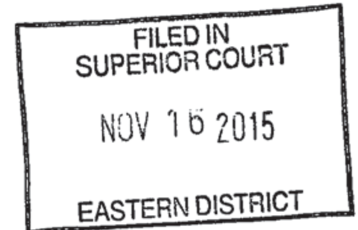
EASTERN DIVISION

F.P.M. NO.: 2529 EDA 2015

Vs.

F.P.M. III:

H.O.M.:



TRIAL COURT OPINION

NO. A06-13-61732-C

CHILDREN'S FAST TRACK APPEAL

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IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION-LAW

FRANCIS PATRICK MOONEY, JR. :
: No. A06-13-61732-C
v. :
:
FRANCIS PATRICK MOONEY, III :
and :
HANNAH OLETA MOONEY :

Case #: 2013-61732 C B09 11012018
Code: 5214 Judge:
Patricia L. Bachtle, Bucks County Prothonotary
Rcpt Z1395058 10/19/2015 10:33:14 AM

OPINION

Francis Patrick Mooney, Jr. (hereinafter "Appellant") appeals to the Superior Court of Pennsylvania following this Court's July 15, 2015, Order dismissing his complaint for partial custody of his granddaughter, Makayla. It is significant that Appellant, through his counsel and testimony, limited his requested relief to partial custody and rejected all offers of visitation of Makayla.[1] We file this Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a).

I. FACTUAL AND PROCEDURAL HISTORY

On March 20, 2009, Makayla Lynn Mooney was born to Francis Patrick Mooney, III (hereinafter "Appellee") and his wife at the time, Hannah Oleta Mooney (hereinafter "Ms. Mooney"). (N.T. 07/07/15, p. 64). Within a year of Makayla's birth, Appellee was sent to prison. Shortly after, Ms. Mooney and Makayla moved in with Kate Mooney (hereinafter "Aunt"), Makayla's paternal aunt. (N.T. 07/07/15, p. 106). In November of 2011, Ms. Mooney moved to Wisconsin and left Makayla in Aunt's care. (N.T. 07/07/15, p. 65).

Bucks County Children and Youth became involved and eventually determined Aunt to be a suitable foster parent. (N.T. 07/07/15, p. 41). Aunt had custody of Makayla from November

[1] At a pre-hearing conference with counsel to define the questions at issue, Appellant's counsel made it clear Appellant was not interested in any type of visitation and would only accept periods of partial custody.

2011 until August 2014. (N.T. 07/07/15, p. 80). During this period, Appellant frequently saw and cared for Makayla. (N.T. 07/07/15, p. 86). Appellant took Makayla on several family vacations to Florida and often assisted Aunt in getting Makayla to school. (N.T. 07/07/15, p. 87).

During his period of incarceration, Appellee made significant efforts to remain in contact with Makayla. The two spoke consistently over the phone, and Makayla visited Appellee on a biweekly basis. (N.T. 07/07/15, p. 42).

Appellee was released from prison in July of 2014. (N.T. 07/07/15, pp. 177-178). He was granted custody of Makayla in August of 2014, and maintained custody ever since. (N.T. 07/07/15, p. 170). After attaining custody, Appellee reached out to Onward Behavioral Health, which is an organization that assists in the reunification of families. (N.T. 07/07/15, p. 8). Appellee also enrolled Makayla in mental health counseling to help her cope with this transition. (N.T. 07/07/15, p. 35).

After Appellee was granted custody of Makayla, he and Appellant began discussing a possible time for Appellant to visit with her. Appellee had no issue with visitation, but wanted to be physically present due to longstanding issues between the two men. (N.T. 07/07/15, pp. 183-84). Utilizing the services of Lauren Smith (hereinafter "Ms. Smith"), a mediator from Onward Behavioral Health, the parties eventually agreed to meet for breakfast at a diner on September 10, 2014. (N.T. 07/07/15, p.13). The agreed visitation would include both parties, Makayla, Ms. Smith, and Appellant's wife. (N.T. 07/07/15, p.13). Everyone met outside the diner and entered together as a group. (N.T. 07/07/15, p.16). Appellant then demanded Appellee leave Makayla with him and the rest of the group. (N.T. 07/07/15, p.17). Appellee refused, but agreed to a compromise proposed by Ms. Smith that he sit at a different table within earshot of the group. (N.T. 07/07/15, pp.17-18). This compromise was rejected by Appellant who became very

agitated and insisted on having breakfast with Makayla outside the presence of Appellee. (N.T. 07/07/15, pp.18-19, 189).

Describing the diner incident, Ms. Smith testified Appellant angrily "started talking about, don't you know his criminal history; alluding to the fact that maybe he's not a good dad, things like that, while Makayla was there." (N.T. 07/07/15, p. 19). As a result, Makayla said to Appellant: "Dad gets worried that sometimes you say things in front of me that might not be appropriate." (N.T. 07/07/15, p. 19). Therefore, Appellee stood to the side while Appellant and his wife said goodbye and gave hugs to Makayla. (N.T. 07/07/15, p. 20).

Appellant has not seen Makayla since the diner incident. (N.T. 07/07/15, pp. 22-23). Appellee testified at the hearing:

> I would like my dad to come see my daughter. Every one of those text messages—even the ones where I asked him to stop harassing me with the court paperwork—says, come see my daughter. But, no, not here is my daughter and go say whatever you want to her and take here wherever you want and pawn her off on whatever family member you want. No. Please come see her, though. Yeah, I would like that—she doesn't ask, but I would like him to do that.

(N.T. 07/07/15, p. 194). Ms. Smith, in her testimony, confirmed Appellee never told her he wished to restrict Appellant from seeing Makayla. (N.T. 07/07/15, p. 23).

II. STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

On August 13, 2015, Appellant filed his Statement of Matters Complained of on Appeal, raising the following issues, *verbatim*:

> 1. Grandfather was not offered "regular periods of visitation," since all attempts at visitation by Grandfather resulted in Father refusing, or replying that the child was unavailable, or ignoring such requests.
> 2. Transcript of judge's decision, Page 9, line 21: The judge concludes that "some contact in this case, visitation, would clearly be in the child's best interest", and that there was "significant, almost daily contact between the two." (Page 8, lines 17-19.)
> 3. Page 9, line 10 of the transcript of 07/15/2015, ".... granting partial physical custody of the grandfather would adversely affect father's ability to parent the

child." There has been no evidence presented that the child's contact with her grandfather would have any bearing on the father's parental ability.
4. The judge concluded that the grandfather had rejected visitation as an option and has refused visitation with the child, when in point of fact even visitation was denied repeatedly by father.
5. Testimony by Lauren Smith, the social worker, was prejudiced negatively against the grandfather, Lauren having been influenced, as in a forewarning, by father prior to the diner visit to expect improper behavior by grandfather. (Transcript of trial, 7/7/2015, page 183-184 lines 21-1.)
In conclusion, despite the judge's/Court's finding that visitation has been offered, grandfather has not been allowed to see his granddaughter in nearly a year. As stated by the judge, it is in the child's best interest for the grandfather and his granddaughter to continue contact (Page 9, lines 21-24), yet no visitation or contact has been permitted by father.

Appellant also makes the following conclusion, *verbatim*:

> The newly amended statute has changed the requirements for grandparents and/or great-grandparents to prevail on a petition seeking partial custody or visitation. The statute states: "although the court always takes into consideration the best interest of the child in determining whether to grant a petition, the statute no longer requires it to consider whether the visitation would affect the child's relationship with his or her parent."
>
> Judge McHugh's decision was based in large part on his opinion of a possible effect on the child's relationship with her parent. This is in direct opposition to the rules of the statute.

III. DISCUSSION

Several of Appellant's Statement of Matters pertain to visitation, and will be addressed in the single analysis that follows. Appellant filed a petition for partial custody of Makayla, specifically requesting: one weekend per month, one week of vacation around Easter to go to Florida, one week vacation after school gets out, again to go to Florida, alternate Thanksgiving and Christmas Eve holidays, and also to have one long weekend to attend a fall festival.

It is significant to note that Pennsylvania, unlike many other states, distinguishes partial custody from visitation. See Hiller v. Fausey, 904 A.2d 875, 897 (Pa. 2006). Visitation is limited to the opportunity to see the child wherever he or she might be, only in the presence of the custodial individual, and does not include the right to remove the child from the environment,

even briefly. Id. A grant of partial custody, on the other hand, allows an individual to have visitation with the child outside the presence of the custodial individual. Id.

Appellant first claims he was denied visitation with Makayla. However, Appellant filed a petition specifically for partial custody, not visitation. Appellant has rejected all previous offers of visitation and indicated he has no desire to see Makayla if Appellee is present. This is illustrated by the diner incident on September 10, 2014, in which Appellant was offered visitation with Makayla while Appellee sat at a different table. Although Appellant claims that Appellee has kept Makayla from him, he chose to walk out rather than exercise an opportunity for visitation. Appellee testified at the hearing on this matter that he wished for Appellant to visit with Makayla, only with the caveat that he be present for such visitation. This Court believed Appellee's testimony that he wanted his father to see his daughter. Appellee's concerns that Appellant would speak to Makayla about his criminal history and fitness as a father if he were not present are legitimate and consistent with past practices, including the incident at the diner.

"There is a presumption that fit parents act in their children's best interests, and there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children." Troxell v. Granville, 530 U.S. 57, 58 (2000) (citing Parham v. J.R., 442 U.S. 584, 602 (1979)). Appellee's limitation on the manner in which Appellant may see Makayla is within Appellant's right as a parent to decide. In addition, a grandparent seeking custody carries the burden of proof to show that a parent is not fit. See Troxell, 530 U.S. at 58. There is no evidence in this case that Appellee is anything but a fit parent.

Although Appellant is not permitted to have contact with Makayla in the manner he wants, it is plainly incorrect to state that Appellant has been denied visitation.[2] Rather, Appellant has been denied partial custody of Makayla. This Court determined that some contact, namely visitation, with Appellant would be in Makayla's best interest, but that Appellant has refused visitation as an option. Visitation allows for Appellant to visit Makayla in the environment in which she is in, but does not allow for Appellant to remove her from that environment, even for a brief period of time. See Hiller, 904. A.2d at 897.

Appellant has no desire to do what is in the best interests of Makayla. He wants to do what is in his best interest. He does not ask, he demands. He does not compromise, he walks out. He will not visit, he will exercise partial custody. He will have it no other way than his way. Although Appellant believes Appellee is denying him contact with Makayla, this Court finds that the no contact is the choice of Appellant, and that Appellee has offered regular periods of visitation, just not the periods of partial custody sought by Appellant.

Appellant next claims that this Court erred in concluding that "granting physical custody of the grandfather would adversely affect the fathers ability to parent the child" because there was no evidence presented that the child's contact with her grandfather would have any bearing on the father's parental ability. Appellant is mistaken in this conclusion. The record indicates that Appellee specifically testified that he was concerned Appellant would interfere with his parenting of his daughter. See N.T. 07/07/15, p. 197. Appellant's actions and spoken words at the diner on September 10, 2014, validate these concerns.

Appellant also claims he was prejudiced by Appellee's statements to Ms. Smith regarding his potentially inappropriate behavior. However, this conclusion is not an appropriate ground for

[2] Immediately after the decision in this case was announced, Appellee and his counsel repeated their offer of visitation to Appellant's counsel. Appellant's response was to storm out of the courtroom.

appeal. In any event, this Court found the testimony of Appellee and Ms. Smith regarding the diner incident to be consistent and credible. This Court also found the testimony of Appellant regarding this incident to be self-serving, inconsistent, and not worthy of belief.

Finally, Appellant concludes that this Court was incorrect to consider the effect of granting partial custody to Appellant on the relationship between Appellee and Makayla. Because the petitioning party in this case is a grandparent, this Court was required to consider the three custody factors in Section 5328(c)(1) of the Child Custody Act. One of these factors, Section 5328(c)(1)(ii), mandates this Court to consider whether an award of partial physical custody or supervised physical custody would affect the relationship between parent and child. Therefore, Appellant's assertion is without merit.

IV. CONCLUSION

For these reasons, it is respectfully submitted that the Order entered by this Court on July 15, 2015, should be affirmed.

BY THE COURT:

October 16, 2015
Date

RAYMOND F. MCHUGH, J.