

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

M.A.,

Appellee

v.

M.G.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 965 WDA 2015

Appeal from the Order Entered May 26, 2015
In the Court of Common Pleas of Allegheny County
Family Court at No(s): FD13-001728-006

BEFORE: BENDER, P.J.E., SHOGAN, J., and MUSMANNO, J.

MEMORANDUM BY BENDER, P.J.E.:

FILED FEBRUARY 01, 2016

M.G. (Mother) appeals from the order entered May 26, 2015, in the Court of Common Pleas of Allegheny County, which awarded shared legal and physical custody of her daughter, E.A., born in July of 2004, and her son, A.A., born in November of 2011 (collectively, the Children), to their father, M.A. (Father). We affirm.

Mother and Father married in February of 2000, while living in Atlanta, Georgia. N.T., 10/14/2014, at 12. The family relocated to Seattle, Washington, in 2007, and then to Istanbul, Turkey, in September of 2011, as a result of Mother's job. *Id.* at 14-15. In the fall of 2012, Mother began to exhibit unusual behaviors. *Id.* at 18. Among other things, Mother claimed that Father was trying to kill her and the Children, and asked Father to leave the marital residence. *Id.* at 26-27. Concerned, Father enlisted the

aid of the Children's maternal grandmother, and attempted to have Mother involuntarily committed to a Turkish mental health facility. **Id.** at 38. Turkish authorities arrived at the marital residence and spoke with Mother, but she was not committed. **Id.** at 39-40.

Following this incident, Mother and Father shared custody of the Children informally. **Id.** at 44. Father filed the Turkish equivalent of a custody complaint in December of 2012, and a Turkish court entered an order in January of 2013 awarding Father with two weekends of physical custody per month. **Id.** at 43, 45. In February of 2013, Mother obtained the Turkish equivalent of a Protection From Abuse (PFA) order against Father. **Id.** at 44. However, the order related only to Mother, and Father retained his partial physical custody rights with respect to the Children. **Id.** at 51. Later, in April of 2013, Mother obtained another Turkish court order, which prohibited Father from visiting E.A. at her school.¹ **Id.** at 57, 234-37.

In the fall of 2013, Mother relocated to Pittsburgh with the Children. **Id.** at 63. Father also moved to Pittsburgh, and requested custody of the Children pursuant to the Turkish order. **Id.** Shortly thereafter, on or about October 4, 2013, Mother filed a PFA against Father. Father then filed a complaint for primary physical and shared legal custody of the Children on October 9, 2013. On October 18, 2013, the trial court awarded Father

¹ Both of the Turkish orders were entered without a hearing. N.T., 10/14/2014, at 49, 57.

supervised physical custody of the Children every other weekend pending a hearing on Mother's PFA petition. A PFA hearing was held on October 24, 2013 and November 4, 2013. On November 6, 2013, the trial court dismissed the PFA petition and entered an order adopting the Turkish court's prior custody order.²

On October 7, 2014, Mother filed another PFA against Father. A combined PFA and custody hearing was held on October 15, 2014, October 16, 2014, January 15, 2015, February 10, 2015, and March 2, 2015.³ On May 26, 2015, the trial court entered its order awarding the parents shared legal and physical custody of the Children. Mother was awarded physical custody every Monday and Tuesday, and Father was awarded physical custody every Wednesday and Thursday, with each parent having physical custody on rotating weekends.⁴ Mother timely filed a notice of appeal on

² On April 30, 2014, the trial court entered an order which awarded Father shared legal custody, and which slightly increased Father's partial physical custody.

³ Mother's second PFA petition was denied on October 17, 2014, and Mother filed an appeal. Mother's appeal remains pending at 1861 WDA 2014.

⁴ The order also required that Mother submit immediately to an additional psychological evaluation. That same day, the court entered a separate order providing that Father's request for counsel fees would be deferred pending the completion of the evaluation.

June 22, 2015, along with a concise statement of errors complained of on appeal.⁵

Mother now raises the following issues for our review.

A. Whether the [t]rial [c]ourt erred in its Order of May 2[6], 2015 by concluding that [Mother] has a “severe undiagnosed and untreated mental illness” and then predicating all of its Orders upon that unwarranted and improper conclusion[?] The [t]rial [c]ourt reached such conclusion on [Mother’s] mental health contrary to the report findings of the court-appointed expert, J. Anthony McGroarty, PsyD, whose report of March 5, 2014 specifically did not find any mental health issues. The trial court then “bootstrapped” this mental health determination to a potential counsel fee award for Father.

B. Whether the [t]rial [c]ourt erred in reducing physical custody time of the [C]hildren with [Mother] (and granting [Father] shared physical custody and extended custodial time): contrary to the [C]hildren’s best interest, contrary to the evidence presented regarding the statutory factors, contrary to the evidence and testimony presented regarding physical and mental abuse perpetrated against [Mother] and the [C]hildren, and without support of the weight of the evidence presented at trial[?]

Mother’s brief at 8 (trial court answers omitted).

We address Mother’s claims mindful of our well-settled standard of review.

⁵ In her notice of appeal and concise statement, Mother indicated that she also was appealing from the order providing that Father’s request for counsel fees would be deferred pending the completion of a psychological evaluation. Mother’s appeal from that order was premature, as the trial court had not yet ruled on Father’s request for counsel fees. Any claims related to Father’s request for counsel fees are not yet ripe for our review.

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.

V.B. v. J.E.B., 55 A.3d 1193, 1197 (Pa. Super. 2012) (citations omitted).

"When a trial court orders a form of custody, the best interest of the child is paramount." ***S.W.D. v. S.A.R.***, 96 A.3d 396, 400 (Pa. Super. 2014) (citation omitted). The factors to be considered by a court when awarding custody are set forth at 23 Pa.C.S.A. § 5328(a).

(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).

Instantly, in its opinion accompanying the subject custody order, the trial court addressed each of the Section 5328(a) factors.⁶ **See** Trial Court Opinion, 5/26/2015, at 4-9. The court found that factors 2, 6, 7, 11, and 14 were not relevant in this case, and that factors 3, 4, 10, and 12 were equal. **Id.** at 5-9. The court found that factor 5 slightly favored Mother, while factors 1, 9, and 13 favored Father. **Id.** at 4-9. Critically, with respect to factors 8, 15 and 16, the court found that Mother “has a severe, undiagnosed and untreated mental illness.” **Id.** at 6-13. Based on these considerations, the court found that it would be in the best interest of the Children for Mother and Father to share legal and physical custody. Trial Court Opinion, 8/10/2015, at 7-8.

Mother’s first issue is that the trial court abused its discretion by finding that she suffers from mental health issues. Mother’s brief at 21-30. Mother argues that the court was not permitted to reach this conclusion without the support of expert testimony. **Id.** at 21-24, 27-28. Mother emphasizes that she underwent a court-ordered psychological evaluation by Dr. Anthony McGroarty, who testified during the PFA and custody hearing, and that Dr. McGroarty did not conclude that she suffers from a mental

⁶ Effective January 1, 2014, Section 5328(a) was amended to include an additional factor at 23 Pa.C.S. § 5328(a)(2.1) (providing for consideration of child abuse and involvement with child protective services). Because Father’s complaint for custody was filed prior to the effective date of Section 5328(a)(2.1), that section does not apply to the present case. **See** § 6 of 2013, Dec. 18, P.L. 1167, No. 107, effective 1/1/14.

illness. **Id.** at 24-26. Mother also observes that the court “bootstrapped” its findings regarding Mother’s mental health to a potential award of counsel fees to Father. **Id.** at 29-30.

In its opinion accompanying the subject custody order, the trial court explained at length why it concluded that Mother is mentally ill. In short, the court found that Mother has a history of making “unsubstantiated and wild claims” concerning abusive conduct by Father. Trial Court Opinion, 5/26/2015, at 9. The court explained that it did not find Mother’s testimony concerning these claims to be credible. **Id.** at 5. The court provided the following example, among others.

Mother claimed that Father stalked her and surprised her by following her on a business trip to Russia. When confronted with text messages clearly indicating that she knew he was coming and[,] in fact, was looking forward to his arrival, she testified to some bizarre story about [Father] [*sic*] having two (2) phones and that he somehow broke into her phone (a year prior to the separation) and sent the message himself.

Id. at 10.

The court further reasoned that Mother appears to believe her demonstrably false claims. **Id.** at 6-7, 11. According to the court, Mother “believes the unbelievable.” **Id.** at 11. We agree.

During the custody hearing, Mother testified extensively concerning Father’s allegedly abusive behaviors. **See, e.g.,** N.T., 2/10/2015, at 102-53. Mother described, *inter alia*, a business trip to Russia in July of 2012. **Id.** at 136, 239-240. According to Mother, Father surreptitiously followed

her to Russia. **Id.** at 136. Mother insisted, “I had no idea he was going to show up,” and, “I found it to be creepy” **Id.** On cross-examination, Mother was confronted with a series of text messages sent between her and Father. **Id.** at 238. In the text messages, Father asked Mother to “add my name to your hotel reservation.” **See** Plaintiff’s Exhibit 27. Mother replied, “I added you can not [*sic*] wait to see you in Moscow.” **Id.** Mother denied that she ever sent the relevant text messages, and claimed that she did not even know the messages existed. **Id.** at 239. Mother suggested that “there are numerous texts that [Father] has used my phone to send to himself that are not mine,” and that Father did this “regularly.” **Id.** at 239-41. Mother noted that she had two phones, and “[i]t was not unusual that I would leave one at home.” **Id.** at 241.

We discern no abuse of discretion. The trial court was free to reject the testimony of Mother concerning Father’s allegedly abusive and inappropriate behaviors. The trial court also was free to conclude that Mother appeared to believe her many claims of abuse, despite the fact that those claims were false. Given these two conclusions, it was reasonable for the court to infer that Mother was suffering from some sort of mental ailment. Expert testimony was not necessary to support this inference, as Mother contends. “Expert testimony is necessary when a case presents questions beyond the ken of the average layperson.” ***Burlington Coat Factory of Pennsylvania, LLC v. Grace Const. Management Co., LLC***, 2015 Pa. Super. LEXIS 716, 2015 WL 6523331 (Pa. Super. 2015) (*en banc*)

(citing **Vazquez v. CHS Professional Practice, P.C.**, 39 A.3d 395, 398–99 (Pa. Super. 2012)). Here, it is well within the knowledge of a layperson that, if someone believes things that are demonstrably untrue, they may be suffering from mental health issues. Admittedly, Dr. McGroarty stated in his evaluations that “I do not believe that either parent has any significant physical condition, mental health, or drug or alcohol problem that would significantly interfere with their ability to provide good care for the [C]hildren.” Psychological Evaluation for Custody, 3/5/2014, at 27. However, Mother does not direct our attention to any authority which would suggest that the trial court was prohibited from reaching a conclusion with respect to Mother’s mental health simply because Dr. McGroarty did not reach the same conclusion. Mother is not entitled to relief.

In her second issue, Mother argues that the trial court abused its discretion with respect to several of the Section 5328(a) factors. Referencing Section 5328(a)(2), Mother contends that she suffered abuse at the hands of Father, that the court failed to conduct a sufficient analysis with respect to Section 5328(a)(4), and that the court should have placed greater weight on the well-reasoned preference of the Children suggested by Section 5328(a)(7). Mother’s brief at 32-37.

We first consider whether the trial court abused its discretion by concluding that Father did not commit abuse against Mother pursuant to Section 5328(a)(2). **Id.** at 32-33. Mother emphasizes that a court in Turkey “issued orders which are the equivalent of PFA orders due to Father’s

abusive conduct,” and that these orders “confirm[ed] the abuse which occurred in Turkey.” *Id.* at 33. The trial court explained that it found no credible evidence that Father ever abused Mother, physically or emotionally. Trial Court Opinion, 5/26/2015, at 5. The trial court observed that the Turkish court entered its orders without a hearing. *Id.* at 3.

We again discern no abuse of discretion. As before, the trial court was free to reject Mother’s testimony that Father had abused her. Moreover, the court was free to credit Father’s testimony that both of the Turkish orders were issued without a hearing. *See* N.T., 10/14/2014, at 43, 49, 57. Thus, Father never was able to defend himself from Mother’s accusations of abuse while living in Turkey, and the existence of the Turkish orders does not prove that Father committed abuse.

We next consider Mother’s assertion that the trial court failed to conduct a sufficient analysis with respect to Section 5328(a)(4). *See* Mother’s brief at 33-35. Mother argues that the subject custody order created a “seismic shift in the custody of the [C]hildren,” and that it was “incumbent on the court to fully discuss the possible effect on the [C]hild[ren] of the proposed transfer of custody.” *Id.* at 34 (citing *E.A.L. v. L.J.W.*, 662 A.2d 1109, 1117 (Pa. Super. 1995)). According to Mother, the court provided “no discussion of the effect that a modification of custody this

dramatic will have on the continuity of these children's family life"⁷ **Id.** The trial court found that both Mother and Father were capable of providing stability and continuity for the Children, and that Section 5328(a)(4) weighed equally in favor of both parents. Trial Court Opinion, 5/26/2015, at 5.

Mother is not entitled to relief. We observe initially that the case relied upon by Mother, **E.A.L.**, has limited precedential value in this matter, given that it was decided prior to the creation of the Section 5328(a) custody factors. Moreover, while **E.A.L.** instructs that courts should "fully discuss" the possible effect that transferring custody may have on a child, this Court has more recently explained that no particular amount of detail is necessary when a court discusses the Section 5328(a) factors. **See A.V. v. S.T.**, 87 A.3d 818, 823 (Pa. Super. 2014) (quoting **M.J.M. v. M.L.G.**, 63 A.3d 331, 336 (Pa. Super. 2013), *appeal denied*, 68 A.3d 909 (Pa. 2013)) ("[T]here is no required amount of detail for the trial court's explanation; all that is required is that the enumerated factors are considered and that the custody

⁷ Mother also asserts that the trial court abused its discretion by failing to comply with the recommendation of Dr. McGroarty that a shift to shared physical custody be conducted gradually. Mother's brief at 35. We note that this issue was not included in, or in any way suggested by, Mother's concise statement of errors complained of on appeal. Thus, it is waived. **See Krebs v. United Refining Co. of Pa.**, 893 A.2d 776, 797 (Pa. Super. 2006) ("[A]ny issue not raised in a statement of matters complained of on appeal is deemed waived.") (citations omitted).

decision is based on those considerations.”). Regardless, even applying **E.A.L.** to the instant matter, the trial court’s discussion with respect to Section 5328(a)(4) was more than sufficient. It is clear that the court carefully considered the impact that transitioning to a shared physical custody arrangement would have on the Children, and determined that such a transition would be in the Children’s best interests. **See** Trial Court Opinion, 8/10/2015, at 7-8 (“The [c]ourt found based on all the credible evidence presented that it was in the best interest of the [C]hildren for the parents to share custody”). We see no reason to disturb the court’s conclusions, or to reverse or remand the case for further fact-finding.

Finally, we address Mother’s claim that the trial court abused its discretion by failing to place greater weight on the well-reasoned preference of the Children pursuant to Section 5328(a)(7). **See** Mother’s brief at 35-37. Mother contends that E.A. expressed a well-reasoned preference to reside primarily with Mother during the PFA proceedings in October of 2013, and that A.A. presented testimony during the instant proceedings that he was being abused by Father. **Id.**

The trial court explained that it did not consider Section 5328(a)(7) to be a factor in this case. The court offered the following discussion.

In the PFA, which was filed days before the start of the trial, Mother alleged that Father was physically, and sexually abusing [A.A.]. The [c]ourt attempted to interview [A.A.] and found him not to be competent to testify. It should be noted that the first words out of [A.A.’s] mouth were that his [d]ad hits

him, which appeared forced and coached. [A.A.] shows no fear of his Father.

The [c]ourt also interviewed [E.A.]. She slightly preferred Mother, which is no surprise given the little time Father has been able to spend with her, as well as Mother's subtle, and sometimes not so subtle, attempts to convince [E.A.] that her Father is "dangerous."

Trial Court Opinion, 5/26/2015, at 6.

First, we discern no abuse of discretion by the trial court in concluding that A.A. was not competent to testify. A.A. was less than three years old at the time of his interview with the court, and he struggled to stay on topic and provide clear answers to the court's questions. A.A. also seemed surprisingly eager to tell the court about all the bad things that Father allegedly does. Thus, the court was well within its discretion when it concluded that A.A.'s testimony appeared to be coached. The following excerpt of A.A.'s interview with the court is illustrative of these issues.

THE COURT: So, [A.A.], my name is Judge. What do you want to be called, [short version of A.A.'s first name] or [A.A.'s full first name]?

[A.A.]: Guess what daddy said to me.

THE COURT: Do you know why you are here, [A.A.]?

[A.A.]: Uh-huh.

THE COURT: What are you here for?

[A.A.]: My dad sa[i]d bad words.

THE COURT: Your dad said bad words?

[A.A.]: Huh-uh.

THE COURT: What did he say?

[A.A.]: I think he said "stupid".

THE COURT: Did your dad say any other bad words?

[A.A.]: Uh-huh.

THE COURT: What other bad words?

[A.A.]: Yeah, he punched me on my back.

N.T., 10/16/2014 (interview of A.A.), at 3-6.

Second, with respect to E.A., it was reasonable for the court to conclude that her views should not be a factor in this case. As noted by Mother, the trial court interviewed E.A. during the prior PFA proceedings in 2013. During the interview, the court asked E.A. if she misses Father, and E.A. stated that she does. N.T., 10/24/2013, at 65. However, when the court asked E.A. if she would like to see Father more, E.A. provided "[n]o audible response." **Id.** E.A. stated that she is scared of Father "[s]ometimes," because he yells, and because he spanks her or takes her iPod if she misbehaves. **Id.** at 65-68, 75-77. The court asked E.A. if she would like to have Father's supervised visits become unsupervised, and E.A. responded that she would not. **Id.** at 68-69. E.A.'s explanation as to why she did not want unsupervised visits is as follows.

[E.A.]: Well, just like, I like the fun stuff we do like rock climbing and stuff, but otherwise I really don't feel like going.

THE COURT: What? Because you're board? [sic]

[E.A.]: Yeah. I don't have like -- I been like -- I can do all these things at my mom's that like -- mostly it's just -- I don't know.

THE COURT: Well, is it because your dad doesn't do fun stuff with you?

[E.A.]: Well, we do do fun stuff, but it's like that's all we do basically.

THE COURT: You just do fun stuff, and you don't want to do fun stuff all the time?

[E.A.]: Like sometimes I get really tired at night, and then sometimes it's on a school night, so I get really tired, and I have to wake up early.

THE COURT: So you want to go to bed?

[E.A.]: Yeah.

THE COURT: And what? He wants to stay up and do fun stuff?

[E.A.]: Yeah.

Id. at 69-70.

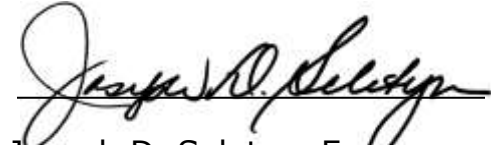
Thus, while E.A.'s comments indicated that she would prefer to spend most of her time with Mother, E.A. had a difficult time explaining this preference, and her views certainly were not "well-reasoned." Moreover, the record supports the trial court's finding that Mother has strived to alienate E.A. from Father, and it is not surprising that E.A. would present such a preference.⁸

⁸ While not mentioned by Mother in her brief, we note that E.A. was twice interviewed by Dr. McGroarty as part of his psychological evaluations. During her most recent interview, E.A. stated "that she does not want to
(Footnote Continued Next Page)

Accordingly, we conclude that the record supports the finding of the trial court that Mother appears to be suffering from a mental illness. We further conclude that the record supports the court's findings with respect to Sections 5328(a)(2), (4), and (7). Therefore, we affirm the order awarding the parents shared legal and physical custody of the Children.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016

(Footnote Continued) _____

spend any time with her father." Psychological Evaluation for Custody – Supplemental, 10/6/2014, at 11. However, Dr. McGroarty concurred with the conclusion of the trial court that E.A.'s negative view of Father is a result of Mother's attempts at alienation. **See id.** at 14.