NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

N.O. Appellant v. J.O. Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2302 EDA 2012

Appeal from the Order Dated July 19, 2012
In the Court of Common Pleas of Pike County
Civil Division at No(s): 2040-2009

BEFORE: LAZARUS, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY LAZARUS, J. Filed: February 20, 2013

N.O. (Mother) appeals from the trial court's order denying her motion to modify the parties' previous custody arrangement that gave her and Appellee, J.O. (Father), shared legal custody, Mother primary physical custody and Father partial physical custody. Because the trial court's order is supported by the record and is in the best interests of the parties' minor children, R.O. and J.O., we affirm.

On appeal, Mother raises the following issues for our consideration:

> (1) Did the trial court err in adopting the Amended Report and Recommendation of the Hearing Officer when her recommendation is based on fragments of the evidence presented to the exclusion of the minor child's testimony including testimony of past visitation, testimony regarding

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* Retired Senior Judge assigned to the Superior Court.

the conditions at the father's residence and the fact that the minor children have had repeated bouts of head lice after the visits and the fact that the minor child, R.O. testified on two separate occasions that she was afraid while at the residence?

(2) Did the trial court err in adopting the Amended Report and Recommendation of the Hearing Officer who relied on a past finding of contempt to the exclusion of all other prior proceedings, including prior hearings where the minor child testified in a manner consistent with her testimony and when the Petition for Contempt focused solely on a narrow issue of location of delivery of the children and where the Court admitted that the wording at issue in the contempt proceeding does not appear on the face of the Order?

(3) Did the trial court err in adopting the Amended Report and Recommendation of the Hearing Officer where the testimony of the father as to his caring for the children was refuted by witnesses including the minor child and where the Amended Report and Recommendation is not in the best interests of the minor children[?]

Mother and Father divorced in June 2010. They are the natural parents of R.O. (born January 6, 1999) and J.O. (born July 16, 2002). Mother's divorce complaint included a count for custody of the children. After a December 2009 custody hearing, the trial court adopted a hearing officer's report and recommendations which included the following agreed-upon arrangement: shared legal custody, with Mother having primary physical custody and Father having partial physical custody. Father filed a petition to modify custody on March 15, 2010. Following a hearing, a hearing officer recommended that Father, who resides in the Bronx, New York, be permitted to exercise his periods of custody at his residence and that the parties should share the costs associated with transportation to and

from New York. The trial court adopted these recommendations in an order entered on November 4, 2010.

On February 8, 2011, Father filed a petition for contempt, asserting that Mother had violated the November 2010 custody order by not transporting the children to his Bronx, New York, home. On April 6, 2011, Mother filed a motion to modify, seeking suspension of Father's periods of overnight visitations in New York. Six days later, Father filed a motion to modify custody, seeking to increase his periods of physical custody. On September 7, 2011, a hearing was held, at which the minor child, R.O., testified *in camera* in the presence of the parties' attorneys and the hearing officer.[1] The hearing officer filed an amended report including the parties' original custody arrangement and recommending that Father have expanded visitation, to now include two non-consecutive weeks during the children's summer school break. Exceptions were filed and denied. The trial court adopted the hearing officer's amended report and recommendation, making it an order of court. Mother filed a motion for reconsideration, which was denied. An appeal was filed to this Court.

On June 26, 2012, a panel of this Court vacated the trial court's order and remanded the case for application of this Commonwealth's new Custody Act, 23 Pa.C.S.A. §§ 5321-40. Specifically, the trial court was instructed to

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[1] R.O.'s *in camera* testimony has been transcribed; it is sealed and made a part of the record on appeal.

consider the sixteen factors listed in 23 Pa.C.S.A. § 5328(a), in light of the best interest of the children, and to come to a considered custody decision under the facts of this case. Having applied the relevant section 5328(a) factors, the trial court has now filed an opinion concluding that the hearing officer's amended report and recommendation should be affirmed.

> The scope of review of an appellate court reviewing a child custody order is of the broadest type; the 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.

Kaneski v. Kaneski, 604 A.2d 1075 (Pa. Super. 1992)(citing ***McMillen v. McMillen***, 602 A.2d 845 (Pa. 1992)).

Mother's first and third issues concern the trial court's alleged lack of consideration given to R.O.'s *in camera* testimony. Mother claims that had the court properly weighed R.O.'s testimony, it would have concluded that it is not in the children's best interest to continue overnight visitation with Father at his New York residence.

During her *in camera* testimony, R.O. expressed that she does not care about Father, that he is mean and that he lies a lot. N.T. *In Camera* Interview, 9/7/2011, at 6-7. R.O. further testified that Father's New York

residence is dirty, ***id.*** at 8, that she is not happy when she is visiting him, that she does not want to visit him more often, ***id.*** at 12, and that she does not care if she ever sees or talks to him again. ***Id.*** at 18.

> When a hearing judge interviews a child in a custody case, certain procedures must generally be met: (1) counsel must be present; (2) counsel must have the opportunity to question the child; and (3) the testimony must be transcribed and made a part of the record. Those procedures are designed to provide the appellate court with all the necessary information to discharge its responsibility to exercise the broadest type of review. Additionally, in determining the best interests of the child, her preference, although not controlling, is a factor to be considered **as long as it is based on good reasons.** In assessing the weight to be accorded the child's preference, her maturity and intelligence are to be considered, with increased weight being accorded the preference as the child grows older.

G. v. G., 426 A.2d 157, 161 (Pa. Super. 1981) (emphasis added). However, a child's bare statement of preference, without more, is of little persuasive value in a custody matter. ***Tomlinson v. Tomlinson***, 374 A.2d 1386, 1389 (Pa. Super. 1977).

Contrary to Mother's contention that the court failed to consider R.O.'s testimony, the hearing officer, to whom the trial judge deferred, specifically concluded that "the minor child's testimony presents no credible evidence or established reason to support [her] preference." Hearing Officer's Recommendation/Report, 7/19/2012, at ¶ 7. Although R.O.'s testimony with regard to her animosity towards Father and lack of desire to see and visit him again is troubling, we defer to the credibility findings below. ***Robinson v. Robinson***, 645 A.2d 836 (Pa. 1994) (on credibility and weight of

evidence, appellate courts must defer to trial judge's findings; trial judge has had opportunity to observe proceedings and demeanor of witnesses). As stated above, a child's preference, without more, is of little value in the overall custody determination. ***Tomlinson***, ***supra***. While Father may not have an idyllic living arrangement or be the parent whom R.O. prefers, the court properly noted that R.O. gave no specific or concrete evidence to support a finding that overnight custodial periods at Father's home are not in the children's best interest. ***Compare id.*** (thirteen-year-old girl's desire to live with one parent over another, without any underlying reasons to prove validity of preference, does not support change in custody arrangement) ***with Shoup v. Shoup***, 390 A.2d 814 (Pa. Super. 1978) (twelve-year-old boy's preference given due weight where court noted child was honest and gave valid reasons).

Moreover, Mother's assertion that Father is not fit to have overnight custody of the children is unsupported in the record where the parties' testimony was largely conflicting and there was no disinterested testimony presented at the custody hearing on the issue. ***G.***, ***supra*** (court remanded custody matter for further proceedings, where record deficient on disinterested testimony regarding suitability of parents' homes). The fact remains that the hearing officer and trial judge are more than familiar with the parties and the contentious nature of this ongoing custody battle. Based on this history, the trial judge astutely recommended that the parties continue to adhere to a predictable custody schedule and that the children

receive counseling to help them process the parties' separation and deal with their parents' animosity toward each other. These recommendations are certainly in the best interests of the children and should be heeded by Mother and Father.

Finally, to the extent that Mother claims the court improperly weighted her contempt[2] when fashioning the instant order, we recognize that the contempt finding was properly considered in accounting for the overall lack of consistency in carrying out the ordered custody schedule as well as a reason for the children's lack of familiarity with Father and his New York residence. The court also used the contempt finding to refute Mother's claim that the missed visits to New York were solely Father's fault. ***See*** Pa.R.A.P. 1925(a) Opinion, 9/7/2012, at 7 ("both Mother and Father have been uncooperative in carrying out their custody and that has lead [sic] to missed periods of custody with Father.").

Based on the evidence of record, we cannot conclude that the instant order, which consists of an overall modification of two additional weeks of custodial time with Father, is manifestly unreasonable or not in the best interest of the children. ***Robinson***, ***supra***.

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[2] Mother was found in contempt of a court order for failing to transport the children to Father's home in the Bronx.

Order affirmed.[3]

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[3] We also note that the hearing officer was careful to include in her recommendation the conditions that Father "ensure the proper hygiene, nutrition and welfare of the children at all times during his periods of custody [and that he] ensure that the children eat sufficient meals and change their clothing, as appropriate." Hearing Officer's Amended Report and Recommendation, 7/19/12, at 2.