NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

M. M. AND M. M.	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
A. M. AND B. M.	
APPEAL OF: A. M.	
	No. 2308 EDA 2012

Appeal from the Order August 2, 2012
In the Court of Common Pleas of Lehigh County
Civil Division at No.: 2004-FC-1387

BEFORE: GANTMAN, J., DONOHUE, J., and PLATT, J.*

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

A.M. (Mother) appeals from the order of the Court of Common Pleas of Lehigh County that awarded primary physical custody of her son, A.M. (Child), to his maternal grandparents, M.M. and M.M. (Grandparents), and established a schedule of partial physical custody for Mother. The parties share legal custody. We affirm.

Child was born in June of 2004 to Mother and B.M. (Father).[1] Mother conceived Child at the age of fifteen and gave birth when she was sixteen.

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* Retired Senior Judge assigned to the Superior Court.

[1] Mother and B.M. cohabited briefly at Grandparents' home at the time that Child was conceived. B.M. is not a party to this custody matter, and he has never expressed any desire to engage in litigation regarding Child.

Grandparents filed a complaint for custody of Child in the Court of Common Pleas of Lehigh County on November 4, 2004, when Mother, who is the adopted foster child of Grandparents, voluntarily left Grandparents' home and reentered the foster care system, alleging that her physical and mental well-being would be jeopardized if she stayed with Grandparents.[2] The trial court entered an interim order on December 23, 2004, and a final order March 16, 2005. Grandparents have been solely responsible for Child's care and upbringing since Mother left their home.

The original custody order gave Grandparents primary physical custody and final say over decisions regarding legal custody. The trial court modified the order several times over the years while the basic terms remained the same: the parties shared legal custody but Grandparents had the final say when the parties could not agree, and Grandparents had primary physical custody while Mother had two visits during the week and one full day on the weekend, with no overnight. The orders also provided for holiday visits but no additional time in the summer.

Mother filed a petition for modification of custody on February 8, 2012, in which she sought primary physical custody of Child. The parties agreed to an interim order that the trial court entered on April 3, 2012, by which the parties shared legal custody and Mother received physical custody of Child

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[2] After leaving Grandparents, Mother had two other children by two other fathers; both of those children have always been in her sole custody.

every other weekend. Mother filed a petition for contempt on April 12, 2012, in which she alleged that Grandparents failed to comply with that agreed order. The parties agreed to another order, subsequent to a conference with a custody master, that the trial court entered on May 14, 2012. The new order provided that the parties would share legal custody and that Mother would have partial custody each Tuesday and Thursday evening and every other weekend during the school year. The parties were to share custody during the summer on a 5-5-2-2 schedule.

The trial court held a hearing on Mother's February 8, 2012 petition for modification on August 2, 2012. The trial court entered the order complained of on August 14, 2012. Mother filed a timely notice of appeal and statement of errors complained of on appeal on August 27, 2012.

Mother presents the following questions for our review:

> A. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED AS A MATTER OF LAW BY NOT AWARDING MOTHER PRIMARY CUSTODY OF THE CHILD WHERE THE COURT WAS NEITHER PRESENTED WITH NOR FOUND CLEAR AND CONVINCING EVIDENCE TO REBUT THE PRESUMPTION THAT, VIS-A-VIS A THIRD PARTY, CUSTODY SHALL BE AWARDED TO THE PARENT?
>
> B. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED AS A MATTER OF LAW IN FAILING TO MAKE ANY DETERMINATION OF COMPELLING FACTORS THAT WOULD NEGATE THE POLICY OF THE COMMONWEALTH THAT SIBLINGS SHOULD BE RAISED TOGETHER?
>
> C. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION AND/OR ERRED AS A MATTER OF LAW IN PLACING RESTRICTIONS ON MOTHER'S PERIODS OF PHYSICAL AND LEGAL CUSTODY BY AWARDING PARTIAL CUSTODY EVERY

> OTHER WEEKEND, AWARDING ONLY TWO WEEKS SUMMER VACATION, LIMITING TELEPHONE CONTACT TO TWO DAYS PER WEEK FOR 1/2 HOUR AND BY FAILING TO MAKE ANY PROVISION FOR REUNIFICATION?

(Mother's Brief, at 5).

Our scope and standard of review is as follows:

> 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.

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

We have stated,

> [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) (quoting ***Jackson v. Beck***, 858 A.2d 1250, 1254 (Pa. Super. 2004)).

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 wellbeing." ***Saintz v. Rinker***, 902 A.2d 509, 512 (Pa. Super. 2006) (citing ***Arnold v. Arnold***, 847 A.2d 674, 677 (Pa. Super. 2004)).

In this case, at the close of testimony at the hearing on August 2, 2012, the trial court noted its findings of credibility for each witness, and discussed in detail its findings regarding each of the statutory factors set forth in 23 Pa.C.S. § 5328. (***See*** N.T., 8/02/12, at 397-408). The trial court made express findings of credibility. Specific to our review, the trial court found Grandmother to be more credible than Mother:

> So then we come down to [Mother] and [Grandmother]. I find [Grandmother] more credible than [Mother]. This does not mean I like everything she said, but, as to things that these two people are diametrically opposed on, I have more reason to find [Grandmother] credible than [Mother] credible. This also does not mean I do not believe anything [Mother] said, but I think that, where I have those conflicts, I find [Grandmother] more credible.

(***Id.*** at 399-400).

The trial court's findings that are relevant to Mother's claims of error are these:

> 3. The parental duties performed by each party on behalf of the Child. Who is the primary caregiver? Past and present possession of the Child. That falls squarely on the [G]randparents because of all these many years of taking care of the Child.
>
> 4. The need for stability and continuity in the Child's education, family life and community life. That falls squarely on the [G]randparents.

* * *

6. The Child's sibling relationships. That comes squarely on Mother's side. She has two other children and the Separation of Siblings Doctrine requires that a child stay with other siblings, even half-siblings, unless there is a compelling reason not to. In this case, the compelling reason is the other factors that weigh in Grandparents' favor, some of which I have already indicated and some of which I will discuss.

7. The well-reasoned preference of the Child based upon the Child's maturity and judgment. I interviewed the Child. He is young, but very articulate and straight-thinking. I asked him if anybody talked to him about coming to see me and what he was going to talk to me about. I had to explain to him that I was the judge, etc. He said had never seen a judge, so it did not seem to me at all like he had been coached. Based upon his testimony, the only logical conclusion is that primary custody would go to the Grandparents. So because of the clarity of his testimony, we give it some weight, but [it] is not the decision-maker.

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9. Which party is more likely to maintain a loving, stable, consistent and nurturing relationship for the Child adequate for the Child's emotional needs. That is pretty even, but I think it slightly falls onto Grandparents' side. It appears that [Mother] is working hard to grow up, but she is still growing up -- that is not a criticism -- and she needs to continue to do that. I am not taking it just from [Child's] testimony. But just to look at that for a second, if you want to maximize your time with him and if you really are on the phone out on the porch or anything like that, that is not your time to do that when he is there. I would use all the time I had with the Child and let him know that you are attending to him. But I think that [Mother] loves him. I think she wants to do what she has to for him, but I think she is still learning how to be a mother, as everybody learns on the job.

10. Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs including religious training and doctor visits? Well,

> [G]randparents have been doing that and I think Mother wants to do that, but I think that comes down on [G]randparents' side.

(***Id.*** at 401-04).

When the trial court finished its discussion, it summarized its findings by stating:

> So when I balance out all of these factors, taken as a totality, the clear answer to me is that at this time primary custody must be awarded to Grandparents. Now the layperson would say, "Well, the mom's the mom. And the mom should be paramount." While I understand that thinking, that was our law many, many years ago. That is not the law anymore. There are a number of factors -- I just went through them -- that we are required to go through. So, just being the mom is not enough and here we have an unusual situation where the grandparents stand in *loco parentis*, meaning they have been acting like parents for eight years and so you cannot make that automatic switch.

(***Id.*** at 406-07).

Mother first complains that the trial court abused its discretion in not placing Child with her as the evidence failed to rebut the presumption that a child should reside with his mother. The trial court did not ignore the presumption in favor of placing a Child with his mother. The trial court, in discussing factor six, found that the presumption, standing alone, favored Mother, but that the specific circumstances of this case, as it explained in its summary, above, favored Grandparents. It is undisputed that Child has lived with Grandparents for his entire life and that it has been Grandparents, acting *in loco parentis*, who have provided for Child since he was born. The record clearly demonstrates that Child is healthy, thrives in school, and is

active in church, social, and other activities. In addition, the trial court expressed its concern over Mother's lack of maturity: "It appears that [Mother] is working hard to grow up, but she is still growing up — that is not a criticism — and she needs to continue to do that[,]" (***Id.*** at 405), and, "she is still learning how to be a mother." (***Id.*** at 406). The trial court concluded that Mother was not ready to be the stable parent that Child needed at this time but that their relationship should continue to develop, "Perhaps, in time, he can eventually live with [Mother] and spend time. [Mother] is younger, no offense". (***Id.*** at 408).

Our examination of the record reveals that the trial court's decision to place Child with Grandparents rather than Mother is supported by clear and convincing evidence in the record. The trial court did not abuse its discretion in placing Child with Grandparents.

Mother next complains that the trial court erred by failing to permit Mother to raise Child with his half-siblings. The trial court, however, recognizing correctly that siblings should be raised together "unless there is a compelling reason not to" (***Id.*** at 402), gave the following reasons for refusing to place Child with his half-siblings. First, the Grandparents have been Child's primary caregivers for his entire life and staying with them will provide "stability and continuity in the Child's education, family life and community life." (***Id.*** at 401). In considering Factor 4, the need for "stability and continuity" in a child's life, the trial court found that this factor

"falls squarely on the [G]randparents." (***Id.***). After interviewing Child, whom the trial court found to be "articulate and straight-thinking," (***Id.*** at 402), the trial court found that, though it was not the "decision-maker," the "only logical conclusion is that primary custody would go to the Grandparents." (***Id.*** at 402). The trial court also found that Grandparents were more likely to attend to the Child's "daily physical, emotional, developmental, educational and special needs including religious training and doctor visits[.]" (***Id.*** at 404). Finally, as we stated above, the trial court expressed its concern regarding Mother's maturity, "[i]t appears that [Mother] is working hard to grow up, but she is still growing up — that is not a criticism — and she needs to continue to do that[,]" (***Id.*** at 405), and, "she is still learning how to be a mother." (***Id.*** at 406). All of these factors argue strongly in favor of Child remaining with Grandparents. The trial court did not abuse its discretion when it considered the siblings doctrine in light of the record and concluded that Child should remain with Grandparents.

Finally, Mother claims that the trial court's visitation schedule does not provide sufficient time with Child and does not provide any provision for reunification. Mother argues that the trial court's schedule "restricted Mother's custody by failing to institute a plan for reunification[,]" and "failed to make any plan for transfer to Mother's sole custody." (Mother's Brief, at 27). In making this argument, Mother recognizes the need for a plan of reunification, but fails to appreciate that a good first step to reunification is

regular visitation. Mother had limited contact with Child for most of his eight years. Evidence presented at trial showed that Mother was barely involved in Child's life for a long period. Her sporadic contact was often at the urging of Grandparents, and both of them testified that they want Mother to be more involved in Child's life. (N.T., 8/02/12 at 294, 329-330). T.K., Grandmother's sister and Mother's aunt, testified:

> I think as [Mother] got — there was a period of time, a few years, where [Mother] didn't have as much involvement in [Child's] life. She was just busy with other things and — I'm sorry. So, yes, that changed. And that was probably for — I don't know. Maybe four years? Five years? — that she was very little involved. And then more recently, within the last six or eight months, she started to get more involved again.

(***Id.*** at 132).

The trial court recognized that a regular visitation schedule is a prelude to reunification, "[Child] must develop a relationship with his Mother. Nobody is doing him any favors if that is squelched. That is extremely important and he might not even realize it, but he will later. Perhaps, in time, he can eventually live with her and spend time." (***Id.*** at 407). A plain reading of the record reveals that the trial court envisions the reunification of Mother and Child but also recognizes the reality of Child's situation:

> So, just being the mom is not enough and here we have an unusual situation where the grandparents stand in *loco parentis*, meaning they have been acting like parents for eight years and so you cannot make that automatic switch.

(***Id.***). The trial court did not abuse its discretion when it established a visitation schedule that did not also include a specific timetable of reunification.

Accordingly, for the reasons stated, we affirm the order of the trial court that grants primary physical custody to Grandparents and partial physical custody to Mother.

Order affirmed.

Donohue, J., files a Dissenting Memorandum.