

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

N.A.M.

Appellee

v.

M.P.W.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2349 EDA 2012

Appeal from the Order Entered August 8, 2012
In the Court of Common Pleas of Bucks County
Domestic Relations at No(s): A06-06-61635-C

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, J.:

Filed: January 25, 2013

Appellant, M.P.W. ("Mother") appeals *pro se* from the order entered in the Bucks County Court of Common Pleas, which denied Mother's petition to modify the existing custody order pertaining to N.M. and H.M. ("Children"); N.A.M. is Father. We vacate and remand.

The relevant facts and procedural history of this case are as follows.

Father filed a petition for custody on May 15, 2006. On October 24, 2007, the parties entered into a stipulation for 50-50 shared physical custody, which the Honorable Harold A. Thompson, Jr. made an order of court. On September 19, 2008, Father filed to modify the agreed [upon] custody order. [The court] held eight hearings between December 23, 2008, and February 5, 2010. [The court] heard testimony principally from the parties, the Children, and Dr. John Shanken-Kaye who authored a custody evaluation report dated March 5, 2007, and an addendum in August 2008. On March 2, 2010, [the court] entered an order awarding Father sole legal custody and primary physical custody, eight of fourteen days during the

school year, alternating weeks in the summer. No appeal was filed.

On April 18, 2011, Father filed a petition to modify custody, and on May 3, 2011, he filed a petition for contempt (the issue was the selection of summer camp for the Children). [The court] held six hearings between August 2, 2011, and January 17, 2012. [The court] heard testimony from Father, his live-in girlfriend, and the Children's psychologist, Dr. Dill-Standiford. On January 20, 2012, Father withdrew his petition for custody when [the court] made it clear that [the court] [was] not going to grant Father's petition to significantly limit Mother's custody time. Through all of the proceedings, up to and including January 17, 2012, both parties were represented by counsel. Through counsel, Mother represented that she was not attempting to change [the court's] March 2, 2010, custody order.

On February 21, 2012, Mother filed a "petition for new date on continuing custody trial on her petition to modify and for contempt and supplemental petition to modify custody order." [The court] denied that petition on February 29, 2012.

On April 23, 2012, Father filed a second petition for contempt on the issue of summer camp selection. [The court] denied this petition on April 27, 2012. Father also filed petitions on April 27, 2012, and May 2, 2012, on the issue of summer camp. [The court] denied them.

(Trial Court Opinion and Order, filed August 14, 2012, at 1-2).

On July 17, 2012, Mother filed a *pro se* petition for modification of custody order, which sought sole legal and physical custody of Children, reimbursement of legal fees, child support, court-ordered therapy for N.M., and continued enrollment of N.M. in his current school. On August 8, 2012, the court denied and dismissed Mother's petition without a hearing. Mother

timely filed a notice of appeal on August 27, 2012, and then a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925.

Mother raises three issues for our review:

DID THE TRIAL COURT ERR IN DENYING [MOTHER'S] MOTION TO AMEND CUSTODY ORDER WITHOUT EITHER A CUSTODY CONFERENCE OR A HEARING?

DID THE TRIAL COURT ERR IN HEARING [FATHER'S] MOTION TO AMEND CUSTODY ORDER BUT REFUSING TO HEAR [MOTHER'S] TIMELY FILED COUNTERCLAIM AFTER [FATHER] WITHDREW HIS MOTION?

DID THE TRIAL COURT ERR IN REFUSING TO RECUSE ITSELF IN THIS MATTER?

(Mother's Brief at 4).

Our scope and standard of review of a custody determination 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. v. S.E.F., 45 A.3d 441, 443 (Pa.Super. 2012).

In her first issue, Mother essentially argues that the trial court's decision, to deny and dismiss her petition for modification of custody without a hearing, prevented Mother from presenting new evidence regarding the welfare of the Children and precluded full consideration of the Children's best interests. Specifically, Mother contends the court must conduct a hearing to consider the need for N.M. to continue psychological treatment. Mother concludes she is entitled to relief in the form of a remand for a hearing. We agree.

Initially, we note that on January 24, 2011, the General Assembly's revision of Pennsylvania's child custody laws, namely the Child Custody Act, went into effect. *See* 23 Pa.C.S.A. §§ 5321-5340. The Child Custody Act applies to "disputes relating to child custody matters" filed after the effective date of the new law. 23 Pa.C.S.A. § 5321. Further, the Act applies to any proceeding filed after January 24, 2011. *E.D. v. M.P.*, 33 A.3d 73, 76-77 (Pa.Super. 2011). Mother filed her petition for modification of custody on July 17, 2012. Thus, the Child Custody Act applies.

The Child Custody Act provides the following:

§ 5338. Modification of existing order

(a) Best interest of the child.—Upon petition, a court may modify a custody order to serve the best interest of the child.

(b) Applicability.—Except as provided in 51 Pa.C.S. § 4109 (relating to child custody proceedings during military deployment), this section shall apply to any custody order entered by a court of this Commonwealth[.]

23 Pa.C.S.A. § 5338. Therefore, Section 5338 directs the trial court to determine the child's best interest when making custody determinations; to that end, the Child Custody Act provides certain factors the court must consider:

§ 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.A. § 5328(a). When a party files a petition to modify custody under the Child Custody Act, the court must conduct a thorough analysis of the best interests of the child based on all of the Section 5328(a) factors. ***E.D., supra*** at 80. "The paramount concern in a child custody case is the best interests of the child, based on consideration of all factors that legitimately affect the child's physical, intellectual, moral and spiritual well-being." ***Landis v. Landis***, 869 A.2d 1003, 1011 (Pa.Super. 2005).

Additionally, this Court has stated:

Child custody orders are temporary in nature and always subject to change if new circumstances affect the welfare of a child. The Commonwealth has a duty of paramount importance, to protect the child's best interests and welfare.

Holler v. Smith, 928 A.2d 330, 331-32 (Pa.Super. 2007) (citing **Kassam v. Kassam**, 811 A.2d 1023, 1025 (Pa.Super. 2002), *appeal denied*, 573 Pa. 704, 827 A.2d 430 (2003)). Further, "[a] change in custody is just as important to the child and to others as an original award of custody, and the parties should be afforded the same type of hearing on the subsequent application as they are entitled to on an original award." **Clapper v. Harvey**, 716 A.2d 1271, 1275 (Pa.Super. 1998) (quoting **Rosenberg v. Rosenberg**, 504 A.2d 350, 353 (Pa.Super. 1986)).

Instantly, the trial court denied and dismissed Mother's July 17, 2012 petition for modification of custody without a hearing. Instead, the court stated it had already held fourteen hearings since 2008 to broker various disputes between the parties. Mother's July 17, 2012 petition sought a custody modification order to assure continued psychological therapy for N.M. and ensure he would remain in his current school. The court indicated the constant litigation does not serve the best interests of the Children, and an additional hearing to address the legal and physical custody issues raised in Mother's petition was unnecessary.

Despite the parties' frequent litigation and the court's determination to encourage cooperation between Mother and Father, the court was required

to consider the Children's best interests above all else. **See** 23 Pa.C.S.A. § 5338. A change in N.M.'s school could affect the continuity of his education. **See** 23 Pa.C.S.A. § 5328(a)(4). Disruption of N.M.'s psychological treatment certainly could affect his well-being. **See Landis, supra.** Further, the custody order of March 2, 2010, was potentially subject to modification in light of Mother's alleged new circumstances affecting N.M.'s welfare. **See Holler, supra.** The court should have conducted a hearing prior to dismissing Mother's July 17, 2012 petition for modification of custody to address Mother's concerns, based upon the alleged changed circumstances. **See Clapper, supra.** Thus, we remand the matter to the trial court for a hearing on Mother's July 17, 2012 custody modification petition.

In her second issue, Mother argues Father filed numerous custody related motions, and the court conducted hearings in response to Father's motions. Mother asserts the court denied her the same opportunity to be heard on significant issues related to the Children's well-being. Mother contends the trial court favored Father by previously denying her petition for a custody hearing, which she had filed on February 21, 2012, after Father withdrew his motion to amend the existing custody order. Mother concludes the court treated Father's motions for modification of custody more considerately, and dismissed her February 21, 2012 petition abruptly and in error. We cannot agree with Mother's contentions for the following reasons.

"[T]o preserve an issue for appellate review, a party must make a timely and specific objection at the appropriate stage of the proceedings...." ***Thompson v. Thompson***, 963 A.2d 474, 475 (Pa.Super. 2008). "Failure to timely object to a basic and fundamental error will result in waiver of that issue." ***Id.*** at 475-76. Significantly:

In this jurisdiction...one must object to errors, improprieties or irregularities at the earliest possible stage of the adjudicatory process to afford the jurist hearing the case the first occasion to remedy the wrong and possibly avoid an unnecessary appeal to complain of the matter.

Id. at 476. ***See generally*** Pa.R.A.P. 302.

Instantly, the record shows Mother failed to make any timely and specific objection, file a direct appeal, or otherwise contest the court's decision to dismiss her petition of February 21, 2012. Mother has raised the issue of unfair treatment with respect to that prior petition for the first time in her current appeal. Mother's previous failure to object or challenge the decision on direct appeal constitutes waiver. ***See Thompson, supra*** at 475-76; Pa.R.A.P. 302. Moreover, the trial court stated:

[The] court made it clear during the hearings on [Father's] petition to modify custody that [the court] [was] not going to grant Father the relief requested. ... As [the court] stated in [its] August 8, 2012, opinion following these hearings on Father's petition to modify, we denied the three petitions Father filed on the issue of summer camp for the Children. As we explained in our opinion, both parties need to work on their communication and cooperation and stop resorting to the courts every time a problem arises. [The court] did not favor either side.

(Trial Court Supplemental Opinion, filed October 5, 2012, at 1-2). Thus, we give Mother's second issue no review.

In her third issue, Mother asserts the trial court is frustrated with the parties and their on-going litigation. Mother acknowledges there has been excessive litigation in this case but claims she bears no responsibility for it. Mother asserts Father is an attorney who has worked extensively with the county court and has attempted to use his "power with the court" and his significant financial advantage to obstruct Mother's efforts on behalf of the Children. Mother further maintains the court's frustration with the unnecessary litigation led to the exclusion of Mother's side of the case to the detriment of the Children's best interests. Mother concludes the court would better serve the parties if the current jurist recused herself and assigned the case to another trial judge. For the following reasons, we cannot agree.

If a party questions the impartiality of a judge, the appropriate recourse is a motion for recusal. *Commonwealth v. Druce*, 577 Pa. 581, 588-89, 848 A.2d 104, 108 (2004). Additionally:

The proper practice on a plea of prejudice is to address an application by petition to the judge before whom the proceedings are being tried. He may determine the question in the first instance, and ordinarily his disposition of it will not be disturbed unless there is an abuse of discretion.

Due consideration should be given by him to the fact that the administration of justice should be beyond the appearance of unfairness. ... If the judge feels that he can hear and dispose of the case fairly and without prejudice, his decision will be final absent an abuse of discretion.

Reilly by Reilly v. Southeastern Transp. Authority, 507 Pa. 204, 220-21, 489 A.2d 1291, 1299 (1985) (citing **In re Crawford's Estate**, 307 Pa. 102, 160 A. 585 (1932)). Further, "[a] party seeking recusal or disqualification [is required] to raise the objection at the earliest possible moment, or that party will suffer the consequence of being time barred." **In re Lokuta**, 608 Pa. 223, 241, 11 A.3d 427, 437 (2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 242, 181 L.Ed.2d 138 (2011).

"This Court presumes judges of this Commonwealth are 'honorable, fair and competent,' and when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice." **Druce, supra** at 589, 848 A.2d at 108 (citing **Commonwealth v. White**, 557 Pa. 408, 426, 734 A.2d 374, 384 (1999)). The Pennsylvania Supreme Court has said:

[A] trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can be reasonably questioned. It is presumed that the judge has the ability to determine whether he will be able to rule impartially and without prejudice, and his assessment is personal, unreviewable, and final.

Commonwealth v. Blakeney, 596 Pa. 510, 538, 946 A.2d 645, 662 (2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 1317, 173 L.Ed.2d 596 (2009) (internal citations omitted).

In the instant case, Mother failed to raise the issue of the judge's alleged impartiality or bias at any time during the underlying custody

proceedings or in her custody modification petition filed July 17, 2012. Mother further failed to file a motion for recusal, failed to raise the issue at the earliest possible opportunity, and provided no reason for not raising the issue sooner than this appeal. Mother's failure to do so constitutes waiver of her recusal issue. ***See In re Lokuta, supra.***

Based upon the foregoing, we vacate and remand the matter to the trial court for a hearing on Mother's July 17, 2012 custody modification petition.

Order vacated, case remanded for further proceedings. Jurisdiction is relinquished.