NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

L.G.M. Appellee v. S.I.M. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2534 EDA 2012

Appeal from the Order Entered August 22, 2012
In the Court of Common Pleas of Northampton County
Domestic Relations at No(s): C-0048-CV-2011-11150

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

MEMORANDUM BY LAZARUS, J. Filed: February 8, 2013

S.I.M. ("Father") appeals from the order of the Court of Common Pleas of Northampton County denying his petition for modification of a custody order. After our review, we find no error or abuse of discretion and we affirm the order, in part, on the opinion of the Honorable Emil Giordano.

L.G.M. ("Mother") and Father are the parents of two minor children, ages seven and four. Following an expedited custody conference, the court entered an interim order, which granted the parties shared legal and physical custody of the children, and certified the matter for trial. Thereafter, Mother filed a petition for special relief seeking primary physical custody, which the court denied without prejudice.

Following trial, on August 22, 2012, the court entered an order, substantially unchanged from the interim order, granting the parties shared

legal and physical custody of the children on a week-on/week-off basis. Father filed a motion for reconsideration, which the court denied, and this appeal followed. Father raises four issues for our review:

1. Did the trial court err in not offering its reasons for its order of court on the record?
2. Did the trial court err in failing to find that Mother's testimony was not credible?
3. Did the trial court err in maintaining the status quo and awarding continued shared custody between parties who cannot cooperate?
4. Did the trial court err in failing to award primary custody to Father?

Initially, we note that the custody-related conference was held on April 17, 2012, and, therefore, the new Child Custody Act ("Act")[1] is applicable. ***C.R.F. v. S.E.F.,*** 45 A.3d 441, 445 (Pa. Super. 2012) (holding that, if the custody evidentiary proceeding commences on or after the effective date of the Act, *i.e.*, January 24, 2011, the provisions of the Act apply).

When reviewing a custody order, our scope of review 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, and with regard to issues of credibility and weight of the evidence, we must defer to the trial judge who viewed and assessed the witnesses first-hand. However,

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[1] Pennsylvania's new child custody law, Act 112, has been codified at 23 Pa.C.S.A. §§ 5321-5340.

this Court is 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.***, 45 A.3d at 443 (citation omitted).

This Court has stated that the discretion 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." ***Ketterer v. Seifert***, 902 A.2d 533, 540 (Pa. Super. 2006) (quoting ***Jackson v. Beck***, 858 A.2d 1250, 1254 (Pa. Super. 2004)). Additionally, we recognized that 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." ***Id***.

In his first issue, Father argues that the court erred in failing to give reasons on the record for its August 22, 2012 order. To support this claim, Father cites to section 5323(d) of the Domestic Relations Code, which provides:

> **(d) Reasons for Award.-** The court *shall* delineate the reasons for its decision on the record in open court in or in a written opinion or order.

23 Pa.C.S.A. § 5323(d) (emphasis added). As the statutory language illustrates, this requirement is mandatory. ***See Oberneder v. Link***

Computer Corp., 696 A.2d 148, 150 (Pa. 1997) (explaining that, by definition, "shall" is mandatory, so "there is no room to overlook [a] statute's plain language to reach a different result"). The reasoning behind this requirement is twofold; a parent should know the reasons for the trial court's order without having to file an appeal, and this Court requires reasons for the decision in order to conduct a comprehensive appellate review.

The statutory language, however, also makes clear that the court's reasons may appear either on the record *or* in a written opinion or order. Here, Judge Giordano has written a comprehensive opinion analyzing the statutory factors and testimony, and the weight to be accorded each, and outlining the reasons for the shared custody award.

Additionally, we distinguish ***M.P. v. M.P.***, 54 A.3d 950 (Pa. Super. 2012), which held the trial court erred in failing to give reasons for its order until mother filed an appeal and the court filed a Pa.R.A.P. 1925(a) opinion. In ***M.P.***, mother had primary physical and sole legal custody of the child; father had supervised visitation for two hours each week. ***Id***. at 951. Mother, who had been born and raised in Ecuador, wanted to take the child to Ecuador for three weeks for a family visit. ***Id***. Because father refused to sign a document allowing the child to travel to Ecuador with mother, mother required a court order and thus filed a petition for special relief. The court denied mother's petition, but it gave no reasons for its order until after mother appealed. ***Id***. at 952.

In our decision reversing the order, we emphasized that mother had sole legal custody of the child, and, therefore she was responsible for major decisions regarding the child. ***Id***. at 954. Additionally, we pointed out that for the eighteen months preceding the hearing on mother's petition, father had not exercised his right to supervised visits. ***Id***. We concluded, therefore, that the court's order was inconsistent with its acknowledgment that mother had sole custody, and, therefore, the court had abused its discretion in denying mother's petition. ***Id***. at 955. Further, the trial court had relied on information obtained from internet websites about The Hague Convention and Ecuador's noncompliance in previous years. ***Id***. at 954. Mother was unaware of this off-the-record information until after she appealed, and, therefore, had no opportunity to respond to it prior to the court's order. We stated:

> Even if we were to conclude that the court could take judicial notice of the information regarding the Hague Convention pursuant to Pa.R.E. 201 ("Judicial notice of adjudicative facts"), Mother was unaware that the court relied on this information until after she filed the appeal in this matter. Pursuant to Pa.R.E. 201(e), Mother was entitled "to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed."

Id. at 955.

Here, there is no argument that the court's order is inconsistent with the award of shared custody. Further, and more to the point with respect to the section 5323(d) mandate, Father makes no claim that the court relied on

information outside the record. Thus, ***M.P.*** is clearly distinguishable and we conclude that Father's reliance on that case is misplaced.

Father's second issue on appeal is waived as he failed to present it in his Pa.R.A.P. 1925(b) Statement of Errors Complained of on Appeal. ***See*** Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived."); ***see also*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). In any event, with regard to issues of credibility and weight of the evidence, this Court must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. ***M.P.***, 54 A.3d at 953, citing ***Durning v. Balent/Kurdilla***, 19 A.3d 1125, 1128 (Pa. Super. 2011) and ***A.D. v. M.A.B.***, 989 A.2d 32, 35–36 (Pa. Super. 2010).

With respect to Father's remaining claims, we rely on Judge Giordano's Rule 1925(a) opinion. Having reviewed the parties' briefs on appeal, the certified record, and relevant case law, all in light of our standard of review, we find no basis upon which to disturb the trial court's order granting the parties shared legal and physical custody. We therefore adopt the thorough analysis provided in Judge Giordano's opinion to affirm the custody order. ***See*** Trial Court Opinion, 10/17/2012, at 5-10 (applying relevant statutory factors for determining custody, court found both parents have strong relationships with children and both parents were unwilling to encourage frequent contact with the children and the other party, therefore, court

found it was in children's best interest to have shared custody between both parents). We instruct the parties to attach a copy of Judge Giordano's opinion in the event of further proceedings.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION

L. G. M. PLAINTIFF VS. S. M. DEFENDANT	NO. CV-2011-11150

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CIVIL DIVISION
NORTHAMPTON COUNTY, PA

MEMORANDUM OPINION

This Memorandum Opinion is filed in accordance with Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure. The Appellant, S[redacted] I[redacted] M[redacted] ("Appellant") filed a Notice of Appeal-Children's Fast Track to the Superior Court on September 19, 2012 from this Honorable Court's August 22, 2012 Order. Appellant also filed and served upon this Court a 1925(b) statement on September 19, 2012.

I. Factual and Procedural History

Appellant, filed a Divorce Complaint for Custody on November 22, 2011, for the parties two minor children, A[redacted] D. M[redacted]i and N[redacted] O. M[redacted]i. Both minor children are adopted. A[redacted] was born on [redacted], and is currently [redacted] years old. N[redacted] was born on [redacted] and is currently [redacted] years old. A custody conference was originally scheduled to occur on January 19, 2012. However, no action was taken because the Appellant and Appellee were still residing together in the marital home with both minor children. Thereafter, Appellant moved from the marital home on April 21, 2012, and in doing so, an

expedited custody conference was held on April 17, 2012 before Leonard Mellon, Esquire, Custody Conference Officer. This matter was unable to be settled and an interim Order of Court was entered, establishing joint legal and physical custody between the parties. The Master also certified the matter to trial. Mother filed a Petition for Special Relief on April 27, 2012, in which she averred that shared physical custody was not in the best interests of the children. The Petition was heard and denied without prejudice by the Honorable Leonard Zito on May 4, 2012.

This matter was then assigned to the undersigned for a non-jury hearing, which was held on August 15, 2012 and lasted one day. On August 22, 2012, this Court entered the following custody arrangement:

1. The parties shall have joint legal custody of A[redacted] D. M[redacted] born [redacted], 2009, and N[redacted] O. M[redacted], born [redacted].

2. The parties shall have joint physical custody of the children on a week on/week off basis. Exchanges shall take place on Sunday at 5:00 PM.

3. In the off weeks, the non-custodial parent shall have the children from Tuesday at 5:00 PM until Wednesday at 5:00 PM, and then Thursday from 5:00 PM until Friday at 5:00 PM. This schedule will become effective August 26, 2012, with Mother having the first week.

4. A[redacted] shall attend Forks Elementary School for the 2012-2013 academic school year. Further, N[redacted] shall be enrolled in a pre-school program.

5. There shall be a preferred babysitter rule. In the even that either parent cannot be with the children for a period of three (3) hours or more, they are

to give the other parent the first opportunity to provide babysitting. Upon being informed of the need for a babysitter, the custodial parent shall give the other parent at least two (2) hours advance notice. The non-custodial parent must respond within one (1) hour, or the other parent may seek alternative arrangements. The parent who is seeking to obtain custody under the above preferred babysitter rule shall provide transportation both ways. At the conclusion of the need for babysitting, the regular custody schedule shall resume. The parties intend that this paragraph be strictly honored.

6. Neither parent will undertake or permit by any other person a conversation which inferentially derides, ridicules, condemns or in any manner derogates the other parent or extended family members of either parent. Neither party shall attempt or condone any attempt, directly or indirectly, to estrange the children from the other parent or extended families or to injure or impair the need for love and affection of both parents for their children. At all times, each parent shall encourage and foster in the children a sincere respect and affection for the other parent, and shall not hamper the natural development of the children's love and respect for the other parent. Neither parent shall discuss with the children, or in the presence of the children, the litigation involving the custody arrangement. Both parties shall cooperate with the provisions in this Order in good faith.

7. Neither parent shall comment to the children concerning the others faith.

8. A[redacted] and N[redacted] shall both attend any and all counseling sessions that are deemed necessary.

9. The out of custody parent shall have daily phone calls with the children at 6:00 PM. These calls only need to take place when the parent is not otherwise going to see the children that day. The out of custody parent shall place the call at that time. If either child is not available for the call for any reason, the custodial parent shall return the call with 24 hours.

10. All other provision of the April 17, 2012, Order not modified in this Order shall remain in full effect.

Appellant filed a Motion for Reconsideration of this Court's August 22, 2012 Order, which was denied by this Court on September 11, 2012. Appellant then filed his Notice of Appeal to the August 22, 2012 Order on September 19, 2012. Appellant also filed and served upon this Court a 1925(b) Statement of Matters Complained Of with the Notice of Appeal on September 19, 2012. On Appeal, the Appellants are pursuing the following issues:

1. "The trial court erred by not "stating its reason for denial on the record" as required under 23 Pa.C.S.A. §5307. In this case, both parties were seeking primary custody. The court, in effect, denied both claims and instead issued an order which mirrored the temporary order entered by the Custody conference officer. No reasons were stated at the trial and no written opinion for this decision was issued."

2. " The trial court erred by entering an order not in the best interests of the children. The trial court erred by not considering the factors specified in 23 Pa.C.S. §5328. Had the court done so, the evidence presented would have tipped the court in favor of Father having primary custody of the children, with partial custody to mother."

3. "The trial court erred in not giving enough consideration to the testimony of Diana Giovagnoli, the daughter's therapist who recommended that the child needs a primary custody/partial custody arrangement."

4. "The court erred in ordering a custody schedule which is detrimental and impractical in that it provides for twenty custodial changes per month, in a

case where the children are of tender tears with need of greater stability, and the parents are unable to communicate effectively."

II. Discussion

Appellant first avers that this Court erred by not "stating its reason for denial on the record" as required under 23 Pa.C.S.A. §5307. It is the law of this Commonwealth that "after considering the factors set forth under 23 Pa.C.S.A. §5328(a)(1), this Court may award shared physical custody if it is deemed in the children's best interests." Furthermore, pursuant to 23 Pa.C.S.A. §5328(d), this Court "shall delineate the reasons for its decision on the record in open court or in a written opinion or order." Appellant further avers that this Court erred by entering an order that was not in the best interests of the children pursuant to the factors specified in 23 Pa.C.S.A. §5328. Appellant asserts that if the Court had, the evidence presented at trial would have tipped this Court in favor of Father having primary custody of the children.

Pursuant to Pa.C.S.A. §5328, when ordering any form of custody, this 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.

In applying the aforementioned factors to the instant matter, this Court decided that it was in the children's best interest to have shared custody between both parents. At the hearing, it was clear to this Court that neither party was willing to communicate with the other regarding the children's care and/or the custody. It was also clear that neither party was willing to reach an

amicable agreement. Thus, this Court determined that neither party was willing or likely to encourage and permit frequent and continuing contact between the child and the other party.

However, it was clear that both parents have strong relationships with both children. Each party presented their own witnesses who each testified that the children truly love both of their parents and wish to be with both.[1] Appellee presented Monica Roach and Linda Cooper as witnesses, who both testified that the children enjoy being with their mother and that Appellee is essentially a good mother. Appellant also presented James Noone and William Quinn as witnesses who testified that Appellant is a good father who has a caring, loving relationship with both children[2].

Appellee also asserts that she has been the primary care giver since adopting A[redacted] in 2006. At the hearing, there was testimony by the Appellee that A[redacted] has been diagnosed with Pervasive Developmental Disorder (PDD), Sensory Processing Disorder and Post Traumatic Stress Disorder (PTSD). N.T. 8/15/22 pg. 12-17. N[redacted] has been diagnosed with a milk protein allergy and had parasites when he was adopted. N.T. 8/15/22 pg. 18-23. Appellee also testified that N[redacted] has a heart murmur. Appellee asserts that the Appellant does not believe that the aforementioned diagnosis are founded. Appellant, on the other hand, testified that Appellee is erratic, has mood swings, and has overall concerns about her mental health. N.T. 8/15/12 pg. 115. Furthermore, there was evidence presented that Appellant does participate in ensuring the special needs of the children and that he cooperates and complys with the recommendations of their physicians. N.T. 8/15/12 pg. 129-130.

[1] Due to the tender age of the children, neither child testified to their own preference regarding custody.
[2] There have been allegations of abuse by the Appellee and the children against the Appellant, but said allegations were investigated and deemed unfounded by Northampton County Children and Youth.

Testimony was presented at trial that the Appellant's extended family are close by and are willing to help support [the Appellant to] raise the minor children. N.T. 8/15/12 pg. 116:14-21. Furthermore, it was presented that the Mother does not have any extended family in the area. Id. Both Appellant and Appellee provided testimony to indicate that they each are loving, nurturing, caring parents who both tend to the daily physical, mental and emotional needs of both children. Terrence Brennan, a clinical psychologist and expert witness for the Appellant, testified that neither parent had any psychological issues. Terrence Brennan further found that neither parent was a bad parent, but did recommend that both attend co-parenting classes and that he, "would very much like to see them in a co-parenting situation." N.T. 8/15/12 pg. 151:17-25; pg. 152:1-15.[3]

The parties live extremely close to each other. More specifically, as the Appellant testified at the hearing, "it is a couple of blocks" to the marital home. N.T. 8/15/12 pg.98: 9. Appellant testified that the drive from his house to the marital home is less than one minute. Id. Thus, even though the instant Order may appear to be inopportune because the parties are to partake in numerous exchanges each week, in fact, it truly would not be inconvenient for either party to transport the children back and forth to the custody exchanges because of the close proximity of the residences.

In fashioning the August 22, 2012 Order that is the subject of this appeal, this Court took into account the factors in 23 Pa.C.S. A. § 5328, all credible evidence adduced at trial, the record including the home evaluations conducted by the Children and Youth Division. Considering the foregoing, this Court determined that a custody arrangement resulting in a 50/50 split between the parties was in the best interests of both A[redacted] and N[redacted]. Furthermore, when applying

[3] Terrence Brennan testified that Appellant admitted to being in "detox" three years prior to his evaluation. N.T. 8/15/12 pg. 149. However, there was no other testimony or allegations of Appellant's drug abuse or addiction. Thus, this Court did not consider this factor when making its determination under 23 Pa.C.S.A. §5328.

the aforementioned, this Court did not find that the factors "tip" in favor of the Appellant. Accordingly, the August 22, 2012 Order entered by this Court is in the best interests of A[redacted] and N[redacted].

Appellant next asserts that this Court erred in not giving enough consideration to the testimony of Diana Giovagnoli, A[redacted]'s therapist, as said therapist recommended that the child[4] needed a primary custody/partial custody arrangement. However, after an exhaustive review of the record, this Court did not find any testimony in the record by Diana Giovagnoli in which she testified that A[redacted]a needed a primary custody/partial custody agreement. In fact, when asked by Appellee's Attorney, if she had any recommendations for this family, Diana Giovagnoli testified that the Appellant and Appellee should attend co-parenting class and did not mention anything about A[redacted] need for a specific custody arrangement. N.T. 8/15/12 pg. 137-138. There was no testimony as to A[redacted]'s need for primary custody with one parent. Thus, absent testimony of A[redacted]'s need for a specific custody arrangement, this Court did not err in its decision to award shared custody.

Finally, Appellant asserts that this Court erred in ordering a custody schedule which is detrimental and impractical in that it provides for twenty custodial changes per month, in a case where the children are of tender years with need of great stability, and the parents are unable to communicate effectively. Per the custody Order of August 22, 2012, the parties are to have joint physical custody of the children on a week on/week off basis. In the off weeks, the non-custodial parent shall have the children from Tuesday at 5:00 PM until Wednesday at 5:00 PM, and then Thursday from 5:00 PM until Friday at 5:00 PM. This custody arrangement permits both children to spend equal time with Appellant and Appellee. As presented at trial, Appellant and Appellee reside within blocks of each other, which is not detrimental, impractical, or

[4] Only A[redacted] has been treated by Diana Giovagnoli. N.T. 8/15/12 pg. 126.

inconvenient to either parent to complete the custodial exchanges. Instead, this manageable and practical custody arrangement is meant to maintain the current healthy relationships between the parent and the children, which is in the best interests of A[redacted] and N[redacted].

As aforementioned, both children appear to have strong and healthy relationships with both parents. The testimony presented at the hearing reflected that both Appellant and Appellee are virtuous and respectable parents and both wish to continue to have healthy relationships with both children, despite their difference in opinions with the other. Also, because of the close proximity of the Appellant's and Appellee's residences, this Court found that it would not be impractical for Appellant or Appellee to transport the children and make the exchanges of custody. The neighboring vicinity of the residences also permits A[redacted] to remain enrolled in [redacted] Elementary School and also for N[redacted] to remain enrolled in kindergarten at [redacted] Elementary. Thus, in an attempt to continue and maintain said relationships, this Court found that it was in the children's best interest to spend equal time with both the Appellee and Appellant. Accordingly, this Court properly entered an Order on August 22, 2012, in the best interests of the children, A[redacted] and N[redacted] M[redacted].

BY THE COURT:

EMIL GIORDANO, J.