

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

R.M.

Appellee

v.

K.M.,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 3454 EDA 2012

Appeal from the Order of December 11, 2012,  
in the Court of Common Pleas of Bucks County,  
Domestic Relations Division at No. 2011-61483

BEFORE: FORD ELLIOTT, P.J.E., BENDER, and WECHT, JJ.

MEMORANDUM BY WECHT, J.:

**FILED JUNE 03, 2013**

K.M. ("Mother") appeals from a December 11, 2012 order that granted Mother and R.M. ("Father") shared legal custody and equal periods of shared physical custody of the parties' minor daughter, O.M. ("Child") (born in October 2007). We affirm.

The trial court summarized the relevant factual and procedural history of the case as follows:

The parties were never married. They lived together for approximately one and one-half years, ending in November of 2008. On May 19, 2011, Father filed a Custody Complaint, seeking shared physical custody of [Child]. By order dated September 29, 2011, the parties consented to participate in the Court Conciliation and Evaluation Service ("CCES") program. On

January 21, 2012, the CCES custody evaluation report was issued.

At the time of the evaluation, Mother lived in a two-bedroom home in Philadelphia, Pennsylvania with her boyfriend and [Child]. She worked full-time in customer service for an insurance company. [Child] attended preschool in Philadelphia near Mother's home. Father resided in a five-bedroom home in Bucks County, Pennsylvania, with his wife, their child, and [Child's] paternal grandfather and step-grandmother. Father was in his last year in an engineering program at Drexel University. While in school, Father also worked part-time. The CCES evaluator recommended that Mother and Father have shared legal custody of [Child], and that Mother continue to provide [Child's] primary residence due to the distance between the parties' homes. At that time, Father lived in Levittown, Bucks County, approximately forty minutes from Mother's residence. After the CCES evaluation was completed, Father moved to Essington, Pennsylvania, approximately fifteen minutes from Mother's residence. He now lives in a two-story single family home, which has four bedrooms and a large backyard.

Trial Court Opinion ("T.C.O."), 2/11/2013, at 1-2 (citations to notes of testimony omitted).

On December 5, 2012, the trial court held a hearing on Father's custody petition. Mother and Father testified at the hearing. On the same date, the trial court entered an order granting shared legal custody and 50/50 shared physical custody of Child.

Mother timely filed a notice of appeal on December 11, 2012 but failed to include a concise statement of errors complained of on appeal as required by Pa.R.A.P. 1925(a)(2)(i). On December 19, 2012, the trial court directed Mother to file a concise statement. Mother complied on January 4, 2013.

**See *In re K.T.E.L.***, 983 A.2d 745, 747 (Pa. Super. 2009) (holding that failure to file concise statement contemporaneously with notice of appeal results not in automatic waiver for failure to file a timely concise statement, but in defective notice of appeal, disposition of which will be decided case-by-case).

On appeal, Mother raises the following issues:

1. Was the evidence insufficient to merit an award of equal custody?
2. Was the Order awarding equal custody against the weight of the evidence?
3. Was the evidence presented at trial regarding the best interests of the child contradictory to the award of shared custody?
4. Was the evidence presented contrary to the award of shared custody under the Custody Statute, 23 Pa.C.S.A. § 5321 *et[ ] seq.*?
5. Did the court abuse its discretion in awarding split custody without giving the proper consideration to Mother's role as primary caretaker?
6. Did the court err in awarding equal custody despite the testimony that Father's new wife was the caretaker of the child when in Father's custody?
7. Was the evidence presented on the parties' ability to cooperate with one another contrary to justify an award of split custody?
8. Was the evidence presented sufficient to show that [Father's] credibility was suspect?
9. Was the evidence presented regarding the Father's level of contact with the child thus far insufficient to support the award of equal custody?

10. Did the court err in ruling that the child did not need to see a psychiatrist?
11. Was the order issued by the lower court ambiguous?

Mother's Brief at 3-4.

Mother's issues on appeal generally fall into two categories: failure of the trial court to determine Child's best interests in consideration of the custody factors pursuant to 23 Pa.C.S.A. § 5328, and a challenge to the weight that the trial court afforded the evidence. As Mother's issues are interrelated, we address them together.

Our standard of review in all custody matters 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).

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 well-being. **Saintz v. Rinker**, 902

A.2d 509, 512 (Pa. Super. 2006) (citing ***Arnold v. Arnold***, 847 A.2d 674, 677 (Pa. Super. 2004)). In determining Child's best interests under the Child Custody Act, 23 Pa.C.S.A. §§ 5321-40, the trial court must consider the following factors:

§ 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).

The trial court considered all of the factors set forth in section 5328(a).

T.C.O. at 2-7; Notes of Testimony ("N.T."), 12/11/2012, at 66-73.<sup>1, 2</sup>

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<sup>1</sup> We remind the trial court that, while it did not have the benefit of **C.B. v. J.B. & M.B. & T.B.**, \_\_\_ A.3d \_\_\_, 2013 WL 1715684 at, \*4 (Pa. Super. April 22, 2013), it should state its rationale under section 5328 at or near the time it issues its custody order.

<sup>2</sup> The trial court does not specifically address each factor. However, our review of the trial court opinion and the statements made on the record when the custody order was issued demonstrate that the trial court sufficiently considered the factors. As all factors must be considered, **J.R.M.**

Specifically, the court found that Father and Mother are “mature, loving, and committed parents.” T.C.O. at 2. The trial court determined that both parents are willing and able to provide a “loving, stable” home for Child. **Id.** The court further determined that both parties are willing and able to provide for Child’s physical, intellectual, moral, and spiritual needs and well-being. Currently, Mother and Father live in sufficiently close proximity so as to allow both parents to equally “participate in [Child’s] upbringing without disrupting [Child’s] life.” **Id.** at 2-3. The trial court noted that, at the time of the hearing, there was little dispute regarding Father’s ability to parent. In fact, Mother stipulated that Father and his wife have a good family life with their infant child and Child. **Id.** at 3; N.T. at 13.

At the custody hearing, Mother also stipulated that there were no current issues of substance abuse. T.C.O. at 3; N.T. at 25. Mother also conceded that there were no issues with regard either to Father’s or Mother’s mental or physical conditions, or to their respective abilities to make childcare arrangements. T.C.O. at 3.

Mother argues that she has been the only consistent figure in Child’s life. However, Father had a consistent schedule of three overnights every two weeks. N.T. at 5. Father also testified that he had asked Mother for additional time with Child. N.T. at 17. Following the trial court’s review of

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**v. J.E.A.**, 33 A.3d 647, 652 (Pa. Super. 2011), we urge the trial court to explicitly address each factor in future proceedings to assist parties in their understanding of the custody decision, as well as to aid appellate review.

the evidence, it found that Father demonstrated his commitment to Child to its satisfaction in part because Father had gone as far as moving his family closer to Child so that he could increase his custodial time with Child. T.C.O. at 3. Further, the trial court explicitly found Father's testimony to be credible. T.C.O. at 5.

Father testified that Child and her half-sibling have a good relationship and enjoy each other's company. N.T. at 13-14, 16. Further, there was testimony regarding Child's relationship with her extended family. Until recently, Child lived with her paternal grandfather and step-grandmother while in Father's care. N.T. at 5, 8-9. Mother conceded that Child has a good relationship with Father's family. N.T. at 43. Maternal grandparents also care for Child. N.T. at 53.

Mother also asserts that Father did not cooperate with her with regard to Child's schooling, extracurricular activities, and health insurance. The evidence revealed that Mother and Father had a strained relationship. Father conceded as much. T.C.O. at 3; N.T. at 16. However, Father asserted Mother did not consult with Father regarding events in Child's life, such as where Child would be enrolled in school, whether Child would attend camp, and the extracurricular activities in which Child would participate. T.C.O. at 4; N.T. at 18-19. The trial court found that the differences between the parties were "not so extreme as to preclude shared custody." T.C.O. at 4.



The trial court ordered co-parenting classes/counseling. N.T. at 69. The court also directed that neither Father nor Mother disparage the other parent, that both parents communicate each other with regard to their separate health insurance plans, and that they select the daycare and the summer camp that Child is to attend. *Id.* at 70-72. The trial court determined that its custody order adequately addressed all of Mother's concerns, which allowed Child to maintain a strong bond with both of her parents. T.C.O. at 4. In addition, the trial court's decision granting shared physical custody was in line with the CCES Evaluation because Father now lives in close proximity to Mother's residence. *Id.* at 4-5.

Although Mother is not satisfied with the weight that the trial court afforded to each of the factors in rendering its custody decision, the trial court's conclusions are not unreasonable, as shown by the evidence of record. Therefore, we are constrained to defer to the trial court's custody decision. *C.R.F.*, 45 A.3d at 443.

Mother raises two additional issues: that the trial court erred in failing to order Child to see a psychiatrist, and that the trial court's order was ambiguous. We briefly address these issues.

The trial court did not order Child to be seen by a psychiatrist, as requested by Mother. The court found that Child's comments to Mother (*i.e.*, that Child did not want to make Father sad by talking about summer camp, since Father wanted her to stay at his home rather than go to camp,

and that Father had a better job than Mother because he had a college degree) were not of such a nature as to require Child to see a mental health professional. The trial court concluded that these types of problems could be avoided by mandating that Mother and Father undergo co-parenting counseling or classes. T.C.O. at 6; N.T. at 69.

The trial court's order did not specify the schedule by which Mother and Father were to share physical custody. Instead, the trial court left to the parents the opportunity to arrange schedules according to what best suited their situations. T.C.O. at 6. While it would have been better practice for the court to outline a schedule, it was not unreasonable for the court to allow the parties the flexibility to develop a workable schedule, especially since the parties were to begin co-parenting counseling. As the trial court noted, if the parties were unable to agree on a schedule, or if the need for Child to enter counseling arose, either party was able to present a motion to seek the court's assistance in resolving the issue. Given the court's expectation that co-parenting counseling would aid the parties in developing cooperation, it was not an abuse of discretion for the trial court to deny the request for psychiatric counseling for Child or not to detail the custody schedule.

Accordingly, we affirm the order granting Father's Petition to Modify Custody and directing equally shared physical and legal custody.

Order affirmed. Jurisdiction relinquished.

J. S26045/13

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 6/3/2013