

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

J.H.

Appellant

v.

A.H.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 997 MDA 2012

Appeal from the Order Entered May 3, 2012
In the Court of Common Pleas of Mifflin County
Civil Division at No(s): CP-44-CV-424-2010

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

MEMORANDUM BY OTT, J.:

Filed: January 24, 2013

J.H. ("Mother") appeals from the order in the Court of Common Pleas of Mifflin County granting A.H. ("Father") primary physical custody and her partial custody of the female child, A.S.H. ("Child"), born in September of 2006. We vacate the order and remand this case in accordance with the following decision.

The relevant facts and procedural history are as follows. Child has moderate to profound bilateral hearing loss. N.T., 12/12/11, at 143. As a result, she has speech, language, and developmental delays. In addition, a psychological evaluation revealed that Child functions in the mild range of mental retardation. *Id.* at 59-63.

* Retired Senior Judge assigned to the Superior Court.

Mother and Father are the natural parents of Child. They were married in 2007, and resided in Clarion County with Child and J.S., Mother's son from a prior relationship.¹ When Child was twenty-nine months old, she began receiving services for developmental delays. *Id.* at 68. In October of 2009, when Child was age three, Mother and Father separated,² and Mother moved to Mifflin County with Child and J.S.

In December of 2009, Mother contacted the Tuscarora Intermediate Unit ("TIU"), which serves Mifflin County, about enrolling Child in an intervention classroom. *Id.* at 69. In January of 2010, Mother obtained speech, language, and developmental services for Child from the TIU. *Id.* at 134. Child also participated in the Head Start Program ("Head Start") in Mifflin County. In April of 2010, Head Start administered the first hearing test for Child, which did not reveal hearing loss. *Id.* at 135-136. One year later, in April of 2011, Child received a second hearing test, which revealed significant bilateral hearing loss. *Id.* at 143.

Mother initiated the instant custody action *pro se* on April 8, 2010. By temporary order dated May 5, 2010, the trial court granted Mother primary physical custody and Father partial custody on alternating weekends from

¹ J.S. was born in March of 1999.

² The parties were divorced in February of 2011.

Friday at 8:00 a.m. to Sunday at 8:00 p.m.³ During the underlying proceedings, Father continued to live in the same home he had shared with Mother in Clarion County, which is a driving distance of two and one-half hours from Mother's home in Mifflin County. *Id.* at 10.

By temporary order dated August 12, 2010, the trial court amended the May 5, 2010 order to include a specific exchange point for the custody transfer, and amended the exchange time on alternating Fridays to 8:30 a.m.

On January 5, 2011, Mother, acting *pro se*, filed a petition to modify the custody order by requesting (1) the custody exchange time of 5:00 p.m. on alternating Fridays so that Child may attend Head Start during the day; and (2) a pick-up time of 6:00 p.m. on alternating Sundays. In addition, Mother requested that Father, not A.H., his fiancée at the time, participate in the custody exchanges.

On January 27, 2011, Father filed a motion for contempt wherein he alleged that Mother refused to release Child to A.H. at the exchange point, and that Mother had sent him harassing text messages, *inter alia*. By order dated February 10, 2011, the trial court amended the August 12, 2010 custody order to reflect a new custody exchange point at a state police barracks location, and to allow A.H. to meet Mother at the exchange point

³ By separate order on the same date, the trial court directed the parties to participate in a custody evaluation by psychologist, David G. Ray.

instead of Father if Father is unable to be there because of his work schedule.

On March 17, 2011, Mother filed *pro se* a petition for modification of the February 10, 2011 order, alleging that A.H. has health problems that would compromise Child's safety if driven by her, and, for this reason, she does not want to release Child to A.H. at the exchange point. Father filed a petition to modify on March 18, 2011, wherein he alleged Mother did not transport Child to the exchange point for one of his custodial weekends in February of 2011, and one in March of 2011. Further, Father requested primary physical custody.

By order dated February 14, 2011, the trial court appointed a Guardian *Ad Litem* ("GAL"). On March 22, 2011, the GAL filed a report with the trial court wherein she stated, "Mother appears to be thwarting the relationship between Father and child. . . ." Report, 3/22/11, at 2. The GAL further stated that Mother was not following through at home with recommendations by the TIU speech therapist, the Head Start instructor, and Child's pediatrician. *Id.* at 2-3. In addition, the GAL observed that Child's medical records reflect, "[O]n many occasions, Mother has brought the child to [her pediatrician's office] directly after Father's periods of custody with concerns of sexual abuse. The result has consistently been contact dermatitis." *Id.* at 4. With respect to Father, the GAL noted that, in 2000, the Court of Common Pleas of Jefferson County involuntarily

terminated with aggravated circumstances his parental rights to four children. *Id.* at 2.

In March and May of 2011, custody conferences were held in this matter. By interim order dated May 17, 2011, the trial court maintained the custody arrangement and referred the parties to the Mifflin County Children and Youth Services (“CYS”) for purposes of determining the physical, mental, and developmental needs of Child, and of making appropriate referrals for services. In addition, the court directed the parties undergo mental health assessments and follow through with all recommendations.

The custody trial occurred on December 12, 2011, February 8, 2012, and February 9, 2012.⁴ The following witnesses testified: David G. Ray, a licensed psychologist who performed a custody evaluation; Sharon Hugendubler, Child’s speech therapist from the TIU who worked with her from September of 2010, to September of 2011; Hillary Benny, CYS caseworker; Jessica Reed, who is familiar with Father and the children as to whom Father’s parental rights were involuntarily terminated; Cindy Cornwell, CYS caseworker in Jefferson County involved with the prior dependency cases of Father’s older children; Allison Solt, Child’s current speech therapist from the TIU; Father; A.H., Father’s wife; and Mother.

⁴ Child was age five at the time of trial.

Mr. Ray was the first witness to testify with respect to his custody evaluation dated June 29, 2011. Mr. Ray evaluated Mother, Father, A.H.,⁵ Child, and J.S., then age twelve. Mr. Ray recommended Father be granted primary physical custody and Mother partial custody for the following reasons. He conducted a home visit to the parties' respective homes. Mr. Ray observed Child, Mother, and J.S. at Mother's home watching a movie that was inappropriate for Child's age. Custody Evaluation, 6/29/11, at 12. At Father's home, Mr. Ray observed Child, A.H., J.S.,⁶ and N.S., who is A.H.'s son, interacting at breakfast. He also observed that the children played well together, that Child was more active and engaged than what he observed at Mother's home, and that Child displayed affection for Father. *Id.* at 12-13. Likewise, in his report, Mr. Ray stated that Child has a positive relationship with J.S., her half-brother, and with A.H., whom she refers to as "mommy." *Id.* at 11, 16.

In addition, based on the GAL's report, dated March 22, 2011, Mr. Ray believed the services Child was currently receiving were due to intervention

⁵ By the time of the custody trial, Father and A.H. had married. They lived in Clarion County with N.S., A.H.'s son from a prior relationship, who was age eight at the time of trial.

⁶ The testimony revealed that J.S. often accompanied Child to Father's home, as Father and J.S. had a relationship since Father helped raise him since he was age four. N.T., 2/8/12, at 42. Mother testified J.S. has not visited Father since June of 2011, because J.S.'s natural father began to show more interest in him, and so J.S. does not express interest in visiting Father. N.T., 2/9/12, at 38, 64.

by the trial court and not to Mother's initiative. *Id.* at 13-14. Therefore, he believed Mother was not meeting Child's needs. *Id.* at 17-18. Further, Mr. Ray was concerned with respect to Mother's allegations of sexual and physical abuse by Father against Child.⁷ *Id.* at 15.

With respect to Father, Mr. Ray was concerned that his parental rights to four of his children from a prior marriage were involuntarily terminated with aggravated circumstances. *Id.* at 15-16. In addition, Mr. Ray expressed concern regarding Father's temper, and that he "is quick to verbally express his anger." *Id.* at 16.

In testimony on direct examination, Mr. Ray opined that "he saw significant limitations on both sides [regarding which party would serve Child's best interest as primary custodian], but it was my opinion the mother did so much to just block the father's relationship and it was a good relationship."⁸ N.T., 12/12/11, at 17. He stated that he felt Father "was a bit more supportive of mom having a relationship [with Child] than mom with dad." *Id.* at 23.

⁷ By the time Mr. Ray interviewed Mother, she had concluded Father was not a child molester, but she remained concerned regarding alleged inappropriate contact between A.H.'s son, N.S., and Child. Custody Evaluation, 6/29/11, at 5. There is no testimony regarding sexual contact by N.S.

⁸ Mr. Ray believed this based on the custody exchange disputes between the parties, and Mother's allegations of sexual abuse by Father against Child. Custody Evaluation, 6/29/11, at 39-45.

With respect to his opinion that Mother had not met Child's special needs, Mr. Ray testified on cross-examination by Mother's counsel as follows:

Q. . . . Given what we have just gone through, the fact that [Child] has received services from 29 months of age until April 27th, 2011[,]⁹ which includes speech and language therapy – we went through what it included?

A. Right. Basically your early intervention services. . . .

Q. . . . Did [Mother] as far as you can tell from your review of the documentation follow all the recommendations made by the professionals for the services that [Child] required?

A. She does appear to have followed the recommendations.

Q. And from your review of the documentation what role, if any, can you tell me that father has taken from age 29 months [of Child] until today to ensure that his daughter receives the services that the professionals recommended that she do [sic] receive?

A. I found none.

Id. at 77-78. Mr. Ray continued on cross-examination with respect to his reliance on the GAL's report of March 22, 2011, as follows:

Q. What you concur with . . . [in the GAL's] report is that . . . the child's educational needs are not being met. Do you still believe that is an accurate statement?

A. I believe that the child's needs appear now to being met.

⁹ Prior to this date, Child was not diagnosed with bilateral hearing loss.

Q. And you also agree that the child's needs were met prior to April 27th, 2011 to age 29 months?

A. Needs were being met prior, correct.

Id. at 82. Nevertheless, on re-direct examination, Mr. Ray continued to opine, based on the GAL's report, that Mother had not met Child's needs because she had not been practicing speech therapy at home with her at the time of the GAL's appointment. *Id.* at 114.

However, at the conclusion of the testimony in this case, the GAL recommended on the record that Mother maintain primary physical custody. **See** N.T., 2/9/12, at 96-101. The GAL stated that she has "seen a great improvement in [Child] since prior to writing that report [dated March 22, 2011]." *Id.* at 97. She recommended that Mother maintain primary custody so "that we keep the current service providers. They are working." *Id.* at 100. In addition, the GAL based her recommendation on Father's history, during Child's lifetime, of not being involved with her service providers. *Id.* at 99. Further, the GAL based her recommendation on the testimony of Ms. Cornwell, the CYS caseworker in Jefferson County involved from 1999 to 2003, with respect to the adjudications of seven of Father's children.

Ms. Cornwell testified Father had eight children from his prior marriage, and seven of them were placed in the custody of the child welfare agency in Jefferson County in 1998. N.T., 2/8/12, at 6-7. The oldest of Father's eight children had been previously placed by the Court of Common Pleas of Clarion County. *Id.* at 7. Ms. Cornwell testified the reasons for the

seven children's placement were deplorable home conditions and sexual abuse between the siblings. *Id.* In addition, she testified Father had an extensive history with child welfare agencies in Clarion County and in the State of South Carolina, including severe child neglect and physical abuse by Father. *Id.* at 7-8. Ms. Cornwell testified that, in 1999, the court found aggravated circumstances with respect to the seven children based on Father and his wife, the children's natural mother, failing to have continuing and substantial contact with the children. *Id.* at 11-12. She acknowledged that Father was not cooperative with CYS during the time that she was the caseworker. *Id.* at 6, 12, 16-17. Father's older three children had remained in placement until they reached age eighteen, with the last one turning eighteen in 2003. *Id.* at 17. In 2001, Father's parental rights were involuntarily terminated with respect to the youngest four children. *Id.* at 11.

By order dated May 2, 2012, and entered on May 3, 2012, the trial court granted Father primary physical custody following a transition period to be completed no later than August 6, 2012. The court granted the parties shared legal custody. In addition, the court directed the GAL to "ensure that all needed services are in place for transition of the child during the summer, and for a time, to be determined by the Court, after primary custody has been transferred to Father." Order, 5/3/12, at ¶ 4. Further, the court directed Father to undergo a mental health assessment and follow all

recommendations. The court directed Mother to resume her recommended mental health counseling.

On May 30, 2012, Mother filed a notice of appeal. On June 1, 2012, the trial court directed Mother to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P. 1925(b), and Mother timely complied.¹⁰

On appeal, Mother presents one issue for our review:

Did the trial court err in determining that the evidence presented in the within case supported a finding that the best interest of the minor child subject to this action warranted a change of primary custody from Mother to Father?

Mother's brief, at 5.

Our 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,

¹⁰ Because Mother complied with the trial court's order to file a concise statement, we review her appeal. *Cf. J.P. v. S.P.*, 991 A.2d 904, 908 (Pa. Super. 2010) (stating where the appellant not only failed to simultaneously file a Rule 1925(b) statement with her notice of appeal but also failed to comply with the trial court's order to file the Rule 1925(b) statement within 21 days, she waived her issues on appeal).

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).

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).

Relevant to this case are the best interest factors set forth in Section 5328(a) of the Child Custody Act ("Act"), 23 Pa.C.S.A. §§ 5321-5340, which provides:

§ 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).

On appeal, Mother argues the court abused its discretion in granting Father primary physical custody to the extent it based its decision on the testimony and report of Mr. Ray, the custody evaluator.¹¹ Further, Mother argues the evidence does not support the court's findings that Father was (1) more engaged with Child's activities; and (2) more likely to attend to the daily physical, emotional, developmental, educational, and special needs of Child. In addition, Mother argues the record evidence does not support the court's finding that Child's need for stability is better served by granting Father primary physical custody. Upon thorough review, we are constrained to agree.

The trial court reviewed the relevant statutory factors in its opinion that accompanied the subject order. **See** Trial Court Opinion, 5/3/12, at 3-8. The determining factors for the court were based on its findings as follows. Father is more likely, than Mother, to encourage and permit contact by Child with the other party. The court found "no direct manipulation by either parent" to turn Child against the other, but "the palpable dislike between the parents presents a real threat of emotional harm to the child, if not addressed and eliminated by the parents." *Id.* at 6. Child's "greatest

¹¹ It is well-established that a trial court is not required to accept an expert's conclusions and recommendations in a custody matter as long as the certified record supports the trial court's independent determinations. **See** *M.A.T. v. G.S.T.*, 989 A.2d 11, 19-20 (Pa.Super. 2010) (*en banc*).

need for stability . . . is for the parents to cease their significant and detrimental conflict with each other." *Id.* at 4.

Based upon the history of the case reflected in the record, the testimony at trial, the report and testimony of Mr. Ray, and the recommendation of the GAL, the court found Father more likely to provide a loving and stable relationship adequate to meet Child's emotional needs. Based on these same considerations, the court found Father more likely to attend to the daily physical, developmental, educational, and special needs of Child.

With respect to the availability of the parties to care for Child and make appropriate child-care arrangements, the court found Father is a truck driver whose job requires long hours. A.H. testified she would be available to provide care for Child, and they also have a next door neighbor available to babysit.¹² *Id.*

¹² Father testified he is a truck driver, and he works 70 hours per week, at least in the summer months. N.T., 2/8/12, at 124. His work schedule requires him to leave the house at 1:30 p.m., and he returns home between midnight and 1:30 a.m. *Id.* at 70. A.H., his wife, does not work outside the home. N.T., 2/9/12, at 28. Father has no support system besides A.H., A.H.'s father, and a neighbor, who babysits for A.H.'s son, N.S. N.T., 2/8/12, at 125. With respect to Mother, she works at a nursing home as a certified nursing assistant. N.T., 2/9/12, at 32. Mother works from 2:00 p.m. to 10:30 p.m. five days per week. *Id.* at 33. Mother's parents, grandparents, brothers, their wives and children, aunts, uncles, and cousins reside in Mifflin County. *Id.* at 34. Mother testified Child has a relationship with all the extended family, and they provide a support system for her. *Id.* (Footnote Continued Next Page)

Finally, the court considered the past dependencies of Father's seven children and termination of his parental rights to four of them as a relevant factor under section 5328(a)(16). The court aptly stated, "Father's explanation regarding this issue is that he was away from home [as a truck driver] and his first wife allowed the home conditions to deteriorate to the point that CYS removed the children from the home." *Id.* at 8. The court concluded,

[Father] deflects responsibility for his past failures to parent by saying that he was working and couldn't be there, implying that his then wife should have been taking proper care of the house and children. He still exhibits this by stating that now, with his current wife, [A.H.], that he has a good team. To Father's credit, it appears to the Court that he has learned something from his past failures and indeed is willing to be and is more involved with this child than was true for his other children in the past.

Id. at 9.

We conclude the court's finding that Father will better provide for all of Child's needs, most especially her hearing, speech, language, and developmental needs, is not supported by competent record evidence, as follows. At the conclusion of the custody trial, the GAL stated to the court,

When I first was appointed GAL and wrote that report [dated March 22, 2011], of course, I relied heavily upon collateral interviews. I was of the opinion based on my observations and the interviews that [Child] was not receiving the proper level of

(Footnote Continued) _____

at 34-35. Her mother cares for Child and J.S. when Mother is working. *Id.* at 35.

care and that she was basically inaudible. . . . I like to think [the report] got the ball rolling.

. . . .

Here are the things that I believe to be true after everything I have observed:

One, we have a child with special needs. Two, I think it's true that in the past mom was thwarting dad's relationship with the child to some extent. Three, I think that mom has really stepped up. Four, by all accounts this child is doing well today.

N.T., 2/9/12, at 96-97. The GAL went on to state to the court that, despite the history of this case involving contempt petitions and hostility between the parties, "the bigger issue is who can meet this child's needs." *Id.* at 98. As discussed above, after hearing the testimony and observing the witnesses during the custody trial, the GAL believed Mother can best meet child's special needs.

Despite the GAL's statement, the court nevertheless relied upon the opinion of Mr. Ray and the GAL's repudiated report dated March 22, 2011, in its finding that Mother had not worked with Child at home on speech and language skills. See Trial Court Opinion, 5/3/2012 at 6, Finding of Fact No. 9. Further, we find the trial court ignored the testimony of Ms. Hugendubler, Child's speech therapist. Ms. Hugendubler, from the TIU, worked with Child from September of 2010, to September of 2011. Ms. Hugendubler testified she inherited the case from a prior speech therapist, who had been involved with Child since January of 2010. Ms. Hugendubler remembered speaking to the GAL prior to the GAL's report, but she denied she told the GAL that

Mother was not meeting Child's needs. N.T., 12/12/11, at 139. She stated to the GAL she suspected Mother may not have been working on activities at home because Child's skills had not been progressing as quickly as she would have liked at that time. *Id.* at 141-142. However, by the time Ms. Hugendubler stopped working with Child in September of 2011, Child's expressive language had improved from one-word to six-word sentences, and her speech articulation skills had improved. *Id.* at 139-140. Ms. Hugendubler testified, "that poured into her personal and social skills in the classroom where she was initiating more conversation with peers which she was not doing very much at the beginning when I picked her up in September of 2010." *Id.* at 146. Significantly, she testified that, in January of 2011, Mother had requested suggestions and strategies for working with Child at home. *Id.*

Likewise, the testimony of Ms. Solt, Child's speech therapist from September of 2011, through the time of trial, is relevant. Ms. Solt testified Child is continuing to progress steadily in her speech and language skills. N.T., 2/8/12, at 29. In addition, she continues to progress in her social interaction skills with peers. *Id.* at 30. Ms. Solt testified she sends work home for Child to work on with Mother, which she thinks Mother does with Child. *Id.* at 30-31. She continued, "[Mother] had pulled me aside one day when she dropped [Child] off and made a comment that she is no longer accepting simple one word answers at home from [Child]. She is really

encouraging her to combine words like I'm doing at school[,] so we're really working on that together as a team." *Id.* at 31. In addition, Mother cooperates by returning a communication binder that Ms. Solt uses regularly as a means to communicate with Mother. *Id.* at 30-32.

Finally, Ms. Benny, the CYS in-home caseworker for Child and her family since March of 2011, per referral by the trial court, testified that Mother has continued all necessary services for Child recommended by CYS's family service plan. N.T., 12/12/11, at 180. She testified Mother has cooperated with services. *Id.* at 182. Ms. Benny testified on direct examination, "I agree that [Child's] needs are being met educationally, emotionally, medically, and that assessment is also based on reports from the [TIU], the Juniata River Center, and medical reports[,] so in collaboration with the service providers her needs are being met." *Id.* at 182. Ms. Benny testified she is recommending that CYS close the case because she has concluded Child is safe in Mother's home, she is receiving the necessary services, and there is no more CYS can do for Child. *Id.* at 180-181, 189.

In contrast to the foregoing testimony relating to Mother's cooperation and ability in meeting Child's needs, Ms. Hugendubler testified she sent Father one letter in May of 2011, inviting him to participate in the Individualized Education Plan meeting for Child in June of 2011. N.T., 12/12/11, at 150, 166. Father never responded to the letter, nor did he

subsequently contact Ms. Hugendubler. *Id.* at 168-169. As such, Ms. Hugendubler has never spoken to Father, and she does not believe that he has ever participated in any team meetings for Child during the time she acted as Child's speech therapist. *Id.* at 147.

Likewise, Ms. Solt testified Father has never contacted her. N.T., 2/8/12, at 32. However, she testified Father did participate over the telephone in a kindergarten transition meeting that occurred on January 24, 2012,¹³ approximately two weeks before Ms. Solt's testimony in the custody trial. *Id.* at 33.

Ms. Benny testified Father failed to personally appear for and participate in the two Family Service Plan meetings conducted by CYS in April and September of 2011. N.T., 12/12/11, at 175-178. However, his attorney in the custody trial appeared at the first meeting and signed the Family Service Plan for Father. *Id.* at 176. Father did not comply with his Family Service Plan objectives, which included locating a mental health provider and scheduling a mental health intake assessment in his county. N.T., 12/12/11, at 178-180.

¹³ Ms. Solt testified the interdisciplinary team did not make a decision at that time with respect to whether Child would attend kindergarten in the 2012-2013 school year. Rather, they decided to wait to evaluate Child until after she received surgery for the insertion of tubes in her ears, which was scheduled for mid-February of 2012. N.T., 2/8/12, at 35-37. Following the surgery, Child would undergo a hearing test and a psychological evaluation to determine whether she was ready for kindergarten.

Based on the foregoing, the testimonial evidence overwhelmingly demonstrates that Mother is meeting Child's physical, emotional, developmental, language, speech, and hearing needs, and that Child is making steady progress. The record reveals Child's progress is attributable to services Mother has initiated for Child and cooperated with during Child's lifetime. Accordingly, based on the totality of the testimonial evidence, we conclude the trial court abused its discretion in granting Father primary physical custody.

We vacate the trial court's order granting Father primary physical custody and Mother partial custody and remand for the trial court to formulate a new order granting Mother primary physical custody and establishing a partial custody schedule for Father. Further, the parties shall share legal custody.

Order vacated. Case remanded. Jurisdiction relinquished.