NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

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

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

BEFORE: GANTMAN, DONOHUE and PLATT*, JJ.

DISSENTING MEMORANDUM BY DONOHUE, J.: Filed: February 20, 2013

I respectfully dissent. For the following reasons, I believe the trial court erred in its application of the law.

This is a custody dispute between a natural mother and the natural mother's adoptive parents. In making its decision, the trial court wholly fails to recognize the presumption our law affords natural parents in a custody action between a natural parent and a third party.

Section 5327(b) of the Domestic Relations Act provides: "In any action regarding the custody of the child between a parent of the child and a nonparent, there shall be a presumption that custody shall be awarded to the parent. The presumption in favor of the parent may be rebutted by clear and convincing evidence." 23 Pa.C.S.A. § 5327(b). In giving effect to this presumption, our law provides that "the burden of proof is not evenly balanced. In such instances, the parents have a prima facie right to

*Retired Senior Judge assigned to the Superior Court.

custody, which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to the third party." ***V.B. v. J.E.B.***, 55 A.3d 1193, 1199 (Pa. Super. 2012) (citing ***Charles v. Stehlik***, 560 Pa. 334, 340, 744 A.2d 1255, 1258 (2000)). Thus, "the even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the biological parents' side." ***Id.***

Here, it is evident from the record that the trial court did not proceed with the evidentiary scales "tipped hard" in Mother's favor, as the trial court stated that the presumption codified in section 5327(b) in favor of a natural parent "is not the law anymore." N.T., 8/2/12, at 406-07. As such, the trial court patently misapplied the law.

Moreover, while the trial court properly considered the factors listed in section 5328(a) and stated its findings with regard to each on the record, not all of its findings are supported by the evidence of record. For instance, with regard to the factor that requires the court to consider which party is more likely to provide a stable, loving, and consistent relationship with the child, the trial court made reference to what is perceived to be the Mother's immaturity and found that she is "still growing up … and she needs to continue to do that." ***Id.*** at 403. The trial court made this statement without any reference to evidence that would support such a conclusion and I have found no evidence in the record to support such a conclusion. To the contrary, the evidence reveals that Mother, who was 24 years old at the

time of the hearing, is the custodian of two other children and that she is engaged to be married. ***Id.*** at 179. She graduated from high school and received a certificate in a pharmacy technician program. ***Id.*** at 180. Mother has no history of drug use and drinks alcohol only occasionally. ***Id.*** at 180-81. I cannot discern upon what basis the trial court concluded that Mother was still "growing up" such that it found this factor tipped the custodial scale in Grandparents' favor.

Indeed, in reviewing the trial court's conclusions with regard to the section 5328(a) factors, it appears that the trial court found some of the factors to be in Grandparents' favor simply because Grandparents have had custody of the child for the majority of his life. ***See id.*** at 400-04.[1] This cannot be. Our law requires custody determinations be based upon the parties' situations at the time of the custody proceeding, not based upon circumstances of the past. ***See, e.g., Michael T.L. v. Marilyn J.L.,*** 525 A.2d 414, 418 (Pa. Super. 1987) ("[T]he ability to care for the child is to be determined as of the time of the custody hearing. In making its decision, the [t]rial [c]ourt must not dwell on matters buried in the past, but must concentrate only on those matters which affect the present and the future of the child."). To proceed otherwise would place an excessive premium on the

[1] For instance, the trial court found that Grandparents are more likely to "attend to the daily physical, emotional, developmental, educational and special needs" of the child because "Grandparents have been doing that." N.T. 8/2/12, at 404.

status quo, and it would become very difficult to modify a custody order in any significant way. Here, the trial court considered the section 5328(a) factors with its eye toward the past, not the present or future capabilities of the parties. For that reason, as well, I would find that the trial court erred.

Because I conclude that the trial court misapplied the law, I would vacate its order and remand this case to the trial court so that it could reassess its decision in light of section 5327(b), the evidence before it, and the parties' present capabilities to provide for the child's best interests.