

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

R.L.

Appellee

v.

M.D.

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 2390 EDA 2013

Appeal from the Order Entered July 11, 2013  
In the Court of Common Pleas of Montgomery County  
Domestic Relations at No(s): 2010-05150

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and STRASSBURGER, J.\*

MEMORANDUM BY OTT, J.

**FILED APRIL 22, 2014**

M.D. ("Mother") appeals from the order of the Court of Common Pleas of Montgomery County entered on July 11, 2013, which denied Mother's petitions for relocation and modification of custody, and ordered Mother and R.L. ("Father") to share physical and legal custody of the parties' male child, B.L., (age 8) ("Child"). On appeal, Mother claims the trial court abused its discretion by finding Father more stable and consistent than Mother when it awarded Father joint physical custody and erred as a matter of law by failing to consider the impact on Child of separating him from his half-brother when it denied the petition to relocate. Based on the following, we affirm.

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\* Retired Senior Judge assigned to the Superior Court.

The facts and procedural history are as follows. Mother and Father were married in 2004. Child was born in September of 2005. Mother also has another son, S.S., age 13, from a previous relationship. In 2009, Child was diagnosed with Pervasive Developmental Disorder (PDD) – not otherwise specified.

The parties' marriage was irretrievably broken and they separated in 2007. They eventually divorced in 2010. Relevant to this appeal, the parties were operating under a custody order, dated July 6, 2012, wherein legal custody was shared, Mother had primary physical custody, and Father had physical custody every other weekend from Friday until Monday morning and every Wednesday after school until Thursday morning. Child began the 2012-2013 school year attending first grade in the Pottstown School District. In January 2013, Mother relocated Child to the Upper Perkiomen School District.

In the meantime, on October 6, 2012, Mother notified Father of her intention to move with Child to Asheville, North Carolina, because she wanted to utilize Asheville's school system in light of Child being a special needs student. She filed a petition for relocation and a modification of the custody order.<sup>1</sup> Father, filed a counter-affidavit on October 15, 2012, objecting to the relocation. Father subsequently filed a counter-petition to

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<sup>1</sup> Mother also intended to take S.S. with her to North Carolina and S.S.'s father agreed to the relocation.

modify custody, which specifically sought primary physical custody of Child. The relocation hearing took place on May 30-31, 2013. On July 11, 2013, the trial court entered an order and opinion, denying Mother's request to relocate Child and awarding Father joint physical custody of Child. The court also directed Child attend Pottstown Area School District "where the child had been flourishing prior to the child's transfer to the Upper Perkiomen School District by [M]other." Memorandum and Order, 7/11/2013, at 1. This appeal followed.<sup>2</sup>

In Mother's first issue, she claims the trial court abused its discretion in awarding Father shared physical custody. We reiterate our scope and standard of review of a custody determination 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,

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<sup>2</sup> It should be noted that Mother did not file her concise statement along with her notice of appeal on August 9, 2013 pursuant to Pa.R.A.P. 1925(a)(2)(i). On September 4, 2013, this Court entered an order, requiring Mother to file a concise statement no later than September 16, 2013. Mother complied with this order by filing a concise statement on that day. **See J.M.R. v. J.M.**, 1 A.3d 902, 906 (Pa. Super. 2010) (noting that in children's fast track cases, the failure to file a concise statement of errors complained of on appeal with the notice of appeal will result in a defective notice of appeal, to be disposed of on a case by case basis). Accordingly, we will not apply the waiver rule to the present case.

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.

**M.J.M. v. M.L.G.**, 63 A.3d 331, 334 (Pa. Super. 2013), *quoting J.R.M. v. J.E.A.*, 33 A.3d 647, 650 (Pa. Super. 2011).

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), *quoting Arnold v. Arnold*, 847 A.2d 674, 677 (Pa. Super. 2004).

Relevant to this issue are the best interest factors set forth in Section 5328(a) of the Child Custody Act ("Act"), 23 Pa.C.S. §§ 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. § 5328(a). This Court has held that “[a]ll of the factors listed in section 5328(a) are required to be considered by the trial court when entering a custody order.” *J.R.M. v. J.E.A.*, 33 A.3d 647, 652 (Pa. Super. 2011) (citation omitted) (emphasis in original).

Here, the crux of Mother’s argument is that the trial court abused its discretion with respect to the fourth factor, “the need for stability and continuity in the child’s education, family life and community life,” by concluding Father possessed more stability and consistency than Mother in order to justify awarding Father shared physical custody. Mother’s Brief at 8. She states that the record does not support this conclusion based on the following: (1) Father pled guilty in 2008 to assaulting Mother, which resulted in Mother obtaining a protection from abuse (“PFA”) order against Father; (2) Father works part-time for \$8.50 an hour at a convenience store and this chosen career path is a blatant effort to minimize his child support obligation to Mother; (3) Father does not provide health insurance for Child and Mother must seek coverage through the Pennsylvania Medical Assistance program; and (4) Father is dependent on his significant other, M.B., for housing and has no other alternate plan in the event that this relationship terminates. *Id.* at 8-9. Moreover, she claims “Father attempted to minimize his tenuous personal circumstances by having [M.B.] misrepresent to the trial court that she was engaged to Father.” *Id.* at 9.

Mother asserts that she, on the other hand, is the one parent who possesses “stability and consistency” to care for Child because: (1) she has raised Child since he was two-years-old as well as her other son; (2) she is employed as both a home health aide and a certified massage therapist; and (3) she has extensive experience working with troubled and emotionally disturbed children at several private institutions and will be able to utilize this specialized education and training to care for Child. ***Id.*** at 9.

In its memorandum and order, the trial court provided a thorough explanation of how it weighed the Section 5328 factors and subsequently determined the best interests of the child. The court emphasized the importance of daily input of both Mother and Father in the life of Child and the ongoing, daily availability of each parent to meet the special needs of Child, including the individualized education program (“IEP”) meetings. Trial Court Opinion, 7/11/2013, at 1. The court noted “[b]oth parents are extremely active and vested in the process and essential need for the rearing” of Child. ***Id.***

The trial court then set forth its rationale for awarding shared physical custody to Father in applying the factors enumerated in Section 5328, which can be summarized as follows: (1) Mother and Father encourage frequent and continuing contact; (2) there is no evidence of risk of harm to either

party, and there never was a risk of harm to Child;<sup>3</sup> (3) both parents have been actively involved in Child's life; (4) Father shows more stability with respect to Child's education, according to the testimony of school personnel, Father is engaged to M.B., and Father lives with her in her home in Pottstown; (5) both parents have extended family and friends that live in the Pottstown area, Child has friends in the area, and Child has a relationship with M.B.'s nieces and nephews; (6) Child has an older half-brother, S.S., who is the son of Mother's former boyfriend; (7) in light of Child's condition, it was stipulated by the parties, and the court agreed, that an *in camera* interview would not be meaningful; (8) there was no evidence of attempts by either parent to turn Child against the other parent; (9) each parent maintains a loving and nurturing relationship with Child but Father is more likely to maintain stability and consistency; (10) school witnesses testified about how Child's physical and educational needs were met by Father and not by Mother, including the fact that Mother refused to allow the school to serve Child breakfast which affected his education and his overall well-being, and that she was not properly taking care of Child when he was in her care; (11) both parties live in close proximity to each other; (12) the availability

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<sup>3</sup> The trial court indicated that Mother was arrested in 2007 for assaulting Father but the charges were dropped. Likewise, the court noted Father pled guilty in 2008 to simple assault and entered into an agreed PFA order for three years. Moreover, in January of 2013, Mother filed an unfounded PFA petition against Father, which was dismissed after a hearing. **See** Trial Court Opinion, 7/11/2013, at 6.



and ability for appropriate child-care arrangements was not an issue in the matter; (13) there was evidence of conflict and non-cooperation between the parties, specifically Mother's "consistent[]" refusal to send Child's school backpack with him during Father's custodial time, which served no purpose and caused unnecessary stress for Father and Child, and also negatively affected Child's education because Father and Child could not review schoolwork and Child was forced to go to school without school materials; (14) there was no evidence of drug or alcohol abused with respect to the parties; and (15) there was no evidence of mental and physical condition of either party or a member of the parties' households. **See id.** at 6-9. The court concluded that its decision "serves the best interests of the child, affording the child equal and continuous access to both parents and involvement, by the parents, on a daily basis, in the life of a special needs child." **Id.** at 9.

Keeping our standard of review in mind, we must defer to the trial court's credibility and weight determinations. **See M.J.M.**, 63 A.3d at 334. Mother's argument regarding Subsection 5328(a)(4) challenges the weight the trial court accorded this custody factor and asks this Court to substitute its judgment for that of the trial court. Because this is not a proper appellate function, **E.D., supra**, Mother's first claim is meritless. Moreover, despite Mother's contentions, the record supports the court's finding that Father does provide stability to Child based largely on his involvement in Child's

education, emotional, and physical needs. For example, Leslie Motruck, the principal at Child's Upper Perkiomen school, testified that Father followed the principal's safety protocol regarding dropping Child off at school, while Mother refused to do so. N.T., 5/30/2013, at 126-127. Moreover, Julie Boettcher, Child's kindergarten teacher at the Pottstown school, testified that Child had an issue with tardiness when he was under Mother's care. *Id.* at 195. Boettcher also stated that when Father brought Child to school, Child "was on time and he was ready – he wasn't asking for breakfast, he was ready to work when he was at school on time." *Id.* at 196. On the other hand, Boettcher testified that when Child was under Mother's care, his clothes were often stained and on one occasion, his body was "visibly dirty." *Id.* at 216.

Most importantly, we note the court's rationale focused on the fact that it was in the best interest of Child to afford him equal and continuous access to **both** parents. We conclude that in light of the circumstances, including the age of the Child and his special needs, it was not unreasonable for the court to impart shared physical custody between Father and Mother. Accordingly, we discern no abuse of discretion on the part of the trial court and conclude Mother's first argument fails.

In Mother's second argument, she claims the trial court erred in denying her petition for relocation because it failed to consider Section 5328(a)(6) ("the child's siblings relationships") concerning the impact on

Child of separating him from his half-brother. Relying on ***Ferdinand v. Ferdinand***, 763 A.2d 820 (Pa. Super. 2000), she states such a separation violates the well-established “whole family” custody concept, which mandates that siblings should be kept together whenever possible.

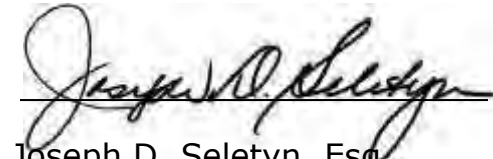
We note that counsel for Mother conceded at the time of oral argument on January 15, 2013, that because the trial court found her justification for relocating to North Carolina was speculative, as evidenced by her vague references to specialized schools and housing within those school districts, the issue of keeping Child and his sibling together became moot because Mother would not be moving, and both children would reside in Pennsylvania. Therefore, we need not address this issue further.

Lastly, based on the nature of this case, we would like to emphasize the following: “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).

Accordingly, we affirm the trial court’s order, which denied Mother’s petitions for relocation and modification of custody, and ordered Mother and Father to share physical custody of Child.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/22/2014