

,NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

R.E.R.,

Appellee

v.

L.S.,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: B.W.,

No. 2003 MDA 2013

Appeal from the Order entered October 10, 2013,
in the Court of Common Pleas of Cumberland County,
Civil Division at No(s): 2009-00639

BEFORE: DONOHUE, ALLEN, and MUNDY, JJ.

MEMORANDUM BY ALLEN, J.:

FILED APRIL 11, 2014

B.W. ("Grandmother") appeals from the custody order granting primary physical custody of the minor child, ("Child") (born December 2008), to R.E.R. ("Father"), with Grandmother having partial physical custody of Child on alternating weekends. We affirm.

The trial court summarized the background of this case as follows:

Plaintiff Father initiated a custody action in February 2009, which was followed by Defendant Mother's Emergency Petition and a subsequent Petition for Modification of Custody that resulted in the parents having shared legal custody and Mother being awarded primary physical custody of the parties' one child, Son, born 3 December 2008. Mother was tragically killed in an out-of-state automobile accident in June 2011. Son was also injured in that accident and upon his return to the Commonwealth, Father was initially denied access to his injured

son. Maternal Grandmother, within days of her daughter's death, filed an Emergency Petition for Modification of Custody from which an agreed upon temporary custody order was reached. The matter was assigned to [the trial court] in June 2012 and ultimately a custody trial was held over two days in September 2013. A Parenting Plan Custody Order describing the court's assessment pursuant to Section 5328 guidelines [was] entered in October 2013.

Trial Court Opinion, 12/6/13, at 1.

Grandmother has appealed from the trial court's October 10, 2013 custody order. Grandmother raises the following issues:

I. Whether the trial court abused its discretion and mistakenly applied the law by failing to rely on the custody factors enumerated in 23 Pa.C.S. § 5328 to determine the best interest of the child in assessing whether to grant Grandmother primary physical custody, when the custody factors are heavily weighted in Grandmother's favor?

II. Whether the trial court abused its discretion and mistakenly applied the law by relying solely on a presumption in favor of Father simply because he is the biological parent of the child when Grandmother provided clear and convincing evidence the best interests of the child were served by granting Grandmother primary custody, and for over two (2) years, Grandmother shared physical custody of the child with Father and Father has never exercised primary physical custody of the child?

III. Whether the trial court's decision granting Grandmother partial physical custody, rather than primary physical custody, was an abuse of discretion and unsupported by the evidence when an experienced Custody Evaluator clearly and convincingly stated that, after a full evaluation, it was her opinion that the best interest of the child would be served by Grandmother exercising primary physical custody of the child?

Grandmother's Brief at 4 (underlining omitted).

Our standard and scope of review of custody determinations is well settled:

[O]ur scope of review is of the broadest type and our standard of review is an abuse of discretion. We must accept [factual] 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.B. v. J.B., 65 A.3d 946, 956 (Pa. Super. 2013) (citations 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).

In her first issue, Grandmother asserts that the trial court abused its discretion "by failing to rely on the custody factors enumerated in 23 Pa.C.S. 5328 to determine the best interests of the child ... when the custody factors were ... weighted heavily in Grandmother's favor." Grandmother's Brief at 17. Significantly, Grandmother concedes that the trial court "did assess the

sixteen custody factors, and provided such assessment in the Custody Order.” *Id.* at 18. However, Grandmother asserts:

What is disputed is whether the Trial Court properly relied on the factors when evaluating the best interests of the Child. A review of the Court’s assessment of the custody factors quickly reveals that the factors are heavily weighted in Maternal Grandmother’s favor.

Id. at 19. Grandmother continues, “rather than relying on the clear and convincing evidence weighing those factors in Maternal Grandmother’s favor, the Court concluded Father should receive primary custody simply because the factors did not prove him to be a ‘bad parent.’” *Id.* at 20-21.

In contrast, the trial court explained:

The Grandmother’s perception that the custody factors are heavily weighted in her favor is mistaken. The custody evaluation report is heavily weighted in Grandmother’s favor; however, it was distinctly stated by the custody evaluator that those recommendations were conditioned upon the cooperation of Father and Grandmother. There is no such cooperation between parties and there is no way for any court to force Father or Grandmother to cooperate. Indeed, there is a history, a long history, of prior conflicts between Father and Grandmother, dating back to the beginning of the relationship between Mother and Father. Grandmother prohibited Father from entering her house, even though he was in a relationship with Mother. Grandmother, even through today, is still exerting her influence and control over that relationship through this custody action. The statement of Grandmother that she has attempted to mend the relationship is hollow as she continues to insist that it is her way or no way.

Trial Court Opinion, 12/6/1, at 2.

Critical to our analysis is the fact that when reviewing a child custody order, we must accept the findings of the trial court that are supported by

competent evidence of record, as our role does not include making independent factual determinations. ***B.K.M. v. J.A.M.***, 50 A.3d 168, 176 (Pa. Super. 2012) (citation omitted). With regard to issues of credibility and weight of the evidence in a child custody case, we must defer to the presiding trial judge who reviewed and assessed the witnesses first-hand. ***Id.*** Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. ***Id.***

Our review of the record provides competent evidence to support the trial court's findings. The custody trial encompassed two days, with three (3) witnesses: custody evaluator Deb Salem, Father and Grandmother.

The parties stipulated to Ms. Salem being an expert in custody evaluations. N.T., 9/16/13, at 6. In her testimony, Ms. Salem described Father and Grandmother as "people who don't even remotely like each other or have the ability – like isn't the right word, have the ability to comfortably relate." *Id.* at 21. When asked whether Grandmother was "manipulative", Ms. Salem responded:

That's a loaded question. Manipulative. Yeah, I think [Grandmother] – actually I think – I guess I would say [Grandmother and Father] were both pretty skilled at presenting a point of view and really trying to push that point of view. I would also say in my report [deceased Mother's boyfriend] says [Grandmother] is very good at getting what she wants in a situation so probably [Grandmother's husband] might say the same thing about her. I wouldn't see her maneuvering, but, you know, going after what she wants, I would say yes, she does do that.

The best I can tell you is I can see in the animosity between [Father] and [Grandmother] that [Grandmother] would have clearly done what she could do to have her position prevail way before this whole thing happened.

Id. at 57-58.

Father testified that immediately after Mother's death, "They wouldn't allow me to – they wouldn't allow me to see [Child]. It was difficult for him to be moved because he had broken collarbones, and I wanted to come see him and he was at [Mother's boyfriend's] house and [Mother's boyfriend] didn't want me at his house and said I would never come to his house." *Id.* at 72. Father explained that he subsequently worked out a custody arrangement with Grandmother, stating:

It was supposed to be a temporary order. It was agreed on as far as that we would do 4-3-4-3, which I didn't really want to do, but [Grandmother] was very broken up in the courtroom. I also know it was very difficult for – I was willing to agree to, I believe, weekends, that they would have [Child] weekends and I would have him during the week...so I thought that was a few months, but I definitely didn't think it was best for me to take [Child] and rip him out from where he was completely at that time so...I just – like it would be a total shock to his system, first of all. His mother had just died and I had to take into consideration how he was feeling and the rest of his family, like for everybody it just wasn't the best thing.

Id. at 74. Since the shared custody arrangement, Father described his relationship with Grandmother, "It's been tenuous. We haven't really gotten along very well." *Id.* at 80.

Father also testified that Grandmother offered to “purchase” custody of Child.¹ *Id.* at 84. He explained, “She offered me a large sum of money and said that she would – if I left [my wife] that she would pay for an apartment ... and she wouldn’t try to keep [Child’s] money or something ... that I could continue to get his social security benefits or something.” *Id.* at 84-85. Father testified that Grandmother offered “somewhere between 20 and \$50,000. I don’t remember the exact number. It was on more than one occasion she talked about it. I said you could give me a million dollars, there is no way I’m going to sign away the custody of my son.” *Id.* at 85.

Father further commented:

I think counseling [with Grandmother] would be a good thing. I mean, we have no real relationship whatsoever. We can’t have any kind of interaction or dialogue, I don’t think. I know on my part there is absolutely no trust with me as far – I trust [Child] is safe when he is there but there is no trust as far as what her motivation would be or anything that she says to me.

Id. at 90.

Grandmother testified that she has always had a “volatile” relationship with Father, and “it’s never been an easy relationship.” N.T., 9/25/13, at

¹ Ms. Salem’s custody evaluation confirms Father’s testimony as follows: “[Father] was offended when [Grandmother] offered him a sum of money in exchange for him allowing her to have primary custody of [Child]. (It should be noted that [Grandmother] confirmed that in the throes of her worst grief shortly after [Mother’s] death, she did do this.)” Exhibit 4, Custody Evaluation, 4/15/13, at 5.

35. When asked "What do you think has been the hurdle between [sic] the communication between you and [Father] at this point?", Grandmother responded:

I don't know how to say it. Just – we just can't come to any kind of an agreement. There's never any communication. There's never any – you know, with the schooling. And he was supposed to have called me. He was supposed to have talked to me. There is no communication on that part.

Id. at 40. Grandmother sought primary physical custody of Child, but conceded, "I think [Child] needs to see [Father], yes, I do." *Id.* at 47.

Given the foregoing, we find Grandmother's first issue regarding the custody factors to be without merit. The trial court expressly considered the custody factors, see Order, 10/10/13, and ultimately awarded primary physical custody to Father based on the parties' difficult relationship. ***B.K.M. v. J.A.M., supra*** (with regard to issues of credibility and weight of the evidence, we defer to the presiding trial judge who reviewed and assessed the witnesses first-hand).

In her second issue, Grandmother contends that the trial court abused its discretion "by relying solely on a presumption in favor of Father ... when for over two years, Grandmother shared physical custody with Father and Father has never exercised primary physical custody of Child." Grandmother's Brief at 21. Although Grandmother concedes that "the evidentiary burden is heavily tipped in favor of the parent" in a custody action with a third party, and "it becomes the heavy burden of the non-

parent to produce evidence which clearly tips the scale back to the non-parent's favor", she avers that she satisfied "her heavy burden to rebut the presumption in favor of Father." *Id.* at 21-23 (citing **Rowles v. Rowles**, 668 A.2d 126 (Pa. 1995)). According to Grandmother, she "has met her heavy burden of establishing that the special circumstances the child faces and the potential psychological harm the Child could face in Father's primary care clearly indicate the appropriateness of awarding primary custody to Maternal Grandmother." *Id.* at 25. Again, Grandmother's assertions contravene the findings of trial court, and disregard the trial court's role as factfinder. **B.K.M. v. J.A.M., supra.**

The trial court explained:

Grandmother has only ever had custody of Son following Mother's death, as Father saw fit. ... Father had allowed Grandmother into the life of Son to a level which Grandmother had not previously enjoyed. But there is no mistaking it was Father's permission that allowed Grandmother this opportunity.

...

The presumption that Father be awarded custody as the parent is only overcome by clear and convincing evidence that the parenting by Father is not in the best interest of the child. Again, it has been found Father is a fit parent. Instead of being a dynamic proactive "helicopter parent" that Grandmother wants Father to be, Father's style of parenting is reactive to needs but this style is neither wrong parenting nor neglectful of the child. Exception is taken with the evaluator's report that the "issue was never who had the right to [Son]" as Father is generally non-confrontational and had not asserted his rights. It is clear that Grandmother is more assertive, has access to more resources, and that she wants to fill the void left by her daughter in an attempt for "normalcy." This push will only serve to alienate Son from his Father, as Father will not confront and will not

cooperate to the “dictated” terms of Grandmother for primary custody.

Trial Court Opinion, 12/6/13, at 3-4.

Our review of the record supports the trial court’s factual findings. The trial court expressly references 23 Pa.C.S. § 5327(b), which states that 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.” **See also V.B. v. J.E.B.**, 55 A.3d 1193 (Pa. Super. 2012) (reversing and remanding primary physical custody award to maternal grandparents where the trial court “failed to apply the statutory presumption when it divested father of legal custody of his children and severely reduced his ... physical custody”). Thus, the trial court acted within its province as factfinder in determining that Father “is a fit parent” and awarding him primary physical custody. Trial Court Opinion, 12/6/13, at 3. Grandmother’s second issue lacks merit.

In her third issue, Grandmother again challenges the trial court’s discretion as factfinder and arbiter of credibility. Grandmother contends that the trial court erred by not granting her primary physical custody “when an experienced Custody Evaluator clearly and convincingly stated, after a full evaluation, that it was her clinical opinion the best interests of the child would be served by Grandmother exercising primary physical custody of the child.” Grandmother’s Brief at 25. Grandmother further argues that the trial

court erred in its assessment of the evaluation and determining that the recommendation of custody to Grandmother was contingent on the parties' cooperation. *Id.* at 26-27.

The trial court stated:

The custody evaluation was clearly understood that **if the parties cooperated** this custodial plan was, in the experienced custody evaluator's opinion, how best to handle the situation. This lack of cooperation, as noted by the evaluator, has always existed. Further, cooperation being the basis of the recommendation, causes the recommendation to fail. The evaluation notes throughout that co-parenting is necessary and also notes that it has not occurred. Father's distrust of Grandmother occurred long before Son was born and the power play in this custody action seeks to reinforce it.

Trial Court Opinion, 12/6/13, at 4 (bold and underline in original).

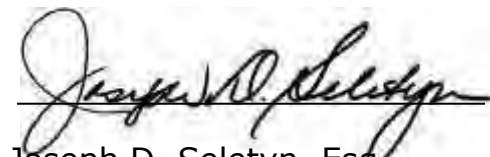
Again, our review of the record indicates that the trial court's reasoning is supported by competent evidence. In addition to the custody evaluator's trial testimony excerpted above at pages 5-6, our review of the custody evaluation supports the trial court's statement that the "custody evaluation was clearly understood that if the parties cooperated this custodial plan was, in the experienced custody evaluator's opinion, how best to handle the situation." *Id.* For example, the evaluation contains two separate discussions of the "History of Custody Conflict Prior to [Mother's] Death" and "Current Custody Conflict." Exhibit 4, Custody Evaluation, 4/15/13, at 2-3. The evaluation is rife with references to conflict between Grandmother and Father. *See generally*, Exhibit 4, Custody Evaluation, 4/15/13. Notably, in the paragraph preceding her "Recommendations for

Consideration by the Family and the Court”, Ms. Salem prefaces her recommendation of primary physical custody of Child to Grandmother to include the sentence: “Recommendations also address the absolute necessity for the adults in [Child’s] life who he loves as parents to learn a way to allow [Child] his own perceptions of who they are and not force relationships on him. It is equally important for them to relate in a civil and respectful way for [Child’s] sake.” *Id.* at 28. Based on the cumulative testimony presented during two (2) days of trial, the trial court acted within its discretion in concluding, “...cooperation being the basis of the recommendation, causes the recommendation to fail.” Trial Court Opinion, 12/6/13, at 4. We thus find Grandmother’s third issue to be without merit.

In sum, because our review of the record shows no abuse of discretion in the trial court’s award of primary physical custody of Child to Father, with Grandmother having partial physical custody on alternating weekends, we affirm the order.

Order affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/11/2014