J-S16023-14

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

J.S.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
B.S.,	:	
	:	
Appellant	:	No. 2168 MDA 2013

Appeal from the Order entered November 7, 2013,
Court of Common Pleas, Dauphin County,
Civil Division at No. 2011 CV 10430 DC

BEFORE: BENDER, P.J.E., DONOHUE and STRASSBURGER*, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED APRIL 11, 2014**

B.S. appeals from the order entered on November 7, 2013 by the Court of Common Pleas, Dauphin County, granting J.S. primary physical custody of C.S., and restricting B.S.'s custody of C.S. to Wednesday evenings and alternating weekends. We affirm in part and vacate in part.

The facts and procedural history in this case are as follows. B.S. and J.S. married in August 2001 and separated in September 2011. B.S., the father, and J.S., the mother, have one seven-year-old child together, a daughter, C.S. On October 26, 2011, before J.S. initiated divorce proceedings and after the parties separated, B.S. and J.S. reached a custody agreement where J.S. received primary physical custody of C.S. and B.S. received partial physical custody of C.S. Subsequent to the written agreement, and despite its terms, C.S. and B.S. had equal custody of C.S.:

*Retired Senior Judge assigned to the Superior Court.

C.S. spent Mondays and Tuesdays with J.S., Wednesdays and Thursdays with B.S., and alternating three-day weekends with each parent. J.S. initiated divorce proceedings on November 2, 2012. On January 5, 2012, the Court of Common Pleas of Dauphin County issued an order formalizing the October 26, 2011 custody agreement. The court then issued a decree in divorce on February 23, 2012.

On June 7, 2013, B.S. filed a motion to modify custody, seeking to ensure that B.S. and J.S. continued to share custody on a 50/50 basis. J.S. opposed this motion and sought enforcement of the original order that granted her primary physical custody. On November 7, 2013, the trial court held a hearing to resolve this custody dispute. The trial court heard testimony from witnesses through offers of proof followed by cross-examination. Following the hearing, the trial court denied B.S.'s 50/50 request and awarded J.S. primary physical custody of C.S. The trial court ruled that B.S. would have physical custody of C.S. on Wednesday evenings and alternating three-day weekends (Friday, Saturday, and Sunday). The trial court also granted B.S. four non-consecutive weeks with C.S. during the summer. The trial court awarded J.S. physical custody of C.S. at all other times and provided separate provisions for holidays and major family events.

On December 3, 2013, B.S. filed this timely appeal. B.S. presents the following four issues for review:

> 1. Whether the trial court acted unreasonably in deciding that the application of the custody factors set forth in 23 Pa.C.S.A. § 5328 weighed in Mother's [f]avor because:
>
> A. The Father's co-habitation with his fiancee does not in and of itself raise questions [about] his [judgment];
>
> B. The Father's decision to not enroll his daughter in professional counselling in the absence of any need for counseling does not suggest that he is less likely to attend to her daily physical, emotional, developmental, educational and special needs; and
>
> C. The fact that awarding the Mother primary physical custody would eliminate mid-week custody exchanges is not a valid factor under the statute or case law.
>
> 2. Whether the trial court acted unreasonably in conducting the hearing in this matter by offer of proof?
>
> 3. Whether the trial court improperly inserted its own opinions and biases into its findings of fact?
>
> 4. Whether the trial court abused its discretion in imposing additional and [intrusive] parenting rules on the parties?

Appellant's Brief at 9.

This Court reviews a custody order for an abuse of discretion. ***Gates v. Gates***, 967 A.2d 1024, 1028 (Pa. Super. 2009). An abuse of discretion occurs if, in reaching its conclusion, a trial court overrides or misapplies the law or exercises judgment that is manifestly unreasonable, or reaches a

conclusion that is the result of partiality, prejudice, bias or ill will as shown by the evidence of record. ***Id.*** Additionally, "[t]his Court 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." ***Cramer v. Zgela***, 969 A.2d 621, 625 (Pa. Super. 2009). Concerning issues of credibility, this Court must defer to the trial court, which presided over the proceedings and thus viewed the witnesses first hand. ***Id.*** However, this Court is 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. ***Id.***

In his first issue on appeal, B.S. argues that the trial court acted unreasonably in its application of the custody factors set forth in 23 Pa.C.S.A. § 5328(a). Appellant's Brief at 13-17. Section 5328(a) states that when ordering custody, "the court shall determine the best interest of the child by considering all relevant factors," including the following sixteen issues:

> (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.

(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).

(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 the day of the hearing, after hearing testimony, the trial court listed on the record all sixteen factors, and analyzed those factors that applied to this case based on the evidence presented by the parties. Although it considered all of the factors, the trial court based its decision primarily on subsections (9), (10), and (16) of section 5328(a). Relating to section 5328(a)(9), trial court stated:

> Which party is more likely to maintain a loving, stable, consistent, and nurturing relationship with the child adequate for the child's emotional needs. Both parents seem to be able to do that although father introducing a girlfriend moving in with her ten year old son certainly presents a judgment issue.

N.T., 11/7/13, at 31. B.S. argues that the trial court erred when it determined that B.S. having his fiancée, J.D., and her ten-year-old son move in with him was poor judgment and not in C.S.'s best interests. Appellant's Brief at 14-15. B.S. asserts that there is no evidence in the record stating anything negative about J.D. and in fact, she helps B.S.

maintain a loving home. ***Id.*** at 15. B.S. contends that the trial court improperly applied a presumption that cohabitation is harmful to a child. ***Id.***

In this case, we cannot conclude that the trial court presumed that cohabitation is harmful to a child. Rather, J.S.'s uncontroverted testimony indicates that J.S. has repeatedly told B.S. that C.S. feels neglected when she is with him. N.T., 11/7/13, at 12. J.S.'s testimony also indicates that that J.D. was not the first woman to spend the night at B.S.'s home while C.S. was present. ***Id.*** at 9. J.S. stated that a woman named Gina began spending the night shortly after B.S. and J.S. separated and that a few months later, J.D. began staying over at B.S.'s house. ***Id.*** J.S. also testified that her child is still not happy after two years of the current custody arrangement and that she cries and gets upset when it is time for her to go to B.S.'s home. ***Id.*** Based on this testimony, the trial court could reasonably conclude that J.S. was the parent more likely to maintain a loving, stable, consistent, and nurturing relationship with C.S. adequate for her emotional needs.

B.S. next argues that the trial court erred when it determined that his failure to cooperate in having a licensed psychologist examine C.S. showed that he was less likely to attend to her daily physical, emotional, developmental, educational, and special needs. Appellant's Brief at 15-16. Relating to section 5328(a)(10), the trial court stated:

> Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child. Both parents seem to have attended to that other than father who had agreed when we had a pretrial conference that we would have the child evaluated by a licensed child psychologist just to check in with her and see if she was okay or maybe she was just having some separation anxiety or maybe just having some issues with a new woman and a ten year old boy moving into her home. But father refused to do that so I would say mother is the one more likely to attend to the child's emotional and special needs.

N.T., 11/7/13, at 31. B.S. asserts that a school counselor evaluated C.S. and reported that C.S. had no psychological issues. ***Id.*** at 16. Thus, B.S. did not believe there was a need to take B.S. to a licensed psychologist. ***Id.***

In this case, J.S.'s testimony reveals that both B.S. and J.S. agreed at pre-trial conference to get counseling for C.S. N.T., 11/7/13, at 10. Additionally, J.S.'s testimony indicates that the trial court did not want C.S. to see just the school counselor. ***Id.*** Rather, the trial court wanted a licensed child psychologist to examine C.S. ***Id.*** However, B.S. refused to have a licensed psychologist examine C.S. ***Id.*** Instead, J.S.'s testimony indicated that, although the trial court provided B.S. and J.S. with a list of three approved psychologists, B.S. stalled by stating that he was waiting for the advice of his attorney and then ultimately decided that the court did not order the examination and that he therefore did not have to do it. ***Id.*** at 11. Based on this testimony, we cannot say that the trial court abused its

discretion in concluding that J.S. was the parent more likely to attend to the emotional needs of C.S.

Finally, B.S. argues that the trial court erred when it awarded J.S. primary physical custody of C.S. because it would prevent multiple transitions every week during the school year. Appellant's Brief at 16-17. B.S. asserts that it was reversible error for the trial court to presume that primary physical custody situations are best for school age children and that this consideration is not a valid factor under statutory or case law. ***Id.*** In support of this argument, B.S. relies on ***BCS v. JAS***, 994 A.2d 600 (Pa. Super. 2010).

In ***BCS***, this Court reversed the trial court's decision to award the Mother primary physical custody of her children. ***BCS***, 994 A.2d at 601-05. The trial court in ***BCS*** stated that one of its reasons for awarding primary physical custody to the Mother was that not moving between the Mother's and Father's residence would be better for the children's education, without regard to the specific facts of the case. ***Id.*** at 604-05. This Court stated, "the law contains no presumption that primary physical custody situations are best suited for school-aged children." ***Id.*** at 605.

The trial court, in its 1925(a) opinion stated that,

> I would also note that although I didn't discuss it on the record at the time, another relevant factor weighing heavily in favor of the current custody arrangement is that the child will not be subject to multiple transitions every week during the school

> year. The current order, whereby the child lives with Mother for much of the school week, will provide her much needed stability.

Trial Court Opinion, 12/19/13, at 6. Therefore, the trial court did not presume that primary physical custody situations are best for school age children. Instead, the trial court considered the amount of transitions that C.S. had to make during the school year as another relevant factor in its decision and found that fewer transitions would provide C.S. with more stability. ***Id.*** Section 5328(a)(16) permits courts to consider "any other relevant factor" when ordering custody. 23 Pa.C.S.A. § 5328(a)(16).

Additionally, the trial court did not state that it wanted to reduce C.S.'s transitions during to the school week in order to improve her performance at school. ***See*** Trial Court Opinion, 12/19/13, at 6. In fact, testimony indicates that C.S. is doing well in school. N.T., 11/7/13, at 10. Rather it stated that the new custody arrangement, "whereby the child lives with Mother for much of the school week, will provide her much needed stability." Trial Court Opinion, 12/19/13, at 6. Thus, the trial court was concerned with C.S.'s stability, which is a relevant consideration under 23 Pa.C.S.A. 5328(a)(9). ***See id.*** Furthermore, J.S.'s testimony indicates that even after two years of the current custody arrangement, C.S. is still having trouble being with B.S. and transitioning between the two homes. N.T., 11/7/13, at 12. Likewise, J.S. stated that when C.S. is with B.S., she frequently asks him if it is time to go back to her mother's house, or, how many more days

until she gets to go to be with her mother. ***Id.*** at 10. Therefore, the trial court did not err when it awarded J.S. primary physical custody with one of the reasons being that it would prevent multiple transitions every week during the school year, which would promote stability for C.S.

For his second issue on appeal, B.S. argues that "[t]he trial court acted unreasonably in conducting the hearing in this matter by offer of proof." Appellant's Brief at 17-19. We find that B.S. has waived this issue on appeal. Pennsylvania courts have long held that,

> In order to preserve an issue for appellate review, a party must make a timely and specific objection at the appropriate stage of the proceedings before the trial court. Failure to timely object to a basic and fundamental error will result in waiver of that issue. On appeal the Superior Court will not consider a claim which was not called to the trial court's attention at a time when any error committed could have been corrected. In this jurisdiction . . . one must object to errors, improprieties or irregularities at the earliest possible stage of the adjudicatory process to afford the jurist hearing the case the first occasion to remedy the wrong and possibly avoid an unnecessary appeal to complain of the matter.

In re S.C.B., 990 A.2d 762, 767 (Pa. Super. 2010) (citations omitted). In this case, the trial court stated that it would operate as it usually does and hear offers of proof for the primary witnesses followed by cross-examination. N.T. 11/7/13, at 3. At no point during the hearing did B.S. object to presenting evidence through offers of proof. ***See id.*** at 3-33. Thus,

because we find that B.S. failed to object to the trial court conducting the hearing by using offers of proof, B.S. has waived the issue on appeal.

For his third issue on appeal, B.S. argues that the trial court erred because it improperly inserted its own opinions and biases into its decision. Appellant's Brief at 19-20. B.S. argues that the trial court was biased against him because he cohabitated with his fiancée. ***Id.*** at 19. He also contends the trial court was biased against him because he did not agree to have a licensed psychologist examine C.S., asserting that the trial court stated that it believed all children in a custody case should receive a psychological evaluation. ***Id.*** at 20.

We find that B.S. has waived this argument because B.S. did not raise this issue in his 1925(b) statement. 1925(b) Statement at 1. Under Pennsylvania law, "when an appellant is ordered to file a Rule 1925(b) statement . . . any appellate issues not raised in a compliant Rule 1925(b) statement will be deemed waived." ***Commonwealth v. Hill***, 609 Pa. 410, 417, 16 A.3d 484, 488 (2011). B.S.'s 1925(b) statement raises no issue asserting err on the part of the trial court based on the trial courts reliance on its own opinions and biases in its decision. ***See*** 1925(b) Statement at 1. Therefore, we find that B.S. has waived his third issue on appeal.

Even if B.S. had not waived this issue on appeal, we find no evidence of record to support his assertions. The trial court never expressed a bias towards cohabitation, rather it only stated that B.S.'s decision to have his

fiancée and her son move in with him reflected poor judgment based on the testimony provided by J.S. that C.S. stated she felt neglected when she was with B.S. and her difficulty transitioning to her father's house. Trial Court Opinion, 12/19/13, at 7. Likewise, we find no evidence of record that the trial court stated that ***all*** children in a custody case should receive a psychological evaluation. Therefore, there is no evidence that supports B.S.'s assertions in regards to this issue.

Finally, B.S. argues that "[t]he trial court abused its discretion in imposing additional and intrusive parenting rules on the parties." Appellant's Brief at 20-21. The trial court included in its custody order several provisions that it required both J.S. and B.S. to follow in the shared custody of C.S. ***See*** Order of Court – Parenting Plan at 1-11. Specifically, B.S. takes issue to the provision prohibiting both he and J.S. from leaving C.S. alone with friends and paramours without the written permission of the other parent. Appellant's Brief at 20. B.S. also takes issue with the provision that requires both he and J.S. to read online material about sexual predators, internet dangers, and parenting skills and to submit notarized documents stating that they have read these materials.[1] Appellant's Brief at

[1] The sections within the custody order challenged by B.S. follows:

11. Safety:

a. The child shall not be left alone with any of Father or Mother's friends or paramours unless agreed to in writing by both parents.

b. Both parents shall adopt measures to shield their child from sexual exploitation which may be more likely to occur while in a parent's home by a paramour or paramour's child.

c. The parents shall enroll their child in a school-based or other program at an appropriate age to educate, empower and protect herself from sexual abuse and exploitation and victimization.

d. Both parents shall carefully read "*7 Steps to Protecting Our Children*" and "*Preventing Children from Encountering Dangers Online*" at *www.darkness2light.com* and provide a notarized statement to the other parent that they have read it, within 30 days of the date of this Order.

e. Both parents shall implement guidelines and monitor the child's appropriate internet online behavior. Both parents and any other adults supervising their child shall read The American Academy brochure on internet use arid families at: http://safetynet.aap.org/internet.pdf, and Microsoft's Safety and Security Center at: http://www.microsoft.com/security/family-safety/default.aspx#Internet-use. Both of these resources appropriate [sic] give guidelines based on the child's age.

* * *

15. Shared Parenting Education: The parents shall keep themselves updated on shared parenting

20-21. B.S. characterizes these provisions as intrusive, asserting that they are inappropriate because neither parent requested the inclusion of these rules and they are not specific to any problem C.S. faces. ***Id.*** at 20. B.S. further contends that these rules include requirements that are absurd, burdensome, and properly left to the discretion of the parents. ***Id.*** at 20-21.

We find that the trial court abused its discretion by including these mandatory, unindividualized provisions in the custody order. In support of these provisions, the trial court relies on the portion of section 5328(a) stating, "[i]n ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted

---

> techniques, including reading on June 1 of each year:
>
> - AFCC's "Planning for Shared Parenting — A Guide for Parents Living Apart" which can be found at: http://www.dauphincounty.org/court-departments/offices-departments/court-of-common-pleas/practices-judge-turgeon/.
>
> - CreativeWithKids.com — "100 Ways to be Kind to your Child" which can be found at: http://creativewithkids.com/100-ways-to-be-kind-to-your-child/.
>
> Each parent shall provide a notarized statement to the other parent that they have read it within 30 days of June 1st every year. (Free internet is available on the computers at any Dauphin County Library.)

Order of Court - Parenting Plan at 8-9.

consideration to those factors which affect the safety of the child . . . ." Trial Court Opinion, 12/19/13, at 9 (quoting 23 Pa.C.S.A. § 5328(a)). The trial court argues that it included these provisions because they not only promote child safety, but also the best interests of the child. ***Id.*** (citing 23 Pa.C.S.A § 5328(a)). However, section 5328(a) states that a court is to give weighted consideration to those factors that affect child safety when "ordering any form of custody." 23. Pa.C.S.A. § 5328(a). Fashioning a custody order anticipates individualized application of the factors to the case at hand, not a boilerplate order to be entered in every case. Our court has previously stated, "the law unequivocally provides for a fact-specific, case-by-case analysis of all factors affecting the child's best interest in custody proceedings . . . ." ***BCS***, 994 A.2d at 605. Section 5328(a) does not authorize a trial court to add safety and parental education conditions to a custody order without regard to the specific facts of the case.

In fact, 23 Pa.C.S.A. § 5323(e) provides the following regarding safety conditions:

> (e) Safety conditions.--After considering the factors under section 5328(a)(2), if the court finds that there is an ongoing risk of harm to the child or an abused party and awards any form of custody to a party who committed the abuse or who has a household member who committed the abuse, the court shall include in the custody order safety conditions designed to protect the child or the abused party.

23 Pa.C.S.A. § 5323(e). Thus, section 5323(e) specifically describes the circumstances that warrant the inclusion of safety conditions like those imposed by the trial court in this case. The safety conditions were not appropriate here because there is no evidence of record indicating any concern about C.S.'s safety when she was alone with J.D. or any concern about J.D.'s son sexually exploiting C.S. In fact, there was no evidence of record indicating any concern about an ongoing risk of harm to C.S.

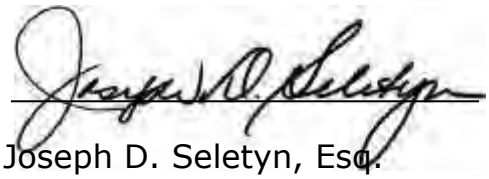
The trial court's safety and educational provisions also create a practical concern. A violation of any of these provisions by either party, without more, subjects him or her to a contempt petition. These requirements create a breeding ground for conflict between the parties when the testimony otherwise indicates that these parties are able to conduct themselves in a civil fashion in the shared custody of C.S. ***See*** N.T., 11/7/13, at 19.

Non-mandatory, generalized recommendations for child safety, parental education, or other forms of guidance in a custody order are within the discretion of the trial court. However, we discern no authority under § 5328(a) for the mandatory requirements under the heading of "11. Safety" or "15. Shared Parenting Education" set forth in the custody order in this case where there were no safety concerns raised by either party. ***See*** n.1, ***supra***. Therefore, we vacate the custody order with respect to these mandatory, unindividualized provisions.

Order affirmed in part and vacated in part. Jurisdiction relinquished.

Strassburger, J. files a Concurring Statement.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/11/2014