NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

J.E.R., JR. Appellee v. J.F.M. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1691 MDA 2012

Appeal from the Order Entered August 28, 2012
In the Court of Common Pleas of Adams County
Civil Division at No(s): 2008-SU-0001216

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

MEMORANDUM BY MUNDY, J.: Filed: April 1, 2013

Appellant, J.F.M. (Mother), appeals from the August 28, 2012 child custody order granting the motion of guardian *ad litem*, Heather Roberts, Esquire (Attorney Roberts), of C.G.R., the biological child of Mother and Appellee, J.E.R., Jr. (Father), to continue C.G.R.'s enrollment in public school and to allow enrollment in extracurricular activities.[1] After careful review,

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* Retired Senior Judge assigned to the Superior Court.

[1] In the instant matter, Mother does not challenge the standing of Attorney Roberts to file the motion at issue herein. We note that Attorney Roberts involvement in this matter stems from her appointment as guardian *ad litem* for C.G.R. in the underlying proceedings which resulted in the order enrolling C.G.R. in public school for the 2011-2012 school year. She was not, however, C.G.R.'s guardian *ad litem* at the time she filed the petition seeking enrollment of C.G.R. in public school. Nevertheless, as this issue has not been challenged, we express no opinion.

we vacate the trial court's order and remand for further proceedings consistent with this memorandum.

The relevant facts and procedural history, as set forth by the trial court, are as follows.

> [Mother] and [Father] are the natural parents of the subject minor child, [C.G.R.] who was born [] March [] 2000. By [o]rder of the [trial c]ourt, dated September 29, 2008, it was ordered that [Mother] and [Father] were to share legal custody, and [Mother] was to have primary physical custody of [C.G.R.]. By [o]rder dated February 8, 2011, [Father's] legal and physical custody rights were suspended until further order.
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> As a brief background to the case, [Mother] is deeply religious and believes that those who do not practice her conservative Christianity are inherently immoral and corrupt. Historically, [C.G.R.] has been isolated, and her only significant source of interaction has been in the context of church or Church based activities.
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> On July 27, 2012, Attorney Roberts filed a petition before the [trial] court, which requested that [C.G.R.] continue enrollment in the public school system, specifically in the Fairfield School District.[2] Thereafter, on August 15, 2012, The Honorable Judge Thomas H. Kelley appointed Attorney Heather E. Roberts as Guardian *Ad Litem* to represent the interest of [C.G.R.]. On August 28, 2012, a hearing was held before the [Judge Kelley,] on Attorney Roberts' Petition, and it was ordered that [C.G.R.]

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[2] Specifically, Attorney Roberts averred that pursuant to an August 26, 2011 order, C.G.R. was to matriculate in the Fairfield School District, but the order was unclear as to whether C.G.R. would attend the school in the 2012-2013 school year. Motion For The Child's Continued Enrollment in Public School, 7/27/12, ¶¶ 4-6.

> continue in the public school system at the current school in which she was enrolled during the previous year. Further, the [trial c]ourt determined that [C.G.R.] may be enrolled in one extracurricular activity per season in fall, winter, and spring of a sport or extracurricular activity of her choosing.

Trial Court Opinion, 10/26/12, at 2.

Thereafter, on September 24, 2012, Mother filed a timely notice of appeal, together with a concise statement of errors complained of on appeal in accordance with Pa.R.A.P. 1925(a)(2)(i). On October 26, 2012, the trial court filed its Rule 1925(a) opinion.

On appeal, Mother raises the following issues for our review.

> 1. Whether the trial court erred as a matter of law by ordering Appellant to enroll minor child in public school when Appellee's legal and physical custody has been suspended since February 3, 2011?
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> 2. Whether the trial court erred as a matter of law by ordering Appellant to enroll minor child in extracurricular activities or sports, of child's choosing, during each of the fall, winter and spring seasons?
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> 3. Whether the trial court erred when concluding that home schooling was affecting child's health, safety and physical well[-]being?

Mother's Brief at 4.

We are guided by the following when reviewing issues governing child custody determinations.

> [O]ur scope is of the broadest type and our standard is abuse of discretion. This 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. In addition, with regard to issues of credibility and weight of the evidence, this Court must defer to the trial judge who presided over the proceedings and thus viewed 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.

E.D. v. M.P., 33 A.3d 73, 76 (Pa. Super. 2011) (citation omitted). With any child custody case, this Court has long stated that the paramount concern is the best interests of the child. ***Landis v. Landis***, 869 A.2d 1003, 1011 (Pa. Super. 2005). This standard requires a case-by-case assessment of all of the factors that may legitimately affect the "physical, intellectual, moral and spiritual well-being" of the child. ***Id.***

Recently, our Legislature adopted a new Child Custody Act, which became effective on January 24, 2011. ***See*** 23 Pa.C.S.A. §§ 5321-5340. The new Child Custody Act applies to "disputes relating to child custody matters" filed after the effective date of the new law. ***Id.*** § 5321. In ***E.D.***, we held that the new Act applied to any proceeding filed after the effective date of the new Child Custody Act even though the original complaint or action was commenced prior to that date. As Attorney Roberts' petition was filed on July 27, 2012, the principles and directives contained in the new Child Custody Act apply to the instant case. ***See id.*** § 5337.

In this regard, the new Child Custody Act provides as follows.

> **§ 5338. Modification of existing order**
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> **(a) Best interest of the child.**—Upon petition, a court may modify a custody order to serve the best interest of the child.
>
> **(b) Applicability.**—This section shall apply to any custody order entered by a court of this Commonwealth[.]

Id. § 5338. Thus, section 5338 directs the trial court to apply a best interest analysis in ruling on Attorney Robert's motion.[3]

In the instant matter, all three of Mother's issues are interrelated; the crux of her argument being that she "has full physical and legal custody of [C.G.R.] and yet has not been able to exercise her parental rights." Mother's Brief at 8. Specifically, Mother argues "the trial court is dictating to Mother how to raise her daughter." ***Id.*** at 9. Mother contends she should be able to home school C.G.R., so that C.G.R. can "be protected from []

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[3] Additionally, we note that in custody cases involving a parent with sole physical custody there is a presumption that the parent is acting in the best interests of the child and a third party must rebut that presumption by clear and convincing evidence. ***See*** 23 Pa.C.S.A. § 5327(b) ("[i]n 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, 1205 (Pa. Super. 2012) (holding that a decision to grant grandparents sole legal custody and Father reduced physical custody was manifestly unreasonable because "pursuant to § 5327, the parties are not balanced evenly and, mindful of Father's adequate parenting capabilities … the certified record does not establish that Grandparents adduced clear and convincing evidence to rebut the statutory presumption and tip the scales in their favor[]").

negative influences until [she is] older and mature enough to resist [] negative influences." ***Id.*** at 10. Mother further supports her argument by noting the following.

> [Mother] home schooled [C.G.R.] up until 6th grade, when she was ordered to enroll [C.G.R.] into public school by Judge Kelley after a custody hearing. Before that time, Mother had always complied with Pennsylvania law concerning home schooling. [C.G.R.] was socialized by being heavily involved in church youth group, choir, activities with her five siblings and neighborhood children, and regular involvement in field trips.

Id.

Relying on ***Staub v. Staub***, 960 A.2d 848 (Pa. Super. 2008), Mother argues "she has the fundamental right[] to direct the education of her daughter and the free exercise of religion." Mother's Brief at 10-11. Specifically, Mother notes that the ***Staub*** Court "involved a custody dispute wherein one of the issues was whether the continuation of home education was in the best interest of the children[,]" and that "[t]he [***Staub***] Court upheld that home schooling is one of four education options in the Commonwealth of Pennsylvania and permitted mother to continue home schooling her children." ***Id.*** at 10.

It is important to note, while the ***Staub*** Court held that home schooling was appropriate, it did so because the particular facts of the case, demonstrated that home schooling was in the **best interest** of the children. ***Staub***, ***supra*** at 849. In ***Staub***, the father asked this Court "to adopt a

clear but narrow rule that requires children to attend public schools when parents who share legal custody cannot agree on home schooling versus public schooling." ***Id.*** This Court declined to adopt such a bright line rule, but rather held that "the well-established best interests standard, applied on a case by case basis, governs a court's decision regarding public schooling versus home schooling." ***Id.***

Instantly, in its Rule 1925(a) opinion, the trial court addressed the best interests of the child standard, noting the following.

> Despite [Mother's] argument that she is the parent with sole legal custody of [C.G.R.] with the purported authority to make all major decisions for the child, a court is permitted to supersede a parent's educational choices for the child in certain situations.
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> According to the Pennsylvania Rules of Juvenile Procedure,
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> > At any proceeding or upon motion, the court shall appoint an educational decision maker for the child if it determines that: (1) the child has no guardian; or (2) the court, after notice to the guardian and an opportunity to be heard, has made a determination that it is in the child's best interest to limit the guardian's right to make decisions regarding the child's education.
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> Pa.R.J.C.P. Rule No. 1147. **Because, in this case, there is a parent and/or guardian who is "competent, willing, and available to make decisions regarding the child's education and who is acting in the child's best interest regarding all educational matters for the child," the court was not authorized to appoint an educational decision maker.** Pa.R.J.C.P. Rule No.

> 1147, Comment; See Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* (2004). However, "[a] court should limit the authority of a parent to make decisions regarding the education only to the extent necessary to protect the child's interest…" Pa.R.J.C.P. Rule No. 1147, Comment. Here, per the Order of August 28, 2012, [Mother's] right to make decisions regarding [C.G.R.]'s education had appropriately been limited so that the best interests of the child were being effectuated.

Trial Court Opinion, 10/26/12, at 4-5 (emphasis added).

Preliminarily we note, Rule 1147 does not apply to custody matters, but rather, applies in dependency cases. ***See*** Pa.R.J.C.P. 1100 (stating, "[t]hese rules shall govern dependency proceedings in all courts. Unless otherwise specifically provided, these rules shall not apply to orphans' court, domestic relations and delinquency proceedings[]"). As a result, the trial court was without authority to appoint an educational decision maker pursuant to Rule 1147.

Nevertheless, the trial court's flawed reasoning for concluding that it could not apply Rule 1147 is beneficial to our inquiry. Citing a comment to Rule 1147, the trial court notes Mother is competent, willing, and able to make the decisions regarding C.G.R.'s education, and appears to concede that Mother is "acting in the child's best interest regarding all educational matters for the child[.]" ***Id.*** Upon review, we further conclude that to the extent the trial court conducted a best interests analysis, the evidence fails to show public schooling is in C.G.R.'s best interests. Absent clear and

convincing evidence to the contrary, the trial court cannot usurp Mother's authority to make such decisions for her child.

At the August 28, 2012 hearing, Attorney Roberts argued that homeschooling was not in C.G.R.'s best interest because C.G.R. had apparently been testing below her ability when she began public school, and she needed socialization. N.T., 8/28/12, at 4-5. In support of her averment, Attorney Robertson had C.G.R.'s public school transcript admitted into evidence. ***Id.*** at 5. However, Attorney Roberts did not admit a comparative transcript from home schooling, or any evidence to establish that home schooling was not meeting C.G.R.'s educational needs or otherwise was not in her best interest. Also, Attorney Roberts noted that during C.G.R.'s one year in public school C.G.R. began cutting herself. ***Id.*** at 5-6.

In response, Mother testified that the homeschooling program is in connection with the public school, that C.G.R. would be issued a report card, and that the program was appropriate to prepare her daughter for college. ***Id.*** at 6. Additionally, as to socialization, Mother stated C.G.R. was involved in soccer, youth group, home economics, choir, and cake decorating classes. ***Id.*** Mother went on to express her concerns about the friends C.G.R. had made in public school, as well as C.G.R.'s issues with cutting herself. ***Id.*** at 10. Mother stated that C.G.R. became very rebellious during her time in public school, and offered the following three examples. ***Id.*** at 15. First,

C.G.R. is supposed to wear skirts to school but snuck in pants to change into. Second, C.G.R. hid an iPod from her Mother that someone had bought her containing music of which Mother disapproved. Third, C.G.R. threw a birthday party for herself and her friends at a rolling skating rink. ***Id.*** at 15-16. Mother argued that C.G.R. was 12 at the time of the hearing, living in Mother's house, and subject to her authority. ***Id.*** at 16-17. In response, the trial court stated, "[r]ight, but here's the thing. She's in your house and she's under your authority, but perhaps she feels that your authority isn't just." ***Id.*** at 17. While this may be true, the uncontested evidence of C.G.R.'s disobedience to parental authority while at public school does not support a best interest analysis for ordering C.G.R. to be enrolled in public school against Mother's wishes. Additionally, while a child's preference shall be taken into account, "[t]he weight to be accorded to a child's preference varies with the age, maturity and intelligence of that child, together with the reasons given for the preference." ***See B.C.S. v. J.A.S.*** 994 A.2d 600, 604 (Pa. Super. 2010); ***see also*** 23 Pa.C.S.A. § 5303 (stating, "[i]n making an order for custody or partial custody, the court shall consider the preference of the child as well as any other factor which legitimately impacts the child's physical, intellectual and emotional well-being[]").

At the hearing, the trial court conducted an *in camera* interview of C.G.R. to determine what her wishes were. N.T., 8/28/12 at 27. C.G.R. initially expressed a desire to be home schooled. ***Id.*** In response to

questions about cutting herself, C.G.R. indicated she did it "because my friends were doing it and it doesn't really hurt." ***Id.*** at 29-30. Specifically, C.G.R. mentioned that she had made mostly "gothic" friends. ***Id.*** at 30. When asked by the trial court to state a preference without considering her parents' wishes, C.G.R. did state that she "liked going to public school." ***Id.*** at 34. The following discussion took place between the trial court and C.G.R., which the trial court weighs heavily in support of sending C.G.R. to public school.

> [Q.] [Mother] could not say anything or do anything to you which showed you that she was unhappy with your decision.
>
> [A.] Then I would go to public school.
>
> [Q.] Do you think that would make you happiest?
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> [A.] Possibly. I mean, because when I go – I like public school, but I just – I don't do anything but go to school and I know I have friends in public school, but I don't see them at all.

Id. at 34.

However, the remainder of C.G.R.'s testimony confirmed that she had been cutting herself, and had committed the three rebellious acts noted above. ***Id.*** at 35. C.G.R. expressed an understanding of why Mother was concerned about sending her to public school again, and admitted that cutting herself is a temptation at school. ***Id.*** at 36. Nevertheless, after hearing C.G.R.'s testimony, the trial court made the following determination.

> I certainly don't want to dictate to the parties as to how to appropriately raise the child; however, it's [C.G.R.]'s desire, and the [trial court] believes it's in [C.G.R.]'s best interest, to be in the public school system.
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> [C.G.R.] expressed to me *in camera* that essentially [C.G.R.]'s recent desire to be enrolled in cyber school in [M]other's home was due to the fact that she was advised that [F]ather had no legal rights with regard to her and that she thought that was the path of least resistance in order to make [M]other happy and because [M]other had so clearly expressed a desire not to have [C.G.R.] in the public school system. That will be my order.

Id. at 45.

After thorough review, we conclude that the evidence presented at the hearing fails to establish that C.G.R.'s best interests are served by mandating she attend public school, contrary to the wishes of Mother, the parent with sole physical and legal custody. Specifically, we note the lack of evidence pertaining to the academic appropriateness of C.G.R.'s home schooling, the uncontested evidence of C.G.R.'s rebellious conduct and harmful actions to herself while in public school, and the testimony of the parent with sole legal and physical custody stating her wish to educate her child through home schooling. Despite the fact C.G.R. may desire to attend public school, the facts of record do not suffice to show that public schooling is in C.G.R.'s best interest. Thus, we cannot agree with the trial court's conclusions that home schooling, per Mother's wishes, is not in C.G.R.'s best interest. ***See Fox v. Garzilli***, 875 A.2d 1104, 1110 (Pa. Super. 2005)

(citations omitted) (holding "[w]here the trial court's conclusions are unreasonable as shown by the evidence of record, the court has committed an abuse of discretion[]").

Based on the foregoing, we conclude the trial court abused its discretion in ordering C.G.R. attend public school. Accordingly, we vacate the trial court's August 28, 2012 order, and remand for further proceedings consistent with this memorandum.

Order vacated. Case remanded. Jurisdiction relinquished.

Judge Strassburger files a Concurring Memorandum.