

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

J.A.K.

Appellee

v.

D.M.K.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 316 EDA 2013

Appeal from the Order Entered December 21, 2012
In the Court of Common Pleas of Carbon County
Domestic Relations at No(s): 11-0985 In Custody

BEFORE: GANTMAN, J., ALLEN, J., and PLATT, J.*

MEMORANDUM BY GANTMAN, J.:

FILED AUGUST 23, 2013

Appellant, D.M.K. ("Mother"), appeals from the order entered in the Carbon County Court of Common Pleas, which awarded shared legal and physical custody of the minor child, J.T.K. ("Child"), to Mother and Appellee, J.A.K. ("Father"). We affirm in part but vacate that portion of the order appointing a parenting coordinator.

The relevant facts and procedural history of this appeal are as follows.

Father initiated this action by filing a complaint for custody of Child on May 2, 2011. At the time of the filing of that complaint, and pursuant to a Temporary Protection from Abuse Order entered by [the trial court] on April 18, 2011, Father had already been evicted from the parties' marital residence...in Jim Thorpe, Pennsylvania, and prohibited from having any contact with Mother, Child, or Mother's minor daughter from a previous relationship, [M.K.], except for periods of supervised visitation with Child arranged through Carbon County Children and Youth

*Retired Senior Judge assigned to the Superior Court.

Services [("CYS")]. The basis for the Temporary Protection from Abuse Order was Mother's allegation that Father had sexually assaulted M.K., who was seven (7) years old on the date that the allegations were made. Those allegations were also the basis for a criminal investigation which was pending at the time Father filed the aforesaid custody complaint. A criminal complaint was eventually filed against Father stemming from that investigation, pursuant to which he was charged with Indecent Assault of a Person Less Than Thirteen Years of Age, Corruption of Minors, Endangering the Welfare of Children, and Aggravated Indecent Assault....

The Protection from Abuse matter never proceeded to a full hearing on Mother's petition for a final order; instead, Mother withdrew the petition on June 16, 2011 after Father's arrest on the criminal charges. The criminal matter likewise did not proceed to trial. On September 5, 2012, [the trial court in the criminal matter] issued an Order...determining that M.K., the alleged victim of the sexual assault, was not competent to testify at trial in connection with those charges, and the final disposition of the matter was an order of dismissal entered December 3, 2012.

Due to the circumstances described above, as of May 2, 2011, when Father filed his complaint for custody, his only contact with Child was in the form of supervised visitation. Such supervision continued to be in place throughout the pendency of the litigation, although the nature of the visitations and the identity of the supervisors changed frequently.

* * *

The trial on Father's complaint for custody commenced on August 1, 2012, and [the court] heard testimony on August 3, September 7, October 10 and November 21, 2012 before the trial concluded.⁴

⁴ On August 3, 2012, prior to commencement of the second day of testimony in the custody hearing, Mother filed a "Motion and Memorandum of Law to Disqualify Judge, Remove Guardian *ad Litem* and

Petition to Transfer Venue.” The gist of Mother’s allegations...was first, that the [trial court] had engaged in inappropriate *ex parte* communications with the Guardian *ad Litem*, [court-appointed custody supervisor] Dr. [Samuel] Dolgopol, and custody supervisors from JusticeWorks, who thereby exerted inappropriate influences upon [the trial court], and that the [c]ourt had exhibited a bias against Mother and her counsel and in favor of Father and his counsel; second, that the Guardian *ad Litem* had been derelict in her duty to investigate and report on circumstances affecting Child’s welfare; and, finally, that due to Mother’s creation of [a] Facebook page alleging unfair treatment at the hands of Carbon County officials, Mother could not receive a fair hearing in Carbon County and justice would only be served by transferring venue...to another jurisdiction. After an evidentiary hearing held on August 3, 2012 on Mother’s motion, and after due consideration of the legal issues raised by those assertions, [the court] denied the motion pursuant to [an] order dated August 10, 2012.

* * *

Dr. Ronald J. Esteve testified as an expert in the field of psychology and as the court-appointed custody evaluator in connection with this litigation. He administered objective psychological evaluations to the parties as well as conducting his own interviews and observing the parties’ interactions with Child. He found that both parties gave responses that suggested defensive attitudes. He indicated that with respect to the objective testing of Mother, he found that her responses to testing prompts indicated such an extremely defensive posture, and such a rigid and dualistic mindset, that the results of the tests were very difficult to interpret reliably. Dr. Esteve used the objective findings primarily to confirm or to refute his own clinical impressions, however, and not as a primary determinant upon which any recommendations were based.

Significantly, Dr. Esteve’s observation of each parent with Child revealed that Child is strongly and securely bonded

to each parent, that he is affectionate and well behaved, and that each parent demonstrates positive parental skills, tolerance and encouragement of Child. Dr. Esteve indicated, however, that he did identify several areas of concern which would need to be addressed by the parents in order to allow Child to thrive. Among these concerns was the publication by Mother of various allegations against Father.... Dr. Esteve recommended that, if the allegations of sexual assault against Father turned out not to be valid, he would recommend that primary custody of Child be granted to Father; he specifically testified that this recommendation turned upon his belief that Father was more likely to encourage Child's positive regard for Mother than Mother for Father, in that Mother was very negative and critical, primarily toward Father but also toward other parties. In furtherance of the objective of achieving a parental relationship between the parties which is less damaging to Child, Dr. Esteve also recommended that the [c]ourt direct the parties to participate in parental coordination. He found that the level of conflict between the parties was extremely high, and did not believe that the parties were capable of finding a way to have reasonable communications with each other without professional guidance.

Turning to Dr. Esteve's recommendations, he indicated that while the investigation of the allegations against Father was ongoing, it was still critical that Father and Child have frequent, regular and predictable contact with each other, albeit in a supervised setting; this was based on a desire to protect both Child from abuse and Father from further allegations which might or might not be meritorious. Of the parents, he believed Father was more likely to provide stability and security for Child, because he is more capable of engendering a positive regard for the other parent. Dr. Esteve was disturbed by many of the statements and actions of Mother in apparent efforts to turn Child against Father. While he acknowledged an "important and positive" relationship between Child and M.K., Dr. Esteve nevertheless recommended that primary custody be given to Father if the allegations against him were determined to be without cause. This recommendation was made with the understanding that consistent contact should be maintained between the

siblings. It was Dr. Esteve's opinion that both Mother and Father would maintain a loving relationship with and provide for the regular and special needs of Child. Regardless of which parent was ultimately awarded primary custody of Child, he emphasized a need for consistent, frequent and predictable contact with the non-custodial parent.

* * *

Following the close of the custody trial, in accordance with [23 Pa.C.S.A. § 5334(b)(6)], the Guardian *ad Litem* filed her report and recommendations on November 26, 2012.... The Guardian's Report indicated as follows: Child loves and is bonded with each of his parents, and he transitions easily between the two without any outward signs of having been harmed by the acrimonious litigation surrounding his custodial situation. The Guardian adopted Dr. Esteve's opinion that each parent is capable of performing parental duties, maintaining a loving and stable relationship with Child, attending to Child's needs, and caring for or making appropriate arrangements for Child's care. Each parent was dedicated to providing continuity and stability for Child and had extended family available to provide additional care and bonding. Thus, the best interests of Child would be best served by having each parent maintain a significant role in his life.

The Guardian acknowledged the parents' significant conflict and inability to cooperate and communicate with each other, and joined Dr. Esteve in recommending that a parenting coordinator be appointed in order to facilitate an improvement in those areas and to enable the resolution of conflicts. The Guardian's ultimate recommendation was for joint custody of Child, alternating on a weekly basis.

On December 3, 2012, [the trial court in the criminal matter against Father] entered the...order of dismissal with respect to the criminal charges against Father. Thereafter, [the court in the custody proceeding] entered a Final Custody Order [on December 21, 2012], directing that the parents would have joint legal custody and that physical custody of Child would be shared by the parents on an

equal basis, alternating weekly, and that Louise Walsh-Sander was appointed as parenting coordinator.

(Trial Court Opinion, filed February 28, 2013, at 2-4, 22, 25-28, 31-32)

(internal citations to the record omitted).

Mother timely filed a notice of appeal on Monday, January 21, 2013.

The notice of appeal included a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i).

Mother raises five issues for our review:

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DECIDING THAT SHARED CUSTODY IS IN THE BEST INTEREST OF THE MINOR CHILD DESPITE AN INDICATED REPORT OF ABUSE AGAINST FATHER FOR SEXUAL ABUSE OF HIS STEPDAUGHTER BY [CYS]?

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DECIDING THAT SHARED CUSTODY WAS IN THE BEST INTEREST OF THE MINOR CHILD IN CONTRAVENTION OF ITS FINDING THAT THE CHILD HAS A STRONG RELATIONSHIP WITH HIS HALF-SISTERS, PENNSYLVANIA'S STRONG PUBLIC POLICY THAT SIBLINGS SHOULD BE RAISED TOGETHER ABSENT COMPELLING REASONS, AND MOTHER'S ROLE AS THE PRIMARY CARETAKER THROUGHOUT THE CHILD'S LIFE?

WHETHER THE TRIAL COURT COMMITTED AN ERROR OF LAW WHEN IT ORDERED THE PARENTS TO PARTICIPATE IN COUNSELING NOTWITHSTANDING THE CUSTODY LAW'S CLEAR PROHIBITION AGAINST JOINT COUNSELING IN INSTANCES OF ABUSE AND FATHER ABUSED BOTH MOTHER AND HIS STEPDAUGHTER?

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT ENTERED AN ORDER THAT GRANTED THE PARENTING COORDINATOR BROAD POWERS THAT EXTEND BEYOND ANCILLARY DECISION-MAKING, ASSIGNED THE PARENTING COUNSELOR A DUAL ROLE OF THERAPIST AND NEUTRAL ARBITER, AND FAILED TO

SPECIFY *DE NOVO* REVIEW OF THE PARENTING COORDINATOR'S DECISIONS?

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT PRECLUDED THE TESTIMONY OF [A WITNESS] DURING THE CUSTODY PROCEEDINGS EVEN [THOUGH] HER PRIOR TESTIMONY PERTAINED TO A HEARING ON A MOTION TO TRANSFER VENUE?

(Mother's Brief at 4-5).

Our scope and standard of review of a custody order are as follows:

[T]he appellate court is not bound by the deductions or inferences made by the trial court from its findings of fact, nor must the reviewing court accept a finding that has no competent evidence to support it.... However, this broad scope of review does not vest in the reviewing court the duty or the privilege of making its own independent determination.... Thus, an appellate court is empowered to determine whether the trial court's incontrovertible factual findings support its factual conclusions, but it may not interfere with those conclusions unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion.

R.M.G., Jr. v. F.M.G., 986 A.2d 1234, 1237 (Pa.Super. 2009) (quoting

Bovard v. Baker, 775 A.2d 835, 838 (Pa.Super. 2001)). Moreover,

[T]he paramount concern in a child custody case is the best interests of the child, based on a consideration of all factors that legitimately affect the child's physical, intellectual, moral and spiritual wellbeing.

[O]n issues of credibility and weight of the evidence, we defer to the findings of the trial [court] who has had the opportunity to observe the proceedings and demeanor of the witnesses.

The parties cannot dictate the amount of weight the trial court places on evidence. Rather, the paramount concern of the trial court is the best interest of the child. Appellate

interference is unwarranted if the trial court's consideration of the best interest of the child was careful and thorough, and we are unable to find any abuse of discretion.

R.M.G., Jr., *supra* at 1237 (internal citations omitted). The test is whether the evidence of record supports the trial court's conclusions. **Ketterer v. Seifert**, 902 A.2d 533, 539 (Pa.Super. 2006).

In her first issue, Mother asserts that CYS filed an indicated report of child abuse, alleging Father had sexually assaulted M.K. Mother contends an indicated report occurs only after CYS finds substantial evidence of abuse. Mother acknowledges the custody court considered the sexual abuse allegations, and the criminal court ultimately dismissed the sexual abuse charges against Father. Mother insists, however, the custody court did not properly weigh the abuse allegations. Mother emphasizes the criminal court dismissed the criminal charges only after M.K. refused to speak about the alleged abuse. Mother avers M.K.'s refusal to speak is distinguishable from situations where a minor victim does not remember the abuse or recants. Under these circumstances, Mother argues the custody court should have placed greater weight on the indicated report of sexual abuse, because it relates to Child's safety.

In her second issue, Mother claims the court did not properly weigh additional factors relevant to the custody determination. Specifically, Mother submits she is the primary custodian of Child's half-sibling, and shared physical custody undermines the importance of Child's relationship with his

half-sibling. Further, Mother alleges the court did not consider her role as Child's primary caretaker since birth.¹ Mother maintains she has provided continuity and stability for Child, and shared custody will cause unnecessary upheaval in Child's life. Based upon the foregoing, Mother concludes this Court must vacate the custody order and remand for the entry of an order awarding primary physical custody to Mother. We disagree.

The new Child Custody Act, codified at Section 5328 on November 23, 2010 (effective January 24, 2011) 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.

¹ Citing ***M.J.M. v. M.L.G.***, 63 A.3d 331 (Pa.Super. 2013), *appeal denied*, ___ Pa. ___, 68 A.3d 909 (2013), Mother concedes that the Child Custody Act does not list "primary caretaker" as a specific factor requiring additional weight. Rather, a trial court will consider a parent's status as a primary caretaker implicitly as it considers the factors enumerated in Section 5328(a) of the Child Custody Act. ***Id.***

- (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). When deciding a petition to modify custody under the new Child Custody Act, the court should conduct a thorough analysis of the best interests of the child based on all of the Section 5328(a) factors. ***E.D. v. M.P.***, 33 A.3d 73 (Pa.Super. 2011). ***See also J.R.M. v. J.E.A.***, 33 A.3d 647 (Pa.Super. 2011) (stating court must address relevant factors and conduct case-by-case analysis of what is in child's best interests).

"In determining whether to award shared legal custody, the trial court must consider the following factors: (1) whether both parents are fit, capable of making reasonable child rearing decisions, and willing and able to provide love and care for their children; (2) whether both parents evidence a continuing desire for active involvement in the child's life; (3) whether the child recognizes both parents as a source of security and love; and (4) whether a minimal degree of cooperation between the parents is possible." ***Yates v. Yates***, 963 A.2d 535, 542 (Pa.Super. 2008).

Additionally, "The policy of this Commonwealth is that, where possible, siblings should be raised together absent 'compelling reasons' to do otherwise." ***L.F.F. v. P.R.F.***, 828 A.2d 1148, 1152 (Pa.Super. 2003). "However, this policy is a consideration in, rather than a determinant of, custody arrangements." ***Id.***

Instantly, the trial court awarded shared legal and physical custody of Child to Mother and Father. In support of its finding, the court relied upon the recommendations from Dr. Esteve and the guardian *ad litem*, who

“found that both Mother and Father were quite capable of tending to Child’s needs and had the strong desire to do so, and that Child was securely attached to each parent.” (**See** Trial Court Opinion at 34.) The court also addressed the indicated report of sexual abuse as follows:

A determination about the factual basis for, or the merits of, the allegations of sexual abuse was not [within] the purview of [the trial court] in this custody proceeding. In weighing the import of the [CYS] finding as it bore on the continuing risk of harm posed by Father, we were called upon to balance the finding against the fact that [the court in the criminal matter] subsequently declared M.K. incompetent to testify as to the events which were the subject of the investigation of Father, and that the criminal charges were ultimately dismissed. In addition, the record reflects that the “Indicated” finding was not a final determination and was subject to an appeal, the result of which is not in evidence. Finally, the fact that Child himself was not the alleged victim of the abuse was unquestionably of relevance.

The allegations against Father were clearly of a serious nature. As a result, and because a criminal proceeding arising from those allegations was ongoing, we gave the issue of the alleged abuse great weight in fashioning each of the numerous orders which have governed the custody of Child during the pendency of this litigation. As a direct result of the issue, during each of the permutations of the custodial arrangement which allowed Father to see Child at various times and in various locations, Father’s visitation with Child was subject to supervision.

* * *

During this extended period of supervision, Father’s interaction with Child was noted as being entirely positive by several neutral parties appointed by [the trial court] to protect the best interests of Child, none of whom expressed any concern that Father’s behavior indicated a risk of harm. Dr. Esteve, who was appointed by the [c]ourt for the specific purpose of conducting an in-depth

evaluation of the parties to make a recommendation in furtherance of Child's best interests, offered the opinion that if the allegations against Father were not valid, Father should have primary custody of Child.

The issue of alleged abuse by Father of M.K. was not and could not be dispositive of our decision in fashioning an order which was in the best interests of Child. Instead, we were required to consider all the evidence which was presented regarding that issue and afford it appropriate weight. After consideration of that evidence, we submit that we did not commit any error in finding that there is no risk of harm so great as to preclude Father's shared physical custody of Child.

(*Id.* at 38-40.)

Regarding Child's relationship with his half-sibling and Mother's role as the primary caretaker, the court stated:

Without question, the record reflects that Child is strongly bonded to both M.K. and to Ms. Wojtynski,^[2] and that his relationships with them are of the importance and strength we normally associate with sibling relationships. These relationships should be fostered and encouraged, and we were bound to consider them as relevant factors to our overall custody determination. The law of this Commonwealth, however, does not require...privileging those relationships to the detriment of Child's relationship with his natural father.

Physical custody of Child which is shared equally by Mother and Father will not require that Child should lose his sibling relationships, nor that they should suffer for it. It is in the best interest of Child that he be given every opportunity to preserve and strengthen his relationships with his father and with his siblings, and not one at the expense of the other.

² Ms. Wojtynski is Mother's stepdaughter from a prior marriage.

Similarly, [the court] neither neglected nor minimized Mother's critical role as caretaker for Child by directing that Child should have a substantial amount of time with Father. The parental duties performed by each party on behalf of the child was another factor which [the court considered] in fashioning [the] Final Order.... As [the court] noted in that Order, however, it was the opinion of both Dr. Esteve and the Guardian *ad Litem* that both parents promoted the best interests of Child by their performance of parental duties. We acknowledge the responsibilities Mother has assumed in caring for Child and the positive effects her efforts in that regard have had on his development. However, [the court submits] that there is no contradiction, and it was not an abuse of...discretion to find, after consideration of those efforts and all other relevant factors pursuant to Section 5328, that shared custody was in the best interests of Child because both parents will have critical and beneficial roles in childrearing in the future.

(*Id.* at 35-37) (internal citations omitted).

Contrary to Mother's assertions, the record demonstrates that the court considered all relevant factors in making its custody determination. The court gave appropriate weight to the indicated report of sexual abuse, Child's relationship with his half-sibling, and Mother's role as the primary caretaker. The case primarily turned on the court's determination that both parents are fit, capable of making reasonable child-rearing decisions, and willing and able to provide love and care for Child. **See Yates, supra.** We see no reason to disturb the court's decision on these grounds. **See R.M.G., Jr., supra.** Thus, Mother's first and second issues merit no relief.

In her third issue, Mother contends the Child Custody Act forbids a court from ordering joint counseling in situations involving abuse. Mother

asserts the definition of “abuse” includes physically or sexually abusing a minor child, as well as knowingly engaging in a course of conduct which places another in reasonable fear of bodily injury. Mother claims Father’s behavior satisfies the statutory definition of abuse. Mother reiterates that CYS filed an indicated report of child abuse against Father, which sufficiently demonstrated Father’s abuse of M.K. Mother also relies on her own testimony to establish that Father stalked her and she now fears for her safety. In light of Father’s abusive behavior, Mother concludes the court should not have ordered joint counseling. We disagree.

The Child Custody Act addresses counseling as follows:

§ 5333. Counseling as part of order

(a) Attendance.—The court may, as part of a custody order, require the parties to attend counseling sessions.

(b) Abuse.—In situations involving abuse, the court may order individual counseling for the abuser but may not order the parties to attend joint counseling.

23 Pa.C.S.A. § 5333(a)-(b). The Child Custody Act utilizes the definition of “abuse” set forth in the Protection from Abuse Act. 23 Pa.C.S.A. § 5322. In the Protection from Abuse Act, “abuse” is defined as follows:

§ 6102. Definitions

(a) General rule.—The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Abuse." The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

* * *

(4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).

(5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

23 Pa.C.S.A. § 6102(a)(4)-(5).

Instantly, Mother provided testimony throughout the proceedings to support her assertions of Father's abusive behavior. The court, however, characterized Mother's evidence as "tending to demonstrate that the parties had an argumentative and unhappy relationship...." (**See** Trial Court Opinion at 42.) Likewise, the court considered the evidence of Father's alleged sexual abuse of M.K. Nevertheless, the court maintained that Father posed no threat to Child. (**Id.** at 43). Therefore, the court found that Father's actions did not constitute abuse under Section 6102. We see no abuse of discretion in the court's analysis of the evidence. **See R.M.G., Jr., supra.** The court did not credit Mother's testimony, and we decline to disturb the

court's credibility determinations. ***Id.*** Consequently, Mother is not entitled to relief on her third issue.

In her fourth issue, Mother contends the court should not have appointed a parenting coordinator, because the parties' case involved allegations of domestic violence. Moreover, Mother submits the court failed to limit authority of the parenting coordinator. Mother claims the court's appointment order is overbroad, because it enables the parenting coordinator to discuss and resolve any matter involving "parenting" or "custody issues." Mother also complains that the appointment order did not provide for *de novo* review of the parenting coordinator's decisions. Mother concludes the court erred in appointing a parenting coordinator.

As a prefatory matter, Pennsylvania Rule of Civil Procedure 1915.11-1 (effective May 23, 2013) eliminated a trial court's authority to appoint a parenting coordinator:

Rule 1915.11-1. Elimination of Parenting Coordination

Only judges may make decisions in child custody cases. Masters and hearing officers may make recommendations to the court. Courts shall not appoint any other individual to make decisions or recommendations or alter a custody order in child custody cases. **Any order appointing a parenting coordinator shall be deemed vacated on the date this rule becomes effective.** Local rules and administrative orders authorizing the appointment of parenting coordinators also shall be deemed vacated on the date this rule becomes effective.

Pa.R.C.P. 1915.11-1 (emphasis added).

Instantly, the custody order included a provision appointing a parenting coordinator. (**See** Order, entered 12/21/12, at 8.) Rule 1915.11-1 mandates vacating any order appointing a parenting coordinator, as of May 23, 2013, the effective date of the rule. **See id.** Therefore, we must vacate the portion of the court's custody order appointing a parenting coordinator.

In her fifth issue, Mother asserts the court precluded Ms. Wojtynski from providing relevant testimony on October 10, 2012. Mother acknowledges that Ms. Wojtynski initially testified on August 3, 2012. Nevertheless, Mother insists Ms. Wojtynski's August 2012 testimony related to Mother's outstanding motions to transfer venue and disqualify the judge. Mother maintains she recalled Ms. Wojtynski in October 2012 to provide details about Father's fitness as a parent. Mother complains the court prohibited the testimony, erroneously concluding that Ms. Wojtynski had previously testified about such details. Mother claims the court's ruling is an example of the court's bias against Mother. Mother concludes the court abused its discretion by improperly limiting Ms. Wojtynski's testimony. We disagree.

"The admission or exclusion of evidence...is within the sound discretion of the trial court." **In re K.C.F.**, 928 A.2d 1046, 1050 (Pa.Super. 2007), *appeal denied*, 594 Pa. 705, 936 A.2d 41 (2007) (quoting **McClain v. Welker**, 761 A.2d 155, 156 (Pa.Super. 2000)). "An abuse of discretion is

not merely an error of judgment; if, in reaching a conclusion, the court overrides or misapplies the law, or the judgment exercised is shown by the record to be either manifestly unreasonable or the product of partiality, prejudice, bias or ill will, discretion has been abused.” **A.J.B. v. M.P.B.**, 945 A.2d 744, 749 (Pa.Super. 2008) (quoting **Bulgarelli v. Bulgarelli**, 934 A.2d 107, 111 (Pa.Super. 2007)).

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Pa.R.E. 401. Pennsylvania Rule of Evidence 403 limits the admission of relevant evidence as follows:

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Pa.R.E. 403.

Instantly, Mother initially called Ms. Wojtynski as a witness on August 3, 2012. At that time, Mother sought to introduce testimony concerning purportedly improper conversations between Father and the court-appointed custody supervisor, Dr. Dolgopol, which occurred in front of Child. Specifically, Ms. Wojtynski testified that she transported Child to Father’s supervised visits at Dr. Dolgopol’s office. On one occasion, Ms. Wojtynski

overheard a conversation between Father and Dr. Dolgopol, which she described as follows:

[WITNESS]: Um, I actually had heard that—Dr. Dolgopol and [Father] speaking of matters not concerning the visitation taking place and of court matters.

[MOTHER'S COUNSEL]: Was [Child] present when this was happening?

[WITNESS]: Yes, it was during the visitation hours.

[MOTHER'S COUNSEL]: At any point did Dr. Dolgopol reference [the trial judge]?

[WITNESS]: Yes, he had.

[MOTHER'S COUNSEL]: And what did he say?

[WITNESS]: He had mentioned about just concerning about court, about him...asking if Dr. Dolgopol could be present at the court and that was all I remembered from what he had asked.

[MOTHER'S COUNSEL]: Did [Father] ask Dr. Dolgopol to do anything on his behalf to the best of what you can recall without your notes?^[3]

* * *

[WITNESS]: He was talking to Dr. Dolgopol about if he could—if Dr. Dolgopol could listen in on the phone calls, the visitation phone calls that [Child] gets with his father.

³ Earlier on direct examination, Ms. Wojtynski testified that she kept written notes of her observations during the supervised visits, but she failed to bring them to court on August 3, 2012.

(**See** N.T. Trial, 8/3/12, at 130-31.) Shortly thereafter, counsel concluded her direct examination, because Ms. Wojtynski could not recollect any additional details of the conversation.

Mother recalled Ms. Wojtynski on October 10, 2012, at which time Ms. Wojtynski detailed the history of her relationship with Mother and her role as a caretaker for Child. Mother's counsel also attempted to revisit the topic of Father's conversation with Dr. Dolgopol during the supervised visit. Father's counsel immediately objected, claiming Ms. Wojtynski had already testified about the issue. Mother's counsel responded that Ms. Wojtynski did "not entirely" cover the topic, because she "didn't have her notes...." (**See** N.T. Trial, 10/10/12, at 128.) The court, however, ordered counsel to move on to her next question.

Subsequently, Mother's counsel continued to ask about Father's conversation with Dr. Dolgopol. Father's counsel objected, and the court decided to receive argument on the matter from the parties and the guardian *ad litem*. Ultimately, the court sustained the objections to the questions regarding Father's conversation with Dr. Dolgopol. Nevertheless, the court permitted counsel to proceed with a separate line of questioning regarding whether Ms. Wojtynski had heard Father making disparaging comments about Mother. (**Id.** at 135).

When viewed in context, the court's evidentiary rulings did not preclude Ms. Wojtynski from providing testimony about the relevant custody

factors. To the extent Mother wanted to elicit evidence of Father's allegedly inappropriate discussions with Dr. Dolgopol, Ms. Wojtynski's August 3, 2012 testimony already achieved this purpose. When Mother attempted to revisit this topic, the court properly sustained Father's objections to the testimony as cumulative. **See** Pa.R.E. 403. On this record, the court did not abuse its discretion. **See A.J.B., supra; In re K.C.F., supra.** Moreover, our review of the court's evidentiary rulings revealed no pattern of bias against Mother.

Based upon the foregoing, we vacate the court's custody order to the extent that it appointed a parenting coordinator. **See** Pa.R.C.P. 1915.11-1. In all other respects, we affirm the order awarding shared legal and physical custody of Child to Mother and Father.

Order affirmed in part, vacated in part.

Judgment Entered.

A handwritten signature in dark ink, appearing to read "Karen Gambetti", written over a horizontal line.

Prothonotary

Date: 8/23/2013