

Pennsylvania Superior Court

Custody

Custody Modification: 5328(a) Factor Analysis

C.M. v. M.M., 2019 PA Super 216 (File July 12, 2019)

This case concerns mother's request for a custody modification. After previous litigation that awarded mother primary physical custody, father supervised partial custody, and the parties shared legal custody Mother filed a modification requesting sole legal custody due to Father's inconsistency in exercising his periods of custody, and that he had brought "several partners" around the child. The trial court refused this request and kept legal custody shared, expand Father's partial custody time and non-custodial contact with the child. Mother appealed pro se stating that the trial court abused its discretion in failing to consider Section 5328(a) best-interest factors. The Superior Court agreed with Mother's assertion stating, "This Court has held that, even in cases where the trial court merely reaffirms its prior custody order, it is nevertheless making a ruling on a request to change the form of physical custody; therefore, the trial court is bound to decide whether the order remains in the Child's best interests and it is obligated to consider the factors set forth in Section 5328(a). Here because the custody order was modified to both change and increase Father's custodial time, the trial court did not offer any explanation as to how Father's partial physical custody award was in the child's best interests, and reiterated that the trial court was obligated to go through the 5328(a) factors in making its decision.

Grandparent Standing

M.S. v. J.D., Appeal of: E.A.S., Intervenor, 2019 PA Super 215 (Filed July 12, 2019)

This case concerns maternal grandmother's petition to intervene in a custody matter involving her grandchild. Child's parents were never married, and maternal grandmother had been actively involved in the child's life. Father filed a custody action, and at that time grandmother filed a petition to intervene and it was denied. The custody action proceeded with Father first being given partial physical custody, but Father lost his custody rights due to allegations that he had abused the child. Again, grandmother filed a petition to intervene which she withdrew due to an agreement. Grandmother filed a third petition to intervene stating that she has legal standing to seek custody. She contended that the trial court erred in not considering the child's best interest when evaluating standing. Furthermore, she argued that it was incumbent on the trial court to consider the presumption that the parents were fit and acting in the child's best interests when they decided that they did not want grandmother to have custody. The Superior Court agreed with the trial court in stating that it had properly limited its standing analysis to the statutory elements under section 5325(2)(ii) and that, had it delved into the best interests of the Child and the fitness of the parents, it would have contravened the established bifurcation process inherent in parent-grandparent custody issues under the statute. Also, the

court stated that had the legislature intended the trial court to consider the best interests of the child and/or whether parents are presumptively "fit" as part of its grandparent standing analysis, it could have included the wording to suggest such in the statute.

Child Welfare

Authority to Require Home Inspections and Drug Testing

In the Interest of D.R., A Minor, Appeal of D.R. and J.R., 2019 PA Super 230 (Filed July 26, 2019)

This case concerns an appeal arising from D.R. and J.R.'s (Parents) refusal to submit to both a drug screening and a home inspection by Fayette County Children and Youth Services (Fayette CYS.) Parents were under investigation by Fayette CYS due to allegations that Father was under the influence of drugs and/or alcohol, and that he has abused Mother. Fayette CYS was unable to corroborate these allegations but presented a "motion to compel cooperation with [General Protective Services] assessment" before the Greene County Court of Common Pleas.¹ The parents objected to this motion stating that Fayette CYS should have filed a verified petition. After a hearing on the motion to compel, the court ordered the parents to comply with the home inspection and the drug testing or otherwise face sanctions for noncooperation. Parents appealed this order, and the Superior Court agreed with them. The Superior Court stated that a home inspection and a drug testing trigger the limitations of state and federal search and seizure jurisprudence and therefore probable cause must exist for CYS (the government) to gain access to the residence. Concerning the home inspection, the court looked at the facts of the case and determined that they did not constitute a sufficient foundation for a finding of probable child abuse or neglect under the CPSL. Furthermore, the court held on the drug testing that there is no statutory authority for a CYS agency to petition for a drug test before a dependency adjudication. Finally, the court stated that Fayette CYS should not have initiated this action by a motion to compel but by a verified petition as is required by 55 Pa. Code §3490.73 of the CPSL. The court held that the trial court should not have granted the motion to compel as it was not proper to compel cooperation by the parents.

Criminal Law

Interference with a Custody Order: Defense Due to Belief of Abuse

Commonwealth of Pennsylvania v. H.D., 2019 PA Super 256 (Filed August 21, 2019)

This case concerns a Mother who was convicted of Interfering with the Custody of a Child. Mother withheld custody of the child from Father for forty-seven days upon the belief that he was sexually, verbally, and physically abusing the child. During the trial, the Commonwealth presented evidence that there were thorough and substantial independent investigations into

¹ Father is a local attorney in Greene County. Due to the conflict of interest presented with Greene County CYS investigating Father, the matter was transferred to Fayette County CYS.

the abuse allegations all of which concluded that the reports of abuse were either unfounded or invalid. Before trial, the Commonwealth had presented a motion *in limine* to the trial court, requesting that they add a reasonableness standard to the jury instructions and such standard was subsequently added. Mother filed a Petition for Post-Conviction Collateral Relief following her conviction arguing against this instruction as it was not consistent with the elements of the defense outlined in the statute. The issue, in this case, was whether the Commonwealth was required to prove, beyond a reasonable doubt, that Mother did not subjectively believe she was protecting the safety of the child. The Superior Court analyzed the language of the criminal statute and held it was straightforward, and there was no mention of a *reasonable person* standard. It held that the defense provided in the statute is a purely subjective test: whether the defendant "believed that his action was necessary to preserve the child from danger to its welfare." The Superior Court stated that this is strictly a credibility decision to be made by the jury and the statute does not provide an opportunity for the jury to compare the actions of the defendant with a "reasonable person" under similar circumstances.

Divorce

Motion to Compel Discovery – Sanctions

Thomas P. Farrell Jr. v. Amy Farrell, 2019 PA Super 267 (Filed September 3, 2019)

This case concerns a divorce and whether or not a party's counsel can be personally held in contempt for an order compelling discovery. The parties had filed for divorce, and both were represented by counsel. Two days before the scheduled Divorce Master hearing, the parties were in court regarding Motions to Compel Discovery filed by both attorneys. Specifically, Mrs. Farrell's attorney, Lavita Lerch, Esq. was allowed Mrs. Farrell to provide *pro se* "answers" to the discovery requests that provided inadequate information and also included personal attacks on Mr. Farrell. These responses were served on Mr. Farrell and his counsel. At the hearing, the trial court made its frustration well known and held Attorney Lerch personally in contempt on the Motion to Compel and directed her to pay attorney's fees to Mr. Farrell's attorney. Attorney Lerch filed an appeal of this order contending that she could not be held in contempt because she was not subject to any court order. The Superior Court agreed with the trial court and stated that the trial court acted within its authority to sanction counsel under Rule 4019 for engaging in conduct that required the moving party to file sanctions. The Superior Court stated that this conduct would include permitting Ms. Farrell's discovery responses that Ms. Farrell prepared herself to be served on opposing counsel – responses that did not comply with the trial court's order. Furthermore, the Superior Court stated that Attorney Lerch's decision to serve Mr. Farrell *pro se*, unresponsive discovery responses that attacked Mr. Farrell and refused to provide documents is a basis on which the trial court may sanction counsel. The Superior Court found that Attorney Lerch had not established the trial court abused its decision in sanctioning her and affirmed the trial court's order.

Protection from Abuse

Temporary Custody – Best Interests Analysis

C.H.L. v. W.D.L. 2019 PA Super 210 (Filed July 8, 2019)

This case concerns a Protection from Abuse (PFA) order that provided Husband with exclusive possession of the marital residence and temporary custody of the minor child. The child was not listed as a protected party on the PFA. Husband appealed this PFA order stating that the trial court improperly awarded the Wife exclusive possession because she did not hold title to the residence, and that the trial court erred in awarding temporary custody of the minor child to Wife. In response to the defendant's appeal, the trial court issues a meticulous 42-page Rule 1925(a) opinion detailing the very calculated, complex, web of domestic violence, control and intimidation by Husband against Wife. The Superior Court agreed with the trial court, and it reaffirmed the trial court's order. Concerning exclusive possession, the Superior Court stated that the PFA Act specifically allows the court to grant a plaintiff exclusive possession of the residence even though the defendant is the sole owner of the residence and has a duty to support the plaintiff or minor children living in the residence.² Regarding the award for temporary custody, the Superior Court held that absent guidance from our Legislature or our Supreme Court, it concluded that a PFA court need not conduct a best interests custody analysis to award temporary custody as a form of relief under section 6108 of the PFA Act. The Superior Court looked to the intent of the PFA Act to prevent domestic violence and held that such intent is consistent with trial courts having the authority to enter a PFA order that conflicts with the underlying custody order(s.) The Superior Court reaffirmed that the temporary custody provision in the PFA Act was not designed to impose anything but emergency relief and that when awarding temporary custody out of a PFA order, the court need only consider the risk the defendant poses to the child as well as the plaintiff. Besides, the Superior Court went into a detailed analysis on the effects on children exposed to domestic violence and how the temporary custody relief enshrined within the PFA act is to prevent these types of harms from occurring to petitioners and their children.

² 23 Pa.C.S.A. §6108(a)(3)