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MICHELLE KAISER,	:	**IN THE COURT OF COMMON PLEAS OF**
Plaintiff/Appellant	:	**DAUPHIN COUNTY, PENNSYLVANIA**
	:	
v.	:	**NO. 477 MDA 2017**
	:	
RICHARD L. KAISER, JR.,	:	**TRIAL COURT NO. 2016 CV 3466 CU**
Defendant/Appellee	:	

FILED
2018 APR 11 P 1:15

OPINION

[Pursuant to Pa.R.A.P. 1925(a)]

Presently before this Court is the appeal of Michelle Kaiser (hereinafter "Appellant" or "Mother") from this Court's Memorandum Opinion and Order of February 15, 2017, denying Mother's relocation and entering an interim order for custody pending the resolution of Richard L. Kaiser, Jr.'s (hereinafter "Father" or "Appellee") criminal charges.

This Court believes that our Memorandum Opinion of February 15, 2017, as well as the transcripts and evidence of record, thoroughly explain the reasons for our decision. However, this Court will address some of the issues raised by Appellant in her Statement of Errors Complained of on Appeal.

Appellant filed a notice of appeal on March 17, 2017 – the last possible day in which the notice could be filed and considered timely. Simultaneously, Appellant filed a Statement of Errors Complained of on Appeal (hereinafter "Statement") pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)(2)(i). However, this Court will not classify the Statement as being "concise" as required by the rules as it consists of eleven (11) main issues, ten (10) sub-issues, and spans a total of twelve (12) pages. In addition to the overwhelming length, the Statement is riddled with opinions and characterizations by counsel that are inappropriate, irrelevant, and some completely inaccurate. As much as this Court would like to find that Appellant has waived her issues for her failure to comply with the "concise" requirement, it cannot in good conscious do so because once

1a

stripped of extraneous comments, opinions and extra verbiage, the issues are mostly discernable.[1]

After removing counsel's extraneous comments, opinions, and extra verbiage, this Court has discerned the following issues that we will address:

1. The Court erred by failing to address the custody factors enumerated at 23 Pa.C.S.A. § 5328(a).

2. The Court erred in disregarding the testimony of the agreed-upon expert, Dr. Laurie Pittman.

3. The Court erred by granting Father's request for relocation without considering any of the relocation factors enumerated at 23 Pa.C.S.A. § 5337.

4. The Court erred in awarding Paternal Grandparents visitation rights.

5. The Court erred by depriving Mother of her constitutional right to travel.

See Appellant's Statement of Errors Complained of on Appeal, March 17, 2016, para. 1, 3, 4, 10, and 11.

Appellant's remaining issues are mere dissatisfaction with this Court's decision, and the Court's use of discretion in determining the credibility of witnesses and weight to be afforded to each piece of evidence. Specifically, in Paragraph 8 of her Statement, Appellant complains about ten (10) sentences from the discussion section of our Memorandum Opinion. Appellant fails to set forth how the statements in Paragraph 2, as well as Paragraphs 5-9 constitute an abuse of discretion. It is obvious Appellant is dissatisfied with this Court's conclusions, however, that is not a proper basis for appeal.

[1] *See* Donough v. Lincole Elec. Co., 936 A.2d 52 (Pa. Super. 2007).

DISCUSSION

In reviewing a custody order, the Superior Court's scope is of the broadest type and the standard of review is abuse of discretion.

> We 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, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

J.R.M. v. J.E.A., 33 A.3d 647, 660 (Pa. Super. 2011).

The Court notes that Appellant is correct in that we did not include a discussion of the custody factors at 23 Pa.C.S.A. § 5328(a) in our Memorandum Opinion. However, the reason behind the decision is one of common sense – the Court did not change custody, and the order is intended to be an interim order until Father's criminal charges are resolved.

The circumstances of this case are peculiar, and leave a number of unanswered questions pertinent to a final custody decision. Father currently has criminal charges pending from an incident that occurred on or about March 17, 2016. However, Dauphin County Children and Youth Services ("DCCYS") did not get involved regarding the incident until on or about April 14, 2016. As explained in greater detail in our Memorandum Opinion, the charges are based solely upon Mother's statements to Pennsylvania State Police Trooper Raschard Buie as to her perception and belief as what did or did not occur. The DCCYS investigation was determined unfounded on June 13,

2016. The criminal charges were not brought until about August 4, 2016 based upon the same allegations that were investigated and deemed unfounded by DCCYS.

Due to the DCCYS investigation, a sixty (60) day safety plan was entered providing Father no contact with the minor children. Upon expiration of the safety plan, this Court entered an Order, following a pretrial conference with counsel, which provided Mother with primary custody, and Father with supervised visitation at the YWCA.[2] This Order was entered to protect the children from any possible abuse, ensure the safety of the children, and protect Father from any further allegations pending resolution of the criminal charges. The February 15, 2017 Order did not alter the custody that had been previously entered aside from the location of the supervised visitation – Mother was provided primary custody, and Father supervised visitation at ABC House at least once per week – pending resolution of the criminal charges. Therefore, as there was no change of custody, and it is an interim order, it is not necessary for this Court to address the custody factors at 23 Pa.C.S.A. § 5328(a)(1), and there is no error.[3]

Appellant also alleges that this Court erred in failing to accept as true the opinion of an expert merely because the parties agreed to utilize her services. Apparently Appellant forgets that as the trier of fact, this Court is tasked with determining the credibility of witnesses, even expert witnesses. Just because two parties agree to utilize an expert, does not mean that the court must accept that opinion as true – it is within the

[2] *See* Order of June 13, 2016. The Court notes, however, that supervised visitation did not begin until October 1, 2016. This is more fully discussed in our Memorandum Opinion beginning on page 19 of 23.
[3] This Court notes that Mother was only provided sole legal custody on a temporary basis through the safety plan. Mother's sole legal custody ended upon expiration of the safety plan. At the conclusion of the September 6, 2016 hearing, Mother was granted sole legal and primary physical custody. However, that was not memorialized into a written order.

court's discretion to determine the credibility of that witness. Appellant fails to cite any case law to the contrary.

Although this issue was addressed in our Memorandum Opinion on pages six (6) to nine (9), we will provide additional explanation for our decision. After listening to the testimony and reviewing the evidence presented, this Court found the testimony of Dr. Pittman to be subjectively biased toward Mother. As previously explained, this Court found Dr. Pittman's testimony to be subjective for a number of reasons, such as the fact that she asked Mother to respond to certain allegations that Father or his family reported, and failed to ask Father to respond to any of the allegations Mother or her family reported. Particularly disturbing to this Court is the significance that Dr. Pittman placed on the allegations of hoarding and a show-and-tell incident at M.K.'s school – both of which were reported by Mother – without even bothering to ask Father to respond to those allegations.

Further, this Court's observations of Dr. Pittman's testimony were ratified by Dr. Narayan's testimony. In addition to the portion of Dr. Narayan's testimony cited wherein he challenged the methodology and conclusions of Dr. Pittman's report, he further testified as follows:

> Q: Now, did you agree with her other diagnoses of Richard that she outlined in her report?
>
> A: I did not. She is done [sic] testing and came up with – on the last page of her report, page 48, obsessive compulsive disorder, yes, I agree with that. Hoarding disorder, not yet coded. . . . I don't agree that he has a hoarding disorder based on all the information I have seen. That doesn't mean it's not possible. It just means . . . it hasn't been something that been put on the table for me to identify at this point.
>
> However, social phobia I disagree with. I have seen zero evidence of social phobia. Yes, he was bullied as a kid. Yes, he was anxious as a kid, perhaps based on what people called him. I have not seen any evidence of social phobia.

> He has friends that he has good connections with that are in the report. So even if I knew no knowledge of that, he described that. But when he comes to see me, he is very personable with my office staff. When I'm in the background or not there, he doesn't need me to be there. He approaches them very well. . . .
>
> The diagnosis of fetishism, exhibitionism, frotteurism seemed to come directly out of the possibility in one of the reports that he has an interest in those things. You can't use that to make a diagnosis. I don't see where that's coming from.
>
> And the other thing I would say is that he does have a diagnosis of major depression. He was suicidal when I saw him – admitted him to the hospital in 2002, and that diagnosis is omitted from her description.

(Notes of Testimony, Custody Hearing 9/6/16 (hereinafter "N.T. 9/6/16") at 144-45).

Additionally, Dr. Narayan testified at length regarding his concern that Dr. Pittman did not have a full understanding of OCD, its symptoms and treatment. As a psychiatrist who specializes in OCD, this Court found his testimony to be compelling:

> Q: On page 46, where she talks about her opinions on OCD –
>
> A: Yes. My concern is that . . . Dr. Pittman really . . . doesn't understand all of the symptoms of OCD or understand them significantly as they relate to Richard. The particular sentence she writes is the disconnect between Richard's report of dreaded fear as well as Richard's continuation of the practice – kissing is what the reference is here – makes no sense as Richard reports he would never do anything that would harm any kids. **That's a cornerstone of OCD treatment.** You are going to have that "what if?" What if I could do something to hurt my kids? That's part of the diagnosis. And so, again, he's going to probably imagine me telling him, no, you need to go ahead and do this. His wife insisting that he doesn't do it is only going to serve to – like, the person with the knives and the table. Put your hands up and not touch the knives. It's going to cause him to stay [a]way from the kids longer, and he'll be separated in terms of interacting with his kids. . . . **Of course, he's not going to do anything to hurt his kids, but he has that worry, that illogical worry that comes up**.

The review goes on to state that Richard insists his estranged wife affirm and validate he did nothing wrong when he continued repeated kissing of his children also poses a problem for this evaluator. Not quite sure what is being referenced there in terms of OCD thinking, but my sense is that Richard was probably getting blamed for going through with the kissing even though he was having this worry, which is precisely what the treatment is designed to do. You must continue to go about normal parenting behavior which includes kissing despite the anxiety being there.

Furthermore . . . the evaluator says, quote, "she has yet to learn of all the ways OCD could manifest and why, in particular, Richard's OCD centered on possible sexual impropriety." Well, that's basic. That's Psych 101. It's sexual. It's violence. It's religious. It's scrupulosity. Those are some of the basic ways the disorder presents.

Dr. Pittman makes reference to hoarding as an issue that often results from early childhood trauma. I'm not aware of any childhood trauma. It's never been described by Richard. I'm not sure where that's coming from, but it suggests, again, **she's searching for an underlying cause for the OCD.**

OCD is one of the most genetic psychiatric illnesses there is. There's very good data showing that parts of the brain that control OCD or repetitive thinking change in response to psychotherapy and in response to medication. It actually doesn't matter which one you choose. You can do just therapy; you can do just medication. Either one is fine. That changes the brain. That part of the brain becomes smaller, less overactive, more normal, if you will. And a lot of times there isn't an underlying problem in terms of events that happened. There can be, but it doesn't necessarily mean that's the case. **So those are my concerns . . . about her ability to, kind of, know this illness.**

There's another piece on page 47. I'm guessing it's the second paragraph based on the lack of indentation. "Yet Richard had never had to reconcile why he fears contamination, whether of lead or semen, with the disconnect of, at times, unsanitary result of hoarding." Mouse droppings, black mold is what is goes on to say. **This is not a logical process. You can be deathly fearful of one thing and not**

> **be fearful of another.** The person who's afraid of knives in my office may have no problem, you know, with some other type of obsessional though that the next person might worry about. So the fact that one has a worry in one area and a complete lack of worry in another area wouldn't surprise me at all.

(N.T. 9/6/16 at 145-48) (emphasis added).

It was obvious on cross-examination of Dr. Narayan that counsel for Appellant did not comprehend Dr. Narayan's testimony and explanation of OCD. When asked specific questions regarding Father's illness and the allegations made by Mother, Dr. Narayan was adamant that Mother's fear of Father harming the children is misplaced:

> Q: And you have testified, you said, of course, he's not going to do something to hurt his kids; correct?
>
> A: That's correct.
>
> Q: But you're not 100 percent certain of that, are you?
>
> A: Again, if I can clarify. No one can be 100 percent certain of anything, but with reasonable medical certainty, like I said earlier, I don't think he's going to do it.
>
> Q: But earlier in your testimony regarding OCD, you testified that there was a zero percent chance of Richard turning that thought into an action; correct?
>
> A: Correct.
>
> Q: Okay. But now you're saying there's not a zero percent chance, that there is a possibility that Rick could turn that thought into action; correct?
>
> A: Not an OCD thought, no.
>
> Q: So your testimony is still there's a zero percent chance of Richard acting out these thoughts; correct?
>
> A: Correct.

(N.T. 9/6/16 at 164-65)

> Q: Okay. And is it fair to say that you had testified that you would agree that after repeated times of Richard coming to Michelle and asking her if it was okay, that he fears or gets aroused when he lip kisses his daughter, that you would agree that Michelle would be rick to have concerns about leaving her daughters with Richard unsupervised?
>
> ****
>
> A: Yes, she should get concerned, **but concerned about where their relationship is going**. Am I just rescuing you from your own thoughts? That's where my concern would be. **It would not be regarding any danger for the child.**
>
> Q: So when you testified that you agreed that Michelle would have this thought and the thought was – you described it as this craziness when her husband is engaging in these lingering lip kisses with the daughter and then asking her it was okay, you now think that she's concerned for the safety of her marriage as opposed to the safety of her daughters?
>
> A: I think what you're describing is lingering kissing as if that's something he's doing. It takes two people to kiss. **My impression of the lingering kissing, based on his description to me, is that the child is hanging on and kissing longer – way longer than he feels comfortable.** So I'm not sure your question is something that I can answer directly.

(N.T. 9/6/16 at 168-69) (emphasis added). Much to Mother's chagrin, this Court made a credibility determination that Dr. Pittman was subjectively biased towards Mother, and therefore, little weight was afforded to her testimony. On the contrary, Dr. Narayan presented objectively, and he succinctly provided a detailed explanation of the OCD illness and how it relates to Father and the allegations made against him. Since credibility determinations are within the discretion of the fact-finder, i.e. this Court, there is no error.

Next, Appellant alleges that this Court erred by granting Father's relocation request without addressing the enumerated factors. This Court did not address the relocation factors as it relates to Father because the order entered is intended to be an interim order. On or about April 14, 2016, Father was given the choice of moving out of the marital home

or having the children placed into foster care due to Mother's allegations. Father chose to voluntarily move out of the marital residence to avoid putting the children through any more trauma. Further, due to the allegations by Mother and the resulting criminal charges, Father has been suspended from his position with the Pennsylvania Department of Environmental Protection ("DEP"). On top of losing his full-time position, Mother has also filed for child and spousal support, which Father has been paying. Due to Mother's actions, Father had no choice but to move in with paternal grandparents in Franklin County, Pennsylvania.

At this point, this Court does not know what the outcome of Father's criminal charges will be. Without the answer to that question, this Court is left with numerous variables on what could happen in the future – will Father remain in Chambersburg? Will he return to Halifax? Will he move somewhere in-between? Will he keep his position with the DEP? Will Mother find a job in Pennsylvania? Will Mother return to school in Pennsylvania? These are all questions that are left up in the air until the criminal charges against Father are resolved.[4] Accordingly, this Court granted Father's relocation out of necessity – he is suspended from his job, therefore is not getting paid, and had no other practical option other than to move in with his parents. Therefore, this Court did not err in granting Father's de facto relocation as he had nowhere else to go as a result of the allegations.

Appellant next alleges that this Court erred in granting Paternal Grandparents visitation rights. That is just incorrect. Our Order states "Paternal Grandparents are permitted to have reasonable unsupervised visitation with the minor children provided that

[4] The April 5, 2017 plea court was continued and reschedule until May 17, 2017. There is no indication on the docket at whose request the continuation was granted, or if there was even a request.

it occur in a public location."[5] Despite Appellant's characterization to the contrary, that provision does not afford Paternal Grandparents visitations rights. Rather, during the course of the proceedings, the Court made the observation that Mother isolated herself and the children from Father's family on or about April 14, 2016, and at the conclusion of the January 7, 2016 hearing, admonished Mother for cutting off communication with Father's family:

> The concern the Court has is the fact that although I can understand Mom's concern for what her husband with his psychological issues are and what she believes has occurred in the past, I don't understand how that translates into why grandparents, aunts, uncles, cousins, long-term friends have all been cut off. These are children that are in a terribly stressed situation. . . . I thought it was articulated by this Court that we would try to maintain as much normality for the benefit of these children as possible so they're not permanently scarred. Children can be resilient, even if something happened in the past, if you proceed with caution going forward. **But isolation is where this Court has a concern. But for that emergency action and that emergency hearing and this order – an order from this Court directing that the grandparents see the children for Christmas, I am confident that would not have happened, and that would have been grossly unfair not only for the grandparents; it would have been unforgivable for the children.** That's where the concern is.

(Notes of Testimony, Custody Hearing 1/6/17 (hereinafter "N.T. 1/6/17") at 176) (emphasis added).

Paternal Grandparents were intimately involved in raising M.K., as well as E.K., seeing the family at least twice a month until April 2016. After that date, Mother cut off all contact with Father's family, including Paternal Grandparents. When the supervised visitation began at ABC House, Paternal Grandparents expressed an interest in seeing

[5] *See* Order of February 15, 2017 at para. 8.

the children, and were willing to pay the fee to do so because it had been so long. Unfortunately, Mother did not agree, and admitted that she refused to allow Paternal Grandparents to have visitation. (Notes of Testimony, Emergency Hearing 12/9/16 (hereinafter "N.T. 12/9/16") at 54-55, N.T. 1/6/17 at 47). Mother states that she refused because there was no court order in place allowing them to have visitation. (N.T. 12/9/16 at 54). Further, since Father resides with Paternal Grandparents, her concern is that there is no guarantee Father will not be involved with the visit. (N.T. 1/6/17 at 47-48). Mother testified that she does not want Paternal Grandparents to have unsupervised visitation in order to ensure Father complies with his supervised visitation. (Id.)

After hearing the testimony and reviewing the evidence, this Court found no rational explanation for why Paternal Grandparents should not have unsupervised contact, and should be required to pay a fee in order to see the children at ABC House. Recognizing Mother's concern that Father could potentially have unsupervised contact with the children during Paternal Grandparent's visitation, this Court entered the provision above, permitting Paternal Grandparents to have visitation **in a public place**. We did not order Paternal Grandparents to have visitation on any particular day, or for any particular period of time. We merely made it known that Mother should afford Paternal Grandparents unsupervised contact of the children in a public place in lieu of supervised visitation at ABC House. After Father's criminal charges are resolved, this Court anticipates that there will be another hearing in this matter wherein we will have to determine a final custody order.

Lastly, Appellant alleges that this Court erred in requiring Mother to obtain the explicit consent of both parties before removing the children from Pennsylvania. She

alleges that this provision is an unconstitutional restriction on her right to travel. We disagree.

Throughout the course of the proceedings, it became obvious that Mother is anxious to move with the children to Utah. This Court believes Father's fear of being cut off from his children if Mother is permitted to relocate is a very real fear. As such, we included the provision in our Order so that Mother does not abscond with the children while Father's criminal charges, as well as this appeal, are pending. The provision does not restrict Mother's right to travel. It merely makes Mother go through the proper channels in order to do so with the children. If Mother wants to travel with the children, she must seek Father's express permission to do so. If Father refuses and Mother feels he did so in bad faith, she can petition the Court and request permission to travel and the Court would be favorably inclined to do so. Further, Mother is free to travel anywhere in the world without Father's permission as long as the children remain in Pennsylvania. Therefore, this Court did not err or abuse its discretion when requiring Mother to obtain the explicit consent of Father before removing the children from Pennsylvania.

As previously stated, Appellant's remaining allegations in her twelve (12) page Statement are merely complaints of dissatisfaction with this Court's ruling. In addition to counsel's characterization and opinion of the evidence, Appellant fails to cite to the specific testimony and/or evidence that would support her allegations. In fact, after reading the Statement, this Court is unsure whether Appellant was in the same courtroom that we were as the Statement includes a number of completely inaccurate statements of fact. It appears Appellant is using the "throw everything at the wall and see what sticks" method with this appeal. In custody proceedings, the trier of fact has the absolute

discretion to determine witness credibility and the weight to be afforded to the evidence. This Court did so, explained the reasons for doing so, and cited in the transcript where those reasons can be found – yet Appellant is still unhappy. However, Appellant's unhappiness does not mean this Court abused its discretion.

Accordingly, we ask the Superior Court to affirm our Memorandum Opinion and Order of February 15, 2017, and dismiss the appeal in this matter.

Date: April 17, 2017

Respectfully submitted:

William T. Tully, J.

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