J. A40041/04

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

T.W.,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
S.W.,	:	
Appellee	:	No. 199 WDA 2004

Appeal from the Order January 20, 2004,
In the Court of Common Pleas of Allegheny County,
Family Court Division at No. FD99-5488-006.

BEFORE: BENDER, PANELLA and POPOVICH, JJ.

MEMORANDUM: February 28, 2005

T.W. (Mother) appeals the order entered on January 20, 2004, that continued supervised visitation of her minor daughter, H.W. (Child), with S. W. (Father).[1] Additionally, Mother has filed a motion to strike Father's brief. Upon review, we reverse and grant Mother's motion to strike.

The relevant facts and procedural history of this case are as follows: Mother and Father were married on March 18, 1989. During the marriage, two children, S.W. II (age 10), J.W. (age 13),[2] were born to Mother and Father. Mother and Father separated on August 18, 1999. However, during

[1] As is our common practice in cases involving allegations of child sexual abuse, we have abbreviated the names of the parties.

[2] S.W. II and J.W. are estranged from Father and are not part of this appeal.

the separation, Mother discovered that she was pregnant with Child. Thereafter, Child was born on December 18, 1999, and has resided with Mother since birth. A final decree in divorce was entered on September 14, 2000.

On March 14, 2001, following Mother's petition, the trial court granted primary physical and legal custody of Child to Mother and granted partial physical and legal custody to Father. The parties were unable to abide by the March 14, 2001 order, and numerous difficulties arose regarding telephone contact and pick up and drop off of Child during custody exchanges. Thereafter, on September 16, 2002, the trial court set forth a comprehensive custody arrangement whereby Father was to care for Child every other weekend, and one evening per week until Child was to be delivered the following morning to daycare.

This custody order lasted until October 10, 2002, whereupon Mother filed an emergency petition for special relief that sought to impose supervision on Father's visits with Child. The petition alleged that on September 18, 2002, while Child was with Father at Father's sister's home for dinner, Father sexually abused Child. On October 28, 2002, the trial court entered an emergency order that suspended Father's custody of Child and provided for supervised visitation with Child two times per week.

The trial court conducted a hearing on Mother's petition on July 7-9, 2003, which the trial court continued to October 15, 2003. The trial court

limited inquiry to the following questions: (1) whether Father sexually abused Child; and (2) what custody arrangement should exist between the parties. Thereafter, by order filed January 20, 2004, the trial court found that Father did not sexually abuse Child, and it continued the supervised visitation scheme that had been in place since October 28, 2002.

The trial court's Pa.R.A.P. 1925(a) opinion indicates that it ordered Mother to file a concise statement of matters complained of on appeal. However, such order was never docketed by the trial court. Thereafter, Mother filed *pro se* a concise statement of matters complained of on appeal that presented 43 contentions of error.[3] After being directed to author an opinion by this Court, ***see T.W. v. S.W.***, 199 WDA 2004 (Pa. Super. filed 3/31/2004) (unpublished order), the trial court authored an opinion that condensed Mother's issues into a discussion of whether the trial court's order was against the weight of the evidence and whether its custody arrangement was erroneous. [4]

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[3] We note that Mother's hearing counsel, Barbara L. Payne, Esquire, was permitted by this Court to withdraw from Mother's representation on April 12, 2004. ***See T.W. v. S.W.***, 199 WDA 2004 (Pa. Super. filed 4/12/2004) (unpublished order). Mother has retained Richard Ducote, Esquire, of New Orleans, Louisiana, as counsel *pro hac vice* for this appeal.

[4] Although the trial court was forced into guessing what issues Mother would raise on appeal, we decline to find Mother's issues waived. The failure of the trial court to docket its Pa.R.A.P. 1925(b) order properly renders such order non-existent. ***See, e.g., Commonwealth v. Hess***, 570 Pa. 610, 619, 810 A.2d 1249, 1255 (2002) (appellant not penalized for failure to comply with Pa.R.A.P. 1925(b) where clerk of courts failed to docket Pa.R.A.P. 1925(b) order properly).

Before we reach a recitation of Mother's issues, we consider first her motion to strike Father's brief. The record is clear that Father's advocate's brief was submitted after oral argument in this case, and, therefore, the brief was submitted in an untimely fashion. **See** Pa.R.A.P. 2185 (appellee must file brief within 30 days following service of appellant's brief). Pennsylvania Rule of Appellate Procedure 2188 sets forth the consequence of an appellee's failure to file a brief, and the Rule states, in pertinent part, "[i]f an appellee fails to file his brief within the time prescribed by [the Rules of Appellate Procedure], or within the time as extended, he will not be heard at oral argument except by permission of the court." Although permitted by this Court to participate in oral argument, Father failed to file an advocate's brief until after the close of oral argument. Pennsylvania Rule of Appellate Procedure 2501 forbids the submission of briefs following conclusion of oral argument. An exception to this Rule exists if the appellee, following application to this Court or through express permission at bar at the time of argument, is granted leave by this Court to file his brief after the conclusion of oral argument. Father neither sought permission from this Court to submit his advocate's brief in writing nor orally at the time of argument. Accordingly, we are compelled to grant Mother's motion to strike Father's brief.[5]

[5] Although we will not review the arguments presented in Father's brief, we note that he raised in the brief an issue relating to the admissibility of evidence. He did not raise this issue in a cross-appeal and, therefore, this

Mother presents the following issues for our review:

> 1. Did the trial court abuse its discretion in finding [Father] credible in his denial of the [alleged] sexual abuse because he refused to "back down" from a statement which the trial court admittedly knew to be untrue?
>
> 2. Thus, did the trial court abuse its discretion in using this unreasonably based credibility determination to trump the abundant evidence that [Father sexually abused Child], and then find that he did not sexually abuse [Child]?
>
> 3. Did the trial court abuse its discretion in ordering [Mother] to pay the costs of the supervised visitation?
>
> 4. Did the trial court abuse its discretion in ordering reunification therapy, instead of domestic violence, alcohol abuse, and sex abuser therapy for [Father]?

Mother's brief, at 7.

Mother's first two issues present essentially the same question for our review, and, therefore, we will analyze them jointly. Our scope and standard of review for appeals from custody/visitation orders are as follows:

> The scope of review of an appellate court reviewing a [visitation] order is of the broadest type; the 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.

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issue would be waived even if we did not strike his brief. ***See Bullman v. Giuntoli***, 761 A.2d 566, 580 (Pa. Super. 2000).

McMillen v. McMillen, 529 Pa. 198, 202, 602 A.2d 845, 847 (1992) (citations omitted). Additionally, we note that Mother's issues challenge the trial court's credibility findings and, therefore, assert that the trial court's conclusions are against the weight of the evidence. We also review challenges to the weight of the evidence under an abuse of discretion standard. ***Andrews v. Andrews***, 601 A.2d 352, 353 (Pa. Super. 1991).

Mother argues first that the trial court abused its discretion in finding Father's testimony "highly credible" due to his refusal to "back down" from an incorrect recollection of the record in this case. In the trial court's January 15, 2004 order, it held the following:

> [The trial court] finds Father to be credible in his testimony that he did not and never would abuse [Child]. In [the trial court's mind], this case turns upon the credibility of Father. Of particular note is the following testimony of Father; Father testified that prior to [Child's] birth, following a settlement conference in 1999, that Mother met with Father and essentially told him that she would ruin him financially and turn [their] children ([including Child, then *in utero*]) against Father. Father insisted that the meeting [took place] following a settlement conference [in the trial court, with the Honorable Kim Eaton presiding]. When the [trial court] informed Father that [Judge Eaton] did not take the bench until 2000, Father, nevertheless, refused to back down from his statement. Further inquiry [by the trial court] revealed that a settlement conference did, in fact, occur in [1999] before Hearing Officer Ashton. It was obvious that Father "believed" the settlement conference was with [Judge Eaton. The trial court] was impressed with Father's unwillingness to bend on the details of his testimony, even in the face of the [trial court's statement].

Trial court opinion, 1/15/2004, at 4.

We agree with the trial court that the polestar for its analysis of whether Child was sexually abused was its credibility assessment of Father's testimony. Both Father and Mother presented expert witnesses and lay witnesses who, in the trial court's view, testified credibly that Father either abused or could not have abused Child. Therefore, when weighing the evidence presented by both parties at the hearing, the testimony of Father was of particular value to the trial court in its determination of whether he perpetrated the alleged sexual abuse on Child.

In ***Hollock v. Erie Ins. Exch.***, 842 A.2d 409 (Pa. Super. 2004), we explained that our function in appellate challenges to the weight of the evidence is to examine the trial court's exercise of discretion in weighing the evidence and, thereafter, determine if there has been an abuse. ***Hollock***, 842 A.2d at 417-18 (citations omitted). We are not free to answer the underlying question of whether we believe that the verdict is, in fact, against the weight of the evidence. ***Id.***, 842 A.2d at 418 (citations omitted). Rather, our responsibility is to review the court's findings and reasoning in light of the evidence adduced to ensure that the trial judge exercised the duties, yet respected the confines of his or her particular role in the trial proceeding. ***Id.***, 842 A.2d at 418 (citations omitted). This distinction is a fine one, but crucial to our system of jurisprudence; it allows us to correct a palpable abuse of discretion while ensuring that we will not substitute our

judgment for that of the finder-of-fact. ***Id.***, 842 A.2d at 418 (citations omitted).

It is true that minor inconsistencies in a witness's testimony do not, *ipso facto*, render a trial court's adjudication against the weight of the evidence. ***See Goldmas v. Acme Markets, Inc.***, 574 A.2d 100, 105 (Pa. Super. 1990). However, in the present case, we are not left with a minor inconsistency that could have been dismissed as inconsequential by the trial court in its fact-finding role. The record is clear that Father testified that, prior to Child's birth in December 1999, Judge Eaton presided over the settlement conference that took place prior to Mother's alleged statement. ***See*** N.T. Trial, 10/15/2003, at 171-72. Father also testified that Judge Eaton ordered the parties to exit the courtroom and wait in the hall outside. ***Id.*** at 171-72. Judge Eaton, in response, informed Father that his recounting of the facts was incorrect, because she had not ascended to the bench until January, 2000. ***Id.*** at 171. Despite being presented with this fact, Father, without equivocation, stated, ***"I swear you were the judge."*** ***Id.*** at 171 (emphasis added). After the exchange, Father did not change his testimony or concede that he may have misremembered or confused certain facts, such as that a settlement conference did, in fact, occur in 1999 before Hearing Officer Ashton, not Judge Eaton. Therefore, Father's testimony in that regard was consistently ***false***.

Keeping in mind the standard recounted in ***Hollock***, we are constrained to conclude that the trial court abused its discretion when it concluded that Father's testimony was "highly credible" based on the above exchange. It flies in the face of logic to conclude that one who testifies falsely can be deemed highly credible by the finder-of-fact if he is steadfast in his falsity. Such blatant repudiation of an incontrovertible fact by a witness jaundices not only the witness's testimony in relation to the matter being examined but would also cast doubt on the validity of the witness's remaining testimony. As such, we are unable to agree with the trial court's exercise of discretion and cannot accept its conclusion that Father was a "highly credible" witness. ***See Hollock***, 842 A.2d at 417 (appellate court's function is not to weigh evidence anew, but examine trial court's exercise of discretion in weighing evidence). Given that the trial court's reasoning for its order rested primarily upon an assessment of Father's credibility, we are constrained to reverse the trial court's order and remand for a new hearing with a different judge. ***Lanning v. West***, 803 A.2d 753, 765 (Pa. Super. 2002) (remedy for abuse of discretion in assessing weight of evidence claim is a new trial).

As we are compelled to reverse the trial court's January 20, 2004 order, we need not address Mother's remaining contentions.

Order reversed. Case remanded with instructions. Jurisdiction relinquished. Motion to strike granted.

PANELLA, J. files a concurring and dissenting memorandum.

Judgment Entered:

Eleanor R. Valecko
Deputy Prothonotary

DATE: February 28, 2005

T.W.,

Appellant : IN THE SUPERIOR COURT OF PENNSYLVANIA

v.

S.W.,

Appellee : NO. 199 WDA 2004

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FAMILY COURT at No(s): NO. FD99-5488-006

BEFORE: BENDER, PANELLA, and POPOVICH, JJ.

CONCURRING & DISSENTING MEMORANDUM BY PANELLA, J.:

While I concur with the Majority's decision to grant the Motion to Strike Father's brief, I must respectfully dissent from the Majority's decision to reverse the trial court. I would affirm the trial court's decision based upon the Honorable Kim D. Eaton's well-written opinion of April 22, 2004.