

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.

J.S., JR.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
L.M.,	:	
Appellant	:	No. 2440 EDA 2008

Appeal from the Order entered on July 29, 2008,
in the Court of Common Pleas of Monroe County, Civil
Division, at No(s). 413 DR 2007, 5080 CV 2007.

BEFORE: ORIE MELVIN, LALLY-GREEN, and SHOGAN, JJ.

MEMORANDUM:

FILED JUNE 5, 2009

Appellant, L.M. ("Mother"), appeals from the trial court order granting the petition filed by J.S., Jr. ("Father"), seeking primary physical custody of the parties' daughter, A.S. ("Child"). The trial court's order permitted Father to move Child from Pennsylvania to New York, where Father resides. We vacate and remand.

The parties were never married. Mother has bipolar disorder and takes medication. When Mother became pregnant from their ten-month relationship in New York, she moved to Pennsylvania with her mother to have Child. Child was born in Bethlehem, Pennsylvania, on March 12, 2007. N.T., 7/10/2008, at 24. On June 6, 2007, Father filed a complaint for custody of Child. Prior to that time, Mother had filed a support action

against Father. *Id.* at 24-25. Father did not take a paternity test until after Mother filed the support petition. N.T., 6/23/2008, at 80. After paternity was established, Father filed the custody complaint, three months after Child's birth. *Id.* at 79-80.

On July 27, 2007, the trial court entered an order adopting the Custody Conciliator's recommendation as an interim order of the court. Under the interim order, Mother had primary physical custody, subject to Father's physical custody on alternative weekends and on other dates agreed upon by the parties. On August 24, 2007, Father married Maria, who is from the Philippines, and whose visa had expired. On February 4, 2008, Father filed a petition for modification of the custody order. On March 24, 2008, the trial court adopted the Custody Conciliator's recommendation as an interim order, under which Mother retained primary physical custody.

On April 16, 2008, Father filed a petition for a full evidentiary hearing. The trial court held an evidentiary hearing on the petition on June 23, 2008 and July 10, 2008. On June 23, 2008, the first day of the hearing, the trial court heard testimony from Father, Father's current wife, and Father's 14-year-old daughter from a previous marriage, Shannon. The trial court also heard testimony from Bruce Snyder, a private psychologist who treated Mother, and from E.K., the senior pastor at Mother's church. At the second day of the hearing on July 10, 2008, the trial court heard testimony from

Mother and Mother's friend, L.C. Moreover, the court heard testimony from M.F., who resides in Father's home.

The trial court then announced its decision in court on July 25, 2008. The trial court entered an order on July 29, 2008, awarding the parties shared legal custody, and awarding Father primary physical custody. Father's custody was subject to Mother having periods of physical custody every other week, beginning on Thursday at 7:00 p.m. and ending the immediately following Sunday at 6:00 p.m. Mother was to have physical custody at mutually agreed times. Additionally, the trial court set forth a holiday schedule.

Regarding the best interest of Child, the trial court found:

that Father is the more physically, mentally, emotionally, and financially stable parent, that the living situation and environment that Father can offer is more beneficial to [Child] than Mother's present situation, that Father will be able to offer the parties' daughter more opportunities for growth than Mother, and that Father is the parent more likely to foster a meaningful relationship with the non[-]primary custodial parent.

Trial Court Opinion, 10/21/08, at 5.

On August 22, 2008, Mother filed a notice of appeal. The trial court entered an order on August 26, 2008, directing Mother to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) within 21 days. Mother complied by filing her Rule 1925(b) Statement on September 16, 2008.

On appeal, Mother raises the following issues:

A. Did the Trial Court commit an error of law and/or abuse its discretion in deciding that [Father] provided a more stable environment for [Child] than Mother[,] placing too much emphasis on Father's earnings, living arrangements and child care plan for [Child] rather than Mother's demonstrated ability to care for [Child]?

B. Did the Trial Court commit an error of law and/or abuse its discretion when it determined that Father was better suited to care for [Child]?

C. Did the Trial Court commit an error of law and/or abuse its discretion by considering Mother's past rather than current mental health?

D. Did the Trial Court commit an error of law and/or abuse its discretion when it failed to consider Mother's past history as the primary caretaker of [Child]?

E. Did the Trial Court commit an error of law and/or abuse its discretion when it failed to consider the best interests of [Child] when it permitted Father to relocate with [Child] and did not apply the **Gruber** [1] factors in making its decision?

Mother's Brief at 4 (footnote added).

In **Collins v. Collins**, 897 A.2d 466 (Pa. Super. 2006), this Court explained our standard of review as follows:

In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. **Johns v. Cioci**, 865 A.2d 931, 936 (Pa. Super. 2004). 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. **Id.** In

¹ **Gruber v. Gruber**, 583 A.2d 434, 439 (Pa. Super. 1990).

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. *Id.* However, we are not bound by the trial court's deductions or inferences from its factual findings. *Id.* Ultimately, the test is "whether the trial court's conclusions are unreasonable as shown by the evidence of record." *Landis v. Landis*, 869 A.2d 1003, 1011 (Pa. Super. 2005) (citations omitted). 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." *Hanson v. Hanson*, 878 A.2d 127, 129 (Pa. Super. 2005).

With any child custody case, the paramount concern is the best interests of the child. *Landis, supra*, 869 A.2d at 1011. This standard requires a case-by-case assessment of all the factors that may legitimately affect the "physical, intellectual, moral and spiritual well-being" of the child. *Id.* (citations omitted).

Id. at 471.

First, we consider Mother's last issue, *i.e.*, that the trial court erred in failing to apply the *Gruber* factors. On the basis of *Klos v. Klos*, 934 A.2d 724 (Pa. Super. 2007), we reject this argument. In *Klos*, this Court addressed a situation in which the children were living in Pennsylvania with their mother. The mother instituted a custody action in Pennsylvania. The father of the children had previously moved to Florida. The father then sought to "relocate" the children to Florida from Pennsylvania. The panel reasoned that only the minor children would be "relocating" to Florida, because their father was already a resident of Florida. Thus, the panel explained that the focus was on whether the living situation for the minor

children at either the mother's home or the father's home in Florida served the children's best interests.

In the present case, the trial court determined that it was in the best interest of Child for Father to have primary physical custody. The trial court reasoned that it was not granting either parent the right to relocate with Child, and it had no need to apply the three-pronged test set forth in *Gruber*. Trial Court Opinion, 10/21/08, at 5. As the trial court based its reasoning in the instant case on the decision in *Klos*, we see no abuse of the trial court's discretion in applying a broad "best interest" analysis.

In determining the best interest of Child, the trial court compared the living situations which Father and Mother offered Child. The testimony and exhibits in the record established the following. Father is 48 years old, and has resided at the same address in Coram, New York, for 17 years. N.T., 6/23/2008, at 9-10. Child sleeps with Father and Maria in the master bedroom. *Id.* at 15. Father does not have any family members in the Coram, New York area. *Id.* at 21. Father rents a bedroom to M.F., who interacts with the family. *Id.* at 10-11. M.F. pays Father \$700.00 per month in rent for his room. *Id.* at 11. The third bedroom at Father's home is for Father's 14-year-old daughter, Shannon, when she stays with Father. *Id.* at 13. The room had been occupied by another male renter from Narcotics Anonymous/Alcoholics Anonymous until a few weeks prior to the hearing. *Id.* at 40, 77-78.

Father testified that he has worked for Durr Mechanical, both indirectly through his union, and directly as a superintendent, during the past 20 years. *Id.* at 24-25. The evidence showed that Father had an income of approximately \$142,000.00 in 2007. *See* Plaintiff's Exhibit 2.

Father's work requires him to travel in New York, Pennsylvania, Connecticut, and New Jersey. *Id.* Father's work hours are Monday through Friday, 7:00 a.m. to 3:00 p.m., with some flexibility. *Id.* at 26-27. Father testified that his primary income is derived from working on the weekends. *Id.* at 28. He stated that he has worked 15 of the 52 weekends per year. *Id.* Father also has worked on emergency calls in the nighttime on at least ten occasions per year. *Id.* at 28-29. Father plans for Maria to take care of Child while he works in the evenings and weekends. *Id.* at 30. He also plans for Maria to quit her job as a nanny, where she presently works Monday through Friday, and to stay home with Child. *Id.* at 35.

Father had a four-month marriage in 1989, and he later married Shannon's mother in 1992. *Id.* at 16-17. The latter marriage lasted two and one-half years. *Id.* at 92. Maria moved into Father's home in late March of 2007, after Child's birth on March 12, 2007. *Id.* at 143. Maria knew Father for eight months prior to marrying him in August of 2007. *Id.* at 143. Father testified that he has been drug-free for the past 23 years, without any relapses, and that he has served as a counselor for Narcotics Anonymous and Alcoholics Anonymous. *Id.* at 61-62.

Father knew Mother for only four months before they became engaged to marry. *Id.* at 82. Father stated that, during their ten-month relationship, he had accompanied Mother to physicians' appointments and was aware that she was taking medication. *Id.* at 84. He explained that, after they were together for five months, he asked Mother to move out, and then, at the six-month point, she announced that she was pregnant with Child. *Id.* at 84-85. Father placed Mother in an apartment that he owned, and took \$700.00 in rent from her. *Id.* at 87. At some point, the fire marshal declared that the home could not be occupied until the natural gas was fixed. *Id.* at 88-89. Mother's mother took Mother to Stroudsburg, Pennsylvania. *Id.* at 87.

Maria, who is licensed as a dentist in the Philippines, has three children, ages 11, 13, and 16, who live in the Philippines with their father. *Id.* at 135, 137. In the United States, Maria works as a nanny for a family with three children, ages six, eight, and ten, who live a half hour away from Father's home. *Id.* at 19-20, 136. Maria testified that she has not seen her children in person for eight years, that she speaks with them on the phone each day, and that she often communicates with them via a webcam. *Id.* at 135, 142, 148-149.

Father expressed that the transportation arrangements for exchanging Child, meeting at the Rockaway Mall, between the two parties' residences, were working out for him. *Id.* at 67. *See also* N.T., 7/10/2008, at 80.

Father testified that there was no plan for M.F. to move out of Father's home, and that M.F. would be living there indefinitely. N.T., 6/23/2008, at 99.

M.F., who is 49 years old, testified that he was employed in running a dry cleaning delivery service for the past three and a half years, and is a certified teacher. N.T., 7/10/2008, at 65-67. While M.F. had lived at Father's home since 2006, three men with addiction problems had lived at Father's home, as well as Mother. *Id.* at 68, 73. M.F. stated that he would like to continue to live with Father and help with Child. *Id.* at 74. M.F. has a criminal history which includes an arrest for possession of marijuana in 1979, and a resulting discharge from the military; he was also arrested for possession of stolen property in 1980. *Id.* at 74-76. More recently, in 2003, M.F. was arrested for disturbing the peace in relation to road rage in a traffic incident. *Id.* at 76-77.

Mother, who is 36 years old, lives in subsidized housing with two bedrooms, one for herself and one for Child. N.T., 7/10/2008, at 10, 28. Mother attended Hunter College with a basketball scholarship and had studied for five years. *Id.* at 10-11. She graduated with a degree in communications and English. *Id.* at 11, 43. Mother testified that she was unemployed, and that her income is derived from a monthly disability benefit in the amount of \$232.00 from SSI and \$400.00 from SSD. *Id.* at 21. At the time of the hearing, Mother was engaged in obtaining

certification as a certified nurse's assistant and as an emergency substitute teacher. *Id.* at 86. Mother stated that, if she secured employment as a certified nurse's assistant, her mother would assist her in watching Child, and Mother would work overnight shifts when Father has Child. *Id.* at 29. Mother has received help in caring for Child from her mother, who lives nearby. *Id.* at 23. Mother has worked at a job assisting her friend, L.C., in caring for an elderly woman. *Id.* at 5-6. Mother was able to take care of Child and still care for the woman. *Id.*

Mother explained that she was hospitalized at a psychiatric hospital prior to meeting Father, and that she met Father at approximately the time of her discharge. N.T., 7/10/2008, at 14. Before she became pregnant, Mother was taking clozapine and clozaril for bipolar and schizoaffective disorder, and she was seeing psychologists and psychiatrists on a consistent weekly basis at Stonybrook. *Id.* When Mother moved to Pennsylvania, she began treating with a psychiatrist, Dr. Lirag. *Id.* at 16. **See also** N.T., 6/23/2008, at 102. Dr. Lirag maintained Mother on clozapine until she could no longer tolerate it because she was too fatigued from staying up all night with Child. N.T., 7/10/2008, at 16.

Mother testified that she treated with her psychologist, Bruce Snyder, on a weekly basis, and with Dr. Lirag every month or two. *Id.* at 18. Mother stated that Dr. Lirag had stated that she could see him every three months, but she had asked to see him more frequently because of the stress

of the court hearing. *Id.* Mother testified that she would follow Dr. Lirag's treatment recommendations to stay on the medication and attend therapy. *Id.* Mother stated that she would continue to treat with Mr. Snyder on a weekly basis for as long as she was financially able. *Id.* at 20.

In her testimony at the hearing, Mother explained that, on one occasion, after she had been up with Child, she was distracted by a woman who needed her to walk out of the house with her about a 12-step call. N.T., 7/10/2008, at 17. When she returned, the baby bottles were smoking up the kitchen, so she called 9-1-1. *Id.* Mother also explained that, on another occasion, when she was being removed from clozapine as her medication, she was having hallucinations and almost dropping the baby. *Id.* At the time of the hearing, Mother had been off of clozapine for more than a year, was taking Abilify, and was not experiencing any reactions to it. *Id.* at 17-18.

Upon questioning by the trial court, Mother responded that she had a crisis plan in place whereby she would call her mother to come quickly, and that Dr. Lirag and Mr. Snyder were on standby, as they are on-call at all times. *Id.* at 81. Mother stated that she had been treating with Mr. Snyder on a weekly basis, but that she would accept therapy sessions on an every-other-week basis. *Id.* at 85.

Bruce Snyder testified that he had been treating Mother as a psychologist since August 2, 2007. N.T., 6/23/2008, at 102. Mr. Snyder

provides individual therapy for Mother on an every-other-week basis or less frequently. *Id.* at 103. He testified that Mother is diagnosed with bipolar disorder, and that he had not observed any symptoms of schizoaffective disorder so he had not made that diagnosis. *Id.* Mr. Snyder described bipolar disorder as a mood disorder where a patient can cycle from stages of mania into stages of depression. *Id.* Depression phase is indicated by trouble sleeping, eating, flat affect, low mood cycle, retardation, and low sex drive. *Id.* at 104. Manic phase is indicated by agitation, and highly anxious behavior, such as going on spending sprees and erratic behavior. *Id.* Schizoaffective disorder is indicated by hallucinations of association, delusions, and a bizarre quality. *Id.* Mr. Snyder has not observed a bizarre quality in Mother. *Id.*

The most effective treatment for bipolar disorder is a combination of psychotherapy and medication. *Id.* Mr. Snyder treats Mother with psychotherapy, and Dr. Lirag treats Mother with medication. *Id.* Mother takes Abilify prescribed by Dr. Lirag. *Id.* at 105. Mr. Snyder testified that Mother had done very well in her psychotherapy with him, and that her condition was in remission. *Id.* He explained that, if an individual with bipolar disorder were actively in a manic or depressed state, it would compromise the individual's ability to parent. *Id.* Mr. Snyder described that an individual's parenting could be compromised by a lack of energy, not

having enough sleep, or too much sleep, and that the individual's behavior could be erratic at times. *Id.* at 105.

Mr. Snyder denied any knowledge of Dr. Lirag's office notes from April 23, 2007, May 25, 2007, and July 9, 2007 concerning the incidents to which Mother testified concerning Mother's sleepiness and hallucinations, Mother's almost dropping Child, and Mother's almost causing a fire while heating Child's bottles. *Id.* at 110-114. Mr. Snyder responded that, as he is not a psychiatrist, he could not comment on the effect of Mother's medications on her feeling tired. *Id.* at 112. Mr. Snyder opined that Mother had been functioning better in the past ten months, and that he was surprised to hear about those episodes in Dr. Lirag's notes. *Id.* at 119. He stated that Mother's condition is stable. *Id.* Mr. Snyder opined that Mother is able to communicate and co-parent. *Id.* at 119-120.

Mr. Snyder opined that Mother was totally capable of parenting, based on his therapy sessions with her. *Id.* at 105-106. He had observed Mother interact with Child on several occasions. *Id.* at 106. Mr. Snyder found Mother to be very attentive, and he found that Child was very close to Mother. *Id.* His opinion was that, as long as Mother stays in treatment, takes her medications and continues her therapy, that she is totally capable of parenting. *Id.* Mr. Snyder explained that Mother's therapy would continue, and that, because of financial concerns and because Mother had been stable, the frequency of the sessions had been reduced. *Id.* at 106-

107. Mr. Snyder opined that if Mother continues to function well, she may have employment, and that she should continue to follow the treatment plan. *Id.* at 108.

We consider Mother's first, second, and fourth issues together as the trial court similarly discussed them in its best interest analysis. We then consider Mother's third issue, regarding whether the trial court abused its discretion by considering Mother's past, rather than her present, mental health status.

In her first issue, Mother argues that the trial court placed undue weight on Father's earnings, living arrangements, and child care plan, which was for Maria to care for Child. Mother asserts that the trial court placed insufficient weight on Mother's demonstrated ability to care for Child. In her related second issue, Mother also contends that the trial court erroneously concluded that Father was better suited than Mother to care for Child. Mother points out that, although Father earns more money than she does, Mother has been able to financially provide for Child. Further, Mother asserts that, although she lives in subsidized housing, Father rents a condominium with Maria, and rents one bedroom to M.F. Father also previously permitted individuals from Narcotics Anonymous and Alcoholics Anonymous to live with him and his family. In her fourth issue, Mother urges that the trial court failed to place proper weight on the fact that Mother was the primary custodian of Child for the first 15 months of Child's

life. In support of her argument, Mother cites *Roadcap v. Roadcap*, 778 A.2d 687 (Pa. Super. 2001), and *Wiseman v. Wall*, 718 A.2d 844 (Pa. Super. 1998).

The panel in *Roadcap* determined that the trial court changed the primary physical custody from the mother to the father because the father provided a preferable home in the marital residence, and the father had financial ability to provide better opportunities. In *Roadcap*, the panel stated that the law in Pennsylvania,

has long been that custody is not to be awarded merely on the basis that “a better home in physical aspects, or a higher standard of living can be provided elsewhere.” *Commonwealth ex rel. Holschuh v. Holland-Moritz*, 448 Pa. 437, 292 A.2d 380, 384 (1972). Indeed, “[i]n a custody proceeding, the sole permissible inquiry into the relative wealth of the parties is whether either party is unable to provide adequately for the child; unless the income of one party is so inadequate as to preclude raising the children in a decent manner, the matter of relative income is irrelevant.” *Brooks v. Brooks*, 319 Pa. Super. 268, 466 A.2d 152, 156 (1983).

Roadcap, 778 A.2d at 690.

The panel in *Roadcap* concluded that the trial court disregarded its own decision that the mother was the better parent. The panel also found significant the trial court’s conclusion that the father was not cooperating in scheduling the children’s time, and that the trial court had rejected the daycare provider selected by the father in favor of the provider selected by

the mother. Accordingly, the panel in *Roadcap* reversed the trial court's award of primary physical custody to the father.

In the present appeal, there was no evidence that the home that Mother provides for Child is inadequate for Child, especially since Mother provides Child with her own bedroom. On the other hand, the record does reflect that Child sleeps with Father and Maria in Father's room and does not have her own room. Also, Father has involved a non-family member with a criminal record, including anger management issues, M.F., into his home. Father has also involved other individuals from Narcotics Anonymous and Alcoholics Anonymous in his home. Further, Father has permitted those individuals to interact with Child during his periods of custody.

Moreover, the record fails to support any determination that Father is better suited to parent Child than Mother. First, the record does not contain sufficient evidence that Father can provide Child with more emotional stability than Mother. In fact, the trial court noted that, at the hearing, Father's face reddened in response when he did not like the testimony or could not testify as he wished. N.T., 7/25/2008, at 10.

Second, Mother's friend, L.C., and her pastor, E.K., testified positively about Mother's interactions with Child. Mother's expert witness, her psychologist, also testified positively about his observations of Mother's interactions with Child. There was no similar testimony concerning Father's interactions with Child.

Our review of this record leads us to conclude that the trial court appears to have weighed improperly the consideration that Father provides more financial stability than Mother, and to have not considered sufficiently the evidence supporting Mother's ability to parent or the other circumstances existing in Father's home. Thus, we agree with Mother that the trial court abused its discretion in concluding that Father is better suited to care for Child than Mother.

We next address Mother's argument concerning the primary caretaker doctrine. In *Wiseman*, a panel of this Court addressed a custody situation in which the mother had been the child's primary caretaker for nine months. We stated:

While the trial court is required to give positive consideration to the parent who has been the primary caretaker and a child should not be lightly removed from a parent with whom that child has lived since birth, we recognize this is only one factor to be considered in determining the best interest of the child. *Brooks v. Brooks*, 319 Pa.Super. 268, 277-79, 466 A.2d 152, 157 (1983). Additionally, we acknowledge a parent's ability to care for a child must be determined as of the time of the custody hearing, not as of an earlier time. *Bresnock v. Bresnock*, 346 Pa.Super. 563, 500 A.2d 91 (1985).

Wiseman, 718 A.2d at 847.

The panel in *Wiseman* explained that the father in that case had delegated the primary responsibility for dealing with the child's needs during the daytime to his girlfriend, who lived with the father. The father's girlfriend took the child to a full-time daycare center. The child's

grandmother and the grandmother's boyfriend lived in the home with the mother and the child. The panel found that the grandmother's boyfriend was a fit person to be involved with the family, and that he provided stability to the home environment. In contrast, the panel found that the father's girlfriend was not a stable figure in the child's life, as she could separate from the father at any time, and the child would lose his caretaker.

The panel found that the mother and grandmother spent their time with the child, and that the mother had the child spend most of his time with her, and not in a daycare center. The panel stated: "When both parents are otherwise fit, one parent's role as the child's primary caretaker may be given weight as the determining factor in a custody determination." *Wiseman*, 718 A.2d at 851 (citation omitted). Accordingly, the panel in *Wiseman* found that the mother, who had been the child's primary caretaker, should be awarded primary physical custody, and vacated the trial court's custody order that had directed shared custody.

In the instant case, the trial court noted, but did not accord any weight to, the fact that Mother served as Child's primary caretaker for the first 15 months of Child's life. Father admitted that Mother has been the primary caretaker of Child for the first 15 months of Child's life, and that Mother was the sole caretaker of Child for the first three months of Child's life. N.T., 6/23/2008, at 93. Father did not take the paternity test to determine whether Child was his child until after Mother filed a support petition against

him. *Id.* at 80. It was only after paternity was conclusively established as part of the support order that Father filed a custody complaint in June of 2007, three months after Child's birth. *Id.* at 79-80, 93. Father stated that Mother was personally doing better now, and that Child was doing well. *Id.* at 95. Thus, the evidence supports a conclusion that both parents are fit to care for Child, and an application of the primary caretaker doctrine is proper.

The record does not, however, support a finding that Father will be better able to care for Child than Mother. Father's plan is to have Maria watch Child. Maria has worked as a nanny. While Maria has three children of her own, Maria had not seen her own young children in the Philippines for eight years. The record supports an inference that Father has been delegating his parenting duties to Maria, a professional nanny, who moved into his home a few days after Child's birth. They subsequently married. Moreover, Father has had a past history of brief relationships with women. Similar to the situation in *Wiseman*, Maria is not necessarily a stable person in Child's life. On the other hand, Mother and Child's maternal grandmother have been stable figures in Child's life.

The testimony established that Mother spends as much time as possible with Child, to the point of taking Child to work with her, and has enlisted the assistance of her Mother when necessary to care for Child. In fact, Father admitted that Mother loves Child very much. *Id.* at 68. Father stated that Child is not wanting for anything. *Id.* at 38, 70. Thus, we

conclude that the trial court abused its discretion by ignoring the evidence that Mother had successfully performed her role as Child's primary caretaker for the first 15 months of Child's life.

In her third issue, Mother claims that the trial court relied on two episodes of Mother's mental health which occurred a year prior to the two-day hearing. Specifically, Mother points to one incident in which Mother had almost dropped Child because she was tired, and another in which she had called 9-1-1 when she had overheated Child's bottles. Mother claims that these incidents are past matters which did not affect Child's welfare.

Mother correctly asserts that a parent's ability to care for a child must be determined as of the time of the custody hearing, not as of an earlier time. *Wiseman*, 718 A.2d at 847, citing *Bresnock v. Bresnock*, 500 A.2d 91 (Pa. Super. 1985). "[U]nless it can be shown that the parent's conduct has had a harmful effect on the child, it should have little weight in making a custody decision." *Bresnock*, 500 A.2d at 96. The testimony from Mother's treating psychologist, Mr. Snyder, was that, at the time of the hearing, Mother was fit to perform her duties as a parent to Child, despite her mental illness. The record appears to reflect that the trial court unduly penalized Mother for prior episodes of mental health concerns that did not have a harmful effect on Child. This was an abuse of discretion by the trial court.

Summarizing, the testimony and exhibits do not support the trial court's factual findings and inferences that awarding primary physical custody to Father was in the best interest of Child because Father was physically, mentally, emotionally, and financially a more stable parent than Mother. First, the record does not support the trial court's conclusion that Father offers Child a better living situation and environment than Mother, especially in view of the absence of a room for Child and the presence of non-family persons, such as M.F., living with Father. Next, the record reflects that Mother is just as able as Father (or more so) to parent Child. Also, the record fails to support the trial court's conclusion that Father offered Child more opportunity for growth than Mother. Father admitted that Child was doing very well under Mother's care as the primary caretaker. Father said that he was satisfied with what was then the current transportation arrangement, with the Rockaway Mall as the exchange point. Simply because Father could offer the services of his new wife, a professional nanny, did not make him the better parent than Mother to raise Child. The trial court abused its discretion in concluding that it was in Child's best interest for Father to have primary physical custody of Child.

As the record was sufficiently developed, we may substitute our judgment for that of the hearing judge, and decide the case on its merits. **Wiseman**, 718 A.2d at 851 n.3. We conclude that the trial court abused its discretion. Instead of remanding the matter for further consideration, we

J. S22015/09

vacate the trial court's order and remand the matter for entry of a final custody order which grants Mother primary physical custody, in conformance with this memorandum.

Order vacated. Case remanded for entry of a final custody order in conformance with this memorandum. Jurisdiction relinquished.

Judgment Entered.


Prothonotary

Date: _____