J-A26021-13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

B.K.M.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
J.A.M.,	:	
	:	
Appellant	:	No. 1025 EDA 2013

Appeal from the Order dated March 20, 2013,
Court of Common Pleas, Montgomery County,
Domestic Relations at No. 2010-31332

B.K.M.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
J.A.M.,	:	
	:	
Appellee	:	No. 1162 EDA 2013

Appeal from the Order dated March 20, 2013,
Court of Common Pleas, Montgomery County,
Domestic Relations at No. 2010-31332

BEFORE: BOWES, DONOHUE and OTT, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED DECEMBER 11, 2013**

J.A.M. ("Mother") and B.K.M ("Father") both appeal from the order dated March 20, 2013, amending the order dated March 8, 2013, awarding Mother and Father shared legal custody of A.M. (born December of 2003), L.M. (born March of 2005), and J.M. (born March of 2008) (collectively, "the Children"), awarding Mother and Father shared physical custody of the

Children, in the event that Mother elects to return and reside in Montgomery County, Pennsylvania, or, alternatively, awarding Father primary physical custody of the Children, in the event that Mother elects to remain in residence in Sweden. For the reasons that follow, we vacate the trial court's order dated March 20, 2013 and remand the case to the trial court with instructions.

This is the second opportunity for this Court to address issues related to the trial court's determination of custody and relocation issues in this case. In a prior published decision, we set forth the relevant factual background of the case as follows:

> Mother and Father met in New Jersey in 1997. N.T., 10/27/11, at 18–19. Mother is a citizen of Sweden. ***Id.*** at 226. The parties were married in Sweden in June of 2002. ***Id.*** at 26. Shortly thereafter, Mother was diagnosed with ulcerative colitis. N.T., 10/28/11, at 168. Mother's condition progressed, eventually requiring a series of surgeries, the first of which occurred in June of 2009. ***Id.*** at 171–74. Mother underwent three surgeries in the United States, which took place in June of 2009, September of 2009, and December of 2009. ***Id.***
>
> Mother required a fourth and final surgery, which Mother and Father agreed she should seek in Sweden, rather than in the United States. N.T., 10/27/11, at 106–07; N.T., 10/28/11, at 68–70. The parties anticipated that the surgery would take place in the summer of 2010. On April 29, 2010, Mother, Father, and the Children traveled to Sweden. N.T., 10/27/11, at 118. While in Sweden, Father informed Mother that he wanted to end their marriage. ***Id.*** at 127–28. On May 5, 2010, Father returned to the United States, while Mother and the

Children remained in Sweden. ***Id.*** at 129. Mother and the Children were initially scheduled to stay in Sweden for the summer, and return on a flight scheduled in August of 2010. ***Id.*** at 107–08.

Subsequently, medical necessity delayed Mother's surgery date, initially until September of 2010. ***Id.*** at 133. Upon learning of the delay, Father agreed that the Children could remain in Sweden during that period. N.T., 10/27/11, at 133–34; N.T., 10/28/11, at 78–79.

On October 26, 2010, Father filed for divorce. In December of 2010, Mother returned briefly to the United States, alone, with hopes that Father might change his mind regarding the divorce. N.T., 10/28/11, at 84, 87. Mother had hopes that Father would agree to seek counseling and preserve the marriage, but learned during the visit that Father had a paramour. ***Id.*** at 86–87.

In March of 2011, Mother was finally able to undergo the fourth and final surgery. ***Id.*** at 181–82. That same month, Father informed Mother that he wanted to bring the Children from Sweden to Disney World in Florida, but Mother refused. N.T., 10/27/11, at 143.

In May of 2011, Father filed a petition for an expedited custody hearing. In June of 2011, Father and Mother attended a custody conciliation, with Mother participating via telephone. Mother, still recovering from her surgery, represented that she and the Children would not return to the United States until her health improved. ***Id.*** at 155, 148–52. Shortly thereafter, the Children returned to the United States for a four-week visit with Father, from July 11, 2011 to August 11, 2011, at Father's home in King of Prussia, Pennsylvania. ***Id.*** at 174. During the Children's visit, Father filed an emergency petition seeking to keep the Children in the United States, which the trial court denied by an order entered August 9, 2011.

> On October 27 and 28, 2011, the trial court held a custody hearing at which Mother, Father, and several family members testified. On January 5, 2012, the trial court entered its order, granting shared legal custody of the Children to Mother and Father. The trial court order also granted shared physical custody to Mother and Father, in accordance with a schedule, in the event that Mother returns to Montgomery County, and, alternatively, granted primary physical custody to Father, in accordance with a schedule, in the event that Mother remained in Sweden. The trial court order also denied Mother's petition for relocation.[1]
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> > [1] Mother did not file a formal petition for relocation, but the trial court, in its opinion filed pursuant to Pa.R.A.P. 1925(a), explained that it informed the parties that "it would consider the verbal notice she gave at a prior short list conference sufficient for purposes of judicial economy but informed counsel that the decision to proceed was without prejudice to either party's rights to file an appropriate appeal." Trial Court Opinion, 2/8/12, at 1. On appeal, Father did not challenge the sufficiency of the notice provided by Mother.

B.K.M. v. J.A.M., 50 A.3d 168, 170-71 (Pa. Super. 2012).

Mother appealed the trial court's January 5, 2012 order. When said order became effective on March 1, 2012, she did not return the Children to the United States, citing her appeal, her poor health, the expiration of her green card, and her lack of financial resources to travel to and stay in the United States. N.T., 12/19/2012, at 99. On March 5, 2012, the trial court issued an order in which it found Mother in contempt, granted Father sole

legal and physical custody of the Children, and ordered Mother to return the Children to the United States and surrender their passports. The March 5 order also vacated the existing child support order and required Father to deposit all alimony *pendent lite* into an escrow account. On March 6, 2012, the trial court entered another order memorializing under the Domestic Relations caption the provisions of the March 5 order regarding child support and alimony *pendent lite*. On June 29, 2012, the trial court entered a third order, terminating Father's obligation to deposit alimony *pendent lite* into escrow. During this time period, Father instituted an action in Sweden under the Hague Convention for the return of the Children.

In her appeal of the January 5, 2012 order, Mother argued that the trial court had misinterpreted section 5337(*l*) of the Child Custody Act, 23 Pa.C.S.A. §§ 5321-5340, which provides that "[i]f a party relocates with the child prior to a full expedited hearing, the court shall not confer any presumption in favor of the relocation." 23 Pa.C.S.A. § 5337(*l*). Based upon its interpretation of section 5337(*l*), the trial court had intentionally disregarded any evidence arising out of the period after Mother and Children moved to Sweden in April 2010, since to do so, according to the trial court, would permit Mother to "be 'rewarded' because she created a *status quo* that disadvantages Father." ***B.K.M.***, 50 A.3d at 174. In an opinion dated July 31, 2012, this Court agreed with Mother that the trial court had erred in its interpretation of section 5337(*l*):

> In the instant case, Mother presented evidence regarding her role as a primary caretaker from April 2010 onward, as well as evidence regarding the emotional, educational, and social roots that the Children established in Sweden since that time. The trial court, in making its ultimate determination, stated that it was bound to disregard this evidence, in order to avoid conferring a presumption in favor of relocation. This interpretation of section 5337(*l*), however, evinces a misunderstanding of the meaning of the word "presumption," and acts to convert a statutory provision on the allocation of burdens into what amounts to an extreme sanction on relocations that occur prior to a full expedited hearing. Moreover, by disregarding any evidence arising during the relocation, the trial court, in essence, conferred a presumption against relocation. The plain meaning of section 5337(*l*) supports neither the sanction enforced by the trial court by its refusal to consider a substantial portion of the record, nor the de facto presumption against relocation. We conclude that the trial court's interpretation of section 5337(*l*) is, thus, an error of law.
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> Additionally, our review reveals that the trial court's interpretation of section 5337(*l*) resulted in a failure to properly consider all factors of section 5328(a) and 5337(h). The court omitted consideration of the parental duties performed in Sweden, of any need for stability and continuity established for the Children during their time in Sweden, and of the overall best interests of the Children, inasmuch as those interests might involve maintaining the status quo established by their life in Sweden over the past two years, which for the most part occurred with Father's agreement. As a result, the trial court failed to apply the necessary factors provided by section 5328(a) and 5337(h).

Id. at 175.

Accordingly, this Court remanded the case to the trial court, with instructions that it "fully consider the best interests of the Children pursuant to sections 5328(a) and 5337(h), which shall include a weighing of the evidence of the Children's lives in Sweden, and the need for stability and continuity established by the Children's education, family life and community life in Sweden." ***Id.*** at 176. In addition, by order dated September 5, 2012, we granted a stay of the trial court's orders dated March 5, March 6, and June 29 "pending any further appeals and the conclusion of any proceedings held pursuant to this Court's July 31, 2012 decision that vacated the trial court's January 4, 2012 decision." Order, 8/5/2012, at 1.

On September 27, 2012, the Hague Convention proceedings concluded, resulting in an order by the Swedish courts requiring Mother to return the Children to the United States within 30 days. On October 26, 2012, prior to any proceedings on remand, the trial court entered an interim custody order requiring Mother to return the Children to the United States and surrender their passports, setting a custody schedule, and permitting Father to enroll the Children in school in Montgomery County, Pennsylvania. On October 28, 2012, Mother brought the Children to Montgomery County, and returned to Sweden approximately two weeks later.

On December 19, 2012, the trial court conducted an evidentiary hearing on the custody remand, at which time Mother, Mother's father, and Father testified. The hearing continued on January 29, 2013, at which time

Father completed his testimony. Mother offered the videotape depositions of two witnesses in Sweden (her doctor and one of the Children's teachers), but the trial court sustained Father's objections to their admission on the grounds that Mother had not provided sufficient notice of the depositions to Father's counsel.

On March 8, 2013, the trial court issued a custody order substantially similar to its prior January 5, 2012 order vacated by this Court. Pursuant to the March 5, 2013 order, if Mother returns to and resides in Montgomery County, Mother and Father will have shared physical custody of the Children on a 2-2-3 basis (Mother with custody on Monday and Tuesday, Father on Wednesday and Thursday, and each on alternating weekends), and Mother may also take the Children to Sweden for six weeks during the summer. On the other hand, if Mother remains in Sweden, Father will have primary physical custody of the Children in Montgomery County, with Mother permitted to have physical custody during the summer months when school is not in session. The primary distinguishing difference between the January 5, 2012 order and the March 8, 2013 order is that the March 8, 2013 order requires Mother, 30 days prior to each occasion on which the Children travel to Sweden, to post a $100,000 bond naming Father as the beneficiary or payee in the event that she fails to return the Children to the United States. On March 20, 2013, the trial court modified its order to increase the amount of the bond to $500,000.

In her appeal, Mother sets forth six issues for our consideration and determination:

> I. Did the Trial Court err by entering a second Interim Custody Order on October 26, 2012 (a) despite the Superior Court Order of September 5, 2012 which had stayed the lower court's first Interim Custody Order (first order entered March 5, 2012) pending the conclusion of all appeals; (b) despite the Superior Court Order of July 31, 2012 vacating the Custody Order of January 4, 2012; and (c) despite having had no hearing on the matter, all resulting in significant prejudice to Mother and in contravention of the best interests of the children.
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> II. Did the Trial Court err by entering an Order dated December 19, 2012 improperly denying Mother's Motion in Limine filed October 4, 2012 in which Mother sought to limit the additional testimony (if any) to those issues identified in the Superior Court's Order of July 31, 2012 and which facts were already contained in the record and since the Superior Court's remand was based upon an error of law and did not specify the need for additional testimony, and, instead allowing for any and all testimony of events and issues arising up to the date of trial in December of 2012 and January of 2013, resulting in prejudice to Mother.
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> III. Did the Trial Court err by entering an Order dated January 29, 2013 improperly precluding the testimony of Dr. Jonas Bengtsson and Marianne Andreasson, resulting in prejudice to Mother, despite the Court's instruction to conduct said testimony by advance video deposition and thereby rendering the Rules of Civil Procedure inapplicable and, in any event, ignoring that no advance notification of witnesses was required by this Court.
>
> IV. Did the Trial Court err by determining that the best interests of the children warrant Mother having primary physical custody of the children if, and only

> if, Mother resides in the United States, and which grants to Father primary physical custody of the children in the United' States if Mother does not return to the United States.
>
> V. Did the Trial Court err by again (and despite Superior Court directive by Order dated July 31, 2012) failing to properly interpret section 5337(*l*) resulting again in a failure to properly consider and weigh all factors of sections 5328(a) and 5337(h) and thereafter failing to conclude that the best interests of the children warrant their continued residence in Sweden.
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> VI. Did the Trial Court err by abusing its discretion in entering its March 20, 2013 Order and requiring a $500,000.00 bond when no request for said bond was made at trial and no evidence was placed in the record regarding the ability of Mother, a Swedish citizen with no assets in the United States, to secure said bond, and the evidence regarding Mother's financial condition is uncontested, all resulting in an Order which creates impossibility of performance and is otherwise confiscatory and punitive in nature.

Mother's Brief at 9-10.

In his appeal, Father sets forth the following nine issues:

> I. Whether the trial court respectfully erred in entering its subject Order, that it is in the best interest of the children that Mother shall have an opportunity to travel with the children to Sweden, or have custody of the children in Sweden, at any time during their minority, despite having found that Mother failed to follow the Court's Order of January 4, 2012 when she did not return the children to the United States from Sweden.
>
> II. Whether the trial court respectfully erred in entering its subject Order, that if Mother is residing in Sweden she shall have custody of the children during any holiday periods, despite having found that

Mother failed to follow the Court's Order of January 4, 2012 when she did not return the children to the United States from Sweden.

III. Whether the trial court abused its discretion as to the manner in which it weighed all of the evidence relating to section 5328(a), regarding what the Court found to be Mother's blatant defame of the Court's earlier orders.

IV. Whether the trial court respectfully erred in entering its subject Order, that it is in the best interest of the children that Mother may have any custodial time with the children in Sweden at any time before their eighteenth birthdays despite having found that Mother failed to follow the Court's Order of January 4, 2012 when she did not return the children to the United States from Sweden.

V. Whether the trial court respectfully erred in entering its subject Order, that the parties share costs of transporting the children between Pennsylvania and Sweden, despite evidence presented of Father's financial condition such that the resulting Order is confiscatory in nature and would render Father incapable of compliance.

VI. Whether the trial court respectfully erred in weighing all of the evidence relating to section 5328(a), and by failing to consider the impact on the children were they to be again subjected to custodial time in Sweden, considering the substantial evidence of Mother's alienation of Father during Mother's custodial time in Sweden.

VII. Whether the trial court respectfully erred in finding that if Mother elects to reside in Montgomery County, Pennsylvania, the parties shall have shared physical custody despite Mother's adamancy about staying in Sweden and the corresponding absence of any evidence about where or how or Mother would exercise custodial time in Pennsylvania.

> VIII. Whether the trial court respectfully erred in weighing all of the evidence relating to section 5328(a), and in finding it in the best interest of the children that Mother should have shared physical custody in Montgomery County, Pennsylvania.
>
> IX. Whether the trial court erred by failing to properly interpret and apply all of the factors in Sections 5328(a), and thereafter failing to conclude that the best interest of the children warrant primary custody with Father.

Father's Brief at 4-6.

We focus our analysis on Mother's fifth issue on appeal, as we consider it to be dispositive. This case involves both Father's request for custody of the Children and Mother's petition to relocate to Sweden. Our scope and standard of review in this context is as follows:

> In reviewing a custody order, our scope is of the broadest type and our standard 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.
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> With any child custody case, the paramount concern is the best interests of the child. 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.

Durning v. Balent/Kurdilla, 19 A.3d 1125, 1128 (Pa. Super. 2011) (citation omitted).

Pursuant to the Child Custody Act, the factors set forth in sections 5328(a) and 5337(h) must be considered when awarding custody or granting permission to relocate.

> **§ 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.
> >
> > (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).

> **§ 5337. Relocation**
>
> **(h) Relocation factors.—**In determining whether to grant a proposed relocation, the court shall consider the following factors, giving weighted consideration to those factors which affect the safety of the child:

(1) The nature, quality, extent of involvement and duration of the child's relationship with the party proposing to relocate and with the nonrelocating party, siblings and other significant persons in the child's life.

(2) The age, developmental stage, needs of the child and the likely impact the relocation will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child.

(3) The feasibility of preserving the relationship between the nonrelocating party and the child through suitable custody arrangements, considering the logistics and financial circumstances of the parties.

(4) The child's preference, taking into consideration the age and maturity of the child.

(5) Whether there is an established pattern of conduct of either party to promote or thwart the relationship of the child and the other party.

(6) Whether the relocation will enhance the general quality of life for the party seeking the relocation, including, but not limited to, financial or emotional benefit or educational opportunity.

(7) Whether the relocation will enhance the general quality of life for the child, including, but not limited to, financial or emotional benefit or educational opportunity.

(8) The reasons and motivation of each party for seeking or opposing the relocation.

(9) The present and past abuse committed by a party or member of the party's household and whether there is a continued risk of harm to the child or an abused party.

> (10) Any other factor affecting the best interest of the child.

23 Pa.C.S.A. § 5337(h).

As indicated, in remanding the case, this Court specifically instructed the trial court to "fully consider the best interests of the Children pursuant to sections 5328(a) and 5337(h), which shall include a weighing of the evidence of the Children's lives in Sweden, and the need for stability and continuity established by the Children's education, family life and community life in Sweden." ***B.K.M.***, 50 A.3d at 176. Based upon our review of the certified record on appeal and the written opinions of the trial court (including both its findings of fact and order dated March 8, 2013 and its subsequent opinion pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure), however, the trial court has failed to comply either with this Court's instructions or with its obligations under the Child Custody Act to consider all of the factors set forth in sections 5328(a) and 5337(h).

This Court has repeatedly emphasized that when making a determination involving custody and relocation issues, the trial court must address all sixteen best interest factors under section 5328(a) and all ten relocation factors under section 5337(h). ***See, e.g.***, ***A.M.S. v. M.R.C.***, 70 A.3d 830, 835 (Pa. Super. 2013); ***M.J.M. v. M.L.G.***, 63 A.3d 331, 335-36 (Pa. Super. 2013); ***J.R.M. v. J.E.A.***, 33 A.3d 647, 652 (Pa. Super. 2011). This requires, at a minimum, an analysis of each factor, with appropriate

discussion of the credible evidence introduced by the parties and articulation of the trial court's reasons for deciding that said factor favors one party or the other (or neither). Mere cursory considerations or conclusory statements that a factor was considered will not suffice. ***E.D. v. M.P.***, 33 A.3d 73, 81 (Pa. Super. 2011). "It is not this Court's proper function to scour the record in attempts to intuit the reasons supporting the trial court's findings." ***Id.*** As we have indicated, effective appellate review requires the trial court to consider all of the custody and/or relocation factors and "to state its reasoning and conclusions on the record for our review." ***Id.***

In connection with its January 5, 2012 order, the trial court indicated that while it had considered all of the factors listed in sections 5328(a) and 5337(h), it had refused to consider any evidence regarding the Children's lives in Sweden since Mother "should not be 'rewarded' because she created a *status quo* that disadvantages Father." Trial Court Opinion, 2/8/2012, at 10-11. Now, in connection with the order currently on appeal, the trial court begins its analysis with a similar observation, noting that when a relocation occurs before a court determines its propriety, "a new *status quo* exists," with "new friends and a new life" for the Children. Trial Court Opinion, 4/17/2013, at 8-9. But giving "too much weight to this evidence," according to the trial court, would "encourage and reward a parent without court approval." ***Id.*** at 9. Based on this Court's decision to remand the case, however, the trial court indicated that it would look at "all evidence," since

"to disregard the new *status quo* may be nothing more than punishing the child as a means of sanctioning the parent." ***Id.***

We are concerned, however, that despite the trial court's insistence that it considered all the evidence, its current custody order still involves "sanctioning the parent," specifically Mother for her conduct vis-à-vis Father. The trial court makes clear that its decision here is based primarily on Mother's failure to foster and encourage a relationship between Father and the Children, including (1) her failure to return the Children to the United States on March 1, 2012, in response to the trial court's now-vacated order of January 5, 2012, and (2) her interference (or interference by family members) in Skype conversations between Father and the Children and her failure to provide Father with sufficient information about the Children's school and other activities. Findings of Fact, 3/5/2013, at 4-5. For these reasons, the trial court concludes that "[b]ased on Mother's behavior, if Mother remains in Sweden, the Children would essentially lose their relationship with Father," and further states that "Mother's behavior has been not only deplorable but potentially damaging to the [C]hildren, as this behavior has a direct effect on the [C]hildren's relationship with Father."[1] Trial Court Opinion, 4/17/2013, at 9.

[1] Even with respect to these findings, the trial court has not cited to any evidence of record in support of its conclusions, including no evidence to show that Mother's conduct has had any negative effect on the Children's relationship with their Father. We note, for example, that when the Children

Moreover, by focusing solely on this behavior by Mother, the trial court essentially made its custody and relocation determinations based on a single factor, namely which party is more likely to encourage and permit frequent and continuing contact between the child and the other parent. 23 Pa.C.S.A. § 5328(a)(1); 23 Pa.C.S.A. § 5337(h)(5). Other factors under sections 5328(a) and 5337(h) received little or no consideration by comparison. In particular, in our remand order we specifically directed the trial court to weigh the evidence of the Children's lives in Sweden and to consider their need for stability and continuity in their education, family life and community life in Sweden, as required by multiple factors under section 5337(h). ***B.K.M.***, 50 A.3d at 176; 23 Pa.C.S.A. § 5337(h)(1), (2), (6), (7). Although the trial court states, in a cursory fashion, that it "reassessed and reweighed the factors including the evidence of the [C]hildren's lives in Sweden," it provided no findings of fact regard any of the details of the Children's lives in Sweden, no discussion of the quality of the Children's lives in Sweden, no comparison between the quality of the Children's lives in Sweden versus the United States, and no consideration of the Children's need for stability and continuity of their lives in Sweden. ***E.D.***, 33 A.3d at 81.

The trial court's analysis likewise largely ignores other factors in sections 5328(a) and 5337(h). For example, the trial court does not

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first saw their Father upon their return to the United States in October 2012, Father testified that they ran excitedly into his arms and were "extremely happy." N.T., 1/29/2013, at 81-82.

consider which party is more likely to maintain a loving, stable, and nurturing relationship with the Children adequate for their emotional needs, or which parent is more likely to attend to the Children's daily physical, emotional, developmental and educational needs. 23 Pa.C.S.A. § 5328(a)(8), (9). The trial court likewise does not discuss the "nature, quality, extent of involvement and duration" of the Children's relationships with Father and/or "siblings and other significant persons" in their lives with Father. 23 Pa.C.S.A. § 5337(h)(1). The record reflects that while in Montgomery County, the Children live with Father's girlfriend and her two and one half year old child. N.T., 12/19/2012, at 126; N.T., 1/29/2013, at 20. The trial court's writings contain no discussion of these new relationships, including in particular the fitness and suitability of Father's girlfriend, as a "significant person" in the Children's lives, to act in a parental or quasi-parental role towards them. In fact, the trial court does not even mention that Father's girlfriend lives with him and the Children and does not describe the nature and quality of her relationship with the Children. Finally, the trial court does not examine the impact that a relocation of the Children from Sweden will have on their physical, educational and emotional development, particularly since it would likely involve prolonged absences from their Mother. 23 Pa.C.S.A. § 5337(h)(2). To the extent that the trial court considered these factors in its analysis, it has not provided any relevant discussion to explain its findings.

We will address two additional issues raised by Mother on appeal, as their determination may be significant on remand.[2] First, on remand, the trial court should consider the depositions of mother's doctor, Dr. Jonas Bengtsson, and the Children's teacher in Sweden, Marianne Andreasson. On December 4, 2012, Mother's counsel requested permission to take telephonic testimony of Mother's doctor for use at the December 19, 2012 evidentiary hearing. Trial Court Opinion, 4/17/2013, at 6. On December 5, 2012, Father's counsel sent a letter to the trial court consenting to the video deposition for use at trial and requesting, *inter alia*, the doctor's identification, qualifications, an offer of proof, and any prior testimony (translated into English). N.T., 1/15/2013, at Ex. F-1. On December 7, 2012, Mother's counsel called the trial court's chambers to confirm approval

[2] Based upon our decision to remand the case for further proceedings, we will not address the first two issues raised on appeal by Mother, both of which implicate the scope of the proceedings conducted by the trial court after our prior remand – including its decision to enter an interim custody order that was contrary to our instructions in our order dated September 5, 2012, and to conduct another evidentiary hearing.

We must indicate our displeasure, however, with the trial court's rationale for taking these actions. In its written opinion pursuant to Pa.R.A.P. 1925(a), the trial court explains that it decided to issue an interim order and conduct another evidentiary hearing after contacting this Court's Central Legal Staff and obtaining advice regarding the extent of its authority to take these actions. Trial Court Opinion, 4/17/2013, at 5-6. Arguably, contact with an employee of this Court constitutes a violation of the Code of Judicial Conduct, including in particular Canon 3(A)(4) of the, which prohibits a court from considering *ex parte* communications concerning a pending matter. Moreover, employees of this Court's Central Legal Staff have no authority to speak for this Court, and the trial court here has no authority to rely upon any such representations when issuing orders to litigants in a case.

of the video deposition, and was advised that permission was granted and that a CV for the doctor should be provided to Father's counsel. ***Id.*** at 19. On December 13, 2012, Mother's counsel sent two notices of video deposition to Father's counsel, one each for Dr. Bengtsson and Ms. Andreasson. The depositions took place as scheduled on December 17, 2012. By order dated January 29, 2013, the trial court precluded the admission of both depositions on the grounds that Mother's counsel had provided just four days' notice of these depositions, which does not comply with the "reasonable notice" requirement for depositions in Rule 4007.1(a) of the Pennsylvania Rules of Civil Procedure. Trial Court Order, 1/29/2013, at 3.

We conclude that the trial court erred in refusing to admit this testimony into evidence. Our standard of review for the admission or exclusion of evidence is whether the trial court acted within its sound discretion in doing so, and whether the complaining party suffered prejudice as a result. ***See., e.g.***, ***Keffer v. Bob Nolan's Auto Service, Inc.***, 59 A.3d 621, 633 (Pa. Super. 2012). With respect to Dr. Bengtsson, Father's counsel had consented to his deposition 12 days prior to when it took place, and the trial court approved it well in advance. Mother's counsel provided a CV for Dr. Bengtsson, and while the other items requested in counsel's letter were not provided, no rule of court required the production of these

materials in advance of the deposition of a fact witness.[3] We also note that Father suffered no prejudice as a result of the notice provided by Mother's counsel, as our review of Dr. Bengtsson's deposition transcript reflects that Father's counsel, who was already well aware of many of the details of Mother's medical condition, conducted a thorough cross-examination of Dr. Bengtsson.

While it is true that Father's counsel received only four days' notice of Ms. Andreasson's deposition, we likewise conclude that the trial court should have admitted her testimony. As Mother properly points out, Ms. Andreasson could have been called to testify at the evidentiary hearing on December 19, 2012, with *no* advance notice to Father's counsel.[4] As such, providing four days' notice for a deposition for use at trial on December 17, 2012, was reasonable notice under the circumstances. We also find that the exclusion of Ms. Andreasson's testimony was prejudicial to Mother, since it provided direct evidence of the Children's lives in Sweden, which, as

[3] While Mother's counsel presented Dr. Bengtsson as both a fact witness and an expert witness, in its January 29, 2013 order, the trial court, after deciding to exclude his deposition testimony, did not reach the question of whether Dr. Bengtsson qualified as an expert witness.

[4] The trial court disputes this contention, indicating that it "has a policy in which both parties are required to submit a pretrial statement, ten days in advance of trial, which includes a witness list." Trial Court Opinion, 4/17/2013, at 6 n.8. The certified record on appeal in this case, however, does not reflect that either party filed a pretrial statement in advance of the December 19, 2012 evidentiary hearing or that the trial court had advised them of any obligation to do so.

discussed hereinabove, is an important consideration under sections 5328(a) and 5337(h).

Second, on remand, the trial court must determine Mother's financial ability to post a bond before including such a requirement in a custody order. Here the trial court has ordered Mother to post a $500,000 bond on each occasion before the Children travel to Sweden to spend time in that country. The trial court made no findings of fact, however, regarding Mother's ability to post a bond in that amount (or in any amount). In our view, this was error.

Neither the parties nor the trial court has directed us to any Pennsylvania appellate court cases discussing the use of a bond to compel compliance with the terms of a custody order, and we are not aware of any such cases. We note, however, that our courts do permit the use of bonds to compel compliance with orders in the context of civil contempt proceedings, including orders for the payment of spousal and child support. ***See, e.g.***, ***Godfrey v. Godfrey***, 894 A.2d 276, 785 (Pa. Super. 2006). Before doing so, however, our Supreme Court has instructed that the trial court must first determine that the individual has the ability to comply: "A court may not convert a coercive sentence into a punitive one by imposing conditions that the contemnor cannot perform and thereby purge himself of the contempt." ***Barrett v. Barrett***, 470 Pa. 253, 262, 368 A.2d 616, 620 (1977). In ***Godfrey***, the trial court imprisoned a father for failure to pay

child support, but indicated that he would be released upon payment of a $25,000 bond to secure future payments. ***Godfrey***, 894 A.2d at 785. This Court reversed, holding that while the trial court was well within its discretion to impose a bond to secure compliance with its child support order, it abused its discretion by imposing a bond without first making a factual determination that the defendant had the present financial ability to post a bond in that amount. ***Id.***

In this case, in order to secure Mother's compliance with her obligation to return the children to the United States in accordance with the schedule set forth in the custody order, the trial court requires Mother to post a bond of $500,000 at least 30 days in advance of each visit by the Children to Sweden. Mother contends that she has no financial ability to obtain or post a bond in this amount, and that as a result this requirement essentially precludes the Children from ever returning to Sweden. Mother's Brief at 68. On remand, if the trial court again determines that a monetary bond is necessary to secure Mother's compliance with its orders, it may impose such a requirement only in an amount that it determines Mother has the present ability to pay.

Given our disposition of Mother's issues on appeal, it is not necessary to address the issues raised in Father's appeal in any detail. With the exception of Father's fifth issue, Father's remaining issues all question the reasonableness of the trial court's decisions in weighing the factors under

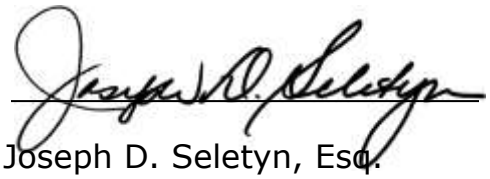
sections 5328(a) and 5337(h), especially its decision to allow the Children to travel to Sweden since Mother previously failed to return them to the United States when ordered to do so by the trial court. Because we have concluded herein above that the trial court's evaluation of the custody and relocation factors was insufficient, and because we are remanding the case for reconsideration of these factors, any further analysis of the trial court's efforts to date would be premature.

With respect to Father's fifth issue on appeal, we conclude that the trial court did not err in ordering Mother and Father to share the costs of the Children's international travel. The trial court appropriately noted that both parties contend that their financial resources are limited, and thus requiring them to share the costs of travel is an equitable compromise under the circumstances. Trial Court Opinion, 5/1/2013, at 4. The trial court further indicated that it had altered the exchange point from Sweden to Copenhagen, Denmark to make travel expenses more affordable for Father. ***Id.*** Finally, the trial court found, as a matter of fact, that Father's own testimony established that his job provides a good salary and benefits. Findings of Fact, 3/8/2013, at 8. As a result, we find no abuse of discretion in requiring Father to contribute equally to the costs of international travel.

The trial court's order dated March 20, 2013 is vacated and the case is remanded for further proceedings consistent with this decision. On remand, the trial court shall conduct an evidentiary hearing, or otherwise receive

evidence, regarding the limited issue of Mother's financial ability to post a bond in the amount of $500,000 (or some other lesser amount). Thereafter, **within 60 days of the date of this decision**, the trial court shall enter a new order and a revised written opinion that (1) weighs the evidence of the Children's lives in Sweden and considers their need for stability and continuity in their education, family life and community life in Sweden, and (2) considers all of the factors in sections 5328(a) and 5337(h) and sets forth its reasons (including relevant evidence) and conclusions with respect to each and every factor. In the event that one or more of the parties thereafter files a notice of appeal, the Prothonotary shall establish an expedited briefing schedule and assign the case to the first available panel. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/11/2013