

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

J.D.F.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
K.H.,	:	
	:	
Appellee	:	No. 1406 MDA 2012

Appeal from the Order entered on July 16, 2012,  
in the Court of Common Pleas of Juniata County,  
Civil Division at No. CV-508-2011

BEFORE: BOWES, GANTMAN, and OLSON, JJ.

MEMORANDUM BY OLSON, J.:

Filed: February 8, 2013

J.D.F. ("Father"), appeals from the final custody order dated July 3, 2012, and entered July 16, 2012, which awarded primary physical custody of X.H. (born in August 2006) ("Child"), to Child's mother, K.H. ("Mother"), and awarded Father partial physical custody in accordance with a schedule.<sup>1</sup> We affirm.

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<sup>1</sup> We note that the trial court's July 16, 2012 order did not make an award of legal custody, and we presume, since Father does not challenge the lack of a legal custody award, that the provision for shared legal custody in the prior order remains intact. Regardless, Father has waived any challenge to the lack of a legal custody provision in the order by his failure to raise the issue in his brief on appeal or in his Pennsylvania Rule of Appellate Procedure 1925(b) concise statement of errors complained of on appeal. **See *Krebs v. United Refining Co.***, 893 A.2d 776, 797 (Pa. Super. 2006) ("[w]e will not ordinarily consider any issue if it has not been set forth in or suggested by an appellate brief's statement of questions involved, Pa.R.A.P. 2116(a), and any issue not raised in a statement of matters complained of on appeal is deemed waived"); **see also *Dietrich v. Dietrich***, 923 A.2d 461, 463 (Pa.

On April 25, 2007, Father filed a complaint for custody in Snyder County. After a hearing on July 12, 2007, the trial court in Snyder County entered a custody order, declaring that the parties shared legal custody of Child, Mother had primary physical custody, and Father had partial physical custody. On August 31, 2007, Father filed a petition for modification of the custody order. On September 20, 2007, the trial court held a hearing and entered an order stating that the July 12, 2007 order would remain in full force and effect until further order of court, but with an amended stipulation regarding Father's exercise of his partial physical custody.<sup>2</sup>

On October 27, 2011, Father filed a petition for modification of the custody order and sought primary physical custody of Child. Father alleged that it would be in the best interests of Child to be in Father's primary physical custody, as Father could provide a stable and loving environment in the home in which he was currently living with his paramour, J.R.

On December 20, 2011, the trial court in Snyder County transferred the matter to Juniata County, where Mother had primary physical custody, noting that Father resided in Northumberland County. On January 19, 2012, Mother filed a petition for modification of the custody order, asserting that it would be in Child's best interests to modify Father's partial custody because Child was currently enrolled in school in Thompsettown, Juniata County, and

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Super. 2007) (issues not raised in Rule 1925(b) statement are waived on appeal).

would be attending full-day kindergarten on a Monday through Friday schedule beginning on January 23, 2012. On January 23, 2012, Mother filed a petition for special relief relating to Father's need to accommodate Child's school schedule with his exercises of physical custody, and seeking a suspension of the July 12, 2007 and September 20, 2007 orders, to accommodate that school schedule.

On February 21, 2012, the trial court entered a temporary custody order, based on an agreement of the parties. Under the order, the parties shared legal custody of Child, Mother had primary physical custody of Child, and Father had partial physical custody of Child every Friday through Sunday. The order required that Mother deliver Child to Father's home by 6:00 p.m. each Friday, and Father was then obligated to return Child to Mother's home by noon on Sunday.

On July 2, 2012, the trial court held the custody hearing. In an order dated July 3, 2012, and entered July 16, 2012, the trial court awarded primary physical custody of Child to Mother, and awarded Father partial physical custody in accordance with a schedule. Trial Court Order, 7/16/12, at 1-6.

On August 2, 2012, Father filed a notice of appeal from the final custody order entered on July 16, 2012. Father failed to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P.

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<sup>2</sup> The order also dismissed Mother's petitions for contempt against Father.

1925(a)(2)(i) and (b). Therefore, the trial court entered an order directing Father to file a concise statement within twenty-five days. Father timely complied with the trial court's order.<sup>3</sup> On August 28, 2012, the trial court filed a "Final Memorandum," pursuant to Pa.R.A.P. 1925(a), stating that it did not believe that it committed an error of law or an abuse of discretion.

In his brief on appeal, Father raises one issue:

Did the trial court abuse its discretion and/or make an error of law in finding that an award of primary physical custody of [Child] to [Mother] was in the best interest of [Child] where said [d]ecision was not supported by either the evidence in the matter, or by the [trial c]ourt's own examination of the evidence relative to the statutory factors for granting physical custody?

Father's Brief at 4.

Initially, we observe that, as the child custody hearing in this matter was held in July 2012, the Child Custody Act, 23 Pa.C.S.A. § 5321 *et seq.* ("the Act") is applicable. ***C.R.F. v. S.E.F.***, 45 A.3d 441, 445 (Pa. Super. 2012) (holding that, if the custody evidentiary proceeding commences on or after the effective date of the Act, *i.e.*, January 24, 2011, the provisions of the Act apply).

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<sup>3</sup> Since Father complied with the trial court's order to file a concise statement, we find no basis to dismiss the appeal. ***See In re K.T.E.L.***, 983 A.2d 745 (Pa. Super. 2009) (declining to deem the appellant's issues waived or dismiss the appeal for failing to comply with Rule 1925(a)(2)(i) and (b) in a children's fast track case); ***but see J.P. v. S.P.***, 991 A.2d 904, 908 (Pa. Super. 2010) (stating "an appellant's failure to comply with an **order** to file a Rule 1925(b) statement in a timely manner constitutes waiver of all objections to the order, ruling, or other matter complained of on appeal") (emphasis in original).

In custody cases, our scope and standard of review is as follows:

In reviewing a custody order, our scope [of review] is of the broadest type and our standard [of review] is abuse of discretion. We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

*C.R.F.*, 45 A.3d at 443 (internal quotations and citations omitted).

We have stated:

the discretion that a trial court employs in custody matters should be accorded the utmost respect, given the special nature of the proceeding and the lasting impact the result will have on the lives of the parties concerned. Indeed, the knowledge gained by a trial court in observing witnesses in a custody proceeding cannot adequately be imparted to an appellate court by a printed record.

*Ketterer v. Seifert*, 902 A.2d 533, 540 (Pa. Super. 2006) (internal quotations and citations omitted).

With any custody case under the Act, the paramount concern is the best interests of the child. **See** 23 Pa.C.S.A. §§ 5328(a) and 5338(a). Section 5338 of the Act provides that, upon petition, a trial court may modify a custody order if it serves the best interests of the child. 23 Pa.C.S.A. § 5338(a). "Section 5328(a) in turn sets forth a list of [16] factors

that must be considered in a best interests of the child analysis in making any custody determination." *E.D. v. M.P.*, 33 A.3d 73, 79-80 (Pa. Super. 2011) (internal footnote omitted). As such, in *E.D.*, we held that a best interests of the child analysis requires the trial court to consider all of the sixteen factors listed in section 5328(a). *Id.* at 80.

In the case at bar, Father claims that the trial court either failed to consider or improperly weighed several of the section 5328 factors in awarding Mother primary physical custody.

Section 5328 of the Act provides:

**§ 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); *see also E.D.*, 33 A.3d at 80 n.2.

Initially, Father argues that the trial court failed to consider the statutory factors set forth at sections 5328(a)(8) and (13).<sup>4</sup> **See** Father's Brief at 8. Father contends that the trial court's failure to consider factor 5328(a)(8) (the attempts of a parent to turn the child against the other parent), and 5328(a)(13) (the level of conflict between the parties and the willingness and ability of the parties to cooperate with one another) was an error of law and/or an abuse of discretion. **See** Father's Brief at 33. These claims are meritless. Indeed, in this case, the trial court explicitly considered the factors contained in sections 5328(a)(8) and (13). **See** N.T. Hearing, 7/2/12, at 201-202; Trial Court Order, 7/16/12, at 2, 4, and 6. However, as the trial court explained, the factors did not favor one party over the other, as neither parent attempted to "turn the child against the other parent" and both parents were at fault for their inability to communicate with one another. N.T. Hearing, 7/2/12, at 201 and 207; Trial Court Order, 7/16/12, at 2, 4, and 6. Thus, Father's claim that the trial court "fail[ed] . . . to consider" the above factors is factually unsupported and necessarily fails.

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<sup>4</sup> Within Father's brief, Father claims – in passing – that the trial court failed to consider the statutory factor set forth at section 5328(a)(2), concerning "[t]he present and past abuse committed by a party or a member of the party's household." 23 Pa.C.S.A. § 5328(a)(2). However, Father concedes that the trial court's failure to address section 5328(a)(2) is understandable, as there was no evidence that any abuse ever occurred. Father's Brief at 33.



Father also claims that the trial court improperly weighed the statutory factors in this case. This claim fails.

In its order, the trial court provided us with a thorough explanation of how it weighed the statutory factors and then determined the best interests of the child. As the trial court explained:

**2. Which party is more likely to encourage frequent and continuing contact between the child and another party.**

The [c]ourt believes that [Father] is more likely to encourage and permit contact between [Child] and [Mother's] family. The [c]ourt was very concerned that the [m]aternal [g]randparents have had no contact with [Father] or his family since [Mother's] pregnancy. The [c]ourt believes that this continued inability or refusal to work together is detrimental to the well-being of [Child].

**3. The parental duties performed by each party on behalf of the child, which include meeting the physical, emotional and social needs of the child.**

The [c]ourt finds that Mother has been the primary caretaker of [Child] and has met [Child's] physical, emotional, and social needs. Father is attempting to meet those needs, but due to the parties' inability to communicate with each other in any meaningful way[,] it has been difficult. The [c]ourt believes that Mother has performed more of the parental duties, however, the [c]ourt is not faulting Father for his failure to do so.

**4. The need for stability and continuity in the child's education, family life and community life.**

The [c]ourt finds that Mother has been providing for [Child's] stability and continuity. . . . The [c]ourt notes, however, that Mother moved on at least two occasions without obtaining Father's consent and, in fact, enrolled [Child] in both [Child's] daycare center and [current] school district without discussing same with Father. However,

[Child] has resided in Thompsontown, Juniata County for close to four years and has obtained the needed stability and continuity. The [c]ourt would also note after review of the record, that Father is currently engaged to be married. His [fiancée] is expecting a child. The introduction of the [fiancée] into [Child's] life, and a new baby, may be difficult to accomplish if the parties cannot work together.

**5. Availability of extended family.**

The [c]ourt finds that [Child] has extended family on both sides, but appears to have more of a nexus to Father's family, as Mother's only sibling resides in Sunbury with his child, which is within 10 miles of Father's residence. Testimony presented that [Child] spends time with his [p]aternal [g]randmother and [p]aternal [a]unt, as well as [his] two cousins, while in Father's custody. [Child] also has a strong relationship with his [m]aternal [g]randparents, who reside approximately 30 minutes from Mother's residence. The [c]ourt heard testimony from Mother's family that they would like to see their [g]randchild more, but due to work schedules are not able to do so. The [c]ourt did not understand that logic, as [m]aternal [g]randfather is off work at 3:30 [p.m.] each day, and [m]aternal [g]randmother is off work at 2:30 [p.m.] Mother does not arrive home from work until [5:00 or] 5:30 [p.m.], which would certainly allow [maternal g]randparents time to spend with [Child].

**6. Child sibling relationships.**

As stated above, there are no siblings on Mother's side. On Father's side[, ] a sister is expected to be born this month.

**7. Factor 7 is not applicable due to the child's age.**

**8. Which party is more likely to maintain a stable, loving, and nurturing relationship with [C]hild.**

The [c]ourt finds that both parties are [capable] of maintaining a stable, loving and nurturing relationship with the child.

**9. Which parent has attended to [Child's] daily needs.**

The [c]ourt believes that Mother has been attending to the daily needs of [Child], however, this is due mainly in part to Mother having primary custody. Father's time with [Child] has been limited.

**10. Proximity of the residence to the parties.**

The [c]ourt believes that Mother's two moves, since [Child's] birth, have increased the distance between Father and [Child], and based on testimony heard, the residences at this time are approximately one hour apart.

**11. Which party is able to care for the child or make appropriate childcare arrangements.**

The [c]ourt finds that both parties are able to care for [Child] or make appropriate childcare arrangements.

**12. The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another.**

It is of extreme concern to [the c]ourt[] that the parties have demonstrated an inability to communicate with each other on any meaningful level, even when it comes to discussing the needs of their child. It is telling that Mother testified she never provided Father with any information as he was able to get that information himself. Mother had also failed to provide information as to [Child's] doctors to Father. The [c]ourt is also extremely concerned about the clear dislike and mistrust by Mother's parents pertaining to Father. The [c]ourt understands that during Mother's pregnancy there were issues pertaining to [p]aternity. However, the [c]ourt believes that once [p]aternity was established, shortly after [Child's] birth, Father has done everything in his power to be a good [father] to [Child]. The [c]ourt is concerned that Mother's family seems unable to forget the past, which occurred eight years ago, and [accept] that [Child] has two parents who will be involved in [Child's] life.

**13. Factor[s] 14 and 15 are not relevant to this determination.**

A review of the . . . factors listed [above] resulted in an almost equal split between Mother and Father. The [c]ourt is DIRECTED to consider other relevant factors and will be doing so.

Although the [c]ourt is extremely concerned about Mother's apparent inability to work with Father and his family, and the [c]ourt believes that Mother would like Father out of [Child's] life, the [c]ourt is DECLINING to award custody of [Child] to [Father] at this time.

The [c]ourt finds that [Child] is well established in Juniata County and has been attending daycare and kindergarten while residing with [Mother]. The [c]ourt feels that it would be more harmful to [Child] to disrupt that connection to the community. However, the [c]ourt is crafting a custody order[] which will provide Father with as much contact with [Child] as possible.

The [c]ourt is concerned that Father's schedule is such that he, at this point, has limited time with [Child] over the weekends. If Father is able to arrange a work schedule such that he would be available Fridays and Saturdays, the [c]ourt will award Father three out of every four weekends, custody to commence Fridays at 6:00 p.m. until Sundays at 6:00 p.m.

The [c]ourt is also awarding Father shared physical custody of [Child] in the summer months with Mother, which is defined as the first Sunday after the end of the school year until the Sunday prior to the beginning of the school year. The parents shall have a week on/week off with [Child], exchanges to be Sundays at 6:00 p.m.

The [c]ourt is DIRECTING that the parties shall share the holidays as follows:

. . .

Mother shall have primary physical of [Child] at all times not mentioned hereinabove.

The [c]ourt is also ORDERING that the parents shall participate in communications counseling and/or co-parenting counseling. The [c]ourt is leaving it to counsel to make arrangements for said counseling to occur.

Although [Child] appears to be stable, at this time, the continued animosity between parents will only lead to a disastrous result in [Child's] upbringing.

Trial Court Order, 7/16/12, at 1-6.

After a careful review of the record in this matter, the briefs of the parties, and the controlling case law, we find that the trial court did consider all of the factors under section 5328(a). **See E.D.**, 33 A.3d at 79-80 (holding that "best interests of the child" analysis requires consideration of all section 5328(a) factors). While Father is not satisfied with the weight the trial court afforded to each of the factors in rendering its custody decision, the trial court's conclusions are not unreasonable as shown by the evidence of record. Therefore, we may not disturb the trial court's custody decision. **C.R.F.**, 45 A.3d at 443. We affirm the trial court's order.

Order affirmed.