

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

R.B.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
B.S.,	:	
	:	
Appellee	:	No. 1934 EDA 2012

Appeal from the Order entered on June 20, 2012,
in the Court of Common Pleas of Delaware County,
Domestic Relations Division, No. 01-6559

BEFORE: MUSMANNO, WECHT and PLATT*, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: February 12, 2013

R.B. ("Father") appeals from the final Order that awarded primary physical custody of Father's three daughters, S.B. (born in June 1996), J.B. (born in August 1998), and A.B. (born in September 2000) (collectively "the Children"), to the Children's mother, B.S. a/k/a B.B. ("Mother"), and awarded Father partial physical custody every other weekend. We vacate the Order and remand the case for further proceedings.

The trial court set forth the procedural history underlying this appeal as follows:

[T]his custody litigation began in 2001. On March 28, 2011, the Honorable Linda A. Cartisano denied Mother's Emergency Petition to Amend Custody Order and stated that this matter had been assigned to the [t]rial [c]ourt on the issue of primary physical custody. On May 18, 2011, the [t]rial [c]ourt held a hearing in this matter that subsequently led to the entry of an Order regarding the extension of Mother's periods of partial physical custody during the Summer [of] 2011. On February 9, 2012, the parties appeared before the [t]rial [c]ourt regarding

*Retired Senior Judge assigned to the Superior Court.

the issue of primary physical custody. During her direct examination, Mother specifically stated that she was asking the [t]rial [c]ourt to consider transferring primary physical custody from Father to her. At the February 9, 2012 hearing, Mother, [Mother's husband, G.S. "(Stepfather)"], and Father testified before the [t]rial [c]ourt. The matter was continued for the Children to testify before the [t]rial [c]ourt. On February 13, 2012, the [t]rial [c]ourt issued a Temporary Interim Custody Order wherein the [t]rial [c]ourt again increased Mother's periods of partial physical custody of the Children.

At the May 15, 2012 hearing, all three of the Children testified before the [t]rial [c]ourt. On June 20, 2012, the [t]rial [c]ourt issued its Final Custody Order transferring primary physical custody from Father to Mother.^[1] In support of its Order, the [t]rial [c]ourt issued 132 Findings of Fact and Conclusions of Law. Among the aforementioned Findings of Fact, the [t]rial [c]ourt specifically found Mother, Stepfather, and all three of the Children to be credible.

Trial Court Opinion, 9/19/12, at 9-10 (footnote added; citations omitted).

Father timely filed a Notice of appeal from the final custody Order, and also filed a Concise Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b). On appeal, Father raises the following issues for our review:

- I. Whether the issues discussed herein should be deemed waived and/or the appeal quashed, where the questions Father raised in his Statement of Matters Complained of on Appeal were sufficiently concise and were not redundant or frivolous?
- II. Whether the Lower Court erred in failing to consider, as a substantial factor, Father's role as primary custodian of the [C]hildren for a period of approximately 11 years, and in awarding primary physical custody of the [C]hildren to Mother despite her steadfast refusal to communicate with Father and attend co-parenting counseling?

¹ Notably, the June 20, 2012 Order did not award legal custody to either party.

III. Whether the Lower Court erred in failing to reach the issues of legal custody, a vacation schedule for the parties and co-parenting counseling?

Father's Brief at 5.

In custody cases, our standard of review 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.

C.R.F. v. S.E.F., 45 A.3d 441, 443 (Pa. Super. 2012) (citation omitted).

Since the custody hearings in this matter were held in February 2012 and May 2012, the new Child Custody Act, 23 Pa.C.S.A. § 5321 *et seq.* ("the Act"), is applicable. **See C.R.F.**, 45 A.3d at 445 (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). With any custody case under the Act, the paramount concern is the best interests of the child. **See** 23 Pa.C.S.A. §§ 5328, 5338. 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. **Id.** § 5338. The "best interests of the child" analysis

requires the trial court to conduct a consideration of all of the factors listed in section 5328(a). ***E.D. v. M.P.***, 33 A.3d 73, 79-80 (Pa. Super. 2011).

Initially, we observe that Father raised seventeen separate issues in his Pa.R.A.P. 1925 Concise Statement. In response, the trial court issued an Opinion recommending that we should quash the appeal because Father's issues are too numerous to review. ***See*** Trial Court Opinion, 9/19/12, at 13-15. However, a number of those issues addressed factors listed in section 5328(a), which, Father argues, the trial court improperly failed to consider. Father also asserted that the trial court erred in awarding Mother primary physical custody without considering the factors under section 5337(h) for relocation, as Father lives in Delaware County, and Mother lives in Chester County. Father has devoted the first issue in his brief on appeal to countering the trial court's suggestion that we must quash the appeal based upon Father's admittedly lengthy Pa.R.A.P. 1925 Concise Statement. Since we determine that Father's issues raised in his Concise Statement are neither redundant nor frivolous, we decline to find waiver. ***See*** Pa.R.A.P. 1925(b)(4)(iv) (providing, in relevant part, that "[w]here non-redundant, non-frivolous issues are set forth in an appropriately concise manner, the number of errors raised will not alone be grounds for finding waiver."); ***see also Eiser v. Brown & Williamson Tobacco Corp.***, 938 A.2d 417, 427-28 (Pa. 2007) (holding that "the number of issues raised in a Rule 1925(b) statement does not, without more, provide a basis upon which to deny

appellate review where an appeal otherwise complies with the mandates of appellate practice.”).

We will initially address the first portion of Father’s second issue, *i.e.*, “[w]hether the Lower Court erred in failing to consider, as a substantial factor, Father’s role as primary custodian of the [C]hildren for a period of approximately 11 years[?]” Father’s Brief at 5. This question implicates the adequacy of the trial court’s consideration of the factors under section 5328(a) in awarding primary physical custody to Mother.

Section 5328 of the Act provides as follows:

§ 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 79-80.

In *E.D.*, this Court held that a trial court must thoroughly analyze all of the section 5328(a) factors when awarding custody. *E.D.*, 33 A.3d at 82. Subsequently, in *J.R.M. v. J.E.A.*, 33 A.3d 647, 652 (Pa. Super. 2011), a panel of this Court addressed an appeal by a father from an order awarding

mother primary physical custody of the parties' child. The panel found that the trial court had improperly based its decision almost exclusively on the fact that the child was breastfeeding, and that the parties had difficulty in communicating with each other. *Id.* at 652. The panel concluded that the trial court had erred as a matter of law in failing to consider *all* of the factors under section 5328(a). *Id.* (stating that “[a]ll of the factors listed in section 5328(a) are required to be considered by the trial court when entering a custody order.” (emphasis in original)). Thus, the panel vacated the custody order and remanded the matter, stating that this Court could not make independent factual determinations. *Id.* at 652 n.5.

Here, the trial court explained that it had considered Father's role as primary physical custodian of the Children in weighing the section 5328(a) factors, stating its reasoning as follows:

Father alleges that the [t]rial [c]ourt failed to consider Father's role as primary physical custodian since the inception of the custody litigation in 2001. Child custody orders are temporary in nature and always subject to change if new circumstances affect the welfare of a child. *Arnold v. Arnold*, 847 A.2d 674, 677 (Pa. Super. 2004); *Friedman v. Friedman*, 224 Pa. Super. 530, 534, 307 A.2d 292, 295 (1973). The Commonwealth has a duty of paramount importance, to protect the child's best interests and welfare. *Id.* To that end, it may always entertain an application for modification and adjustment of custodial rights. *Id.* Custody orders are subject to change. *Arnold, supra.* Unlike other judgments or decrees, an order of custody is a unique and delicate matter. *Friedman, supra.* A custody order is never final, but is considered temporary in nature, subject to constant review and modification. *Id.*

The “primary caretaker doctrine” requires a trial court to give positive consideration to the parent who has been the primary caretaker. *Klos v. Klos*, 93[4] A.2d 724, 730 [n.4] (Pa.

Super. 2007); *Marshall v. Marshall*, 814 A.2d 1226, 1231 (Pa. Super. 2002). However, in addition to the quantity of care provided to the children by the primary caretaker, the trial court must also consider the *quality* of care provided by the primary caretaker. [*Klos*, 934 A.2d at 730 n.4]. The “primary caretaker doctrine” is one of many factors for the trial court to consider when determining the best interest [of] a child. *Marshall, supra*.

In *Klos, supra*, the issue before the trial court was as to the custody and relocation of two of the five children. *Id.* at 727. The trial court, in *Klos, supra*, issued an order that granted [the f]ather primary custody of the two children and permitted the two children to live primarily with him in Florida. *Id.* In *Klos, supra*, the trial court, in rendering its decision, considered the mother’s role as the primary caretaker, but concluded that the mother was an overwhelmingly negative force on the children’s lives. *Id.* at 729. Although the father, in *Klos, supra*, was not involved in the same degree in the children’s day-to-day lives as the mother, the children felt loved by the father and were intimately close to the father. *Id.*

In *Klos, supra*, the record revealed that the mother was physically and emotionally abusive to the children and consistently disparaged the father in front of the children. *Id.* In addition, the trial court, in *Klos, supra*, considered the two children’s strongly-stated preference for living with the father [as] opposed to the mother. The two children, in *Klos, supra*, were 14 and 10 years old, respectively. *Id.* In *Klos, supra*, the trial court found the children’s reasons for wanting to live with the father were well-reasoned and mature. *Id.* Based upon the record, the *Klos* Court refused to overturn the trial court’s well-supported conclusions.

[In the instant case, t]he [t]rial [c]ourt was well aware that since 2001, Father was the primary physical custodian of the Children. But that fact alone does not guarantee that [Father] will and should be the primary physical custodian until the Children reach the age of majority. The [t]rial [c]ourt considered Father’s role in rendering its decision, but found, based upon the application of the enumerated factors as stated in 23 Pa.C.S.A. § 5328, that it was in the Children’s best interests that primary physical custody be transferred to Mother.

In accordance with *Klos, supra*, the [t]rial [c]ourt considered not only the quantity but the *quality* of care that Father provided to the Children. The testimony from the Children in this matter was extremely compelling and credible. The [t]rial [c]ourt found the Children's reasons for the desire to live primarily with Mother to be well-reasoned and mature. (N.T. 05/15/12 at 7-54). [A.B.] and [J.B.] testified that they wanted to live primarily with Mother. (N.T. 05/15/12 at 10-11, 26, 30, 35, 36). It is clear from [A.B.'s] and [J.B.'s] testimony that it is in the best interests of their physical and emotional well-being to live primarily with Mother. *Id.* The [t]rial [c]ourt did not make any finding that Father or Mother [was] physically abusive to the Children, but the [t]rial [c]ourt had concerns regarding Father's anger issues. It should be noted that Father acknowledged that he went to court-ordered anger management classes. (N.T. 02/09/12 at 204). [J.B.'s] testimony about living with Mother is like "taking a breath out of water" particularly concerned the [t]rial [c]ourt about the child's emotional well-being if she remained with Father. (N.T. 05/15/12 at 35-36). [J.B.] further testified regarding the unpredictable nature of Father's yelling. *Id.* at 44. In addition, the [t]rial [c]ourt had serious concerns about Father yelling at [J.B.], including Father yelling at her about having to pay counsel fees to his lawyer regarding every time she is late for school. *Id.* at 44.

Furthermore, the [t]rial [c]ourt finds, based upon the [r]ecord, that the environment that Mother and Stepfather will provide to the Children [is] more of a calming, nurturing, and supportive environment than they presently have with Father, [which will afford the Children] more time to spend with their other half-sisters. (N.T. 02/09/12 at 14-22, 41, 44, 47-49, 51, 63-64)[]. Therefore, the [t]rial [c]ourt, in conjunction with the other enumerated factors, found that Mother should be the primary physical custodian. Therefore, this issue is without merit.

Trial Court Opinion, 9/21/12, at 17-20 (emphasis in original).

Although the trial court appeared to consider some of the sixteen factors set forth in section 5328(a), it did not specifically address *all* of the statutorily mandated factors or discuss the court's reasons for finding that each of the individual factors had been met. Such a review does not permit

this Court to conduct our appellate review. *See J.R.M.*, 33 A.3d at 652 (holding that the trial court erred as a matter of law in failing to properly consider and address *all* of the section 5328(a) factors). Accordingly, we are compelled to vacate the trial court's custody Order and remand the matter for the trial court to make specific factual determinations in relation to each of the section 5328(a) factors, as this Court may not make independent factual determinations. *See id.* at 652 n.5.

We next address the trial court's ruling as it pertains to the relocation of the Children. Section 5337 of the Act sets forth the following considerations:

(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).²

In *E.D., supra*, the panel addressed an appeal by a mother from a custody order that granted the father primary physical custody of the parties' child, and permission to relocate with the child. The panel held that "Section 5337(h) mandates that the trial court *shall* consider all of the factors listed therein, giving weighted consideration to those factors affecting the safety of the child." *E.D.*, 33 A.3d at 81 (emphasis in original).

² Section 5337 further provides that, "[i]f a party relocates with [a] 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). Additionally, section 5337 states that the party proposing the relocation shall bear the burden of establishing that the relocation will serve the best interest of the child or children. *Id.* § 5337(i)(1).

In the instant case, the trial court explained that it had considered that the award of primary physical custody to Mother would require relocation of the Children from Delaware County to Chester County:

Father alleges that the [t]rial [c]ourt erred in relocating the Children from Drexel Hill, Delaware County[,] to Downingtown, Chester County, without considering the factors as stated in 23 Pa.C.S.A. § 5337. Father admitted in his Concise Statement of [Errors] Complained on Appeal[] that Mother has lived in Chester County for the past eight years while Father was the primary physical custodian.

Pursuant to *Plowman v. Plowman*, 409 Pa. Super. 143, 153-154, 597 A.2d 701, 707 (Pa. Super. 1991)[,] there are “three factors for the trial court to utilize in determining whether a custodial parent shall be permitted to relocate a geographical distance from a non-custodial parent: (1) the potential advantages of the proposed move and the likelihood that the move would substantially improve the quality of life for the custodial parent and the child[,] and is not the result of a momentary whim on the part of the custodial parent; (2) the integrity of the motives of both the custodial and non-custodial parent in either seeking the move or seeking to prevent it; [and] (3) the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent.” [*Id.*] []The aforementioned considerations [“]must then be factored into the ultimate consideration of the court, which is to determine what is in the best interests of the child.” *Id.*

The [t]rial [c]ourt’s Findings of Fact and Conclusions of Law in support of its June 20, 2012 Order indicate that the relocation factors as defined by *Plowman, supra*[,] were considered in rendering its decision. When it awarded Mother primary physical custody, the [t]rial [c]ourt was acutely aware that the Children would move from Delaware County to Chester County. As stated by Father, Mother and Stepfather have lived in Downingtown for eight years. For the past eight years, Mother and Father have operated under various custody schedules where both parents were able to maintain an ongoing relationship with the Children despite living in neighboring counties.

In its Findings of Fact and Conclusions of Law, the [t]rial [c]ourt found that Mother and Stepfather both worked in their home for the purposes of employment. (N.T. 02/09/12 at 19, 38, 45-46, 63, 117, 141-142); **[s]ee** Findings of Fact Numbers 19, 21-22. The [t]rial [c]ourt gave weight to Mother's opinions of the Upper Darby School District and the Downingtown School District based upon her own personal experiences with her children. (N.T. 02/09/12 at 53, 75, 113, 131); **[s]ee** Findings of Fact Numbers 38-39. All of the Children opined that they had no problem going to a new school if Mother was awarded primary physical custody. (N.T. 05/15/12 at 13, 34-35, 49); **[s]ee** Findings of Fact Numbers 96-99, 110-112, 122.

Father failed to present any evidence that the Children have been negatively affected by Mother's residency in Chester County or regarding the quality of the Downingtown School District or the Upper Darby School District. Due to the lack of evidence presented, the [t]rial [c]ourt can reasonably infer that the distance between the two counties has not prevented either party from maintaining an ongoing relationship with the Children.

As previously stated, the most compelling evidence that moving the Children from Delaware County to Chester County was in the Children's best interests is from the candid testimony of the Children themselves. (N.T. 05/15/12 at 10-11, 26, 30, 35, 36, 44). Again, the [t]rial [c]ourt finds, based upon the [r]ecord, [that] Mother and Stepfather's home is a more calm and supportive environment as compared to the environment in Father's home. (N.T. 02/09/12 at 14-22, 41, 44, 47-49, 51, 63-64)[].

Based upon the evidence presented, the [t]rial [c]ourt believed that the Children's quality of life would be substantially improved if they moved to Chester County. In light of the [t]rial [c]ourt's consideration as to the Children moving from Delaware County to Chester County when it awarded Mother primary physical custody and its overall impact, this issue is without merit.

Trial Court Opinion, 9/21/12, at 23-26 (emphasis in original).

We find that the trial court erroneously applied the three *Plowman* factors, and improperly failed to discuss the section 5337(h) relocation factors.

[I]t is not this Court's proper function to scour the record in attempts to intuit the reasons supporting the trial court's findings. Effective appellate review requires the trial court to consider each of the factors set forth in section 5337(h), and to state both its reasoning and conclusions on the record for our review.

E.D., 33 A.3d at 81.

As the trial court is responsible for indicating the place in the record that supports its determination, regarding each of the section 5337(h) factors, and the trial court has failed to do so, we must vacate the custody Order and remand the matter for the trial court to make factual determinations in relation to the section 5337(h) factors necessary for determining the award of primary physical custody.

Next, we consider the second portion of Father's second issue, *i.e.*, "[w]hether the Lower Court erred ... in awarding primary physical custody of the [C]hildren to Mother despite her steadfast refusal to communicate with Father and attend co-parenting counseling?" Father's Brief at 5.

Regarding this issue, the trial court requests this Court to remand the matter to it on the issues of Mother's alleged past alienation of the Children against Father and her refusal to participate in co-parenting counseling, to determine whether these conditions had any impact on the preferences expressed by the Children in their testimony regarding the parent with

whom they preferred to reside. **See** Trial Court Opinion, 9/19/12, at 26-27, 28-29. As these matters implicate the section 5328(a) factors, and we are vacating and remanding this matter to the trial court, we direct the trial court, on remand, to consider these issues as well.

Finally, we address Father's third issue, *i.e.*, "[w]hether the [trial c]ourt erred in failing to reach the issues of legal custody, a vacation schedule for the parties, and co-parenting counseling?" Father's Brief at 5. In its Opinion, the trial court requests this Court to remand the matter on the issues of legal custody, vacation schedule, and co-parenting counseling. **See** Trial Court Opinion, 9/19/12, at 26, 29, 30, and 31. Accordingly, the trial court shall also address these issues on remand.

Based upon the foregoing, and pursuant to ***E.D.*** and ***J.R.M.***, as well as the trial court's requests, we vacate the trial court's custody Order, and remand the case for further fact-finding, and clear, consistent credibility and weight assessments, as well new evidentiary hearings, as necessary, so that the trial court can render an opinion that (1) reflects its full consideration of the factors set forth in sections 5328(a) and 5337(h); and (2) addresses the above-mentioned issues that the trial court specifically requested to consider

on remand.³

Order vacated; case remanded for further proceedings in accordance with this Memorandum; Superior Court jurisdiction relinquished.

³ As we are vacating the trial court's Order and remanding the case, we do not address any remaining issues that Father has preserved for appeal. We note, however, that, to the extent that Father challenged the adequacy of the procedure that Mother followed to bring her Petition for primary physical custody before the trial court, Father waived this issue by participating in the proceedings before the trial court. **See** Trial Court Opinion, 9/21/12, at 23; **see also E.D.**, 33 A.3d at 80 (finding that neither the parties nor the trial court complied with any of the procedural requirements of section 5337 during the pendency of the case in the trial court, but, because appellant failed to object to the procedural deficiencies in the trial court, he waived them on appeal).