J-A12006-14

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

S. B.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
A. K.	:	
(f/k/a A. B.),	:	
	:	
Appellee	:	No. 2221 EDA 2013

Appeal from the Order Entered June 28, 2013,
In the Court of Common Pleas of Montgomery County,
Civil Division, at No. 2010-26928.

BEFORE: SHOGAN, STABILE and PLATT*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED JULY 15, 2014**

S.B. ("Father") appeals *pro se*[1] from the June 28, 2013 final custody order ("final custody order")[2] that awarded A.K., f/k/a A.B. ("Mother"), shared legal custody and primary physical custody of the parties' two minor children (collectively, "Children"). The final custody order provided one-on-one time between Father and each child, expanded Father's partial physical custody of the Children to five overnights in a two-week period, awarded each parent two non-consecutive weeks, and provided for a split of holidays

*Retired Senior Judge assigned to the Superior Court.

[1] Father's trial counsel withdrew his appearance on June 29, 2013.

[2] The trial court filed a clarification order on August 7, 2013, which Father also challenges on appeal, and we address below.

by agreement of the parties or proposals submitted to the court for decision. Order, 6/28/13, at ¶¶ 1–4. We affirm.

The parties married in March 2008 and divorced in September 2012. They are the parents of E.B., born in December 2008, and A.B., born in July 2010. Father filed a custody complaint on March 20, 2010, requesting custody of E.B., as A.B. was not yet born. Following a custody hearing, the Honorable Carolyn T. Carluccio entered an order on May 11, 2011, granting Mother primary physical custody of E.B., and Father partial physical custody every other weekend with two overnights in each two week period. As a result of Mother relocating to Virginia before A.B. was born, custody of A.B. was controlled by a Virginia court order, which granted Mother sole legal and physical custody of A.B. Father unsuccessfully moved for reconsideration of Judge Carluccio's custody order and filed an appeal, which he then withdrew.

The trial court set forth the subsequent procedural history of this matter as follows:

> On October 4, 2011, Plaintiff-Father filed a Petition to Modify the Custody order issued by Judge Carluccio on May 11, 2011. Among the relief requested by Plaintiff-Father was shared physical custody of the parties' two children, E.B. . . . and A.B. . . .
>
> We held a hearing on April 16, 2012. On that day, we entered an interim Order that increased the number of overnights the children would spend with Plaintiff-Father. We also included a provision that allowed Plaintiff-Father to spend one-on-one time with each child in an effort to allow Plaintiff-Father to form an independent bond with each child.

> We stated that we would review the case and conduct a phone conference around September 1, 2012 to determine whether the parties had agreed that the changes implemented in the April 16, 2012 Order should continue. (N.T., Order of 4/16/12, pp. 6-7). If either party had an issue with the interim Order, then we would schedule a status review hearing to occur sometime around later September or early October of 2012.
>
> On November 5, 2012, we conducted a status review hearing. We concluded the status review hearing on February 15, 2013.[3]
>
> Following a review of post-trial submissions, we issued our Custody Order on June 28, 2013. Plaintiff-Father filed a timely appeal, along with the required Concise Statement of Matters Complained of on Appeal, on July 29, 2013.
>
> Our Custody Order of June 28, 2013 was essentially the same as the Custody Order of April 16, 2012 in that we awarded Plaintiff-Father physical custody of the children for 5 overnights in a two-week period.

Trial Court Opinion, 8/16/13, at 1–2 (original footnote omitted). On July 29, 2013,[4] Father filed a timely appeal from the final custody order and a

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[3] At the hearing on February 15, 2013, Mother presented the testimony of Father's mother, Z.B., and Father's father, L.B., as on cross-examination. Because their primary language is Russian, Father's parents testified through an interpreter, T.H. Mother's counsel also briefly questioned T.H. Mother's counsel then questioned Father as on cross-examination, regarding *inter alia*, the parties' communications about the exchange location for the Children, and the parties' use of Skype for the non-custodial parent to communicate with the Children. N.T. 2/15/13, at 79–99, 147–148, 155–157.

[4] The final day for Father to file an appeal was July 28, 2013, which fell on a Sunday. ***See*** Pa.R.A.P. 903 ("[T]he notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken."). When computing a filing period, "[if] the last day of any such period shall fall on Saturday or Sunday. . .such

concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b), setting forth eighteen issues. The trial court entered an opinion pursuant to Pa.R.A.P. 1925(a) on August 19, 2013, addressing each of Father's challenges.

On June 18, 2013, prior to entry of the final custody order, Father filed a "Motion for Administrative Ruling on Child-Custody Matter, Pursuant to Pa.R.C.P. 1915.4(d)," seeking an administrative ruling on the delay in disposing of the custody case. The trial court denied the motion on June 28, 2013, in an order separate from the final custody order.

Following entry of the final custody order, Father filed myriad petitions and motions. Father filed a petition to add a custody exchange location on July 5, 2013, and a petition to reinstate Skype communication between the children and parents on July 7, 2013. On July 9, 2013, Father filed a petition for injunctive relief, seeking to enjoin and restrain interference, intrusion, and harassment by Mother. On July 16, 2013, Father filed a petition for contempt and for sanctions, alleging Mother's willful disobedience of the joint legal custody provisions in the June 28, 2013 custody order. On July 25, 2013, Father filed two motions for sanctions against Mother: one for her failure to comply with Montgomery County Rule 1915.3 (Seminar for Separated and Divorced Parents); the second for Mother's improper legal

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day shall be omitted from the computation." 1 Pa.C.S.A. § 1908. Therefore, Father's deadline to file a timely appeal was Monday, July 29, 2013.

procedures and *ex parte* fax communications with the judge. On July 26, 2013, Father filed a second petition for contempt, alleging that Mother was in willful contempt of the final custody order. He also filed a *praecipe* to attach numerous documents to the petition. Father filed a petition to adopt the parties' split holiday proposal on July 28, 2013. On that same date, Father also filed a motion to compel Mother to comply with the prior order directing the use of "Our Family Wizard"[5] for communication between the parties, as directed in the May 31, 2011 custody order. Then, on July 29, 2013, Father filed a petition to reconsider, amend, and rectify the final custody decision and order of June 28, 2013.

In response, the trial court ruled on Father's various submissions and entered a clarification order on August 7, 2013 ("clarification order"). In its clarification order, the trial court addressed a custodial exchange location, Skype communications, and Father's various motions and petitions; it also cancelled a hearing scheduled for August 16, 2013. Order, 8/7/13, at ¶¶ 2–14. The next day, Father filed a petition to reinstate or reschedule a hearing on Father's two contempt petitions and/or a motion for a protective order. On August 16, 2013, Father filed a motion to compel and enforce Mother to follow the order regarding the use of Our Family Wizard and all the

[5] Our Family Wizard is an online service for managing divorce and custody issues. Its mission "is to provide the best possible tools for parents in divorced and separated households to communicate and organize their lives." http://www.ourfamilywizard.com/ofw/index.cfm/about-us/

provisions, including schedule alterations, in a prior custody order entered on May 31, 2011. On September 5, 2013, Father filed a motion to reconsider, in part, the order of clarification, pursuant to Pa.R.C.P. 1930.2(b) and Pa.R.A.P. 1701(b)(3). Father then filed a concise statement related to the clarification order on September 16, 2013. Finally, on September 20, 2013, the trial court filed its opinion with regard to (a) the clarification order, (b) Father's requests to find Mother in contempt, and (c) Father's July 9, 2013 motion for a protective order.[6] Father has also filed numerous motions with this Court since filing his appeal.

In his brief on appeal, Father presents one issue for our review:

> **Question:** In the appeal of the final custody Decision and Order of June 28, 2013, the primary issue to be resolved is the physical custody arrangements of the parties' two biological children, [E.B. and A.B.], their holiday schedule with their parent(s), and the justification of why such grossly [sic] delay for the final decision was made. Is the Plaintiff/Father entitled to a joint (50/50) physical custody, where the trial [c]ourt exceedingly and grossly abused its discretion and/or misapplied the law by omitting, ignoring or failing to abide by the law/statues [sic] and relevant case law, and simply favoring Mother by awarding primary physical custody to the [m]other, and evidently contrary to **23 Pa.C.S.A. §5328, §5327, §5323**, when circumstances, testimony and evidence presented [existed] to support full justification of awarding joint (50/50) physical custody of the children to the [f]ather/Plaintiff**?** Has the trial [c]ourt exceedingly abused its discretion, ignored the law and did not follow the provisions of the [sic] Chapter 1915, mainly of **Pa.R.C.P. 1915.4, 1915.9, 1915.10, 1915.13?** The lower [c]ourt disagreed, ignored and did not address all the

[6] We deem Father's various reconsideration motions denied based on the trial court's failure to grant them in a timely manner.

> questions involved and the record shows [the] trial court's failure. See ***JRM v. JEA***, 33 A.3d 647, Pa. Super (2011) and ***MJM v. MLG***, 63 A.3d 331, 334 Pa Super (2013).

Father's Brief at 16 (bold and underline in original).

On appeal, Father asserts that this Court should reverse the final custody order and direct the trial court, on remand, to enter a custody order that provides at least fifty percent custodial time to Father and a "suitable, just and equitable holiday/split schedule." Father's Brief at 26, 35. In support of his position, Father analyzes the eighteen issues he raised in his concise statement filed on July 29, 2013, relating to the final custody order. Father's Brief at 35–42. He also analyzes the eight issues he raised in his concise statement filed on September 16, 2013, relating to the clarification order. Father's Brief at 43–45. Insofar as each of these twenty-six issues relates to Father's assertion in his statement of questions presented that the trial court did not address all of the questions involved in the custody appeal, we will consider his twenty-six issues preserved for appellate review. ***Compare Krebs v. United Refining Company of Pennsylvania***, 893 A.2d 776, 797 (Pa. Super. 2006) (stating that any issue not raised in statement of questions involved and preserved in concise statement is deemed waived); Pa.R.A.P. 2116(a).

Initially, we observe that, because the custody hearings at issue took place after January 24, 2011, the Child Custody Act ("the Act"), 23 Pa.C.S.A.

§§ 5321 to 5340, is applicable. ***C.R.F. v. S.E.F.***, 45 A.3d 441, 445 (Pa. Super. 2012). Next, we identify our standard of review in custody cases:

> 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.

Id. at 443 (citation omitted).

> We have stated that:
>
> [t]he 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) (quoting ***Jackson v. Beck***, 858 A.2d 1250, 1254 (Pa. Super. 2004)). Moreover:

> [a]lthough we are given a broad power of review, we are constrained by an abuse of discretion standard when evaluating the court's order. An abuse of discretion is not merely an error of judgment, but if the court's judgment is manifestly unreasonable as shown by the evidence of record, discretion is abused. An abuse of discretion is also made out where it appears from a review of the record that there is no evidence to

> support the court's findings or that there is a capricious disbelief of evidence.

M.A.T. v. G.S.T., 989 A.2d 11, 18–19 (Pa. Super. 2010) (*en banc*) (quotation and citations omitted).

In any custody case decided under the Act, the paramount concern is the best interest of the child. ***See*** 23 Pa.C.S.A. § 5338 ("Upon petition, a court may modify a custody order to serve the best interest of the child."). With that concern in mind, the Act provides a list of factors the trial court must consider when awarding custody:

> **§ 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.[7] Additionally, the Act provides ten factors to consider with regard to relocation of a child. 23 Pa.C.S.A. § 5337(h); ***see E.D. v. M.P.***, 33 A.3d 73, 80–81 n.2 (Pa. Super. 2011) (discussing ten factors for

[7] Effective January 1, 2014, the Act was amended to include an additional factor: providing for consideration of child abuse and involvement with child protective services. 23 Pa.C.S.A. § 5328(a)(2.1).

relocation, "giving weighted consideration to those factors affecting the safety of the child").

We begin with Father's contention that the trial court failed to consider all of the relevant factors listed in sections 5328(a) (regarding best interest of child) and 5337(h) (regarding relocation) of the Act. We reiterate that the trial court must consider both the lists of factors in sections 5328(a) and 5337(h) where it is modifying an award of custody and a relocation is involved. ***A.V. v. S.T.***, 87 A.3d 818, 824 (Pa. Super. 2014).

Here, the trial court analyzed the section 5328(a) best-interest factors in its June 28, 2013 custody decision, and in its August 19, 2013 opinion. After a thorough review of the certified record, the relevant case law, and the trial court's analysis, we adopt as our own the sound reasoning of the trial court in response to Father's eighteen challenges. Accordingly, we affirm the final custody order on the basis of the trial court's June 28, 2013 decision and its August 19, 2013 opinion.

As for the relocation factors of section 5337(h), the trial court found that the parents live within a few minutes of each other in Upper Merion Township. Custody Decision and Order, 6/28/13, at 4, ¶ 11. The trial court acknowledged Mother's past removal of E.B. to Virginia but stated that the removal resulted in an increase of Father's custodial time in its April 16, 2012 interim order. Trial Court Opinion, 8/19/13, at 4. Moreover, the trial

court expressly based the final custody order on Mother's conduct after entry of the April 16, 2012 interim custody order. ***Id.*** There was no evidence of any relocation after entry of the interim order. Thus, section 5337(h) was not applicable.

Upon review, we discern no error or abuse of discretion in the trial court's consideration of all sixteen factors under section 5328(a) and its lack of consideration of the relocation factors listed in section 5337(h). Thus, Father's first argument does not warrant relief.

Next, we address Father's complaint concerning the trial court's refusal to award shared fifty-fifty physical custody for the parties under its application of section 5328(a) and section 5323. As stated above, section 5328 lists the best-interest factors, whereas section 5323 of the Act provides for the following types of awards:

> **(a) Types of award.—**After considering the factors set forth in section 5328 (relating to factors to consider when awarding custody), the court may award any of the following types of custody if it is in the best interest of the child:
>
> (1) Shared physical custody.
>
> (2) Primary physical custody.
>
> (3) Partial physical custody.
>
> (4) Sole physical custody.
>
> (5) Supervised physical custody.
>
> (6) Shared legal custody.
>
> (7) Sole legal custody.

23 Pa.C.S.A. § 5323.

Here, the trial court awarded Mother primary physical custody and Father partial physical custody. We have reviewed the reasoning set forth in the trial court's August 19, 2013 opinion with regard to Father's challenges relating to the court's refusal to award shared fifty-fifty physical custody, the award of primary physical custody to Mother, and the holiday-split schedule. After a careful review of the record, including the testimonial evidence, we conclude that the record contains sufficient competent, clear and convincing evidence to support the trial court's credibility and weight assessments in rendering the final custody order. The trial court's conclusions with regard to the section 5238 best-interest factors were not unreasonable in light of the sustainable findings of the trial court. ***C.R.F.***, 45 A.3d at 443. Thus, we discern no error of law in the trial court's conclusions with regard to the section 5328(a) factors. Furthermore, we discern no error or abuse of the trial court's discretion in awarding primary custody to Mother, with partial physical custody to Father, and a holiday/split schedule agreed to or proposed by the parties.

Father's next contention is that the trial court violated Pa.R.C.P. 1915.4 by taking too long to decide this custody matter. Rule 1915.4 provides for the prompt disposition of custody cases, as follows:

> **Rule 1915.4. Prompt Disposition of Custody Cases**
>
> * * *
>
> **(d) Prompt Decisions.** The judge's decision shall be entered and filed within 15 days of the date upon which the trial is concluded unless, within that time, the court extends the date for such decision by order entered of record showing good cause for the extension. **In no event shall an extension delay the entry of the court's decision more than 45 days after the conclusion of trial**.

Pa.R.C.P. 1915.4 (emphasis supplied).

The trial court provides the following explanation for rejecting Father's argument:

> In his final issue, Plaintiff-Father argues that we failed to comply with Pa.R.C.P. 1915.4. This rule relates to prompt disposition of custody cases. *At the conclusion of the hearing on February 15, 2013, the parties requested time to submit post-trial memoranda after the transcripts were completed.* We granted this request. The transcript of the February 15, 2013 hearing and the Order portion of the April 16, 2012 hearing were completed on March 6, 2013 and March 29, 2013, respectively. Plaintiff-Father submitted his post-trial memorandum on April 11, 2013; Defendant-Mother submitted her post-trial memorandum on May 13, 2013. On June 13, 2013, Plaintiff-Father filed a response to Defendant-Mother's memorandum.
>
> As we entered our decision on June 28, 2013, we have complied with Pa.R.C.P. 1915.4.

Trial Court Opinion, 8/16/13, at 7 (italics added).

In his brief on appeal, Father claims the trial court justified its delay in filing its decision by misrepresenting and misstating that the parties requested the opportunity for post-trial submissions at the February 15,

2013 hearing, and that Father agreed to the delay. Father's Brief at 34–35. Our review of the transcript of the February 15, 2013 proceedings reveals that, when asked by the trial court, Mother's counsel requested the opportunity for post-trial memoranda after the completion of the transcripts and that Father's counsel did not object to the request. N.T., 2/15/13, at 181–183. The trial court then instructed counsel for the parties to agree on the time needed to respond and, again, Father's counsel did not object. ***Id.*** Thus, we agree with the trial court that Father has waived any claim of delay pursuant to Pa.R.A.P. 1915.4.[8]

Finally, we address Father's challenge to the clarification order. Father asserts that the final custody order is inconsistent with, and contrary to, the clarification order, and that the trial court erred when it "failed to provide reasoning [for its custody decision] until the appeal was taken." Father's Brief at 31 (quoting ***M.P. v. M.P.***, 54 A.3d 950, 955–956 (Pa. Super. 2012)). We disagree.

Upon review of the trial court's September 20, 2013 opinion regarding Father's challenges to the clarification order, we discern no merit to Father's

[8] Even if Father had preserved this argument, we would conclude that it lacks merit. Father was not prejudiced by the trial court's entry and filing of its decision more than forty-five days after the conclusion of the February 15, 2013 hearing. Rather, Father benefited from the delay because his counsel had an opportunity to submit a post-trial memorandum and argue on his behalf with the benefit of completed transcripts. Throughout this period, Father continued to exercise partial physical custody of the Children in accordance with the April 16, 2012 interim order.

contention that the trial court failed to set forth its reasoning until after it filed its final custody order. The trial court included a detailed decision with the final custody order in which it discussed all of the section 5328(a) factors. ***Accord A.V.***, 87 A.3d at 822–823 (stating that under section 5323(d) there is no required amount of detail for trial court's explanation, only that enumerated factors are considered and that custody decision is based on those considerations); ***C.B. v. J.B.***, 65 A.3d 946, 955 (Pa. Super. 2013) (stating that section 5323(d) requires trial court to set forth its mandatory assessment of section 5328(a) factors prior to deadline by which litigant must file notice of appeal).

In rendering its clarification order, the trial court was within its jurisdiction to clarify the final custody order with regard to the exchange location and the use of Skype, which had been subjects of the hearing on February 15, 2013.[9] Pa.R.A.P. 1701(b)(1). The clarification order was not a custody modification order. Thus, there was no need for the trial court to address the section 5328(a) factors in that order. ***See M.O. v. J.T.R.***, 85 A.3d 1058, 1063-1064 (Pa. Super. 2014) (holding that trial court need not

[9] It is noteworthy that Father's seventeenth issue in his appellate brief is that the trial court erred in its June 28, 2013 order by omitting the provision for Skype communication between the Children and the non-custodial parent. The trial court found that its clarification order rendered this issue moot. ***See*** Trial Court Opinion, 8/16/13, at 7.

address section 5328(a) factors where it is not affecting type of custody and, therefore, not modifying custody award).

Based on the foregoing, we discern no error or abuse of discretion in the trial court's clarification order. Moreover, we adopt as our own the reasoning of the trial court in response to Father's eight challenges relating to the clarification order. Thus, we affirm the clarification order on the basis of the trial court's September 20, 2013 opinion.

Lastly, we address the numerous motions Father has filed in this Court, asking us to direct the trial court to rule on outstanding petitions, to take judicial notice of facts Father does not disclose, and to publish our decision in this matter.[10] Upon review, we deny all of Father's outstanding motions.

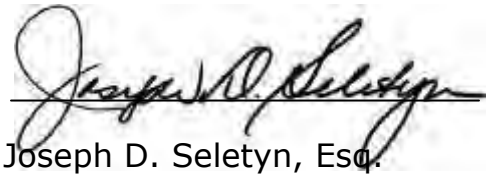
In sum, we affirm the final custody order, as clarified in the clarification order, on the basis of the trial court's well-reasoned June 28,

[10] Our docket shows seven outstanding motions: (1) Application Pursuant to Pa.R.A.P. 1701(b)(5) to Direct Trial Court to Rule on Time-Sensitive Pending Petition for Holiday Split, 3/5/14; (2) Application Pursuant to Pa.R.A.P. 1701(b)(5) to Direct Trial Court to Rule on Pending Petition for Injunctive Relief (Protective Order), 3/13/14; (3) Application Pursuant to Pa.R.A.P. 1701(b)(5) to Direct Trial Court to Rule on Pending 2/25/14 Motion to Reconsider, 3/19/14; (4) Application Pursuant to Pa.R.A.P. 1701(b)(5) to Direct Trial Court to Rule on Pending Petitions for Contempt and Motions for Enforcement and Compel Mother Compliance of Provisions of the Orders, 3/26/14; (5) Application Pursuant to Pa.R.A.P. 1701(b)(5) to Direct Trial Court to Rule on January 9, 2014 Petition Relating to Schooling for 2014-2015+ Year(s), 4/3/14; (6) Judicial Notice of Adjudicative Fact, 4/7/14; (7) Application/Requests to Designate Case Decision as Precedent/Precedential and to Publish (Opinion), 4/7/14.

2013 custody decision, August 19, 2013 opinion, and September 20, 2013 opinion. We direct the parties to attach a copy of those decision to this Memorandum in the event of further proceedings. Father's seven outstanding motions are denied.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2014

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA-
FAMILY DIVISION

S[redacted] B[redacted] : NO. 10-26928
: 2221 EDA 2013
v. :
A[redacted] K[redacted] :

OPINION

DANIELE, J. AUGUST 16, 2013

Plaintiff-Appellant, S[redacted] B[redacted] ("Father"), has filed an appeal to the Superior Court of Pennsylvania from our Custody Order entered on June 28, 2013. For the reasons provided in this Opinion as well as those set forth in our Custody Decision and Order entered on June 28, 2013, we believe our Order was proper. We respectfully request our Order to be affirmed.

Preliminarily, we note that Plaintiff-Father has yet to pay for the transcription of the hearing of April 16, 2012. Pursuant to Pa.R.A.P. 1911(a), it is the duty of an appellant to make the necessary payment for the transcription of relevant proceedings. Failure to abide by this rule may result in action deemed appropriate by the appellate court. Pa.R.A.P. 1911(d).

PROCEDURAL HISTORY/DISCUSSION

The specific reasons underlying the entry of our Custody Order of June 28, 2013 were stated within that Decision and Order, and we incorporate the Decision and Order into this Opinion.

On October 4, 2011, Plaintiff-Father filed a Petition to Modify the Custody Order issued by Judge Carluccio on May 11, 2011. Among the relief requested by Plaintiff-Father was shared physical custody of the parties' two children, E.B. (DOB: 12/11/2008) and A.B. (DOB: 7/7/2010).

We held a hearing on April 16, 2012. On that day, we entered an interim Order that increased the number of overnights the children would spend with Plaintiff-Father. We also

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included a provision that allowed Plaintiff-Father to spend one-on-one time with each child in an effort to allow Plaintiff-Father to form an independent bond with each child.

We stated that we would review the case and conduct a phone conference around September 1, 2012 to determine whether the parties had agreed that the changes implemented in the April 16, 2012 Order should continue. (N.T., Order of 4/16/12, pp. 6-7). If either party had an issue with the interim Order, then we would schedule a status review hearing to occur sometime around late September or early October of 2012.

On November 5, 2012, we conducted a status review hearing. We concluded the status review hearing on February 15, 2013.

Following a review of post-trial submissions, we issued our Custody Order on June 28, 2013. Plaintiff-Father filed a timely appeal, along with the required Concise Statement of Matters Complained of on Appeal,[1] on July 29, 2013.

Our Custody Order of June 28, 2013 was essentially the same as the Custody Order of April 16, 2012 in that we awarded Plaintiff-Father physical custody of the children for 5 overnights in a two-week period.

Plaintiff-Father has asserted 18 appellate issues. However, many of these are redundant. It appears that Plaintiff-Father is simply not happy with the outcome of the custody hearing. We will address each of Plaintiff-Father's appellate issues. When an issue is repetitive, we will cite to the appropriate section of this Opinion.

Plaintiff-Father first argues that we erred in not awarding him shared physical custody despite finding that he is a capable parent. Our Custody Decision and Order entered on June 28, 2013 specifically set forth the reasons for our decision. We examined each of the custody factors enumerated at 23 Pa.C.S.A. §5328(a). As the first 15 factors set forth in this subsection did not

[1] Pa.R.A.P. 1925(a)(2)(i) requires appellants to file and serve their concise statement along with their notice of appeal.

weigh in favor of either party, we stated that the reasons for our custody decision were primarily based on "other relevant factors." These factors were:

(1) inconsistencies in testimony of Plaintiff-Father, A[redacted] (his wife), and his parents. Such inconsistencies discredit Plaintiff-Father's credibility as he has not been completely truthful to this Court;

(2) Plaintiff-Father's failure to spend one-on-one time with each child as directed in our April 16, 2012 Order. We specifically included that provision to allow Plaintiff-Father to prove to this Court that he desired to spend more time with his children; and

(3) Plaintiff-Father's continual filing of criminal actions against Defendant-Mother as well as countless civil filings in this action. Plaintiff-Father's conduct demonstrates that he is consumed with battling Defendant-Mother in court rather than trying to resolve disputes in the best interests of the children.

Despite Plaintiff-Father's contention that we erred by not awarding him shared custody, the record reflects that we carefully examined each custody factor in issuing our Order.

Plaintiff-Father next argues that we erred because our decision was not based on credible evidence. In a bench trial, it is the duty of the trial judge to decide credibility of the witnesses and to weigh their testimony. A trial court's findings will not be reversed unless it appears that the court has abused its discretion or committed an error of law. *Weir by Gasper v. Estate of Ciao*, 556 A.2d 819 (Pa. 1989).

Although Plaintiff-Father argues that our decision was not based on credible evidence, we believe that a review of the record will demonstrate otherwise.

In his third issue, Plaintiff-Father contends that we erred in giving a preference to Defendant-Mother or simply applying the past "status quo."

We did not apply the "status quo." Rather, our decision was based on examination of each of the custody factors.

Plaintiff-Father argues in his fourth issue that we did not take into consideration based on the evidence presented which parent is more likely to encourage, permit, and allow frequent and continuing contact and physical access between the non-custodial parent and the child.

We clearly considered this factor in our decision. In fact, it is the first factor we examined in our Custody Decision and Order. We stated that it is very clear from the evidence and the litigious nature of this case that neither party on his/her own would encourage and permit frequent and continuing contact between the children and the other party.

Plaintiff-Father argues in issue five that we erred by not considering Defendant-Mother's history of unilateral actions, where she removed the minor child, E.B., to Virginia for 16 months.

Again, Plaintiff-Father's contentions are belied by the record. On page 2 of the Custody Decision and Order, we stated that a review of prior proceedings in this case indicated that Defendant-Mother had unilaterally moved to Virginia with E.B. As a result of this, we increased Plaintiff-Father's custodial time in our April 16, 2012 Order.

We would have been more inclined to award shared physical custody to Plaintiff-Father if he had adhered to this Court's directive to spend one-on-one time with each child as provided in the April 16, 2012 Order.

Plaintiff-Father's sixth issue is essentially the same as his fifth issue. Plaintiff-Father argues that we erred in not considering Defendant-Mother's past actions in moving to Virginia.

As stated above, we considered Defendant-Mother's conduct in issuing our Custody Order of April 16, 2012. Our most recent custody decision was based on conduct that occurred after the entry of the April 16, 2012 Order.

Plaintiff-Father argues next that we erred in finding that Defendant-Mother is better suited to provide a stable environment for the children, perhaps due to the "primary caretaker doctrine."

We did not apply the primary caretaker doctrine in this action. 23 Pa.C.S.A. §5328(b) provides that no party shall receive a preference based upon gender. Our Custody Order was based on a thorough review of the custody factors rather than on the primary caretaker doctrine.

In his eighth issue, Plaintiff-Father asserts that we erred in finding that both parties had extended family available to them despite finding that Defendant-Mother's extended family actively worked to prevent contact between the children and Plaintiff-Father.

We considered the availability of extended family to each party. Each party's extended family spends a considerable amount of time with the children, and we believe this is beneficial to the children.

Next, Plaintiff-Father argues that we erred by giving undue consideration to the testimony of Defendant-Mother's private investigator.

As we stated above, the determination of witness credibility is for the court to decide. Absent an abuse of discretion or error of law, a trial court's determinations will be upheld.

In his tenth issue, Plaintiff-Father contends that we disregarded Defendant-Mother's manipulative actions without relying upon competent evidence to the contrary.

We entered our Custody Order after a thorough review of each of the custody factors as well as a review of the testimonial/documentary evidence. Our decision is supported by the record.

Issue eleven is that we erred by failing to consider all evidence. In rendering our decision, we considered all relevant and admissible evidence. Plaintiff-Father does not state with specificity the evidence that he claims we failed to consider.

Issue twelve is that we erred in accepting, considering, or relying on something prepared by Defendant-Mother's counsel. We are not sure what Plaintiff-Father is referring to in this issue. We do not know if Plaintiff-Father is asserting that Defendant-Mother's counsel submitted a letter or some other document to this Court.

In his thirteenth issue, Plaintiff-Father asserts that we did not consider changes of circumstances since the entry of the April 16, 2012 Order. Namely, Plaintiff-Father asserts that the children's daycare/preschool had changed, Defendant-Mother's work schedule had changed, and Plaintiff-Father's availability had changed.

The Court not only considered changes since the entry of the April 16, 2012 Order but also allowed for future changes. Each parent has certain rights and responsibilities with respect to his or her children. Although a parent may not be happy regarding the time that a custodial period begins or ends, we attempt to issue custody orders that are in the best interests of the children. It is the duty of each parent to provide for transportation and child care during that parent's custodial period. We specifically provided in the Corrective Order of August 7, 2013 that the custodial parent has the responsibility for providing transportation and child care at the beginning of his or her custodial period, and by doing so, we indirectly advised the parties that they had obligations with respect to their children which must be met despite changes in their or the children's schedules.

Plaintiff-Father sought shared custody in his Petition to Modify that he filed on October 4, 2011. Following the hearing of April 16, 2012, we entered an interim Order that granted Plaintiff-Father's request for increased custodial time (albeit not the 50:50 custody that Plaintiff-Father sought). Our Custody Order entered on June 28, 2013 was similar to the April 16, 2012 Order in that it awarded Plaintiff-Father substantial physical custody though not equal, shared physical custody. It is difficult to fathom why Plaintiff-Father now complains that our Order did not consider the parties' availability.

Plaintiff-Father argues in his fourteenth issue that we erred by not providing a specific holiday schedule.

In our Order of June 28, 2013, we directed the parties to submit an agreement or proposal with respect to a split of the holidays. After further consideration, we addressed the holiday

schedule in our Corrective Order dated August 7, 2013, which provided that the parties shall divide the holidays as previously provided in Judge Carluccio's Orders.

Plaintiff-Father's fifteenth issue, in which he argues we erred by failing to provide for a custody exchange location, is moot as we addressed this in our Corrective Order dated August 7, 2013.

Plaintiff-Father argues in his sixteenth issue that we erred by stating that all custodial exchanges would occur at noon, without giving weight to testimony that the children have activities that go beyond noon, and in the future, either party may obtain full-time employment that interferes with the noon exchange.

We entered our Custody Order after considering the evidence before us. Furthermore, any claim that either party may obtain full-time employment that would prohibit a noon custodial exchange is speculative. Either party could obtain a full-time position that permits a flexible schedule such that a noon exchange is feasible.

Plaintiff-Father's next issue is we erred by omitting brief Skype communications with the non-custodial parent. The Corrective Order of August 7, 2013 permits daily, five-minute Skype calls with the non-custodial parent so this issue is moot.

In his final issue, Plaintiff-Father argues that we failed to comply with Pa.R.C.P. 1915.4. This rule relates to prompt disposition of custody cases. At the conclusion of the hearing on February 15, 2013, the parties requested time to submit post-trial memoranda after the transcripts were completed. We granted this request. The transcript of the February 15, 2013 hearing and the Order portion of the April 16, 2012 hearing were completed on March 6, 2013 and March 29, 2013, respectively. Plaintiff-Father submitted his post-trial memorandum on April 11, 2013; Defendant-Mother submitted her post-trial memorandum on May 13, 2013. On June 13, 2013, Plaintiff-Father filed a response to Defendant-Mother's memorandum.

As we entered our decision on June 28, 2013, we have complied with Pa.R.C.P. 1915.4.

CONCLUSION

For the reasons set forth above, we believe our decision was proper and should be affirmed.

BY THE COURT:

Rhonda Lee Daniele

RHONDA LEE DANIELE, J.

Copy of this Opinion mailed
to the following on 8/ 16 /2013:

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Barbara Jarrid

Secretary

J-A12006-14

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA-FAMILY DIVISION

S[redacted] B[redacted] : NO. 10-26928

v. :

A[redacted] K[redacted] :

OPINION

DANIELE, J. SEPTEMBER 20, 2013

Plaintiff-Appellant, S[redacted] B[redacted] ("Father"), has filed an appeal to the Superior Court of Pennsylvania from our Order of Clarification dated August 7, 2013. For the reasons provided in this Opinion, we believe our Order was proper. We respectfully request the Superior Court to affirm our Order.

There is currently a fast-track custody appeal pending in the Superior Court (2221 EDA 2013) related to our June 28, 2013 Custody Order. Father appealed that Custody Order. Our June 28, 2013 Custody Order specifically addressed the custody factors enumerated at 23 Pa.C.S.A. §5328(a). On August 19, 2013, we submitted our Opinion with respect to Father's appeal of the June 28, 2013 Custody Order.

Following the entry of the June 28, 2013 Custody Order, Father filed two petitions[1] requesting amendments to the June 28, 2013 Custody Order. Upon reading these petitions, we realized that we had intended to include a custody exchange location as well as a provision permitting the use of Skype in the June 28, 2013 Custody Order. Therefore, we issued our Order of Clarification dated August 7, 2013. The Order of Clarification also included administrative provisions.

DISCUSSION

Father filed his Concise Statement on September 16, 2013. Father's Concise Statement sets forth eight issues.

[1] Father filed a Petition to Add a Custody Exchange Location on July 5, 2013. Father filed a Petition to Reinstate Skype Communication between the Children and Parents on July 7, 2013.

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Father asserts in his first issue that we erred in changing/modifying the custodial times for physical custody, which is contrary to the June 28, 2013 Custody Order. In support of his position, Father cites to *P.H.D. v. R.R.D.*, 56 A.3d 702 (Pa. Super. 2012).

In *P.H.D.*, mother had filed a petition for contempt against father alleging that father had violated a court order by initiating unsupervised contact with the parties' children. The trial court dismissed the contempt petition, but it also "clarified" the parties' custody orders to mandate that father may not appear at any activities or places where the children would reasonably be expected to be at a particular time. The Superior Court reversed and concluded that father's due process rights had been violated because there was no petition for modification before the court.

The case at bar can be distinguished from *P.H.D.* for a couple reasons. First, our Order of Clarification was merely a **technical amendment** of the June 28, 2013 Custody Order. The Order of Clarification set forth the location of the custodial exchanges and permitted the non-custodial parent to Skype with the children for five minutes before the children's bedtime. This is not akin to *P.H.D.* where the trial court imposed a new restriction upon father that barred him from appearing at an activity or place where the children were likely to be present.

Second, in the instant case, Father's Petition to Include a Custody Exchange Location and Petition to Include Skype Communication had been filed and were before the Court.

Father is incorrect in his assertion that the Court changed/modified custodial times for physical custody. Our Order of Clarification did not alter physical custody of the children in any manner.

Father's second issue is that we erred by dismissing his Motion for Sanctions without a conference or hearing. Father had filed this Motion for Sanctions on July 25, 2013, and he requested sanctions based on correspondence Mother's counsel had faxed to chambers requesting the undersigned to take jurisdiction of a private criminal complaint that Father had filed against Mother. We have addressed this issue in the Order of Clarification.

Next, Father contends that we erred by acting in favor of an *ex parte* communication received from Mother's counsel that specified a proposed site for custodial exchanges.

This relates to a fax from Mother's counsel dated July 29, 2013. This was not an *ex parte* communication as Mother's counsel copied Father on the correspondence. Furthermore, Father knew that

the Court had directed each party to submit, within 30 days from the June 28, 2013 Custody Order, either an agreement as to a split of the holidays or each party's proposal regarding the same. In the faxed letter, Mother's counsel set forth a proposed holiday schedule and requested that custodial exchanges that occur when the children are not in school or camp should take place at the Upper Merion Township building.

We did not direct the custodial exchanges to occur at the Upper Merion Township building based on the recommendation of Mother's counsel. The reason we directed the custodial exchanges to take place at the Upper Merion Township building is because the Upper Merion police are housed in the administration building. This is a high conflict case, and we felt that directing the custodial exchanges to take place at the police building would prevent any potential disputes between the parties.

Father asserts in his fourth issue that we erred by striking docket entries 443, 460, 461, 471, and 486 as these docket entries had been filed in accordance with Judge Carluccio's Order of May 31, 2011.

The Order dated May 31, 2011 directed, in part, that a party's failure to respond to a proposal or request regarding the custody of the children within 48 hours would be deemed a consent or waiver of any request. Father had filed docket entries 443, 460, 461, 471, and 486 as alleged agreements between the parties.

These "agreements" filed by Father are not agreements *per se*. They were not signed by Mother. If Father seeks to have an unanswered request to Mother deemed an agreement by default, then he should file a petition that requests the Court to determine if Mother's failure to respond to a custodial request is a deemed acceptance of Father's request.

In his fifth issue, Father argues that we erred by refusing to proceed on Petitions for Contempt while an appeal is pending.

Pa.R.A.P. 1701(b)(2) provides that after an appeal is taken or review of a quasijudicial order is sought, the trial court ... **may** enforce any order entered in the matter, unless the effect of the order has been has been superseded as prescribed in this chapter. (emphasis added).

It is clear from the use of the word "may" in this rule that a trial court's enforcement of an order on appeal is permissive rather than mandatory.

Father's sixth issue is essentially the same as his fifth issue in that he claims we erred by cancelling a hearing for special relief/contempt. As stated above, a trial court's enforcement of an order

on appeal is permissive. Furthermore, Father's petitions for special relief relate directly to the June 28, 2013 Custody Order that is currently on appeal.

Next, Father alleges that we erred by holding important issues in abeyance, such as holiday split relief, without realizing that there had not been any prior orders entered with respect to the holidays.

As the docket reflects, Father is incorrect in this assertion. Judge Carluccio's Order dated May 11, 2011 (docket #125) specifically provides that Mother shall have Mother's Day weekend, and Father shall have Father's Day weekend. Religious holidays and birthdays of the parties will fall where they fall. (N.T., 5/11/11, pp. 7-8).

Father's final issue is that we erred in holding important issues in abeyance such as his Petition for Protective Order filed on July 9, 2013. Father asserts in this petition that Mother has engaged private investigators to conduct surveillance of Father during his custodial periods. Father is not precluded from seeking such relief, but the relief sought is more appropriately filed in the civil division of this Court rather than the family division.

CONCLUSION

For the reasons set forth above, we believe our Order of Clarification was proper and should be affirmed.

BY THE COURT:

Rhonda Lee Daniele

RHONDA LEE DANIELE, J.

Copy of this Opinion mailed
to the following on 9/20/2013:

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