

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

J.W.I.,

Appellee

v.

H.A.I., N/K/A H.A.W.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 5 MDA 2014

Appeal from the Order entered December 3, 2013,
in the Court of Common Pleas of York County,
Civil Division, at No(s): 2006-FC-002108-03

BEFORE: FORD ELLIOTT, P.J.E., OLSON, and STRASSBURGER*, JJ.

MEMORANDUM BY OLSON, J.:

FILED JULY 03, 2014

H.A.I., n/k/a H.A.W., ("Mother") appeals the trial court's order entered December 3, 2013. That order awarded Mother and J.W.I. ("Father") shared legal custody and equally shared primary physical custody on alternating weeks of C.I. ("Child"). On appeal, Mother seeks primary physical custody of Child. We affirm.

The factual and procedural history of this case is as follows. Child, an eight-year-old female, suffered a stroke while *in utero* and, as a result, has special needs, including a history of experiencing seizures,¹ a shunt,² and

* Retired Senior Judge assigned to the Superior Court.

¹ The trial court found that Child had not suffered a seizure in a number of months prior to the hearings. **See** Trial Court Opinion, 12/3/13, at 1.

² Child has a shunt in her neck and a tube that leads to her stomach. N.T., 11/6/13, at 26.

medications that she takes daily. Mother and Father, who were previously married, have been involved in this custody litigation since November 2006. The original, stipulated, custody order that was entered on December 13, 2006 provided joint physical and shared legal custody of Child. That original custody order was amended on several occasions, including August 8, 2011.³ The parties were divorced in late 2012.

On March 29, 2011, Father filed a petition for modification of custody, in which he requested shared legal and physical custody. On September 21, 2012, the trial court held a custody trial, at which Mother, Father, and a number of witnesses testified. On October 11, 2012, the parties filed a joint stipulation of facts. On that same date, the trial court entered an order with regard to the petition, adopting the joint stipulation of facts, and awarding shared legal custody, and equally shared primary physical custody on alternating weeks.

The October 11, 2012 order included a provision directing the parties to communicate with each other via telephone at least one time per week, at 9:15 a.m. on Tuesdays, for a minimum of 15 minutes. The parties were to discuss only matters concerning Child. The order also provided that the parties must keep diaries of the matters discussed. Additionally, the order directed that only the parties, and no other individuals or members of the

³ The August 8, 2011 custody order is complex. As the parameters of that order do not impact our disposition of this matter, we decline to outline the provisions of that order.

parties' respective families, could participate in the telephone calls. Finally, the order directed Father to engage in anger management counseling and provide proof of completion to Mother's counsel.

On February 7, 2013, Mother filed a petition for contempt and modification of the October 11, 2012 custody order. With regard to her petition for contempt, Mother asserted that Father failed to complete the anger management course and to follow the order regarding Tuesday telephone calls and preparation of the diary. Mother requested the trial court hold Father in contempt, award her counsel fees, and modify the existing custody order accordingly. Mother also sought modification alleging that, since the award of shared physical custody, Child's academic progress had worsened, Father had not attended to Child's medical treatments, and Father had not attended to Child's social skills. Mother asked the trial court to award primary physical custody to her.

On March 19, 2013, the trial court entered an interim order maintaining the October 11, 2012 custody arrangement, pending further proceedings, and directed the parties to cooperate in obtaining psychological evaluations, home studies, and other investigations. On May 7, 2013, the trial court appointed Jo Ann MacGregor, Ph.D. as the custody evaluator for the case.⁴ On July 18, 2013, the trial court continued the existing custody arrangement.

⁴ Mother and Father each paid 50% of Dr. MacGregor's fee.

The trial court held hearings on Mother's modification and contempt petitions on October 31, 2013 and November 6, 2013. Mother presented the testimony and expert report of Dr. MacGregor. Mother also presented the testimony of her current husband, R.W. ("Stepfather"). Additionally, Mother testified on her own behalf. Father presented the testimony of Child's teacher, Elizabeth Copenheaver. Father also testified on his own behalf.

Mother is a nurse, and Father is an electrician. Ex. D-13, at 3-5, 13; **see also** N.T., 11/6/13, at 20. Father's mother, ("Paternal Grandmother"), who provides care for Child, is a former nurse. Ex. D-13, at 3-5, 14-16; **see also** N.T., 10/31/13, at 205-206. Paternal Grandmother and her husband provided the transportation for Child because of Father's work schedule. Ex. D-13, at 4.

Dr. MacGregor observed Child interact with Father and Paternal Grandmother on two occasions. Father and Paternal Grandmother requested a second observation by Dr. MacGregor because Father and Paternal Grandmother insisted that, during the first session, Child was tired after returning from Mother's home. N.T., 10/31/13, at 16-22. Dr. MacGregor observed Child refer to Paternal Grandmother as "Mom," and Paternal Grandmother correct Child to use "Mom-Mom." **Id.** at 19. She observed that Child sought Paternal Grandmother for her interactions, and seemed primarily accustomed to interacting with Paternal Grandmother, although Paternal Grandmother attempted to maintain a distance from Child at the

observation. N.T., 10/31/13, at 18. Dr. MacGregor noted that Father did a good job of nurturing Child and played well with her, but did not have much effect in identifying and re-directing misbehavior. **Id.** at 20. Dr. MacGregor's second observation of Child's interaction with Father and Paternal Grandmother was similar to the first observation. **Id.** at 25-26. She testified that Father and Paternal Grandmother discussed inappropriate custody matters in front of Child. **Id.** at 25-26. Dr. MacGregor's observation of Child was non-productive because of Child's developmental delays. **Id.** at 26-27.

Dr. MacGregor also observed Child interact with Mother, Child's half-brother, S.S. (a teenager), and half-sister, E.W. (an infant). **Id.** at 22; Exhibit D-13, at 3. Dr. MacGregor testified that Mother had a stronger skill set than Father in working with Child, who is developmentally delayed. N.T., 10/31/13, at 22-23. Dr. MacGregor also testified that Mother stated her concern regarding Child's ability to function independently as an adult. **Id.** at 28. Further, Dr. MacGregor testified that Mother expressed concern regarding Child's exposure to Father's angry relationship conflicts and alleged excessive consumption of alcohol. **Id.** Dr. MacGregor testified that Paternal Grandmother expressed concern that Aspartame has an adverse effect on Child's seizure disorder, and that Mother is neglectfully administering medications containing Aspartame. **Id.** at 30. Dr. MacGregor stated that the medical documentation did not support Parental

Grandmother's allegation concerning the effect of Aspartame on Child. N.T., 10/31/13, at 30.

Dr. MacGregor also testified that Father and Paternal Grandmother would like to have an individual trained to respond to Child's medical needs ride in the school van with Child. *Id.* at 29-31. She explained that, since Child has not had any seizures for two years, Mother does not find it necessary to have a trained individual ride in the school van, nor does Child's physician find the trained individual necessary. *Id.* Dr. MacGregor stated that Mother is concerned that Father and Paternal Grandmother do not permit Child to function at her own age level, and that this sheltering is holding her back with regard to the consistency of her medical and academic progress. *Id.* at 29.

Dr. MacGregor observed Father has issues with impulse control and anger management, and that, when questioned about a matter that would have a negative impact on him, he becomes defensive, agitated, accusatory, and speaks in a pressured tone. *Id.* at 34. Dr. MacGregor lacked any evidence to conclude that Father has a drinking problem. *Id.* at 35-36.

Dr. MacGregor testified that Father is very emotional regarding Child's use of the word "Daddy" for Stepfather, and that he fails to restrain his displeasure with Stepfather in front of Child. *Id.* at 36-37. Dr. MacGregor stated that Paternal Grandmother has done much to contribute to Child's development, and did a good job in providing specialized care when Child

was medically needy. N.T., 10/31/13, at 37-38. However, Dr. MacGregor assessed Paternal Grandmother as urgently reacting to issues that are no longer present, so that, with the best intentions, she is intruding on the parents' ability to make decisions for Child. **Id.** at 38. Dr. MacGregor stated that Paternal Grandmother provides Child's school with information; however, the school would like only the parents to provide information. **Id.** at 38-39. Dr. MacGregor testified that Paternal Grandmother panics over fecal matter being on Child's underwear for fear that Child might get an infection that could cause death, although there is nothing in Child's medical records to support her fear. **Id.** at 39-40.

Dr. MacGregor testified that the communication between the parents is poor, and that there were miscommunications with regard to medical appointments and confusion concerning medications. **Id.** at 39-40. She stated that Father had a medication changed because it contained Aspartame, without involving Mother. **Id.** at 40. Dr. MacGregor testified that Father stated he was unwilling to make the court-ordered telephone calls to facilitate co-parenting communication. **Id.** Mother's court-required diary showed Father did not make any telephone calls. **Id.** Dr. MacGregor was unable to offer an opinion as to which parent makes a greater effort to communicate. **Id.** at 40-41.

Dr. MacGregor rendered an expert opinion that the court should award Mother primary physical custody of Child, and Father liberal partial physical

custody. N.T., 10/31/13, at 41. Her reason for the recommendation was that Child is currently medically stable, and the focus of parenting and her household environment should be the opportunity for Child to make developmental gains to be a self-sufficient and independently functioning as an adolescent and adult. **Id.** at 41-42. Dr. MacGregor opined that Mother provides a better opportunity for Child to have the developmental experiences necessary for normalized functioning. **Id.** at 42. Dr. MacGregor believed that Mother would be more likely to encourage and support the relationship with the other parent. **Id.** Dr. MacGregor was concerned that Father has difficulties with self-restraint and impulse control, and that these difficulties might affect his ability to maintain a stable lifestyle if he is with Child at his girlfriend A.C.'s home, and not in the structure of Paternal Grandmother's home. **Id.** at 43. Dr. MacGregor was aware that, shortly before her August 2013 report, there was a harassment charge brought against Father that included physical contact. **Id.** at 43-44.

Dr. MacGregor recommended a family therapist because she believed that the family would need assistance in handling different situations, and Child probably would not benefit from individual therapy. **Id.** at 44. Dr. MacGregor recommended that Paternal Grandmother be involved in the family therapy because she needs to alter some of her behavior. **Id.** at 44-45. Specifically, Dr. MacGregor recommended that Paternal Grandmother cease audio recording of what she perceives to be evidence of maltreatment

or neglect of Child, and cease photographing Child's genitals for the same reason. N.T., 10/31/13, at 45. Dr. MacGregor recommended that, if Father believes that there is evidence of neglect, he should report his suspicion to the appropriate authorities, and allow them to document and investigate it.

Id.

Dr. MacGregor recommended that the parents make the medical and developmental decisions. ***Id.*** Dr. MacGregor stated that, although Paternal Grandmother has good intentions, she interferes with the parents' ability to effectively communicate and make decisions with outside medical providers and Child's school. ***Id.*** Dr. MacGregor recommended that Child's medical providers could indicate whether it is necessary to have a skilled person ride in the van to school with Child, and whether Aspartame should be eliminated from Child's diet. ***Id.*** at 45-46. Dr. MacGregor recommended that Child refer to Paternal Grandmother and Stepfather by names other than "Mom" and "Dad," respectively. ***Id.*** at 46-47.

Dr. MacGregor recommended that the custodial exchanges occur at an altered time, so that Father, instead of Paternal Grandmother, will be managing Child's tantrum behavior and emotional outbursts during transitional distress. ***Id.*** at 47-48. Dr. MacGregor also stated that, although well-intentioned, Paternal Grandmother contributes to Child's transitional distress by preparing her several days before transitions. ***Id.*** at 47. She recommended that Father participate in a non-emotional, matter-of-fact

transition of Child to Mother, rather than an emotional preparation process. N.T., 10/31/13, at 48. Dr. MacGregor recommended a neutral exchange site, because leaving Paternal Grandmother's home causes Child to experience transitional distress. ***Id.***

Dr. MacGregor did not make a specific custody recommendation for the summer months, stating that her recommendation would depend on how well Child is functioning in each of the environments. ***Id.*** Dr. MacGregor stated that she would still recommend primary physical custody with Mother during the summer to assist Child in acquiring developmental tools to function as an independent adult, and she would increase Father's partial physical custody in the summer months, but not to equally shared physical custody. ***Id.*** at 48-49.

Mother testified that Father did not make the Tuesday telephone call from October 2012 through July 2013. ***Id.*** at 124. Mother testified that she attempted to communicate with Father via e-mail, text messages, and telephone calls, but did not accomplish productive communication. ***Id.*** at 124. Mother stated that she occasionally e-mailed Father and received a response from him. ***Id.*** at 125-126.

Mother also testified that, as of the filing of the contempt petition, Father had not undergone anger management counseling, as required by the October 11, 2012 order. ***Id.*** at 126-127. Mother stated that, after she filed her contempt petition, Father began seeing an individual anger management

counselor. N.T., 10/31/13, at 127. Mother introduced a number of e-mail messages showing communication difficulties with Father. **Id.** at 148. Mother testified that, on January 18, 2013, Father failed to attend a yearly physician's appointment for Child's shunt, despite notice. **Id.** at 152-153, 170. Mother also testified that, on December 27, 2012, Father failed to attend an eye doctor appointment for Child. **Id.** at 155.

Mother testified that Father failed to respond to her e-mail concerning two other medical appointments for Child. **Id.** at 155-156, 170. Mother made it clear in her e-mail that, because of missed appointments, she planned to pick Child up for all of her appointments, and that Father needed to comply with the Tuesday telephone calls directed by the October 11, 2012 order. **Id.** at 156-157. Mother testified that she sent an e-mail to Father on January 25, 2013, because he failed to take Child to have her lab work completed and Mother had to take Child the following week. **Id.** at 157.

Mother also introduced an e-mail dated January 25, 2013, evidencing that Child's homework assignments were not properly done with Father. **Id.** at 158-159. She stated, however, that Child makes progress at school. **Id.** at 159. Mother claimed Paternal Grandmother failed to follow the instructions given by Child's doctor after medical appointments. **Id.** at 171-172. Mother testified that Father failed to follow the instructions given by Child's doctor regarding discontinuance of Child's Atropine drops a week before an appointment, so that Mother had to re-schedule Child's

appointment. N.T., 10/31/13, at 172-173. Mother was unaware that Father had taken Child to some doctor appointments. **Id.** at 208-209. She also testified that she failed to take Child to one medical appointment that she had scheduled. **Id.** at 209-211.

Mother also testified that, on October 16, 2013, Father failed to appear at Child's school to discuss the parents' communication difficulties. **Id.** at 174. She stated that Father called to cancel the meeting, and that the teacher told him that the meeting started 15 minutes before his call, so he remained on speakerphone for the meeting. **Id.** Mother admitted that Father attempted to cancel the meeting by telephone because he had the flu. **Id.** at 207.

Mother testified that she does not wipe Child's bottom when Child finishes in the bathroom, but provides Child with wet wipes to learn that skill so she may care for herself. **Id.** at 178. Mother also testified that she takes Child to gymnastics to strengthen Child's body, particularly her right side, which was affected by the stroke. **Id.** at 170-180. Additionally, Mother testified that Father used foul language when picking Child up at Mother's home, in front of Child. **Id.** at 182, 216.

Mother testified that her current work schedule is every other weekend, and on Monday or Wednesday of the week following her off weekend. **Id.** at 183. She works daylight hours. **Id.** Mother testified that, when she is working, her infant daughter, E.W., stays with Stepfather, his

grandparents, or his mother. N.T., 10/31/13, at 183. She testified that Child gets along well with E.W. **Id.**

On cross-examination, Mother admitted that she called Father a loser who could not even have primary custody of his dog without his uncle assisting with its care, and that she sarcastically referred to him as “father of the year.” **Id.** at 200. Mother agreed that there are times when she and Father can communicate civilly, and that she shares some of the blame for when they do not. **Id.** at 202. Mother also agreed that she and Father could benefit from co-parenting counseling, and that she would be willing to participate in such counseling, in light of Child’s special needs. **Id.** at 203.

Additionally, Mother admitted that Child has a bond with Father and Paternal Grandmother. **Id.** at 204. Mother also admitted that Paternal Grandmother provided the bulk of Child’s care for the first five years of her life, and that Paternal Grandmother continued to provide the bulk of the care until October 2012, when Mother changed her schedule. **Id.** at 205-206. Mother admitted that, after the October 11, 2012 order, she indicated to Father that she would no longer allow Paternal Grandmother to care for Child during her custodial periods. **Id.** at 206-207. Mother admitted that she previously used Paternal Grandmother as a caregiver during her custodial periods because Child had a lot of medical needs at that time, and Paternal Grandmother was able to attend to Child very well. **Id.** at 206.

Stepfather testified that he had been married to Mother for two years, and that Child lives with him, Mother, Child's half-brother S.S. and half-sister, E.W. N.T., 10/31/13, at 222. He encountered Father in July or August 2013, when Father came to pick Child up to go to Dr. MacGregor's observation. **Id.** at 222-223. Father gave him the finger through the front windshield of his car. **Id.** On cross-examination, Stepfather admitted that was charged with harassing Father in 2011. **Id.** at 224.

Child's teacher, Ms. Copenheaver, testified that she taught Child the previous year, and was currently teaching Child in the neurological support class. N.T., 11/6/13, at 6. Ms. Copenheaver testified that Child is making slow but steady progress at school. **Id.** Ms. Copenheaver testified that the parents were not using the communication log sent home from school, and, at the meeting in October 2013, she had asked them to use it. **Id.** at 11-12. Ms. Copenheaver testified that she did not observe any change in Child from being in Father's custody as opposed to Mother's custody. **Id.** at 12-13. Ms. Copenheaver testified that Child has great socialization skills, she has friends and participates in games and activities, and she follows direction for the most part. **Id.** at 14.

Father explained that he works from 6:00 p.m. to 6:00 a.m. for seven consecutive days and then has six of the next seven days off. **Id.** at 20-22. Father also testified that he was concerned that Mother and Stepfather use corporal punishment with Child, especially because of Child's shunt and tube.

N.T., 11/6/13, at 26-27. Father stated that his academic goal for Child is for her to be “mainstreamed” with the other children who do not have special needs. **Id.** at 29-30.

Father explained the setting for Child at Father’s home with Paternal Grandmother and her husband, and the availability of extended family, including his son, Child’s 16-year-old half-brother, T.I. Father also explained his involvement in encouraging Child to develop her right side, the side affected by her stroke. **Id.** at 42. Father takes Child to the park to engage her in activities, and assists her in playing puzzles on his iPhone. **Id.** at 41-44. Father stated that he engages Child in social activities, and works on her writing skills. **Id.** at 41-44. Father drives Child to school when he has custody. **Id.** at 45-46. He also stated that he picks Child up after school on his custodial days and takes her to the park to play. **Id.** at 47-48.

Father’s girlfriend, A.C., is a healthcare administrator, and has a five-year-old son. **Id.** at 49-50. Father would like to move in with A.C. after she sells her current house and moves to Dallastown. **Id.** at 49-53. Father testified that Child gets along well with A.C., but he admitted that he has had problems with A.C., centering on his focus on Child. **Id.** at 52-53.

Father testified that he had difficulty enrolling in anger management classes, and began seeing a private anger management counselor on May 9, 2013. **Id.** at 53-56, 59. Father testified that he would be willing to participate in co-parent counseling. **Id.** at 60. Father stated that Mother

stopped giving him monthly calendars regarding Child, and that he had to call the physicians' offices to find out Child's schedules. N.T., 11/6/13, at 65-66. Father stated that he did not participate in the court-ordered Tuesday morning telephone calls with Mother because he did not believe they would be productive, as Mother made threats regarding taking away the time that he and Paternal Grandmother would spend caring for Child while Mother worked during her custodial periods. *Id.* at 61-62. Father testified that he attended Child's appointments. *Id.* at 66. Father explained that he did not receive Mother's e-mail on his prior cellphone. *Id.* at 66.

Father stated that the reason Child's doctor did not alter Child's Depakote prescription was the custody litigation. *Id.* at 68-69. Father stated that he is concerned that Child is filthy when she returns from Mother's home, and has fecal matter in her private parts because Mother refuses to assist her in wiping herself. *Id.* at 73-74. Father is concerned that Child's shunt could become infected. *Id.* Father stated that he does not swear in front of Child, nor does he allow anyone else to do so. *Id.* at 71. Father also testified that he and Mother agreed that Child would not ingest Aspartame, based on Child's seizure that resulted in her hospitalization. *Id.* at 72.

Father stated that Child becomes upset about the custody transfer to Mother's house, although it has improved. *Id.* at 74-75. Father testified that Paternal Grandmother and her husband transport Child to Mother's

home because of his work schedule. N.T., 11/6/13, at 77-78. Father denied that he made negative comments about Mother in front of Child, and that he used profanity with Mother at the pick-up of Child. *Id.* at 79.

On December 3, 2013, the trial court issued an opinion with regard to the custody modification petition, re-affirming the July 16, 2013 interim order that awarded Mother and Father shared legal custody, and equally shared primary physical custody on alternating weeks. In the order, the trial court also made the following additions to the interim order:

[Father and Mother] will see a family therapist to work on their co-parenting skills. Furthermore, [P]aternal [G]randmother is to cease recording and photographing parts of [Child's] body. All future medical and developmental decisions should be made by the parties and not by [P]arental [G]randmother. Moreover, [C]hild is to use the terms Mom Mom for [P]arental [G]randmother and Daddy [R.] for [S]tepfather. [Child] will not be removed from her school due to the specialized treatment she is receiving at that school.

Additionally, unless in an emergency, [F]ather, and not parental grandparents, is to personally transport [Child]. Also, rather than parental grandparents, [F]ather shall perform the necessary communication with [Child's] school and medical providers. The parties should reach an agreement prior to providing any information to the school and/or medical providers. Finally, further communication between the parties shall relate only to issues concerning [Child], and it shall be free of any threats and discussion of personal issues as well as free of any and all aspersions directed at the other party.

Trial Court Opinion, 12/3/13, at 6-7.

On December 6, 2013, the trial court entered an order finding Father in contempt of the court's previous order, and assessed a fine in the amount

of \$1,000, to be paid to Mother's counsel within 30 days. This timely appeal followed.⁵

Mother raises the following nine issues on appeal:

1. Whether the trial court committed an abuse of discretion in failing to give any weight to the testimony of [Dr. MacGregor]?
2. Whether the trial court committed an abuse of discretion in determining that neither parent is more likely to encourage and permit frequent and continuing contact between [C]hild and the other party?
3. Whether the trial court committed an abuse of discretion in determining that Father's recent and past abusive conduct was not a factor to be considered in the custody analysis?
4. Whether the trial court committed an abuse of discretion in determining that Father maintains a more stable and consistent schedule and environment than Mother?
5. Whether the trial court committed an abuse of discretion in determining that Father is equally likely as Mother to maintain a loving, stable, consistent, and nurturing relationship with [C]hild?
6. Whether the trial court committed an abuse of discretion in determining that both parties are equally likely to attend to the daily physical, emotional, developmental and educational needs of [C]hild?
7. Whether the trial court committed an abuse of discretion in determining that the amount of conflict between the parties is attributable to Mother?

⁵ On December 31, 2013, Mother filed a concise statement of errors complained of on appeal ("concise statement"). **See** Pa.R.A.P. 1925(a)(2)(i). On January 7, 2013, the trial court issued its Rule 1925(a) opinion. All issues raised on appeal, although phrased differently, were included in Mother's concise statement.

8. Whether the trial court committed an abuse of discretion by failing to consider Father's contemptuous behavior as relevant while fashioning its custody order?

9. Whether the trial court, in determining that Mother's case benefited under the majority of the custody factors relevant to its inquiry, committed an abuse of discretion in failing to subsequently modify the custody schedule?

Mother's Brief at 5-6.⁶

Initially, we observe that, as the custody hearings were held after January 24, 2011, the Child Custody Act, 23 Pa.C.S.A. §§ 5321-5340, controls. **C.R.F. v. S.E.F.**, 45 A.3d 441, 445 (Pa. Super. 2012). As we have explained:

Our standard of review over a custody order is for a gross abuse of discretion. If a trial court, in reaching its conclusion, overrides or misapplies the law or exercises judgment which is manifestly unreasonable, or reaches a conclusion that is the result of partiality, prejudice, bias or ill will as shown by the evidence of record, then discretion is abused. Our scope of review over custody disputes is broad; this Court is not bound by the deductions and inferences the trial court derives from its findings of fact, nor must we accept the trial court's findings of fact when these findings are not supported by competent evidence of record.

L.A.L. v. V.D., 72 A.3d 690, 692 (Pa. Super. 2013) (citation omitted).

We have stated that,

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.

⁶ We have re-numbered the issues for ease of disposition.

A.H. v. C.M., 58 A.3d 823, 825 (Pa. Super. 2012) (internal alteration and citation omitted).

Additionally:

The parties cannot dictate the amount of weight the trial court places on evidence. Rather, the paramount concern of the trial court is the best interest of the child. Appellate interference is unwarranted if the trial court's consideration of the best interest of the child was careful and thorough, and we are unable to find any abuse of discretion

A.V. v. S.T., 87 A.3d 818, 820 (Pa. Super. 2014) (citation omitted). Finally, "[o]ur concern in any custody . . . matter is the best interest of the child, which considers all factors, on a case-by-case basis, that legitimately affect a child's physical, intellectual, moral, and spiritual well-being." **S.J.S. v. M.J.S.**, 76 A.3d 541, 554 (Pa. Super. 2013) (citation omitted).

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). When making a child custody determination, the trial court is required to consider 16 factors. In particular, the trial court is required to consider:

- (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)(1-16).⁷

In her first issue on appeal, Mother argues that the trial court abused its discretion by failing to give any weight to Dr. MacGregor's recommendation that Mother be awarded primary physical custody. In addressing this contention, we note that: "The trial court was under no obligation to delegate its decision-making authority to" Dr. MacGregor. **M.A.T. v. G.S.T.**, 989 A.2d 11, 20 (Pa. Super. 2010) (citation omitted). "While a trial court is not required to accept the conclusions of an expert witness in a child custody case, it must consider them, and if the trial court chooses not to follow the expert's recommendations, its independent decision must be supported by competent evidence of record." **Id.**; **Masser v. Miller**, 913 A.2d 912, 919-920 (Pa. Super. 2006); **Nomland v. Nomland**, 813 A.3d 850, 854 (Pa. Super. 2002).

Here, the trial court considered all of Dr. MacGregor's recommendations, and adopted some of her recommendations. For example, the trial court adopted Dr. MacGregor's recommendation concerning co-parent counseling, and instructing Child to call Paternal Grandmother "Mom-Mom", and Stepfather "Daddy R." It also adopted her recommendation to direct Paternal Grandmother to cease making audio

⁷ Effective January 1, 2014, the statute was amended to include an additional factor at 23 Pa.C.S.A. § 5328(a)(2.1) (providing for consideration of child abuse and involvement with child protective services). **See** 2013 Pa. Legis. Serv. Act 2013-107.

recordings and photographing Child's genital areas. Moreover, the trial court adopted Dr. MacGregor's recommendation that Mother and Father make medical decisions and communicate them with Child's school. **See** Exhibit D-13, at 19. As discussed below, the trial court's independent decision was based upon competent evidence. Therefore, Mother's first issue on appeal is without merit.

In her second issue on appeal, Mother contends that the trial court abused its discretion in considering the first best interest factor, to-wit, which parent is more likely to encourage Child's relationship with the other parent. Unfortunately for Child, as is the case in many custody disputes, neither party encouraged Child's relationship with the other parent. Some evidence presented at trial clearly supported Mother with respect to this factor. For example, Dr. MacGregor opined that, "Mother is more likely to support the relationship between C[hild] and [F]ather, while it is likely that [F]ather and [Paternal G]randmother engage in disparagement of [M]other in [C]hild's presence." Exhibit D-13, at 18. However, other evidence clearly supported Father with respect to this factor. For example, Mother chose not to allow Father and Paternal Grandmother to watch Child while Mother was working. Thus, the trial court had ample evidence that both Mother and Father were unlikely to encourage Child's relationship with the other parent. Accordingly, the trial court did not abuse its discretion when considering the first best interest factor.

In her third issue on appeal, Mother contends that the trial court's finding with respect to the second best interest factor, the history of past abuse, is not supported by the record. We conclude that this issue is waived. As this Court has explained, Pennsylvania Rule of Appellate Procedure 2119 compels a finding of waiver "where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review[.]" ***Tosi v. Kizis***, 85 A.3d 585, 589 n.6 (Pa. Super. 2014) (citation omitted). Mother does not cite to any portion of the record that would support a finding that Father ever abused Mother or Child. Instead, she only cites to an alleged harassment by Father of Stepfather. That is not the type of abuse that is contemplated under section 5328(a)(2). "[W]e decline to become the appellant's counsel. When . . . briefs are wholly inadequate to present specific issues for review, a Court will not consider the merits thereof." ***Branch Banking & Trust v. Gesiorski***, 904 A.2d 939, 942-943 (Pa. Super. 2006) (internal alteration and citation omitted). As such, Mother's failure to cite to any relevant authority or relevant portion of the record results in waiver of her third issue.

Mother's fourth issue on appeal implicates the fourth best interest factor, the need for stability in Child's life. Mother contends that the trial court abused its discretion when it determined that Father had a more stable schedule and environment than Mother. However, the evidence is clear that

Father does have a more stable schedule than Mother. Mother works until 3:00 p.m. on some days and 7:00 p.m. on other days. **See** N.T., 10/31/13, at 183. She works weekends during some weeks and on Monday or Wednesday other weeks. **Id.** On the other hand, Father's work schedule is more consistent. He works from 6:00 p.m. to 6:00 a.m. every day for one week and then has off six of the next seven days. **See** N.T., 11/6/13, at 20-22. Furthermore, this schedule is contractually guaranteed until 2017. **Id.** at 22.

Mother also argues that Father's decision to cohabitate with his girlfriend will cause instability in Child's life. However, Mother fails to recognize that any instability that may be caused by Father's move is balanced by the continuing presence of Paternal Grandmother in Child's life while Child is residing with Father. Paternal Grandmother has been caring for Child since birth, with the full support of Mother for the first five years of Child's life. She is able to provide stability to Child while Child is residing with Father that none of Mother's family members can provide. As such, we conclude that the trial court did not abuse its discretion in its consideration of the fourth best interest factor.

In her fifth issue on appeal, Mother contends that the trial court abused its discretion when considering the ninth best interest factor, the ability of the parties to have a loving, stable, consistent, and nurturing relationship with Child. We conclude that this issue is waived. In her brief,

Mother only discusses Child's development when addressing her fifth issue on appeal. **See** Mother's Brief at 15-16. This is more appropriately addressed under Mother's sixth issue on appeal. Thus, we consider the arguments made by Mother in this section of her brief when addressing Mother's sixth issue on appeal. To the extent that Mother raises a separate claim regarding the ninth best interest factor, the issue is waived. **See** Pa.R.A.P. 2119(a).

In her sixth issue on appeal, Mother contends that the trial court abused its discretion in its consideration of the tenth best interest factor, the parties' ability to attend to the daily physical, emotional, developmental, education, and special needs of Child. Mother relies upon Dr. MacGregor's evaluation of Mother's ability to foster Child's development. Mother also relies on a portion of Dr. MacGregor's report in which she opined that Mother is better able to meet Child's special needs. However, the trial court was presented with ample evidence to suggest that Father was no less capable than Mother of promoting Child's development.

Father is attempting to have Child progress to the point where she would not be in special education classes. **See** N.T., 11/6/13, at 29-30. Father also takes Child to the park to engage her in activities, and assists her in playing puzzles. **Id.** at 41-44. Father engages Child in social activities, and works on her writing skills. **Id.** For example, Father encourages Child to keep her hand open and to properly hold a pencil. **Id.**

at 43. He plays music in the car in order to assist Child's speech. N.T., 11/6/13, at 46-47. Furthermore, Ms. Copenheaver testified that she did not observe any change in Child from being in Father's custody as opposed to Mother's custody. **Id.** at 12-13.

Mother's last contention regarding Child's development, that custody battles do not help Child's development, does not favor either Mother or Father. Instead it shows that Mother and Father should spend more time working together on custody matters instead of litigating every issue. Although Mother and Father have different viewpoints as to how to better promote Child's development – for example, Mother believing that riding the bus is better and Father believing that having Child play with others at school for 30 minutes prior to homeroom - it is clear that both parents are actively trying to teach Child social skills. **See id.** at 46. Thus, we conclude that the trial court's evaluation of the tenth best interest factor was not an abuse of discretion.

In her seventh issue on appeal, Mother contends that the trial court abused its discretion when considering the thirteenth best interest factor, the amount of conflict between the parties. The trial court acknowledged the high level of conflict between the parties and determined that they were equally to blame for this conflict. The record clearly supports such a finding. Both parties engaged in extensive name-calling. Mother refused to disavow her previous statement that Father could not have custody of a dog without

Father's uncle caring for it. **See** N.T., 10/31/13, at 200. Mother also did not repudiate her prior statement that Father was a loser. **See id.** Mother sarcastically referred to him as "father of the year." **See id.**

On the other hand, Father told Mother that she was gross and disgusting. **Id.** at 146. Father also made jokes about Stepfather having Down Syndrome. **Id.** at 146-147. Father told Mother that Child hates her. **Id.** at 147. Father told Mother that "I hope you and lumpy[, Stepfather,] have [12] kids and leave [Child], [Paternal Grandmother], and me alone." **Id.** As the trial court recognized, the exchanges between Mother and Father show a lack of maturity and an inability to co-parent in a productive fashion. **See** Trial Court Opinion, 12/3/13, at 5.

Mother contends that she is still less responsible for the conflict between the parties because she, at least, tries to communicate with Father regarding Child's needs. However, Mother admitted at trial that she was partly to blame for the conflict between the parties. N.T., 10/31/13, at 202. Mother also admitted that she and Father communicate civilly about Child's well-being on some occasions. **Id.** Although Father did not participate in the Tuesday telephone calls as directed, the trial court's finding that both parties were equally responsible for the conflict in the relationship is supported by the record and was not an abuse of discretion.

In her eighth issue on appeal, Mother contends that the trial court abused its discretion by failing to address Father's contempt of court. This

issue is waived. Mother did not devote any portion of the argument section of her brief to addressing this issue. **See** Pa.R.A.P. 2119(a).

Finally, Mother argues that the trial court abused its discretion when weighing the best interest factors. She argues that several factors weighed in her favor but only one factor weighed in favor of Father. Thus, she claims that the trial court should have granted her primary physical custody. "It is precisely this reweighing of the evidence that an appellate court is not at liberty to do." **Doherty v. Doherty**, 859 A.2d 811, 813 n.2 (Pa. Super. 2004), *appeal denied*, 877 A.2d 462 (Pa. 2005) (citation omitted); **Busse v. Busse**, 921 A.2d 1248, 1255 (Pa. Super. 2007) (citation omitted). As the trial court emphasized in its opinion, although more factors weighed in favor of Mother, the benefits were not sufficient to upset the parties' current custody arrangement. **See** Trial Court Opinion, 12/3/13, at 6. The trial court, therefore, determined that the prior custody arrangement should remain in place.

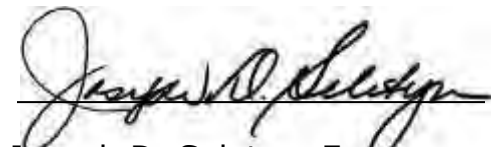
The weighing of the best interest factors was not an abuse of discretion. Child, with her special needs, does not respond well to changes in her routine. This is evidenced by her continued tantrums whenever her schedule changes. It is also clear that Child has a close relationship with Father and Paternal Grandmother. Any reduction in the amount of time that Child spends with Father would likely be detrimental to Child. The trial court carefully considered the arguments put forth by both Mother and Father and

weighed the best interest factors as required by statute. It made a tough determination that it believed was in Child's best interest. Although we may have made a different determination in the first instance, we review the trial court's determination for an abuse of discretion based solely upon a cold record. We can ascertain no abuse of discretion on the part of the trial court that sat through the trial in this matter and was best able to judge the credibility of the witnesses.

In sum, after a careful review of the record in this matter, including the testimonial and documentary evidence, we find no abuse of discretion on the part of the trial court. The trial court's conclusions with regard to the best interest factors, including its refusal to penalize this special needs child by decreasing her time with Father, were not unreasonable in light of the sustainable findings of the trial court. **See C.R.F. v. S.E.F.**, 45 A.3d 441, 443 (Pa. Super. 2012). We implore Father and Mother to cooperate in raising Child. As a special needs child, she needs her parents to help her facilitate reaching her maximum potential. The eight-year custody battle which has occurred in this case is only detrimental to Child's well-being.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/3/2014