

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

N.R.,	:	
	:	IN THE SUPERIOR COURT OF
Appellant	:	PENNSYLVANIA
	:	
v.	:	No. 2718 EDA 2012
	:	
S.G.,	:	
	:	
Appellee	:	

Appeal from the Order Entered August 24, 2012,  
in the Court of Common Pleas of Montgomery County,  
Family Court Division, at No. 02-21321

BEFORE: STEVENS, P.J., OLSON, and STRASSBURGER\*, JJ.

MEMORANDUM BY: OLSON, J.

**FILED MAY 14, 2013**

N.R. (Mother), appeals from the order entered on August 24, 2012, by the Court of Common Pleas of Montgomery County, Family Court Division, awarding primary physical custody of her two daughters, L. and M., (Children), to their father, S.G. (Father).<sup>1</sup> We affirm.

The certified record reflects the relevant factual and procedural background of this matter as follows.

At the time of entry of the August 24, 2012 custody order, L. was 16 years-old and M. was 14 years-old. Both Children have been diagnosed with developmental delays on the autism spectrum which significantly affect their socialization skills, and cognitive and speech development. L. lags behind

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> So as to protect the identity of the children, we refer to the parties by their initials only. We have amended the caption accordingly.

her peers in social development, but is capable of expressing her thoughts and feelings in speech. N.T. 11/18/08, at 204, 205-240. M. has very limited communication skills and cannot consistently express ideas and thoughts verbally. Life Domains Evaluation, Starosta, Ph.D., 5/7/12, Exhibit to N.T. 8/8/12. However, M.'s skills show marked improvement, particularly over the last year while she has been living with Father. **Id.** L. attends her local public school, and M. attends classes at the Deveraux Foundation.

Mother and Father were married, but separated on or around June 2000, and have spent the last 13 years embroiled in custody litigation. This phase of the litigation began in the trial court on September 11, 2006, when Mother filed an emergency petition to modify custody. Mother's petition initiated a continuing round of hearings and conferences prompted by her allegations that Father had sexually molested the Children and was, in general, an unfit parent. The trial court ultimately found Mother's allegations to be unfounded. The trial court summarized the referenced hearings and conferences, and its subsequent finding, as follows:

9. Since the beginning of 2007 when this case was reassigned, the undersigned has conducted hearings on November 8 and 9, 2007, December 13 & 14, 2007, January 3, 2008, November 6, 2008, November 17, 18, 19, 20, 21 & 24, 2008, which were supplemented by video depositions taken on November 19, 2008, December 18, 2008, and January 5, 2009.

10. Those hearings resulted in the issuance of this [c]ourt's findings of fact, and conclusions of law on April 29, 2009, which are incorporated herein. Suffice it to say, that this [c]ourt found that there was no credible evidence that Father had sexually abused the [C]hildren and that during the time the girls were in

[M]other's primary custody, they and [L.] in particular, had been primed by [M]other to believe (falsely) that [F]ather had sexually abused them. The court found [M]other in contempt of the September 16, 2006, agreed-upon temporary custody order. Notwithstanding the court's findings aforesaid, giving [F]ather very limited contact with the girls over a period of years that [M]other kept the girls from [F]ather and [L.'s] primed belief that [F]ather sexually assaulted her the court retained primary physical custody with [M]other and set in place a program to reunify [F]ather and the girls.

11. Since the entry of the April 29, 2009, findings of fact and conclusions of law and order, the [c]ourt has held additional hearings and/or conferences on May 11, 2010, August 12, 2010, June 10 2011, July 11, 12, 18, & 21, 2011, May 17, 2012, and August 8, 2012. The [c]ourt has also viewed video depositions taken on August 6 & 9, 2012.

12. Since the entry of the April 29, 2009, findings of fact and conclusions of law and order, nothing has occurred or has been presented to this [c]ourt which would alter those findings.

Findings of Fact and Conclusions of Law, 8/27/12 (FoF), Procedural Background.

The Children remained in Mother's primary physical custody until August 26, 2011, when, pursuant to the trial court's interim custody order of that date, L. began to reside with Father and his girlfriend, S., in his girlfriend's home. M. moved in with them in February of 2012.<sup>2</sup> The trial court found that the move to Father's primary physical custody was wholly beneficial for the Children:

3. While in [M]other's primary physical custody [L.'s] life had been erratic, disturbed, and at times violent with [M]other and others. This has not been the case during the past year with [F]ather.

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<sup>2</sup> M. was living in a residential treatment facility until that time.

4. In contrast to the representations made by [M]other in prior proceedings which portrayed both [L.] and [M.] as sick, troubled, behaviorally out of control and damaged children whose dangerous and disruptive behavior was based upon their contact with [F]ather, including reports that [L.] continued to act aggressively and express that she did not want to have contact with [F]ather even in the weeks leading up to the August 26, 2011, Order of this [c]ourt which placed [L.] in Father's primary custody, with very minor exception, no reports of any such conduct have been made by any third party while [L.] and, subsequently, [M.] have been in Father's primary custody, and all reports, other than from Mother, suggest that the [C]hildren are happy and thriving in [F]ather's primary custody.

. . .

40. During a recess of the Hearing of May 17, 2012, both [L.] and [M.] were in the courtroom and were observed by all to be happy, smiling and interacting with [F]ather in a very natural and loving fashion without any sign of apprehension, anxiousness or other ill feeling, contrary to [M]other's reports of their conduct, behaviors and statements which [M]other represented demonstrated fear, anxiousness and apprehension with respect to interacting with [F]ather.

41. An examination of any year in which Mother had primary custody of [L.] and/or [M.], compared with the year that [L.] has been in Father's primary custody and the time since February of 2012 that [M.] has also been in [F]ather's primary custody, [shows] there is no question that both girls' lives are in every measurable and material way better and more healthy and nurturing.

Findings of Fact, Additional Findings of Fact.<sup>3</sup>

Our review of the record reveals that these findings are supported by substantial evidence in the record.

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<sup>3</sup> The trial court's Finding of Fact are divided into two sections, Procedural Background, and Additional Findings of Fact. The additional findings are supplemental to the trial court's findings dated April 29, 2009, that were entered May 1, 2009.

On August 24, 2012, the trial court entered an order awarding Father primary physical custody of the Children, while granting Mother partial physical custody and shared legal custody. On September 24, 2012, Mother filed a timely notice of appeal and a statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). The trial court entered its Rule 1925(a) opinion on October 24, 2012.

Mother's brief presents the following questions for our review:

I. WHETHER THE TRIAL COURT COMMITTED A GROSS ABUSE OF DISCRETION IN IGNORING THE INEVITABLE LOSS OF THE CHILDREN'S SSI BENEFITS IF THEY DID NOT REMAIN IN MOTHER'S PRIMARY CUSTODY AT LEAST HALF OF THE TIME[?]

II. WHETHER THE TRIAL COURT COMMITTED A GROSS ABUSE OF DISCRETION IN NOT RECUSING HIMSELF WHEN EXPRESSLY ASKED TO DO SO BECAUSE OF A STRONG APPEARANCE OF IMPROPRIETY AND/OR HIS BIAS AGAINST MOTHER AND IN FAVOR OF FATHER[?]

III. WHETHER THE TRIAL COURT COMMITTED A GROSS ABUSE OF DISCRETION IN TRANSFERRING [sic] PRIMARY PHYSICAL CUSTODY OF THE CHILDREN FROM MOTHER TO FATHER BASED PRIMARILY, IF NOT ENTIRELY, ON THREE RELATED FACTUAL FINDINGS, WITHOUT REASONABLE CONSIDERATION OF THE MANY OTHER FACTORS SUPPORTING A CONCLUSION THAT MAINTENANCE OF THE PRIOR STATUS QUO WAS IN THE CHILDREN'S BEST INTEREST[?]

Mother's Brief, at 7.<sup>4</sup>

Prior to considering the merits of Mother's appeal, we address the trial court's suggestion that Mother's appeal is defective as a result of hybrid representation. **See** Trial Court Opinion, 10/24/2012, at 2-3. Specifically,

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<sup>4</sup> We have reordered the issues on appeal for ease of consideration.

pursuant to well-established Pennsylvania law, a party has a constitutional right to proceed without counsel. **See *Faretta v. California***, 422 U.S. 806 (1975), *accord*, ***Commonwealth v. Davis***, 388 A.2d 324 (Pa. 1978). However, the same right does not apply to permit a party to represent him or herself, while he or she is contemporaneously represented by counsel. Indeed, pursuant to well-established law, a party is not permitted to act on his or her own behalf when he or she is represented, and where counsel has not made a proper withdrawal and the defendant has not made an appropriate waiver of further assistance; also called “hybrid representation.” **See *Commonwealth v. Ellis***, 626 A.2d 1137, 1141 (Pa. 1993) (a defendant does not have the constitutional right of self-representation together with counseled representation at the trial or appellate level); **see also *Commonwealth v. Jette***, 23 A.3d 1032, 1036 (Pa. 2011) (citing Pennsylvania’s long-standing policy that precludes hybrid representation).

In an effort to avoid such hybrid representation, when a represented party makes a *pro se* filing with our Court, Pennsylvania Rule of Appellate Procedure 3304 directs the prothonotary to forward the filing to the party’s counsel of record. **See** Pa.R.A.P. 3304.<sup>5</sup> No further Court action is to be

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<sup>5</sup> Specifically, Rule 3304 reads as follows:

Where a litigant is represented by an attorney before the Court and the litigant submits for filing a petition, motion, brief or any other type of pleading in the matter, it shall not be docketed but forwarded to counsel of record.

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taken on the *pro se* filing unless counsel files an appropriate response, typically some form of motion. **See Jette**, 23 A.3d at 1044. Our Court does not review the *pro se* filings of a counseled appellant. **Commonwealth v. Glacken**, 32 A.3d 750, 753 (Pa. Super. 2011).

In this matter, while still represented by counsel, Mother *pro se* filed her notice of appeal and contemporaneous Rule 1925 concise statement. On that basis, the trial court relies upon the precedent set forth above, and suggests that Mother is engaging in hybrid representation. Trial Court Opinion, 10/24/2012, at 2-3. Consequently, the trial court reasons that Mother's appeal is defective and should be quashed. **Id.** at 3.

The trial court is correct that, based upon review of the docket, Mother's trial counsel has not withdrawn from this matter, and therefore still technically represented Mother when she proceeded *pro se* in initiating this appeal. The docket, however, fails to indicate that the prothonotary properly forwarded Mother's *pro se* notice of appeal to counsel pursuant to Rule 3304. Furthermore, since entry of that *pro se* notice of appeal, new counsel has entered an appearance on behalf of Mother and has represented Mother in all subsequent aspects of this matter, including the filing of a counseled brief and arguing on behalf of Mother in the oral arguments addressing this appeal. Mother and her counsel have no competing filings overlapping one another.

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Pa.R.A.P. 3304.

Under similar circumstances, our Supreme Court has overlooked the hybrid nature in which an appeal was initiated and instructed our Court to consider the merits of the matter. **See e.g. Commonwealth v. Cooper**, 27 A.3d 994, 1006-1008 (Pa. 2011) (holding that Superior Court was required to treat appellant's *pro se* notice of appeal as properly initiating appeal even though notice of appeal was filed prematurely and appellant was represented by counsel at the time of filing the *pro se* notice; among the "quagmire" of procedural missteps in **Cooper**, significant to the Supreme Court's consideration was the fact that the prothonotary accepted the *pro se* notice of appeal for filing and failed to forward the *pro se* notice to appellant's counsel.) Consequently, while unconventional, given the prothonotary's failure to comply with Rule 3304, and the fact that, since filing her notice of appeal Appellant has been fully and adequately represented by counsel, with no competing filings between Mother and her counsel, we overlook the hybrid manner in which this appeal was initiated and consider the merits of Mother's claims.

Prior to considering the merits of the issues set forth in her brief, however, we address another procedural misstep by Mother; specifically, her non-compliant Rule 1925(b) concise statement. Pursuant to Rule 1925(b)(4), entitled "[r]equirements; waiver:"

- (i) The [concise s]tatement shall set forth only those rulings or errors that the appellant intends to challenge.



(ii) The [concise s]tatement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge...

...

(iv) The [concise s]tatement should not be redundant or provide lengthy explanations as to any error...

...

(vii) Issues not included in the [concise s]tatement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

Pa.R.A.P. 1925(b)(4).

In this matter, Mother has filed a 41 paragraph, seven and one-half page, single-spaced concise statement that is redundant and full of lengthy and unnecessary explanation. Mother's failure to comply with Rule 1925 provides grounds to find all of her issues waived. **See e.g. Tucker v. R.M. Tours**, 939 A.2d 343, 346-347 (Pa. Super. 2007) (holding all of appellant's issues waived where appellant filed a 16 page, 76 paragraph, concise statement intended to overwhelm and confuse our Court).

Mother's lengthy concise statement, however, is organized into five sections, each of which begins with a summary heading. The summary headings generally set forth appropriate issues for appeal.<sup>6</sup> Consequently,

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<sup>6</sup> Specifically, the summary headings set forth in Mother's concise statement are as follows:

The trial court was wrong to enter order(s) that did not take into account adequately the needs of the [C]hildren resulting from their diagnoses of Autism Spectrum Disorder ("ASD").

rather than dismiss Mother's appeal, we accept the five issues set forth in her summary headings as those issues preserved within her Rule 1925 concise statement.

Accepting Mother's concise statement, however, does not mean that Mother has preserved for appeal the issues not included within that concise statement. Indeed, we remind Mother that pursuant to Rule 1925(b)(4)(vii), issues not included within the concise statement are waived. **See** Pa.R.A.P. 1925(b)(4)(ii). In this matter, Mother's first issue on appeal, challenging whether the trial court's custody order appropriately considered the loss of the Children's SSI benefits, is not included within her Rule 1925 concise statement. Accordingly, we hold that Mother's first issue on appeal is waived.

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The trial court was wrong to get involved with the [C]hildren's therapeutic care, but not follow through to make sure the care was actually provided.

The trial court erred in concluding that the absolute truth is that Father did not sexually abuse the [C]hildren and that Mother deliberately or inadvertently caused the [C]hildren to believe they were abused.

The trial court's order(s) and findings of fact show that the trial judge was biased against Mother, because his findings were not supported by most of the actual testimony and exhibits.

The trial judge did not manage this case fairly or efficiently, and he should have recused himself instead of blaming Mother and her attorney for the difficulty and complexity of the case.

Mother's Statement of Errors Complained of on Appeal at 1, 2, 4, 5, and 6, respectively.

Mother's second issue on appeal is also waived. Specifically, Mother's second issue argues that the trial judge abused his discretion in not recusing himself from this matter. Mother, however, fails to cite where and how she preserved her appeal of this issue with the trial court. Indeed, Mother does not cite any motion, oral or written, in which she requested that the trial judge recuse himself, and she cites no place in the record that the issue may have been raised in any form. Under longstanding Pennsylvania law, "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302; **see Dilliplane v. Lehigh Valley Trust Co.**, 457 Pa. 255, 322 A.2d 114 (1974). Indeed, "it is not the responsibility of this Court to scour the record to prove that an appellant has raised an issue before the trial court, thereby preserving it for appellate review." **Commonwealth v. Baker**, 963 A.2d 495, 502 n. 6 (Pa. Super. 2008), *appeal denied*, 992 A.2d 885 (Pa. 2010). Accordingly, Mother has waived our consideration of her second issue on appeal.

Finally, we consider Mother's third issue on appeal, arguing that the trial court abused its discretion in transferring primary physical custody of the Children from Mother to Father. We review challenges to custody orders under the following longstanding scope and standard of review.

In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to

the presiding trial judge who viewed and assessed the witnesses first-hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

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

We have stated,

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

**Ketterer v. Seifert**, 902 A.2d 533, 540 (Pa. Super. 2006), *quoting* **Jackson v. Beck**, 858 A.2d 1250, 1254 (Pa. Super. 2004).

Within any custody case, the court's primary concern is the best interests of the child. "The best-interests standard, decided on a case-by-case basis, considers all factors that legitimately have an effect upon the child's physical, intellectual, moral, and spiritual wellbeing." **Saintz v. Rinker**, 902 A.2d 509, 512 (Pa. Super. 2006), *citing* **Arnold v. Arnold**, 847 A.2d 674, 677 (Pa. Super. 2004).

In this matter, Mother claims that "[t]he trial court's decision to remove the [C]hildren from Mother's primary physical custody flies in the face of the overwhelming evidence in this voluminous case." Mother's Brief,

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at 53-54. Mother then reviews the evidence presented to the trial court and urges us to reach a different conclusion than that reached by the trial court.

After review of the certified record, the parties' briefs, and counsels' oral arguments, we agree with the well-reasoned analysis of the trial court's Findings of Fact and Conclusions of Law and Rule 1925(a) opinion. Indeed, the trial court adequately and accurately addresses Mother's issue on appeal, particularly pointing out to Mother that her appeal,

focuses wholly on the [c]ourt's weighing and balancing of the evidence presented to it throughout the custody hearings. Such determinations are well within the discretion of the trial judge and shall remain intact absent an error of law. The extensive record, which rests in large part on the issues of credibility and weight of the evidence, amply supports this [c]ourt's Findings of Fact and Conclusions of Law.

Trial Court Opinion, 10/24/2012, at 6 (citation omitted). As noted by the trial court, it weighed and considered the 16 factors set forth in 23 Pa. C.S. § 5328(a) in its Findings of Fact and Conclusions of Law, and based upon this analysis, determined that it would be in the best interests of the Children to give custody to Father. *Id.* at 5. We find no abuse of discretion. Accordingly, we affirm the trial court's August 24, 2012 custody order.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Sambeth", written over a horizontal line.

Prothonotary

Date: 5/14/2013

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