

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

J.N.-T.,		IN THE SUPERIOR COURT OF PENNSYLVANIA
	Appellant	
	v.	
A.N.B.,		No. 637 MDA 2013
	Appellee	

Appeal from the Order entered March 25, 2013,  
in the Court of Common Pleas of Lebanon County,  
Civil Division, at No: 2012-20492

BEFORE: PANELLA, MUNDY and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 27, 2013**

J.N.-T. ("Father") appeals the Order that awarded him and A.N.B. ("Mother") shared legal and physical custody of their two year-old son, J.A.N.-T. ("Child"), with several special provisions. We remand for the trial court to file a new opinion pursuant to Pa.R.A.P. 1925(a).

The trial court set forth the factual background and procedural history of this appeal as follows:

On June 29, 201[2], Father filed a Complaint for Custody seeking custody of [Child]. Megan Ryland Tanner, Esq.[,] was appointed as the custody conciliator. On July 26, 2012, the parties appeared for a conciliation conference, but they were unable to resolve the issue of custody. Therefore, the custody conciliator referred the case to mediation. She also made certain recommendations, which were filed on July 30, 2012. The conciliator recommended, among other things, that Father and Mother share legal and physical custody of [Child]. By [a c]ourt Order dated July 31, 2012, Loreen M. Burkett, Esq., was appointed as the mediator in this case, and the

recommendations of the custody conciliator were adopted pending further [c]ourt [o]rder.

The custody mediation was held on October 8, 2012. No resolution was reached after the mediation, and the mediator recommended that the custody recommendations of the custody conciliator remain in full force and effect pending further [o]rder.

A pre-trial conference was originally scheduled for November 14, 2012[,] before the Honorable Charles T. Jones, but was continued until December 5, 2012[,] before this Jurist[, *i.e.*, the Honorable Samuel A. Kline]. The matter was ultimately listed for hearing on March 18, 2013. After hearing, this [c]ourt made permanent the July 31, 2012 custody recommendations, [by entering an Order on March 25, 2013, wherein] the [c]ourt added three provisions after hearing testimony about [Child] having diaper rash[.]

Trial Court Opinion, 5/1/13, at 1-2.

On April 10, 2013, Father timely filed a Notice of appeal and a Concise Statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).

On appeal, Father raises one issue: "Whether the lower court erred and/or abused its discretion in awarding shared legal [custody] and equally shared physical custody of [Child], rather than [awarding] primary legal [custody] and physical custody to [ ]Father?" Father's Brief at 4.

Initially, we observe that, since the custody hearing in this matter was held in March 2013, the new Child Custody Act, 23 Pa.C.S.A. § 5321 *et seq.* (hereinafter "the Act"), is applicable. **See C.R.F. v. S.E.F.**, 45 A.3d 441, 445 (Pa. Super. 2012) (holding that, if the custody evidentiary proceeding commences on or after the effective date of the Act, *i.e.*, January 24, 2011, the provisions of the Act apply).

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

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

**Id.** at 443 (citation omitted). Additionally, this Court has 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) (citation omitted).

With any custody case under the Act, the paramount concern is the best interests of the child. **See** 23 Pa.C.S.A. §§ 5328, 5338. Section 5338 of the Act provides that, upon petition, a trial court may modify a custody order if it serves the best interests of the child. 23 Pa.C.S.A. § 5338(a).

Section 5328 of the Act provides as follows:

**§ 5328. Factors to consider when awarding custody**

**(a) Factors.**— In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:

(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.

(2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.

(3) The parental duties performed by each party on behalf of the child.

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

(5) The availability of extended family.

(6) The child's sibling relationships.

(7) The well-reasoned preference of the child, based on the child's maturity and judgment.

(8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.

(9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.

(10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.

(11) The proximity of the residences of the parties.

(12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.

(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.

(14) The history of drug or alcohol abuse of a party or member of a party's household.

(15) The mental and physical condition of a party or member of a party's household.

(16) Any other relevant factor.

23 Pa.C.S.A. § 5328(a); **see also E.D. v. M.P.**, 33 A.3d 73, 80-81, n.2 (Pa. Super. 2011).

Here, Father argues that the trial court abused its discretion in failing to award him primary legal and physical custody of Child, alleging that the testimony established that it is not in the best interests of Child to remain in equally shared legal and physical custody between Father and Mother. **See** Father's Brief at 7-14. In his brief on appeal, Father sets forth the sixteen factors found in section 5328(a), and he asserts that, in relation to these factors, the testimony favored an award of primary legal and physical custody to him. **Id.**

This Court does not make independent factual findings, but must defer to a trial court's credibility and weight determinations that are supported by competent evidence in the record. **C.R.F.**, 45 A.3d at 443. We, therefore, must ascertain the trial court's findings and the basis for its findings before

we may determine whether competent evidence in the record supports those findings.

After review, we are unable to determine whether there is competent evidence in the certified record to support the trial court's credibility and weight assessments. Regarding Father's issue, the trial court acknowledged the sixteen factors that it must review in making a best interest determination under section 5328(a). **See** Trial Court Opinion, 5/1/13, at 5-6. However, the court did not set forth an analysis of each of those factors either on the record or in its Opinion. The trial court noted that the transcript of the custody hearing was not yet available for the trial court's review, and, as a result, the court was unable to provide a comprehensive analysis. **Id.** at 4 n.1. Further, the trial court indicated that, in order to comply with the Children's Fast Track deadlines set forth in Rule 1925(a), the trial court judge relied on his own notes and recollection of the custody hearing. **Id.**

In **E.D.**, a panel of this Court instructed that the "best interests of the child" analysis requires the trial court to conduct a consideration of all of the sixteen factors listed in section 5328(a), *supra*. **E.D.**, 33 A.3d at 79-80, 82. The panel in **E.D.** addressed whether the trial court had failed to consider the factors set forth in section 5328(a) regarding the custody award. **Id.** at 82. After quoting the trial court's cursory disposition of the issue of custody of the subject child, this Court held that the trial court had failed to adequately consider the section 5328(a) factors, and instructed that, on

remand, the trial court must conduct a thorough analysis regarding all of these factors. **Id.**

Subsequently, in **J.R.M. v. J.E.A.**, 33 A.3d 647 (Pa. Super. 2011), a panel of this Court addressed an appeal by a father from an order awarding primary physical custody of the parties' child. The panel found that the trial court had erred as a matter of law in basing its decision almost exclusively on the facts that the child was breastfeeding and that parties had difficulty in communicating with each other. **J.R.M.**, 33 A.3d at 652. Additionally, the panel observed that the trial court had failed to consider all of the factors required to be considered under section 5328(a). **Id.** (holding that "[a]ll of the factors listed in section 5328(a) are required to be considered by the trial court when entering a custody order." (emphasis in original)). Accordingly, the panel vacated the award and remanded the matter to the trial court, noting that this Court has no authority to make independent factual determinations. **Id.** at 652 n.5.

Pursuant to our decisions in **E.D.** and **J.R.M.**, the Opinion filed by the trial court in the instant case must include a discussion of each of the factors set forth in section 5328(a) to support its determination that primary legal and physical custody of Child with Father is not in Child's best interests. However, the trial court's Opinion fails to include such discussion, and merely cites to the factors in section 5328(a). **See** Trial Court Opinion, 5/1/13, at 5-6. We acknowledge that the trial court did not have the benefit of the Notes of Testimony in preparing its Opinion. **See id.** at 4 n.1.

However, our appellate review of Father's issue is considerably hindered in the absence of the trial court's discussion of each of the sixteen factors under section 5328(a), and the facts found by the trial court in relation to each.<sup>1</sup> Without such a discussion, this Court may not appropriately conduct our review.

Thus, we remand the matter and direct the trial court to file a comprehensive opinion discussing the evidence in the certified record, making credibility and weight determinations, and *fully explaining the reasons for the court's conclusions as to Child's best interests under the factors set forth in section 5328(a)*. On remand, the trial court shall (1) discuss the evidence in the certified record for this appeal that supports the court's determinations, and include citations to the record for its determinations; (2) concisely discuss the relevant case law filed after the effective date of the Act; and (3) file its Pa.R.A.P. 1925(a) opinion within thirty days from the date when the court obtains the Notes of Testimony that it needs to prepare its opinion.

Case remanded for proceedings consistent with this Memorandum.

Panel jurisdiction retained.

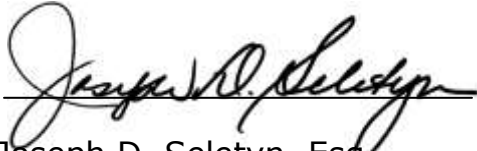
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<sup>1</sup> We note that the trial court's Order in this case preceded this Court's decision in **C.B. v. J.B.**, 65 A.3d 946, 955 (Pa. Super. 2013), filed on April 22, 2013, in which the panel ruled that the trial court must delineate its reasoning and analysis of the section 5328(a) factors at the time the award of custody is made or prior to the expiration of the deadline to file a notice of appeal to this Court. The panel in **C.B.** made its holding prospective in effect. **Id.** at 955.



J-S57032-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/27/2013

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY,  
PENNSYLVANIA

ENTERED & FILED

CIVIL DIVISION

2013 NOV 21 A 9 46

J.N.-T.,	:	
	:	
Appellant,	:	
	:	
v.	:	No: 2012-20492
	:	
A.N.B.,	:	Family Division-Children's Fast
	:	Track Appeal
Appellee.	:	

PROTHONOTARY OFFICE  
LEBANON, PA

APPEARANCES:

Edward J. Coyle, Esq. for the Appellant (hereinafter "Father")  
Donna Brightbill, Esq. for the Appellee (hereinafter "Mother")

OPINION, KLINE, J., NOVEMBER 20, 2013

The instant case involves child custody. By Court Order filed November 12, 2013, the Superior Court of Pennsylvania directed this Court to file a new Pa.R.A.P. 1925(a) Opinion discussing the evidence in the certified record, making credibility and weight determinations, and fully explaining the reasons for our conclusions as to the child's best interests under the factors set forth in section 5238(a) of the new Child Custody Act. The specific instructions are as follows:

On remand, the trial court shall (1) discuss the evidence in the certified record for this appeal that supports the court's determinations, and include citations to the record for its determinations; (2) concisely discuss the relevant case law filed after the effective date of the Act; and (3) file its Pa.R.A.P. 1925(a) Opinion within thirty days from the date when the Court obtains the Notes of Testimony that it

needs to prepare its Opinion.<sup>1</sup>

(J.N.-T. v. A.N.B., 637 MDA 2013, November 12, 2013, p. 8).

### **FACTS AND PROCEDURAL HISTORY**

On June 29, 2012, Father filed a Complaint for Custody seeking primary physical and legal custody of the parties' son. Megan Ryland Tanner, Esq. was appointed as the custody conciliator. On July 26, 2012, the parties appeared for a conciliation conference, but they were unable to resolve the issue of custody. Therefore, the custody conciliator referred the case to mediation. She also made certain recommendations, which were filed on July 30, 2012. The conciliator recommended, among other things, that both Father and Mother share legal and physical custody of the child.

By Court Order dated July 31, 2012, Loreen M. Burkett, Esq. was appointed as the mediator in this case, and the recommendations of the custody conciliator were adopted pending further Court Order. The custody mediation was held on October 8, 2012. No resolution was reached after the mediation, and the mediator recommended that the custody recommendations of the custody conciliator remain in full force and effect pending further Order.

A pre-trial conference was originally scheduled for November 14, 2012 before the Honorable Charles T. Jones, but was continued until December 5, 2012 before this Jurist. The matter was ultimately listed for hearing on March 18, 2013. After hearing, this Court made permanent the July 31, 2012 custody recommendations, and the Court added additional provisions after hearing testimony about the child having diaper rash.

Father filed his Notice of Appeal and Concise Statement of Errors

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<sup>1</sup> The Court notes that the transcript of the custody hearing was filed on June 3, 2013.

Complained of on Appeal on April 10, 2013. Father raised 16 alleged errors for the Court's review. Father argued that the lower court committed an error of law and/or abused its discretion for the following reasons:

I. in determining that it was in the child's best interest to be subjected to an equally shared order of physical custody (week on/week off) under the facts of this case;

II. in failing to award Father primary physical custody of the subject child under the facts of this case;

III. in determining that it was in the child's best interests to be subjected to a shared legal custody order under the facts of this case;

IV. in failing to award Father primary legal custody of the subject child under the facts of this case;

V. in failing to consider and/or to give adequate weight to testimony establishing that Father was an excellent father;

VI. in failing to consider and/or to give adequate weight to testimony establishing that Mother admitted using illegal drugs after the filing of the subject Complaint for Custody, and after the entry of the Court's Temporary Custody Order of July 31, 2012;

VII. in failing to consider and/or to give adequate weight to testimony establishing that Mother uses a babysitter who regularly smokes cigarettes in the presence of the subject child;

VIII. in failing to consider and/or to give adequate weight to testimony establishing that Mother was previously found guilty of a number of drug offenses;

IX. in failing to consider and/or to give adequate weight to testimony establishing that Mother was found guilty of a crime of dishonesty (receiving stolen property);

X. in failing to consider and/or to give adequate weight to testimony establishing that Mother illegally uses prescription medications;

XI. in failing to consider and/or to give adequate weight to testimony establishing that Mother and/or Mother's chosen babysitters have a history of allowing the subject infant/child to be unattended/unsupervised;

XII. in failing to consider and/or to give adequate weight to testimony establishing that Mother has an unstable work history while Father has a stable work history;

XIII. in failing to consider and/or to give adequate weight to testimony establishing that Mother has an unreliable income history, while Father has a reliable income history;

XIV. in failing to consider and/or to give adequate weight to testimony establishing that the child repeatedly has medical issues which arise while the subject child is in Mother's care, while the subject child appeared to be well cared for while in Father's care;

XV. in failing to consider and/or to give adequate weight to testimony establishing that medical care issues appear to be immediately addressed by Father, while medical care issues do not appear to be immediately addressed by Mother;

XVI. in failing to consider and/or to give adequate weight to testimony establishing that Father uses a proper car restraint system, while Mother apparently does not.

(Father's Concise Statement).

On May 1, 2013, this Court filed an Opinion to comply with the 30 day children's fast track appeal deadline pursuant to Pa.R.A.P. 1925(a)(2)(ii). The Court did not have the benefit of the transcript of the custody hearing at the time. On November 12, 2013, the Superior Court remanded the case

directing this Court to file a new Opinion consistent with the aforementioned instructions. The case is thus before us and ripe for disposition.

## DISCUSSION

Since the custody hearing was held in March of 2013, the new Child Custody Act, 23 Pa.C.S.A. §5321 *et seq.* (hereinafter “the Act”) is applicable. “[I]t is the date of the commencement of the hearing that determines whether the Act applies, not the date the petition or complaint was filed.” *C.B. v. J.B.* 65 A.3d 946, 951 (Pa. Super. 2013), citing *C.R.F., III v. S.E.F.*, 45 A.3d 441, 445 (Pa.Super.2012).

The trial court is granted authority to award custody of a child pursuant to 23 Pa.C.S.A. § 5323. The statute provides as follows:

### § 5323. Award of custody

(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. The factors that a trial court should consider when awarding child custody are set forth in 23 Pa.C.S.A. § 5328, which provides as follows:

### § 5328. Factors to consider when awarding custody

(a) Factors.--In ordering any form of custody, the court shall determine the best interest of the child by considering

all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:

- (1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.
- (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.
- (3) The parental duties performed by each party on behalf of the child.
- (4) The need for stability and continuity in the child's education, family life and community life.
- (5) The availability of extended family.
- (6) The child's sibling relationships.
- (7) The well-reasoned preference of the child, based on the child's maturity and judgment.
- (8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.
- (9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.
- (10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.
- (11) The proximity of the residences of the parties.
- (12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.
- (13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.
- (14) The history of drug or alcohol abuse of a party or member of a party's household.

(15) The mental and physical condition of a party or member of a party's household.

(16) Any other relevant factor.

23 Pa.C.S.A. § 5328(a).

Furthermore, the law is well-settled that in a child custody matter, the paramount concern of the trial court is the best interest of the child. *S.M. v. J.M.*, 811 A.2d 621 (Pa. Super. 2002). The best interest standard must be applied on a case-by-case basis, examining all relevant evidence. *McAllister v. McAllister*, 747 A.2d 390 (Pa. Super. 2000). In *E.D. v. M.P.*, 33 A.3d 73, 79–80 (Pa. Super. 2011), the Superior Court stated that the “best interests of the child” analysis requires consideration of all section 5328(a) factors. “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.” *S.M.*, 811 A.2d at 623.

Furthermore, the weight assigned to the testimony of witnesses, as well as credibility determinations, are left to the finder of fact. *Stokes v. Gary Barbera Enterprises, Inc.*, 783 A.2d 296, 297 (Pa. Super. 2001). The court is free to believe all, part or none of the evidence. *Id.* On appeal from a child custody determination, on the issues of credibility and weight of the evidence, the Superior Court defers to the findings of the trial judge. *S.M.*, 811 A.2d at 623. The parties cannot dictate the amount of weight the trial court places on evidence. *Id.* We now turn to our analysis of the 16 factors.

**(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.**

The factor weighs against awarding Father primary custody. Mother would like to see the 50/50 custody agreement remain. (N.T. 138). She testified that she does not want to reduce the time that Father has with the



child. (N.T. 138). Mother's father was not involved in her life, so she is aware of the importance of establishing and maintaining the father/child relationship. (N.T. 137-138). Mother had multiple conversations with the Father about him being involved in the child's life. (N.T. 137). Father acknowledged that Mother realizes the importance that the child has a relationship with Father. (N.T. 80).

Because Father was not initially involved with the child, Mother actually wanted to get a Custody Order to try to get Father more involved with the child. (N.T. 140). She told him that they should come to an agreement or she would proceed with custody. (N.T. 140-141).

**(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.**

This factor weighs significantly against awarding Father primary physical and legal custody. Father testified that he is suing because of the safety of the child, and he fears the child's health is at risk. (N.T. 56).

The focus of Father's case was that the child would suffer severe diaper rash, lacerations, and other various injuries and/or bruises. Father alleged that the diaper rash would occur only in Mother's care. He attempted to cast Mother as the sole cause of this problem. Father always blamed Mother. Not once was it ever his fault. Father's testimony reflects the following:

Question: And, Mr. Torres, you are not suggesting, are you, that absolutely the only time he has ever had diaper rash is when he is with his mother; that is not what you're saying, is it?

Answer: That is exactly what we are saying.

Question: You are saying week on/week off, the only time that [the child] has ever had diaper rash is when he has come back from his mother's house?

Answer: Yes.

...

Question: And have you had a consult with the pediatrician and Ashley and brought everyone in to talk about this?

Answer: No. I have made Ashley aware of it, but I have never brought—you know, we never had like a big meeting where we were talking about it, no.

(N.T. 94-95). Father testified that the diaper rashes were severe whenever he would pick up the child from Mother, and Father was the party that would attempt to clear them up. (N.T. 105).

Father's girlfriend (hereinafter "Velez") testified that she always goes with Father to pick up the child from Mother. (N.T. 121). She sees the diaper rash when they get the child home. (N.T. 121). Velez testified that the diaper rash is gone before the child is returned to Mother. (N.T. 122). Velez testified that she and Father are able to clear up the diaper rash in two or three days. (N.T. 122).

Father's counsel stated that there was no report from a pediatrician concerning the diaper rash. (N.T. 110). Father testified that he received an antibiotic from a pediatrician with regard to a yeast infection. (N.T. 114). Later, Father testified that he did have a record indicating that on February 25, 2013, he took the child to the hospital. (N.T. 226-227). The reason he took him was because of diaper rash, and the child had an infection on his penis. (N.T. 226). The doctor prescribed a cream. (N.T. 228). Father testified that he told Mother about the cream. (N.T. 228).

Father testified that he did not give Mother the cream because the rash

went away. (N.T. 228). Father testified that he used the cream for four or five days before the condition cleared up. (N.T. 230). He gave the child back to Mother six days later. (N.T. 230). His testimony was “The rash went away so I just didn’t give her the cream.” (N.T. 231). Father then changed his testimony, and said that the cream was more for fungus on the penis than the rash. (N.T. 231).

When Father was questioned as to Mother’s response as to the diaper rash issue, Father testified that she “would always blame somebody else for not changing him on time.” (N.T. 229). He also testified, “It was always somebody else’s fault.” (N.T. 230).

The Court was terribly disturbed upon learning of Father’s actions. Father was attempting to cast Mother as the sole cause of the child’s diaper rash. Towards the end of the hearing, the Court learned that Father was actually given a cream by the pediatrician. The instructions for the cream were “apply topically three times daily for ten days.” However, Father stopped using the cream when the diaper rash went away, and he only used it for four or five days. Father did not even provide Mother with a copy of the document stating that the cream was to be applied for ten days.

The Court was also disturbed by the fact that Mother testified that she first learned at the custody hearing about the February 25, 2013 hospital visit. (N.T. 232). She never even saw the hospital record before. (N.T. 232). Mother was never even aware that the child was prescribed cream. (N.T. 232-233).

There were also various incidents that Father testified to where he suggested that he was concerned for the child’s safety. In September 2011, he went to pick up the child at Mother’s house, and Mother was not home. (N.T. 24). Mother’s brother was watching the child, and Father stated when

he came to pick him up, the child was downstairs by himself while the brother was upstairs, and he saw smoke blow out the window. (N.T. 25). Father testified that he smelled marijuana when the brother answered. (N.T. 25). On cross-examination, it was revealed that the child was actually in a baby rocker, and there was a baby monitor upstairs. (N.T. 68-69). Mother testified that she regularly used a baby monitor and required other people to use it. (N.T. 162).

In November 2011, Father said that he went to the maternal grandmother's house to pick up the child, and the child was by itself on the floor while the maternal grandmother was in the backyard drinking a beer. (N.T. 27-28). The maternal grandmother denied that she told Father she was outside drinking a beer. (N.T. 215). She also testified that the child was sleeping in a Pack N' Play, and she went outside to smoke a cigarette. (N.T. 215).

On July 2 or 6, 2012, Father picked up the child at Mother's house. (N.T. 34). Father testified that people were at Mother's house, and it smelled like marijuana. (N.T. 34). Father said that Mother told him that the child rolled off the couch, hit his head, and suffered a laceration. (N.T. 24). Father did not take the child to the hospital for this laceration, but he took him three days later for tonsillitis. (N.T. 85-87). Mother testified that she was trying to put Desitin on the child's diaper rash, the child squirmed, fell off the couch, and knocked his head on the coffee table. (N.T. 85, 160-161).

Father also testified that the child had an ear infection in August of 2012. (N.T. 39). In September of 2012, Father said he picked up the child, and the child had lacerations on his leg. (N.T. 39).

Father submitted numerous photographs of the child's diaper rash, lacerations, scratches, and various infections. (Exhibit No. 1-33). He testified

that these photographs were taken soon after Father would pick up the child. (N.T. 45).

Father also testified that Mother “didn’t get him immunized.” (N.T. 37). Father stated that upon learning this, he scheduled the immunization, and took the child to get it done. (N.T. 37). It was later revealed that the child was actually only behind on his one year immunization shot. (N.T. 154). Mother testified that Father brought the immunization issue up to Mother’s attention, and Father made the appointment. (N.T. 193). However, Mother testified that she was the party that took the child to this appointment when the child was approximately 15 months old. (N.T. 153, 155, 193). Up until this point, the child was current with all of his immunizations. (N.T. 155). Once again, Father was attempting to blame Mother for the fact that child did not have his one year immunization shot. The Court sees no reason why Father could not have been proactive at the one year mark and taken the child for his immunization shot when it was originally due.

**(3) The parental duties performed by each party on behalf of the child.**

This factor favors a shared custody arrangement. The record indicates that both parents currently perform parental duties. Mother testified that Father was not involved with the care of the child during the first 3 months. (N.T. 136). The parties lived together for a couple months after the child was born, but Father moved out in June of 2011. (N.T. 12). When the parties separated, Father left the house and left the child with Mother because she was breast feeding. (N.T. 111). Father later testified that Mother only breast fed for a month or two after the child was born in March of 2011; however, he left in June of 2011. (N.T. 112). Mother testified that she breast fed for about one month. (N.T. 136). This suggests that Mother was finished breast

feeding before Father moved out. The child was then bottle fed because the child got acid reflux from the Mother's breast milk. (N.T. 136). Mother testified that she was the parent that would get up to bottle feed the child. (N.T. 136).

During the period of time that Father lived with Mother, Mother was taking the child to all of the doctor's appointments and the check-ups. (N.T. 73). Father testified he never went to these appointments, and he has taken the child a total of three times to the doctor's office. (N.T. 74).

Mother testified that Father is a great Father. (N.T. 194). Father testified that he would take the child shopping on weekends or do "fun activities with the kids." (N.T. 56).

When questioned about Father's role with his two children, Velez testified as follows:

I can say that he is a great father. I haven't had children of my own, seeing how he is with the boys and how he interacts with them, how he shows them love, how he is always there for him, it is an amazing thing to see, being that I am not a parent of my own. Just to see that he is the way. He is with them, he's an overall wonderful father.

(N.T. 119). Velez also testified both she and Father helped the child with breakfast and with getting dressed in the mornings. (N.T. 127-128).

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

This factor favors a shared custody arrangement. The child has developed relationships with both parents, his half-brother, and the maternal grandmother and aunt. Mother takes the child to have playdates with her friend's child. (N.T. 152). There was testimony that the child is an energetic, loving child. (N.T. 151). "He loves to play, gets along great with other

children.” (N.T. 151). Mother also testified that the child is intelligent for his age. (N.T. 152).

**(5) The availability of extended family.**

This factor is weighed equally for both parties. All of Mother’s family lives in the Lebanon area, and her family consists of her mother, two brothers, and sister. (N.T. 158). The child has cousins with this family. (N.T. 159). Mother resides with her sister and the child. (N.T. 131).

Father’s family is also in Lebanon. (N.T. 159). This family consists of his mother, his brother, and two aunts. (N.T. 159). Father currently lives with his girlfriend and his 9 year old son. (N.T. 21).

**(6) The child's sibling relationships.**

As stated, the child has an older half-brother, who is 9 years old. The record indicates that these children are close.

**(7) The well-reasoned preference of the child, based on the child's maturity and judgment.**

Not applicable/no testimony provided.

**(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.**

Although it appears that Father is manipulative and deceitful, the record does not indicate that he was actually trying to turn the child against the Mother.

**(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.**

These two factors are analyzed together, and the aforementioned discussions are incorporated by reference. The record indicates that both parents maintain a nurturing relationship and attend to the child's needs. Although Father may not have been involved with the child when the child was first born, it is clear that Father has worked on his relationship with the child. Mother has taken care of the child since the child was born.

Both parents work. Father is employed by the Madison Apartment Group, and he has been with this company for 3 years. (N.T. 19). This is full-time employment. (N.T. 20). Father's current work schedule as of the hearing was 8:00 to 5:00 Monday through Friday. (N.T. 21). Father testified his W-2 wages for 2012 were \$45,000. (N.T. 109).

Mother currently works at Prostat Health Care, and she is a home health aid. (N.T. 131). Mother works Tuesday, Thursday and Saturday from 11:00 to 1:00 and from 4:00 PM to 6:00 PM. (N.T. 132). Further, she works on Saturday and Sunday from 8:00 PM to 10:00 PM. (N.T. 132). Mother works between 16 and 20 hours a week, and she gets paid \$8.50 an hour. (N.T. 182). In addition to working, Mother goes to school at the University of Phoenix in Harrisburg. (N.T. 132). She goes to class once a week on a Monday from 6:00 PM to 10:00 PM. (N.T. 133). Although Father may work more hours and earn more money, that in itself does not warrant him to obtain primary custody of the child.

The child has a strong network of support. The child has developed a close relationship with his older half-brother. The child appears to be close with Mother's mom and sister. Mother encourages the child to learn Spanish. (N.T. 77-78).

**(11) The proximity of the residences of the parties.**



This factor supports a shared custody arrangement. Mother resides in Lebanon, PA. (N.T. 131). Father lives in Manheim Township in Lancaster, PA. (N.T. 21, 139). These two places are close.

**(12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.**

As stated, Father works full-time. Mother works part-time and goes to school on Monday nights. Both parties have made appropriate child-care arrangements. Mother utilizes her mother and her sister for babysitting services. (N.T. 133). Her sister has been babysitting the child since he was born. (N.T. 202). When the child is with Father, the child goes to day care during the days. (N.T. 55). Father's day care provider is state certified, and it is in Lancaster. (N.T. 55-56).

**(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.**

This factor weighs against awarding Father primary custody. It appears from the record that Mother attempts to cooperate more with Father than Father does with Mother. Mother was never aware of the child's yeast infection. (N.T. 167). Mother was never aware that the child was throwing up blood one day. (N.T. 167). Most troubling, Mother was not aware that the child was provided with a prescription ointment for the diaper rash as already discussed. (N.T. 232-233). Father testified that he is not aware that the child has allergies. (N.T. 75). Mother testified that she has informed Father of the child's allergies. (N.T. 155). The Court was also troubled by the fact that Father did not even know if he and Mother used the same diapers. Father testified that he "believed" that they did. (N.T. 114).

Father did not have voicemail set up on his phone, so Mother cannot leave him messages. (N.T. 156). Father does not have a house phone. (N.T. 157). Father acknowledged that Mother calls him on his phone to talk about their son. (N.T. 78). If Father contacts Mother to talk about their son, Mother gets back to Father. (N.T. 79). Mother makes Father aware of the child's appointments, and she lets Father know of what transpires at the appointments. (N.T. 155).

**(14) The history of drug or alcohol abuse of a party or member of a party's household.**

Father testified that he has never used illegal drugs, and he drinks socially. (N.T. 21). Mother admitted that she has used illegal drugs in the past, and the last time she used marijuana was in August of 2012. (N.T. 150, 188). Both Mother's mom and her sister testified that they did not think that Mother still used illegal drugs. (N.T. 204, 221). Mother testified that she drinks on occasion on the weekends when she does not have the child. (N.T. 150-151).

Mother testified her sister does not drink alcohol or do drugs. (N.T. 151). The maternal grandmother testified that she drinks alcohol on rare occasions. (N.T. 214, 222). Father's girlfriend does not use illegal drugs, and she drinks once or twice a month. (N.T. 120).

Father testified that he once found muscle relaxors in Mother's possession during the period of time of March 2011 through June 2011. (N.T. 17). Father testified that she did not have a prescription for these. (N.T. 19). Mother testified that this incident occurred before the child was born, and it was before she was even pregnant. (N. T. 162-163). Mother testified that the pills were Xanax, and she was taking them because she was having problems sleeping. (N.T. 163). The Xanax was not prescribed to her. (N.T. 189).

There were accusations made by Father that there were parties occurring at Mother's residence where illegal drugs were present. (N.T. 23). Both Mother and her sister denied this. (N.T. 167, 204).

Although Mother may have used marijuana in the past and the last time she used was in August 2012 after the child was born, this in itself is not a basis for granting Father full custody. The Court believed Mother, her mother, and her sister when they all asserted that Mother does not use drugs anymore.

**(15) The mental and physical condition of a party or member of a party's household.**

This factor supports a shared custody arrangement. There was no indication that either party has a mental condition. Further, there was no testimony that Father has health problems. Mother was previously hospitalized twice for pelvic infections. (N.T. 198-199).

**(16) Any other relevant factor.**

At the conclusion of the hearing, this Court found that the Custody Complaint was resentful and spiteful, and it was filed for the sole purpose of punishing Mother for the fact that she filed for support. (N.T. 236). Mother testified that Father originally never gave her any money for support when he moved out. (N.T. 143). They came up with an agreement that he would give her \$50 a week. (N.T. 16, 143). Eventually, Father started to pay late, and Mother went to Domestic Relations to file for support. (N.T. 144). Mother filed for support on June 13, 2012. (N.T. 145). The Support Order requires Father to pay Mother approximately \$400 monthly. (N.T. 60).

Mother was surprised that she received the Custody Complaint as she thought "everything was going great between us." (N.T. 146). When she received the Custody Complaint, Father had the child, and when Mother

asked him if she would be getting the child back, Father said, "It would be up for the Court to decide." (N.T. 146). It was almost a month until Mother saw the child again. (N.T. 147). During this time, Mother said that she called him almost four times a week, but Father testified that she only called twice. (N.T. 147). Mother testified that Father never discussed with her that he wanted to change the agreed 50/50 custody arrangement. (N.T. 165).

Mother filed for support on June 13, 2012, and the Custody Complaint was filed on June 29, 2012. Father claimed that he was filing for custody because he was worried about the safety of the child. Father testified to an incident alleged to have occurred in September 2011 where he was concerned for the child's safety. However, Father did not file for custody at that time. Father also testified to an incident alleged to have occurred in November of 2011 where he was again concerned for the child's safety. Once again, Father did not file for custody. Father testified that there were parties occurring at Mother's residence where illegal drug use was occurring. Father never filed for custody after these alleged parties. Father waited to file for custody 16 days after the Support Complaint was filed. There was no testimony of any incidents alleged to have occurred between June 13, 2012 and June 29, 2012. Therefore, this Court is convinced that the sole reason that Father filed his Custody Complaint was because Mother filed for support.

Also, the Court notes that Mother has a prior criminal conviction. The incident occurred in 2007, and she was charged in 2008. (N.T. 149). Mother pled guilty to simple possession and receiving stolen property. (N.T. 149). Mother was sentenced to two years probation. (N.T. 149).

23 Pa.C.S.A. § 5329 states:

§ 5329. Consideration of criminal conviction

(a) Offenses.--Where a party seeks any form of custody, the court shall consider whether that party or member of that party's household has been convicted of or has pleaded guilty or no contest to any of the offenses in this section or an offense in another jurisdiction substantially equivalent to any of the offenses in this section. The court shall consider such conduct and determine that the party does not pose a threat of harm to the child before making any order of custody to that parent when considering the following offenses...

23 Pa.C.S.A. § 5329. The crime of receiving stolen property is not listed as one of the enumerated offenses. Even assuming that it was, the fact that Mother may have been found guilty of receiving stolen property in the past does not mean that she currently poses a threat of harm to the child. Furthermore, the Court already stated that it does not believe that Mother's past drug use/conviction poses a threat to the child.

Finally, the Court is troubled by the fact that Father testified that he has a two-seater vehicle, and he has sat the child in the front passenger seat. (N.T. 104). Mother testified that once when Father dropped the child off, Velez was driving the two-seater vehicle, and Father was in the passenger seat holding the child. (N.T. 163-164). Therefore, Father's contention that Mother does not use a proper car seat is disingenuous. (N.T. 53). Mother testified that she has a five-point restraint system for the child, but the child meets the weight requirements for the booster seat as the child weighs 35 pounds. (N.T. 164).

### **Conclusion**

After taking the aforementioned 16 factors into consideration, it was not in the child's best interests to award Father primary legal and physical custody. This Court believed that Father's testimony was inconsistent and not credible at times, and Mother's testimony was consistent and credible.

Additionally, two main points stood out to this Jurist at the conclusion of the hearing. First, this Court was convinced that the Custody Complaint was filed solely because Mother filed for support. Second, Father was being manipulative and attempting to convince the Court that Mother is a neglectful Mother insofar as she is the cause of all of the child's rashes, lacerations, and bruises. Father lives by the belief that everything is always Mother's fault, and he thinks he is the child's savior. What the Court finds to be most disturbing out of this entire case is that Father continually blamed Mother for the child's diaper rash. However, Father was given prescription cream, did not follow the instructions, and did not even give the cream to Mother. Mother first learned of the cream at the custody hearing. The child is the one that suffered because of Father's tactics.

We now return this case to the Superior Court for review. We will enter an Order consistent with the foregoing.