

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

A.M.T.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
M.K.F.,	:	
Appellant	:	No. 680 MDA 2012

Appeal from the Order Entered March 13, 2012,
In the Court of Common Pleas of York County,
Civil Division, at No. 2006-FC-1376-Y03.

BEFORE: SHOGAN, MUNDY and OTT, JJ.

MEMORANDUM BY SHOGAN, J.:

Filed: January 11, 2013

Appellant, M.K.F., ("Father"), appeals from the final custody order dated March 12, 2012 and entered March 13, 2012, which awarded Father and A.M.T. ("Mother") shared legal custody of their Child, A.K.F., a male born in March of 2004, ("Child"); awarded Mother primary physical custody, subject to periods of partial custody with Father; and awarded Father partial custodial time from Friday to Sunday on alternating weekends. Upon review, we vacate and remand the custody order.

A review of the record reflects the following facts. Mother and Father are the parents of Child. After the birth of Child, Mother married V.T., and had a female child with him, I.T., who is four years old. N.T., 1/23-26/12,

at 25, 120, 312-314. Mother was together with V.T. for six years, since approximately 2006. *Id.* at 58.

Under the custody order entered on July 23, 2008, adopting the agreement of the parties, the parties had shared legal custody: Mother had primary physical custody; and Father had partial custody of Child from 10 a.m. on Saturday until 7 p.m. on Thursday, every other week. N.T., 1/23-26/12, at 92.

On March 30, 2011, Father filed a petition for modification of custody. On May 12, 2011, the trial court entered an interim order for custody pending trial, retaining the provisions of the July 23, 2008 order. On July 14, 2011, Mother filed a counter-petition for modification of custody and a petition for contempt against Father. Father filed an answer to the counter-petition for modification of custody and contempt on November 17, 2011.

The custody trial was scheduled for January 23, 2012. On January 14, 2012, prior to the custody trial, an altercation between Mother and V.T. occurred which required the response of the Northeastern Regional Police. N.T., 1/23-26/12, at 13.

On January 17, 2012, Father filed an emergency petition for transfer of custody pending custody hearing. In the petition, Father alleged that Mother had left the marital residence she shared with V.T. on January 14, 2012,

after the altercation, and that she had taken her two children, Child and I.T., to a motel, but had since left the motel. He also alleged that she was engaged in illicit narcotic use and distribution; that she used drugs while driving; engaged in violence, including toward herself; and her whereabouts were often unknown. Emergency Petition for Transfer of Custody, 1/17/12. The trial court denied the emergency petition on that same date. On January 23, 2012, Mother filed a petition for contempt against Father, asserting that, through his actions in picking Child up at the daycare center on January 17, 2012, he had violated the July 23, 2008 and May 12, 2011 custody orders.

On January 23-26, 2012, the trial court held the custody trial, and also heard evidence concerning Mother's contempt petitions. The parties failed to file a joint stipulation of the facts as ordered by the trial court. N.T., 1/23-26/12, at 9-10.

At the trial, Father presented the testimony of Shaun Goodman, a Northeastern Regional patrolman who responded to the incident between Mother and V.T. on January 14, 2012. N.T., 1/23-26/12 at 12-13. He also presented the testimony of Mother as a hostile witness. *Id.* at 25. Moreover, Father presented the testimony of Nicole Christina Adams, Child's first grade teacher during 2010-2011. *Id.* at 201. Additionally, Father presented the testimony of V.T., Mother's husband, from whom she was

separated at the time of the custody trial. *Id.* at 213-14. Father also presented the testimony of his fiancée, a fourth-grade, language arts teacher in the Dallastown School District. *Id.* at 277-78. Father also testified on his own behalf and was re-called by his counsel on rebuttal examination. *Id.* at 79, 429.

Mother presented the testimony of K.A., a childcare provider at Otterbein Early Education school-age program, where Child attends. N.T., 1/23-26/12, at 65-66. Mother also testified on her own behalf. *Id.* at 312. The trial court also questioned Child, and ordered the notes of testimony sealed, as part of the certified record. *Id.* at 2-3. Counsel for the parties also questioned Child on the sealed record.

Father testified that he did not have a driver's license, and would not be getting his driver's license back for a year and a half. N.T., 1/23-26/12, at 82. Father's license was suspended for driving under suspension three times. *Id.* at 112. Father testified that Mother did not tell him about everything that happened in the January 14, 2012 incident until January 17, 2012. *Id.* at 83, 113. On cross-examination, Father admitted that V.T. had called him immediately on January 14, 2012, to tell him about the incident. *Id.* at 124. Father also admitted that he had discussions with V.T. toward helping each other in their mutual custody cases with Mother. *Id.* at 127-128. On January 17, 2012, Father went to Child's daycare and removed

Child, although it was not his time to exercise custody under the existing order. *Id.*, at 61-64. Father testified that he had told the daycare employee that he was there, under guidance of his counsel, to pick up Child because of issues in Mother's home, and that she could make copies of the papers. *Id.* at 85-86. Father admitted that he did not call or let Mother know that he had taken Child from the daycare center and that Child was safe, and that he told Mother not to come visit Child at his home. *Id.*, at 86, 133-134. Kathy Arnold, an employee of Child's daycare provider, Otterbein Early Education school-age program, testified that on January 17, 2012, Father had picked up Child at the daycare center, representing that he had a court order and presenting paperwork. *Id.* at 65-70.

Mother testified at the custody trial regarding the January 14, 2012 incident involving her and V.T. Mother testified that V.T. had pinned her to the floor for at least a half-hour after he had "pretty much beat the crap out of [her]." N.T., 1/23-26/12, at 53. After the incident, Mother left the marital home for a few days, and lived with her two children in a motel. *Id.* at 25-27. Mother testified that she would be divorcing V.T. and moving out of their marital home with the two children. *Id.* at 54-55. Upon questioning regarding her alleged intent to move her and her children in with her mother, Mother testified that her mother lives in an efficiency apartment in Dallastown, and that it would not be feasible to live there. *Id.* at 28.

Mother also obtained a temporary Protection From Abuse order ("PFA") against V.T., and a hearing was scheduled to occur after the custody trial. *Id.* at 26. Upon being questioned regarding alleged drug abuse, Mother testified to using prescribed Percocet after an injury. *Id.* at 59-60. Mother also testified that she had been Child's primary caregiver since his birth. *Id.* at 57.

Subsequently, on February 22, 2012, Father filed a petition for special relief, seeking primary physical custody of Child, on the basis that information presented at the custody trial was inaccurate and subsequent circumstances impacted the court's decision. Father's Petition for Special Relief, 2/22/12. On March 7, 2012, the trial court held an on-record conference regarding Father's petition for special relief with counsel for both parties, Attorney Farley G. Holt, on behalf of Mother, and Attorney Ronald Gross, on behalf of Father. The following exchange occurred between the trial court judge and Mother's counsel, which exchange comprised the entire conference.

THE COURT: What's up with this? He said in his petition – I am not going to read it. We just had a custody trial. Apparently --

ATTORNEY HOLT: We did.

THE COURT: Apparently, [Father] is saying that everything the mother testified to at the custody trial is a lie.

ATTORNEY HOLT: It wasn't a lie, your Honor. At the time of the custody trial, [Mother] was, in fact, employed at my office.

She's no longer employed at my office. She separated from my employment approximately a week and a half after the trial had ended. My understanding was that she obtained a new job down in Baltimore with another attorney making more money than I could afford to pay her. And that's the last I have heard as far as her employment is concerned. In fact, the attorney contacted me for a reference. I indicated she is a good employee, but I just – I couldn't afford to pay her what they were offering to pay her. And I guess Baltimore apparently makes a lot more for paralegals, considerably. So, that's where I last left it. She indicated she was going to leave to go to that job. I said that's fine. That's where we are at.

Now, as far as the other stuff that's contained in there, I didn't represent her in connection with the PFA or any of that stuff.

THE COURT: And the other fellow, her husband, also retained Attorney Gross in his custody action.

ATTORNEY HOLT: Right. That's correct.

ATTORNEY GROSS: We do have pending an indirect criminal contempt before Judge Kelley the next week, the 13th.

THE COURT: Petition for modification – Attorney Gross, your petition for special relief is denied.

N.T., 3/7/12, at 1-3.

On March 12, 2012, the trial court questioned Mother concerning the allegations set forth in Father's petition for special relief. The exchange between the trial court judge and Mother was as follows:

THE COURT: I need you to take this down, at least my preliminary remarks.

Good afternoon. Let me ask you, where are you currently working?

THE PLAINTIFF: I am not currently working.

THE COURT: Okay. Why is that? It was my understanding that you had a better paying job with someone else.

THE PLAINTIFF: Yes.

THE COURT: Don't give me a bunch of baloney.

THE PLAINTIFF: I didn't start yet. I did take the test to get in. I wanted to get through all the hearings before I actually got started.

THE COURT: You know, how is it that I don't believe you?

THE PLAINTIFF: I don't know. I have emails to –

THE COURT: I just don't believe you. Where are you living?

THE PLAINTIFF: . . . in York Haven.

THE COURT: Weren't you living in Red Lion or Dallastown?

THE PLAINTIFF: I did stay with my mom when I got evicted from my home because it was a bit of a surprise to be evicted.

THE COURT: Don't tell me it was a surprise to be evicted. Just weren't you living in Red Lion or Dallastown.

THE PLAINTIFF: I was staying with my mom in Dallastown.

THE COURT: Well, now where are you staying? Who are you staying with?

THE PLAINTIFF: Myself. I'm renting a single family home.

THE COURT: How many bedrooms?

THE PLAINTIFF: Three bedrooms.

THE COURT: Who else lives with you?

THE PLAINTIFF: Just me and my children.

THE COURT: How many children do you have, two?

THE PLAINTIFF: Two, yes.

THE COURT: Did you sign a lease?

THE PLAINTIFF: Yes.

THE COURT: For how long?

THE PLAINTIFF: A year.

THE COURT: And where is your job supposed to be?

THE PLAINTIFF: White Marsh, Maryland.

THE COURT: And you are going to commute from York Haven all the way down to White Marsh Maryland?

THE PLAINTIFF: Yes.

THE COURT: Every day?

THE PLAINTIFF. Yes. I do have a carpool set up already, too.

N.T., 3/12/12, at 1-4.

Immediately thereafter, the trial court judge made her ruling with regard to shared physical custody on the record, as follows:

The two of you, as many couples, parents in custody cases, have asked me to determine at least for the time being, the future of [Child]. You know [Child] better than I do. Nonetheless you have been unwilling and unable to resolve this custody action between the two of you. You've made several decisions in your life that [Child] had no input in and no say in those decisions.

One is that you were together for some period of time; the second is that the two of you brought [Child] into this world[,] you decided to separate sometime [sic] ago, and now [Child] has been deprived of two full-time parents, and you are responsible for that. [Child] is not responsible for any of these things. You, as parents, are responsible, and you failed in that responsibility.

I have to make a decision, and you have to face the harsh reality that I cannot give to each of you what both of you want. You are both seeking primary physical custody of [Child], and it is impossible to give you both primary physical custody.

I have to consider the best interests of [Child], and I've taken a number of factors into consideration, lists that I've made up, four pages, and then two more pages with respect to [Child], of what I see.

You are 18 aren't you, young lady?

[FATHER'S] FIANCEE: I'm 23.

THE COURT: But you are at least 18?

[FATHER'S] FIANCEE: Yes.

THE COURT: I think I asked you that the last time, okay.

I paid particular attention to what the witnesses have said. Your preferences, [Child's] preferences, and other factors which the law requires me to consider.

Shared custody is out of the question. I don't think the two of you communicate even at a minimum degree, and now the distance is too far to have the two of you share custody. Both of you must be fit, capable of making child-rearing decisions in any event and willing and able to provide loving care for [Child]. I think both of you are.

I think you both evidence somewhat of a continuing desire for active involvement in [Child's] life. I'm not sure that both of you are recognized by [Child] as a source of security and love, because what he said to us in the back in your absence was disturbing in so far as what he felt about his mother.

And the final factor that I have to consider before you can make a shared custody arrangement is that a minimal degree of cooperation must be possible, and I don't think that's possible.

N.T., 3/12/12, at 4-6.

Moreover, the trial court stated that it considered the following evidence with regard to awarding primary physical custody.

Let me go over some issues that I consider to be disturbing and issues that I find to be good aspects of each one of you.

We heard a lot of irrelevant testimony during this trial that I've just kind of put aside and said, you know, I am not even going to consider this. But the relevant testimony brought me to the following conclusions with respect to the mother.

You have an unstable lifestyle. You do not impress me as a credible witness. You have been addicted to prescription drugs. On January 14, 2012[,] an incident occurred between you and your current husband, [V.T.]. You reported to the police that he beat, quote beat the crap out of you, yet you had no bruises or blood when the police arrived.

You failed to give [Child's] father's name as a contact in case of emergency. You were aggressive and yourself violent in a violent relationship with your current husband. You don't know [Child's] – or you didn't at the time of trial[,] know [Child's] dentist's name, yet the father did give you that information. You were in jail for driving under suspension after the father called the police on you. So those are some bad aspects I found with relation to you.

With respect to [Child's] father, I think you are lying about your conversation you had with [K.A.] on January 17, 2012 at [Child's] daycare. I believe [K.A.] when she testified that you said you had an order to immediately take custody of [Child]. I think you lied about that. I think you lied in your explanation of that incident and I had denied your ex parte petition, emergency petition earlier in the day.

You don't have a [driver's] license, you won't get it back for about a year, year and a half. It was suspended. You are an arrogant young man. You try to present an image of a perfect father, when in fact you are not.

By coincidence, I mean not coincidence, [Child] started keeping a journal of bad things at his mother's house when you started your current custody action. I think that was precipitated by your discussions with [Child] and telling him to remember bad things at his mother's house. You implied that [M]om was selling or buying drugs from a, quote, Donna – DONNA – end quote, when actually she was just paying her for babysitting [Child]. You have consistently throughout your testimony painted [Child's] mother as a bad person.

What are some good things about the two of you, good aspects in this case? According to [D]ad's testimony, Mom, you are good at getting [Child] to focus on his homework. You have appropriate discipline for [Child], time-outs, that sort of thing. You have a great reward system where you reward [Child] for being good when he does things good [sic], and you have been the primary caretaker of [Child] since his birth.

Dad, you have a stable living arrangement. You live with your fiancée in Dallastown, and [Child] has friends in the neighborhood that you live in. Your fiancée is a fourth grade Language Arts teacher. You appear to be in a stable relationship with her. You are more involved in [Child's] activities than is the mother. You attend church with [Child], attend counseling with [Child], and you and his mother kept in contact with [Child's] first grade teacher. You have a good job as a branch manager of a mortgage company.

The problem is in speaking with [Child], and we know [Child] didn't come up with these things on his own, we believe he has been coached by his father in preparation for this trial, and even throughout the last several months in anticipation of the trial. He told us he doesn't like his mother. She is rude. Where a child that age comes up with that word is only one place, and that's from a parent or an adult. Mean to him, swears at him, dumps ice water on his head, makes food he doesn't like, like brussel[s] sprouts, only to torture him. Whereas his father's fiancée makes all the things he likes and does all the work at his father's house that his mother makes him do in an attempt to help him out and to share in responsibility so that he grows into a responsible person.

As I said before, [F]ather tells him, tells [Child] -- this is according to [Child] -- to remember bad things about his [M]other. Father never tells him anything good about his [M]other[,] and his [F]ather and his fiancée talk with him about this custody case more than just saying, as his [M]other said, tell the truth.

So those are concerns, more substantial because it alienates [Child] from his [M]other, and you know whether he gets an A or a B on his homework, depending upon who helps him with his homework, is of no consequence, as when he says he doesn't like his [M]other because she is rude, mean to him, swears at him, dumps ice water on his head and makes food he doesn't like only to torture him.

(Whereupon, the Court entered an Order regarding the custody of [Child]).

N.T., 3/12/12, at 6-10.

The Custody Order awarded legal custody to both parties. Primary physical custody of Child was awarded to Mother, and Father was awarded partial physical custody of Child. Custody Order, entered 3/13/12. On March 22, 2012, the trial court entered its order denying Father's petition for special relief. Thereafter, on March 28, 2012, the trial court entered its order finding Father in contempt of the previously-existing custody order.

On April 11, 2012, Father filed a notice of appeal of the custody order dated March 12, 2012 and entered March 13, 2012, along with a Concise Statement of Errors Complained of on Appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b). On April 12, 2012, the trial court entered an order directing Father to file a Concise Statement within twenty-one

days. New counsel on behalf of Mother entered his appearance in this Court on July 5, 2012.

In his brief on appeal, Father raises the following issue:

Whether the Trial Court committed an error of law as the conclusion that Mother be granted Primary Physical Custody was not supported by the record and the [trial court] failed to properly address the factors outlined in 23 Pa.C.S.A. Section 5328(a) when rendering a decision?

Father's Brief, at 4.

Father argues that the trial court abused its discretion in modifying the custody order to provide Mother with primary physical custody, as the trial court failed to conduct an analysis of the best interests factors under section 5328 of the new Child Custody Act ("the Act"), 23 Pa.C.S.A. § 5328. Father relies on *J.R.M. v. J.E.A.*, 33 A.3d 647 (Pa. Super. 2011).

Initially, we observe that, as the custody trial in this matter was held in January of 2012, the Act is applicable. *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.

C.R.F. at 443 (citation omitted).

We have stated:

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

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

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. In **E.D. v. M.P.**, 33 A.3d 73, 79-80 (Pa. Super. 2011), a panel of this Court explained that section 5338 of the Act provides that, in ruling on a petition, the trial court may modify a custody order if it is in the best interests of the child. **Id.** at 79 (citing 23 Pa.C.S.A. § 5338). The panel instructed that the "best interests of the child" analysis requires the trial court to consider all of the sixteen factors listed in section 5328(a), 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. **See E.D.**, at 79-80, n.2.

In **E.D.**, the panel addressed an appeal by a mother from a custody order that granted the father primary physical custody of the parties' child and permission to relocate with the child. The panel held that the trial court must consider all of the factors set forth in section 5337(h) of the new Child Custody Act, 23 Pa.C.S.A. § 5337(h), regarding relocation. The panel also addressed whether the trial court had failed to consider the factors set forth in section 5328 regarding the custody award. After quoting the trial court's summary disposition of the issue, the panel instructed that, on remand, the

trial court should conduct a thorough analysis based on the factors set forth in section 5328(a). *Id.* at 82.

Subsequently, in *J.R.M.*, 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 erred as a matter of law by basing its decision almost exclusively on the fact that the child was breastfeeding, and the parties' difficulty in communicating with each other. *J.R.M.*, 33 A.3d at 652. The panel found that the trial court failed to consider all of the factors required to be considered under section 5328(a). *Id.* The panel thus concluded that the trial court erred as a matter of law and vacated the award and remanded the matter for further findings of fact. *Id.* In declining the parties' invitation to make findings of fact and credibility determinations based on the testimony presented at the custody hearing, the panel noted that is the role of the trial court, not the appellate court, to make independent factual determinations based upon the evidence presented. *Id.* at 652, n.5.

In the instant appeal, the trial court stated the following in its Rule 1925(a) Opinion:

This is an appeal by the Appellant from the trial court's Order of March 12, 2012. In consideration of the Statement of Matters Complained Of filed by Appellant, the undersigned states that the reasons for the Order subject to the appeal can be found in the original record, transcript of proceedings, and in the Order itself.

In addition, we believe that it is necessary to respond specifically to some items contained in [Father's] Statement of Matters Complained of on Appeal. In paragraph 7 of [Father's] Statement, he argues that we did not believe anything that Mother said, that she was unstable, unemployed, without a stable home, and is violent and addicted to drugs. While the transcript accurately reflected our skepticism regarding Mother's new home and job, we determined to our satisfaction that she did in fact have a new job and a new residence prior to entry of the Order. We also note that we found Father to be untruthful with regard to some important issues as well, most notably the manner in which he removed the [C]hild from daycare in violation of a previous Custody Order. This resulted in a finding of contempt against Father after issuance of the last Order.

We found that any issues regarding violence with her husband in Mother's former marital residence were resolved by protection from abuse proceedings and the issuance of a PFA Order. Mother did live with the [C]hild in temporary housing in a motel or hotel, and with her own mother for a brief time, but has since obtained suitable permanent housing. As to alleged drug use, we directed an official from the York County Adult Probation Office to test Mother for drug use prior to trial, with all negative results. We determined that any previous problem she had with prescription medications did not prohibit her from retaining custody rights.

The most important matter raised by [Father][,] that we strongly dispute, is his allegation in paragraph 18 of his [Rule] 1925[(b)] [S]tatement that we ignored the factors to be considered when awarding custody as directed by 23 Pa.C.S.A. § 5328(a). To the contrary, we specifically stated that one of the most substantial factors that we considered was Appellant/Father's attempts to alienate the [C]hild from Mother. *Transcript of Proceedings, March 12, 2012*, p. 9-10. The first factor listed under § 5328 is "[w]hich parent is more likely to encourage and permit frequent and continuing contact between the child and another party." Based upon our review of the evidence and discussion with the [C]hild, we determined that [Father] was not as likely, if at all, to encourage such contact, or to encourage good relations or respect for Mother. We found the [C]hild's testimony to be unusually one-sided against the

Mother, and not based [on] substantive or serious concerns, if it was truthful at all. In addition, the eighth factor to be considered is the “attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measure[s] are necessary to protect the child from harm.” § 5328(a)(8). We found that Father did attempt to turn the [C]hild against his Mother, and although he was justifiably concerned about a possible domestic violence incident at Mother’s home, he did not take reasonable measures to protect the [C]hild by first contacting Mother, instead relying on information provided to him by Mother’s husband and the [C]hild. Father and Mother’s husband retained the same counsel in an attempt to obtain custody of their respective children from Mother. We determined that Father’s primary motivation was not to ensure the safety of the [C]hild, but to use the incident to alienate the [C]hild from Mother as part of his broader effort to obtain primary physical custody.

We found that most of the other factors to be considered weighed equally between the parties. We determined that there was no longer a risk of abuse in Mother’s household since separating from her husband and obtaining a new residence. **See** 23 Pa.C.S.A. § 5328(a)(2). We determined that both parties had good structure in their homes, that Mother had rules with a good reward system, and that both parties performed parental duties on behalf of the [C]hild, with both parties involved in the [C]hild’s education. **See** 23 Pa.C.S.A. § 5328(a)(3). We found that both parties are able to attend to the [C]hild’s daily needs and are available to care for the [C]hild or make appropriate child care arrangements. **See** 23 Pa.C.S.A. § 5328(a)(10) and (12). Finally, we considered the need for continuity in the [C]hild’s life, with Mother having been the [C]hild’s primary caretaker since birth, and the bond that existed between the [C]hild and his younger sibling, Mother’s younger child with her husband. **See** 23 Pa.C.S.A. § 5328(a)(4) and (6). **See also**, *Transcript of Proceedings*, March 12, 2012, at [pp.] 4-10.

Trial Court Opinion, 5/9/12, at 1-4.

While the trial court considered some of the factors set forth in section 5328(a) in issuing its March 12, 2012 decision, it did so in a cursory

fashion, and failed to consider, in any fashion, the remaining of the sixteen factors. The trial court based its Order almost exclusively on subsection (a)(8): “The attempts of a parent to turn the child against the other parent.” A trial court’s failure to consider and thoroughly address all sixteen factors outlined in section 5328(a) amounts to error of law and precludes appellate review. **See J.R.M.**, 33 A.3d at 652.

The trial court also relied upon facts in its 1925(a) Opinion that were not supported by the record. Some of the trial court’s determinations regarding the factors set forth in section 5328(a) are based on information that was not developed as part of the evidentiary custody trial, but, rather, through the trial court’s subsequent questioning of Mother and her counsel. Although the questioning occurred before the trial court entered its order, it was not part of the custody trial itself. Additionally, while these facts were relied upon by the trial court in its 1925(a) opinion, they were not developed on the record. For instance, because of the questioning in the proceedings on March 7, 2012 and March 12, 2012, the trial court learned that, after the close of the custody trial, Mother had separated from her employment with her counsel. In the 1925(a) opinion, the trial court relies on its finding that Mother has a new job, but there was no evidence developed as to Mother’s new employer, her hours, or her arrangements for childcare. Additionally, the proceedings revealed that, after the close of the custody trial, Mother

had also moved from her previous residence. Despite this finding, there was no evidence developed with regard to the stability of Mother's new residence and its proximity to Child's school, his childcare, or his living conditions at the residence. Additionally, the trial court's credibility assessments, especially with regard to Mother, appear to have changed between the remarks that the judge made on the record on March 12, 2012, and the trial court's Rule 1925(a) Opinion.

Accordingly, pursuant to ***E.D.*** and ***J.R.M.***, we must vacate the trial court's custody order and remand the case for further fact-finding and clear, consistent credibility and weight assessments which may be reviewed on any future appeal.

Order entered March 13, 2012, is vacated and remanded for further proceedings, within thirty days, in conformance with this Memorandum. Jurisdiction is relinquished.