

CHILD CUSTODY IN PHILADELPHIA COUNTY

WHAT IS A CUSTODY ORDER?

A custody order is a written order signed by a judge. It defines the amount of time each party will spend with the child (physical custody) and how major decisions are made about the child (legal custody).

Note: People who file for custody and people they file against are called “parties.” Each is a “party.”

Physical custody – There are five types:

- **Shared** – More than one party is allowed to take physical custody of the child, and each of them has significant periods of time with the child.
- **Primary** - A party spends the majority (more than half) of the time with the child. The other party may get partial or supervised custody.
- **Partial** – A party spends less than a majority of time with the child.
- **Supervised** – Custodial time during which an agency or adult named by the court monitors interaction between a party and the child.
- **Sole** - One party has physical custody all of the time.

Legal custody - There are two types:

- **Shared** – More than one party has the right to make major decisions for the child.
- **Sole** – One party makes all major decisions for the child.

WHO MAY FILE FOR CUSTODY IN PHILADELPHIA?

Jurisdiction – Generally, a child must have lived in Philadelphia for at least 6 months before the court will hear your case. Exceptions: if the child is under 6 months old, or for certain emergencies such as abandonment or abuse of the child or the child’s parent or sibling.

Standing – Who may file for custody?

- A **parent** of the child may file for any form of physical or legal custody.
- **Someone who has acted in loco parentis** to a child may file for any type of physical or legal custody. You have acted *in loco parentis* if the child is not your legal child, but you have acted as a parent and taken on the responsibilities of

parenthood for a period of time with the consent of a parent or other legal custodian or under court order.

- A **grandparent** of the child who is **NOT in loco parentis** to the child may file for any form of physical or legal custody, **IF**:
 - A parent of the child allowed the grandparent to form a relationship with the child **OR** the court ordered that the grandparent and child be permitted to form a relationship; **AND**
 - The grandparent is willing to take responsibility for the child; **AND**
 - When one of the following conditions is met:
 - ✓ The dependency court has determined that the child is “dependent” under PA’s child abuse and neglect law; **OR**
 - ✓ The court determines that the child is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity; **OR**
 - ✓ The child has lived with the grandparent for at least 12 consecutive months (not counting brief absences) and is removed from the home by the parents. In this case, the grandparent must file for custody within six months after the removal of the child from the home.
- Grandparents and great-grandparents may also file for partial physical custody or supervised physical custody in the following situations:
 - The parent of the child has died **OR**
 - A relationship with the child began with a parent’s consent or under a court order **AND** the parents:
 - ✓ Have started a custody proceeding **AND**
 - ✓ Do not agree as to whether the grandparent or great-grandparent should have partial physical custody **OR**
 - The child has lived with the grandparent for at least 12 consecutive months (not counting brief absences) and is removed from the home by the parents. In this case, the grandparent must file for custody within six months after the removal of the child from the home.

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- Anyone who establishes **ALL** of the following
 - ✓ Willingness to assume responsibility for the child.
 - ✓ Has a sustained, substantial and sincere interest in the welfare of the child, and
 - ✓ Neither parent has any form of care and control of the child.
 - The above provision does not apply where there is a dependency proceeding or the child has been found dependent.

HOW TO FILE FOR CUSTODY

Where do I go?

If you prepare your own petition, file it with the Clerk of Family Court on the 11th floor of the courthouse at 1501 Arch Street, Philadelphia, PA. All custody forms with instructions are on the Philadelphia Family Court's website under Court of Common Pleas-Domestic Relations at <https://www.courts.phila.gov/forms/>

- If you need help preparing your custody petition, you may go to the Intake Unit of Philadelphia Family Court on the 8th floor of the courthouse at 1501 Arch Street, Philadelphia, PA. Staff will help you prepare your petition. Bring important papers and information such as birth certificates for children, previous custody orders, protection from abuse orders, the opposing party's address, and social security numbers for all parties.
- You may also go to the Court's Help Center on the 11th Floor, which is open Monday-Friday, noon to 3 p.m.
- You will need to file two copies with the Court. One of these copies must be "redacted." This means that confidential information such as a child's name and date of birth, must be blacked out. One copy must include the information and one copy must have it blacked out.

What does it cost?

- It costs \$107.13 to file for custody.
- It costs an extra \$42.68 to file for emergency custody.
- Fees are different (or none) for other filings.

What if I cannot afford the filing fee? You may ask to be excused from paying the fee by filing a petition to proceed *In Forma Pauperis* (IFP). Ask for and fill out an IFP Petition. If you are on public assistance, medical assistance or SSI, bring your public assistance photo ID or proof that you receive these benefits. If you are not on public assistance, medical assistance or SSI, bring proof of income.

What if I have an urgent situation? There are 2 ways to try to speed up your custody hearing:

- **Emergency Petition** – This is used for cases that must be addressed the same day, such as those involving extreme danger to the child. To file a Petition for Emergency Relief, you must have already filed one of the following petitions at an earlier time: Complaint for Custody, Petition to Modify, or a Petition for Contempt. On the day you file a master may give a preliminary assessment of whether your situation is an emergency. You may choose to proceed with the emergency petition or not proceed. If you proceed, the emergency petition is docketed, and the designated Emergency Judge will rule on your petition. If you get emergency custody, the court will schedule a hearing in the very near future to hear testimony and receive evidence from both parties.
- **Expedited Petition** – If there is a matter that needs immediate court attention but is not an emergency, you may file a petition for an expedited hearing. Time-sensitive situations for which you may obtain an expedited hearing include when you believe the other party has been charged with a crime and is a risk to the child's safety, the child needs urgent medical or educational attention, you are being denied access to the child, or the other party has changed the terms of the custody arrangement without your agreement. You may only file expedited petitions on Monday, or if the court is closed on Monday, on Tuesday.

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Unless you have already done so, you must also file one of the following petitions: Complaint for Custody, Petition to Modify, or Petition for Contempt.

You will receive a Rule to Show Cause indicating the date and time of your hearing. The Rule and petition must be provided to the opposing party in person. This process is called “personal” service. You cannot do this yourself. It must be done by an adult who is not your relative or employee. The person who delivers it should fill out the affidavit of service and you should bring it to the hearing with you.

What happens after I file? You and the opposing party will receive a notice by mail with a hearing date and must appear in court on that date. If you have filed an emergency petition, you will be told that day how to proceed. Be sure to follow the instructions.

HOW DOES THE COURT DECIDE CUSTODY?

A judge or master, after holding a hearing, decides the custody arrangement based on what is in the *best interest of the child*. The court is required to consider all relevant factors. **It must give more consideration to factors which affect the safety of the child.** The law lists many factors to consider:

1. Which party is more likely to encourage and permit frequent and continuing contact between the child and the other party.
2. Abuse, past and present, by a party or member of a party’s household. Is there a continued risk of harm to the child or an abused party? Which party can better protect and supervise the child?
3. What each party does to parent 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 relationships with sisters and brothers.
7. The preference of the child. The court must determine if the child carefully thought about his/her preference. The court must also assess the child's maturity and judgment.
8. 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. How close the parties’ homes are to one another.
12. Each party's availability to care for the child or ability to arrange appropriate child-care.
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.

What about criminal convictions and abuse history? The court must also consider certain criminal convictions and abuse and determine whether they pose a threat to the child. This includes convictions and no contest pleas for violent crimes, including domestic abuse, but also DUI and drug-related offenses. You must file a Criminal Record/Abuse History Verification Form with your complaint and disclose whether you or any member of your household has a criminal or abuse record, and whether you are aware of any criminal record/abuse history of the other party or members of that party’s household.

To find out if the other party or members of that party’s household has any criminal convictions or pleas in Pennsylvania, go to <http://ujportal.pacourts.us/docketsheets/cp.aspx> and follow the instructions carefully.

This brochure is meant to give you general information and not legal advice.

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If you later learn about criminal charges and believe those charges pose a risk to the child, you may file a motion for temporary custody or, if there is an existing custody order, a motion to modify custody.

Parenting Plans – When the parties do not agree on custody, the court may require each party to submit a parenting plan to help it make a decision. The plan must include a detailed description of how the parties will be involved in making decisions about the child and a schedule of when the child will live with each party. Your plan must be presented to the court in a special format. There are limits to how plans may be used in court. See Parenting Plan brochure for more detailed information.

HOW DO I PREPARE FOR THE HEARING?

Testimony – Each party may present their side and ask questions of the other side. You may prepare a list of your main points as well as questions that you want to ask the other party and bring that list to court with you.

Evidence – You may bring school or medical records or other important papers or photographs, such as criminal records printed from <http://ujportal.pacourts.us/docketsheets/cp.aspx>.

Make two copies of whatever you plan on giving to the court — the judge or master gets the original, the other side gets a copy and you keep a copy.

You have the right to see everything that the other side wants to show the court.

Witnesses – You may want to bring witnesses to testify on your behalf. Witnesses must present a subpoena to be admitted into the court. Request a subpoena from the Office of the Clerk of Family Court on the 11th floor of 1501 Arch Street. **Blue** subpoenas are for “friendly” witnesses; **Red** subpoenas are for witnesses who may not want to testify and may be enforced by court order. Give your witnesses the subpoena before the hearing date and have them show it to the security guard upon entering the courthouse. Red subpoenas must be given to the other party a reasonable time in advance of the hearing. An adult can serve them on another adult, or they can be served by certified mail, return receipt requested.

You may want to prepare and bring with you a list of questions to ask your witnesses and any witnesses the other party brings. Remember:

- Witnesses may only testify to events they have actually seen.
- If your witness can't come to court, you may ask the judge to permit your witness to testify by telephone. You must ask by letter before the hearing date. Letters or affidavits from witnesses will not be accepted without the witness present.

Tests and evaluations – If you have concerns about the other party's substance abuse, mental health, or home safety you may ask the court to order the following services:

- Drug test
- Mental Health Evaluation
- Home Investigation

Be prepared to tell the court why it should issue any of these orders. You may also file a motion asking the court to order these services before your hearing.

WHAT HAPPENS IN COURT?

Custody cases are handled in several different ways, depending on many factors. At different points in your case, you may:

- meet with a Master to see if you can reach an agreement;
- have a hearing before a master; or
- have a hearing before a judge if there was no agreement before a Master.

Before your case is complete, you will have done one or more of these things.

Remember: An agreement made at court cannot become a court order until both parties and a judge sign it. Make sure you understand and agree with any agreement that you are asked to sign. Do NOT sign until you understand it fully and agree with it.

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WHAT IF I DISAGREE WITH THE CUSTODY ORDER?

If a master or judge makes a decision in your case after a hearing, you have the right to appeal that decision. Read your order carefully to make sure that you do not miss any deadlines for appeal if you believe the decision is wrong.

- If you disagree with a master's proposed order after a hearing, you may file *exceptions* within 20 days after the proposed order is mailed to you. In your exceptions, you must explain in writing why you think the master's proposal is wrong. Make sure the court receives your exceptions within 20 days. After you file, you will have a hearing before a judge. You must explain to the judge what the master did wrong.
- If you disagree with a judge's order, you may file a request for reconsideration. You may wish to talk to an attorney if you want to file such a request. You may also file an appeal with the Superior Court of Pennsylvania within 30 days of the date of the court order. Appeals are very complicated. If possible, you should talk to an attorney if you want to appeal to Superior Court. Remember, filing a request for reconsideration does not extend the 30-day time period for appealing to Superior Court.

WHAT IF THE OTHER PARTY VIOLATES THE ORDER?

If a party violates a custody order, you may file a petition for contempt and the court will schedule a hearing to decide whether the other party is in contempt and whether to issue sanctions, such as a fine or imprisonment, or to temporarily change the terms of the order until a full hearing is held on a petition to modify. A form and instructions are available on the Philadelphia Bar Association's website.

WHAT IF I WANT TO MOVE AWAY WITH MY CHILD?

The custody law requires parents who want to relocate to take a number of steps. These steps begin with notice to the other party at least 60 days prior to the planned relocation. In limited circumstances, the party who plans to move may be permitted to give notice to the other party later than 60 days before the move, but at least 10 days prior to the move. The steps follow a required order and must have a particular structure. There are strict timelines for the entire process.

For help with relocation, you can visit the Family Court Help Center on the 11th Floor, which is open Monday-Friday, noon to 3 p.m.

You can also find the necessary forms on the Philadelphia Family Court's website under Court of Common Pleas-Domestic Relations at <https://www.courts.phila.gov/forms/>

IS LEGAL HELP AVAILABLE?

Philadelphia Legal Assistance	215-981-3800
Philadelphia Bar Association Lawyer Referral & Information Service	215-238-6333

You may download all custody forms from the Philadelphia Family Court's website under Court of Common Pleas-Domestic Relations at <https://www.courts.phila.gov/forms/>

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 party when considering the following offenses:

- 18 Pa.C.S. Ch. 25 (relating to criminal homicide).
- 18 Pa.C.S. § 2702 (relating to aggravated assault).
- 18 Pa.C.S. § 2706 (relating to terroristic threats).
- 18 Pa.C.S. § 2709.1 (relating to stalking).
- 18 Pa.C.S. § 2718 (relating to strangulation).
- 18 Pa.C.S. § 2901 (relating to kidnapping).
- 18 Pa.C.S. § 2902 (relating to unlawful restraint).
- 18 Pa.C.S. § 2903 (relating to false imprisonment).
- 18 Pa.C.S. § 2910 (relating to luring a child into a motor vehicle or structure).
- 18 Pa.C.S. Ch. 30 (relating to human trafficking).
- 18 Pa.C.S. § 3121 (relating to rape).
- 18 Pa.C.S. § 3122.1 (relating to statutory sexual assault).
- 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).
- 18 Pa.C.S. § 3124.1 (relating to sexual assault).
- 18 Pa.C.S. § 3125 (relating to aggravated indecent assault).
- 18 Pa.C.S. § 3126 (relating to indecent assault).
- 18 Pa.C.S. § 3127 (relating to indecent exposure).
- 18 Pa.C.S. § 3129 (relating to sexual intercourse with animal).
- 18 Pa.C.S. § 3130 (relating to conduct relating to sex offenders).
- 18 Pa.C.S. § 3301 (relating to arson and related offenses).
- 18 Pa.C.S. § 4302 (relating to incest).
- 18 Pa.C.S. § 4303 (relating to concealing death of child).
- 18 Pa.C.S. § 4304 (relating to endangering welfare of children).
- 18 Pa.C.S. § 4305 (relating to dealing in infant children).
- 18 Pa.C.S. § 5902(b) or (b.1) (relating to prostitution and related offenses).
- 18 Pa.C.S. § 5903(c) or (d) (relating to obscene and other sexual materials and performances).
- 18 Pa.C.S. § 6301 (relating to corruption of minors).
- 18 Pa.C.S. § 6312 (relating to sexual abuse of children).
- 18 Pa.C.S. § 6318 (relating to unlawful contact with minor).

18 Pa.C.S. § 6320 (relating to sexual exploitation of children).

Section 6114 (relating to contempt for violation of order or agreement).

The former 75 Pa.C.S. § 3731 (relating to driving under influence of alcohol or controlled substance).

75 Pa.C.S. Ch. 38 (relating to driving after imbibing alcohol or utilizing drugs).

Section 13(a)(1) of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, to the extent that it prohibits the manufacture, sale or delivery, holding, offering for sale or possession of any controlled substance or other drug or device.

(b) Parent convicted of murder.--No court shall award custody, partial custody or supervised physical custody to a parent who has been convicted of murder under 18 Pa.C.S. § 2502(a) (relating to murder) of the other parent of the child who is the subject of the order unless the child is of suitable age and consents to the order.

(b.1) Parent convicted of certain sexual offenses.--

(1) Notwithstanding any provision of this chapter to the contrary and subject to paragraph (2), if a parent who is a victim of any of the offenses set forth in this paragraph objects, no court shall award any type of custody set forth in section 5323 (relating to award of custody) to the other parent of a child conceived as a result of any of the following offenses for which the other parent has been convicted:

18 Pa.C.S. § 3121.

18 Pa.C.S. § 3122.1.

18 Pa.C.S. § 3124.1, where the offense involved sexual intercourse.

18 Pa.C.S. § 3124.2 (relating to institutional sexual assault), where the offense involved sexual intercourse.

18 Pa.C.S. § 4302.

(2) A court may award any type of custody set forth in section 5323 to a parent who has been convicted of an offense under paragraph (1) if:

(i) the parent who is a victim had an opportunity to address the court;

(ii) the child is of suitable age and consents to the custody order; and

(iii) the court determines the award is in the best interest of the child.

(3) Paternity of the child shall be established by voluntary acknowledgment of paternity or blood, genetic or other paternity testing acceptable to the court. The cost of the

testing shall be borne by the parent who was convicted of the offense.

(c) Initial evaluation.--At the initial in-person contact with the court, the judge, conference officer or other appointed individual shall perform an initial evaluation to determine whether the party or household member who committed an offense under subsection (a) poses a threat to the child and whether counseling is necessary. The initial evaluation shall not be conducted by a mental health professional. After the initial evaluation, the court may order further evaluation or counseling by a mental health professional if the court determines it is necessary.

(d) Counseling.--

(1) Where the court determines under subsection (c) that counseling is necessary, it shall appoint a qualified professional specializing in treatment relating to the particular offense to provide counseling to the offending individual.

(2) Counseling may include a program of treatment or individual therapy designed to rehabilitate the offending individual which addresses, but is not limited to, issues regarding physical and sexual abuse, the psychology of the offender and the effects of the offense on the victim.

(e) Subsequent evaluation.--

(1) At any time during or subsequent to the counseling under subsection (d), the court may require another evaluation to determine whether further counseling is necessary.

(2) If the court awards custody to a party who committed an offense under subsection (a) or who shares a household with an individual who committed an offense under subsection (a), the court may require subsequent evaluations on the rehabilitation of the offending individual and the well-being of the child subsequent to the order. If, upon review of a subsequent evaluation, the court determines that the offending individual poses a threat of physical, emotional or psychological harm to the child, the court may schedule a hearing to modify the custody order.

(f) Costs.--The court may order a party to pay all or part of the costs of the counseling and evaluations under this section.

(Apr. 12, 2012, P.L.241, No.32, eff. 60 days; Oct. 1, 2015, P.L.172, No.40, eff. 60 days; May 4, 2018, P.L.112, No.21, eff. 60 days; June 5, 2020, P.L.246, No.32, eff. 60 days; June 30, 2021, P.L.197, No.38, eff. 60 days)

2021 Amendment. Act 38 amended subsec. (a).

2015 Amendment. Act 40 added subsec. (b.1). Section 3 of Act 40 provided that subsec. (b.1) shall apply to any action regarding custody of a child under Chapter 43 or 53 that is filed on or after the effective date of section 3.

2012 Amendment. Act 32 amended subsec. (c).

Cross References. Section 5329 is referred to in section 5330 of this title; section 1904 of Title 42 (Judiciary and Judicial Procedure).

Private Investigator:

Jeffrey Brenner

Maragell

856-429-0325 x223

jbrenner@maragell.com

Forensic Mental Health Services, LLC

1235 Vine Street Philadelphia, PA 19107

Tel: 215-405-2100 Fax: 215-405-2108

www.forensicval.org

Forensic Evaluation

Name: [REDACTED]
Date of Birth: [REDACTED]
Dates of Evaluation: 7/18/18
Age at Evaluation: 33 years old
Date of Report: 8/14/18
Evaluator: [REDACTED] MA, LPC

Reason for Referral/ Presenting Problem

[REDACTED] has been convicted of an enumerated offense under 23PA, C.S.A 5329. He was referred by the Court of Common Pleas of Philadelphia – Family Court Division for an evaluation to determine if, as a result of his criminal history, he poses a threat of harm to his son, [REDACTED] ([REDACTED]). Mr. [REDACTED] criminal history includes convictions for Possession of Firearm, Possession of Controlled Substance (2007), Possession With Intent to Deliver (2007), Receiving Stolen Property (2007), and Possession With Intent to Deliver, Possession of Controlled Substance (2012). Mr. [REDACTED] is currently seeking a change in custody.

Material Reviewed

Court Order re: [REDACTED] vs. [REDACTED] (4/03/18)
Secure Court Summary for [REDACTED] (printed 4/02/18)
Telephone contact with Philadelphia County Probation Officer [REDACTED] (8/08/18)

Current Custody

Mr. [REDACTED] reported [REDACTED] currently resides with his mother, and he has no formal contact with his son at all. He noted the last time he saw his son was at his brother's funeral on 12/16/17. He stated the mother decided he could no longer have contact, and noted their contact stopped when his daughter was born in August 2011. Prior to his daughter's birth, "Our relationship wasn't good. The courts granted visits, but his mother got that over ridden". He reported he wants the judge to let him see his son, and noted, "Anything is a start".

Developmental History

Mr. [REDACTED] reported that he was born and raised in Philadelphia by his mother and paternal grandmother. He noted his father was not involved in his upbringing. He has two brothers and three sisters and his second child. He explained that he was back and forth between his mother's home and his grandmothers home because his mother worked a lot from ages 6 to 12 years old. When he was 10 years old he lived with his mother for two years. When he was 12 years old he and his brother went to live with their paternal grandmother. He reported positive relationships with his mother, grandmother, and siblings. He got into trouble for quote "kids

stuff", such as stealing and lying. He received a stern talking to, for beatings a couple times. He denied a history of physical or sexual abuse, or childhood trauma.

Mr. [REDACTED] reported that his mother passed away in 2008 from cancer. His paternal grandmother passed away in 2010. He stated he talks to his father and the relationship is "not bad". He reported positive relationships with his siblings and other relatives. He denied anyone else in this family has a criminal history. He reported he has always lived in Philadelphia.

Educational/ Occupational History

Mr. [REDACTED] reported he dropped out of high school while in the 12th grade because he had to pay bills and help out his grandmother. He reported being suspended for tardiness. He denied any trouble learning or paying attention, or special education services. He reported he obtained his secondary diploma 2013. He started attending Community College of Philadelphia in 2016, but noted he has taken the semester off.

Mr. [REDACTED] reported he runs his own business as a personal trainer and selling fitness attire. He has owned his business since December 2017. He stated he also has financial support from a trust fund set up by his mother. He denied experiencing financial stress, but reported he receives food stamps for his daughter. In the past, he has worked in a laundry, at McDonald's, a nursing home, supermarket, and in security. His longest employment was for 2 years. He reported being fired for tardiness.

Medical History

Mr. [REDACTED] reported he suffers from asthma. He stated he uses an inhaler as needed. He reported he has had to go to the emergency room for asthma, but has never had to spend overnight in the hospital. He stated he does not know of any family medical history.

Mental Health History

Mr. [REDACTED] denied any current mental health problems, or history of mental health treatment. He endorsed occasional problems falling asleep, occasional memory problems, excessive worry about his children, and an occasional increase in activities.

Social/ Relationship History

Mr. [REDACTED] stated he is about to start a youth program "geared to getting youth off the street". He expects he will be starting this in two months. He noted he is working with Trap Door Inc. He stated he works out daily and rarely feels bored. He stated he has seven close friends, and communicates with them every other day. He denied any friends are involved in criminal activities, but reported some of his acquaintances are involved in criminal behavior.

Mr. [REDACTED] reported when he was 15 years old he started dating 14-year-old Yolanda. They were together two years and the relationship was good. They did not have any children and the relationship ended due to a difference of opinion about religion and the future of their relationship.

Mr. [REDACTED] stated when he was 17 years old he started dating [REDACTED] who was also 17 years old. They were together more than three years. He stated the relationship

at first was good, but "my mentality changed". He stated, "She was rude. I saw things I didn't like". The relationship ended because "I was a little more mature" and "we didn't see the same things". They have one son together, [REDACTED] (DOB [REDACTED]). He reported with Ms. [REDACTED], "She used to beat on me a little bit" and she "cut me a couple times". He denied he ever reported this, but she reported an incident of domestic violence and fabricated the report. He noted he agreed to the PFA.

Mr. [REDACTED] reported when he was 26 years old he started dating [REDACTED], who was 21 years old. They have been together "off and on" for six years and the relationship has been good. Together they have a daughter, [REDACTED] (DOB [REDACTED]). He reported he sees [REDACTED] almost every day, if not every other day. He noted they have a good relationship. He explained that he and Jessica came to a custody agreement on their own, without Family Court involvement.

Mr. [REDACTED] is not currently in a relationship, and reported he is "pretty satisfied". He stated he currently lives by himself. He reported his home is fair, and he has been at this address a year. He reported he lives in Germantown and the neighborhood is safe.

Parental Relationship

When asked about the critical components to caring for a child, Mr. [REDACTED] stated children need attention, affection, and understanding. When asked about [REDACTED], he stated he knows he likes dancing. He does not know if he has any special needs, or has ever seen a mental health specialist. He stated when he saw him at the funeral, "it was tough", given that they do not have a strong relationship; however, he noted his son was "not stand-offish".

Mr. [REDACTED] denied he has had any DHS involvement as an adult, but believed he was involved as a child; he could not remember the reason he would have been involved with DHS. He stated his son has never had DHS involvement, but reported he knows that people have called the police on [REDACTED].

When asked how his legal history has affected his relationship with his son, Mr. [REDACTED] stated, "It took me away from him. I don't know if he knows any aspects". Mr. [REDACTED] reported that if he were unable to care for his son, he would call on his sister, [REDACTED]'s mother [REDACTED], or his younger brother. When asked how he would discipline his son, he stated he raises his voice with [REDACTED] or talks to her about what she's doing. When asked about the most difficult aspect of a change in custody, he stated for [REDACTED] "while I was incarcerated he saw my family. She stopped by", so he knows Mr. [REDACTED]. He noted for himself, it would be hard getting to know him.

Substance Use History

Mr. [REDACTED] reported a history of marijuana, alcohol, and PCP usage. He first drank alcohol when he was 13 years old. He stated he drank socially, and would have "four shots and a Long Island Iced Tea". He last had a shot the night before his evaluation. He first used marijuana when he was 15 years old. He stated from ages 16 to 18 years old he smoked daily. From ages 19 to 21, he smoked every other day, and his usage "died off" when he was 25 years old. He reported he last smoked marijuana in 2010. He reported he used PCP once when he was 21 years old. He denied ever abusing prescription medication. He stated he sold drugs from ages

16 to 26 years old continuously. He denied it was ever his main source of income. He reported he completed drug and alcohol treatment at Gaudenzia when he was 21 years old.

Offense History

Mr. [REDACTED]'s criminal history includes convictions for Possession of Firearm, Possession of Controlled Substance (2007), Possession With Intent to Deliver (2007), Receiving Stolen Property (2007), and Possession With Intent to Deliver, Possession of Controlled Substance (2012). The Court Summary lists an active case with an arrest date of 10/15/10. The sentence is listed as being disposed guilty on 6/27/12 for Possession with Intent to Deliver and Possession of Controlled Substance. The last action on 9/07/16 was for PCRA.

Mr. [REDACTED] reported he was first arrested when he was 15 years old for a sexual offense, but noted these charges were dismissed. When he was 16 years old he was arrested for marijuana possession. He stated he had marijuana in his pocket, and thinks the charge was thrown out. He noted he had a juvenile probation officer while the trial was going on. He reported in 2004, he was charged with Possession With Intent to Deliver for dealing drugs. In 2006, he was arrested and charged with gun possession and selling drugs. He stated, "I wasn't dealing, but I was caught up in dumb stuff and giving something to somebody". Regarding his conviction for Receiving Stolen Property, he noted "Somebody brought in a stolen car where I worked as a mechanic". He noted he was sentenced to 11 ½ to 23 months incarceration and served 11 ½ months, from 2007 to 2008. In 2010, he got back into selling drugs and was sentenced to 7 to 14 years incarceration in 2012. He was incarcerated from 2011 to 2016. He noted the conviction as later overturned "due to an illegal sentence" and he was released. He reported he is currently on three years probation. He noted he received a write-up for not being visible in his cell while he was praying. He acknowledged he received new charges for drug possession in 2012 while he was on probation, resulting in a violation of probation.

When asked how he feels about his criminal history, Mr. [REDACTED] stated, "It was dumb and senseless". He stated he does not think his most recent sentence was fair because it was an "illegal sentence", but his other sentences were fair, other than the conviction for Receiving Stolen Property because he worked at the shop. He reported he is currently supervised by Probation Officer [REDACTED], and believes she treats him fairly.

When asked about his plan for avoiding future criminal behavior, Mr. [REDACTED] stated his daughter helps him stay out of trouble because he knows he needs to be there for her. He also stated, "I'm old". When it was noted he has criminal acquaintances, he responded, "They respect my lifestyle" and do not invite him to sell drugs. He reported he sold drugs because he did not have any guidance back then. He stated now, "I'm different and trying to guide the youth".

According to Philadelphia County Probation Officer [REDACTED], she has been working with Mr. [REDACTED] since 2016. She reported he is "very compliant", noting that he comes in as he's scheduled. She reported he is on "step-down and comes in every other month because he's been doing so well, is employed, and makes his payments". When asked about substance abuse testing, she reported he is not conditioned to any drug testing. She explained his probation is scheduled to end 8/07/19. She denied having any concerns for him.

Results from Objective Data or Psychological Testing

The Level of Service Inventory-Revised (LSI-R) is a structured risk/ need assessment meant to identify needed level of care and services for an adult criminal justice population, as well as explore subcomponent areas where specific interventions or supervision rules may be needed. The LSI-R is designed to aid professionals responsible for assessing offenders' risks of reoffending and criminogenic needs. The LSI-R taps ten subcomponents of risk and need that have been shown to be highly correlated with risk of recidivism: Criminal History, Education/ Employment, Financial, Family/ Marital, Accommodation, Leisure/ Recreation, Companions, Alcohol/ Drug Problems, Emotional/ Personal, and Attitudes/ Orientation.

Based on a review of the LSI-R, Mr. [REDACTED] scored 15 out of 54, placing him at Low/ Moderate risks/ needs. Areas of concern include prior adult convictions, history of juvenile arrest, history of incarceration, institutional misconduct, and probation violation. He has a history of being fired and receives social assistance. He did not complete high school and has a history of behavioral problems in school. He is not involved in any organized activities and has some criminal acquaintances. He has a history of substance abuse, and a poor attitude toward his sentence.

Mental Status

Mr. [REDACTED] presented as an African American male who appeared his stated age of 33 years. He was dressed appropriately for the weather and oriented to person, place and time. His mood was euthymic and affect congruent with topics. Intelligence was estimated to be within the average range of functioning. Thought content was coherent and goal oriented. There was no evidence of hallucinatory experiences. He denied current suicidal or homicidal ideation.

Biopsychosocial Formulation

Michael [REDACTED] has been convicted of an enumerated offense under 23PA, C.S.A 5329. He was referred by the Court of Common Pleas of Philadelphia – Family Court Division for an evaluation to determine if, as a result of his criminal history, he poses a threat of harm to his son, [REDACTED] (DOB [REDACTED]). Mr. [REDACTED] criminal history includes convictions for Possession of Firearm, Possession of Controlled Substance (2007), Possession With Intent to Deliver (2007), Receiving Stolen Property (2007), and Possession With Intent to Deliver, Possession of Controlled Substance (2012). Mr. [REDACTED] is currently seeking a change in custody.

Mr. [REDACTED] has a criminal history dating back to adolescence and continuing until 2012. His criminal history is related to selling drugs, carrying a firearm, and receiving stolen property. He demonstrated some insight into his behaviors and criminogenic behaviors, while minimizing his responsibility in his receiving stolen property offense. He reported making positive changes in his life and changing his thoughts to avoid criminogenic behaviors. His probation officer reported he has remained violation free since beginning probation in 2016, and earned a decrease in level of supervision.

Mr. [REDACTED] presents with stability in the community. He reported he is currently self-employed and has maintained this employment for the past six months. He stated he is

actively involved in his community. He has support from family and friends. He reported he has maintained sobriety from illegal substances for the past 8 years. He has had no new criminal involvement since 2012. He reported he is helping raise his daughter, [REDACTED], and has regular contact with her.

Mr. [REDACTED] reported that other than one time at his brother's funeral, he has not had any contact with his son since 2011. He acknowledged that they do not have a relationship. He reported that although [REDACTED] had contact with Mr. [REDACTED]'s family while he was incarcerated, he has no real relationship with him and they will need time together to improve their relationship.

Based on available information, there is no indication that Mr. [REDACTED] poses a threat of harm to his son related to his criminal history if current prosocial and stable lifestyle is maintained.

DSM-5 Diagnosis

Z65.3 Problems Related to Other Legal Circumstances
F12.11 Cannabis Use Disorder, Mild, In sustained remission (by self-report)

Recommendations

In order to mitigate risk of reoffending, Mr. [REDACTED] should continue to maintain a stable, prosocial lifestyle characterized by stable and appropriate housing, employment, and leisure activities.



[REDACTED] MA, LPC
Licensed Professional Counselor (PC-004261)

224 A.3d 729
Superior Court of Pennsylvania.

H.R. and C.A.R.

v.

C.P. and J.M.

Appeal of: C.P.

No. 807 MDA 2019

|
Submitted September 30, 2019

|
Filed December 18, 2019

Synopsis

Background: Unwed father filed petition for modification of child custody. The custody officer recommended that the trial court terminate drug-testing conditions on father's ability to exercise unsupervised custody and significantly increase duration and nature of father's three-hour period of supervised partial physical custody to nine hours of unsupervised custody on alternating Saturdays. Maternal grandparents filed exceptions to the custody officer's report and recommendation. The Court of Common Pleas, Schuylkill County, Civil Division, No. S-1868-2011, Charles M. Miller, J., found that it was not in best interest of the child to expand father's partial custody, and father appealed pro se.

Holdings: The Superior Court, No. 807 MDA 2019, Bowes, J., held that:

rather than requiring court to ignore father's marijuana use, Medical Marijuana Act obligated trial court to contemplate father's physical condition, and

court did not deny father's motion to modify child custody simply because father sought to utilize medical marijuana card, and instead, court concluded that it was not in child's best interests to expand father's custody.

Affirmed.

*731 Appeal from the Order Entered April 5, 2019, In the Court of Common Pleas of Schuylkill County, Civil Division at No(s): S-1868-2011, Charles M. Miller, J.

Attorneys and Law Firms

C.P., appellant, pro se.

J.M., appellee, pro se.

Lori A. S. Guzick, Pottsville, for H.R. & C.A.R., appellees.

BEFORE: BOWES, J., LAZARUS, J., and DUBOW, J.

Opinion

OPINION BY BOWES, J.:

C.P. ("Father") appeals from the April 5, 2019 custody order that granted the exceptions filed by the maternal grandparents, H.R. and C.A.R. (collectively "Grandparents"), to the custody officer's report and recommendation, denied Father's counter-exceptions, and awarded Father periods of supervised physical custody of his ten-year-old son, L.P. We affirm.

L.P. was born in May 2009, of Father's relationship with J.M. ("Mother"), whom Father met while they were students at Penn State University. Mother and Father both struggle with substance abuse, and Father's recreational use of marijuana has been a recurring issue throughout the custody litigation.¹ The relationship remained intact for the first few years of L.P.'s life. During this period, the family was transient, *732 and it faced financial hardships. Following L.P.'s birth, Mother and Father moved from Pennsylvania to Michigan, in order for Father to obtain a medical marijuana license in that state. Thereafter, they relocated to Georgia, briefly, before settling in Maryland immediately before the relationship dissolved during 2012, when L.P. was approximately three years old.

Since July 2012, Grandparents have maintained primary physical custody of L.P. pursuant to a stipulated order that was entered after Mother alleged that Father fed L.P. a "fire cracker," which Mother described as a Graham cracker topped with marijuana-laced peanut butter. All four individuals shared legal custody. Mother, who resided with Grandparents in Tamaqua, Pennsylvania, for most of the ensuing period, now lives independently, in Ambler, Pennsylvania and exercises periods of physical custody for

up to four hours on alternating weekends. Similarly, Father exercises three hours of supervised visitation on alternating Saturdays. His relationship with Grandparents is strained, and Father contends that Grandparents intentionally relocated with L.P. from Tamaqua to Denver, Pennsylvania, after Father moved to Tamaqua to be closer to his son. He complains that it takes approximately two hours to travel from Tamaqua to Denver, which is about a fifty-five mile car trip. Grandparents counter that the duration is closer to one and one-quarter hour.

During 2014, Father filed a motion to modify the 2012 custody stipulation. Following a procedural misstep, the modification request culminated in a complete custody trial and a determination of L.P.'s best interests pursuant to the relevant factors outlined in § 23 Pa.C.S. § 5328(a).² As *733 it relates to the issue presented on appeal, the trial court awarded Grandparents physical custody pursuant to the terms of the initial 2012 stipulation except that it added a provision that conditionally extinguished the supervision requirement “upon Father's willingness to demonstrate sobriety and continued abstinence.” Trial Court Order, 7/2/15, at 1. In pertinent part, the addendum provided,

1. The Order Of Court dated July 16, 2012 per Baldwin, P.J., shall remain in full force and effect except that the Order is hereby amended to include the following with regard to Father's supervised partial physical custody as follows:

3(d). Father shall be provided the opportunity for unsupervised contact within his home setting on alternating Saturdays for three (3) hours provided and contingent upon Father's willingness to demonstrate sobriety and continued abstinence through submission to hair follicle tests to be conducted by Compliance Drug and Testing Services, LLC., “NE Compliance” at intervals of six (6) months for two (2) years from the date of this Order. In the event the first test administered within thirty (30) days - of the date of this Order is negative, then Father may have the aforementioned unsupervised visitation provided that he continues to submit to the other hair follicle tests. It is agreed by [Grandparents] that they shall pay and be responsible for the hair follicle test fees submitted by NE Compliance to them. Furthermore, Father shall sign a release authorizing NE Compliance to release the test result reports to [Grandparents'] counsel who shall be authorized to provide copies of the same to Mother and the [Grandparents].

3(e). In the event that any of the four (4) the hair follicle tests are positive then supervised visitation shall continue until Father tests negative.

Id. at 1-2.

The 2015 custody schedule continued unchanged until Father filed his most recent petition for modification on June 12, 2018. In addition to a general assertion that the prevailing custody arrangement was contrary to L.P.'s best interest, Father contended that, in light of his newly-acquired license to use medical marijuana as a mechanism to manage wrist pain, the trial court should not weigh the fact of his marijuana use against him. In this vein, Father argued, “Marijuana is now a state recognized medicine and shouldn't be used to keep children from parents.” Petition for Modification of Custody, 6/12/18, at 2. Following two non-consecutive days of evidentiary hearings pursuant to Pa.R.C.P. 1915.4-2(b) (regarding record hearings for determinations of partial custody), the custody officer filed a report noting its consideration of the best-interest factors and a recommendation that the trial court (1) terminate the drug-testing conditions on Father's ability to exercise unsupervised custody, and (2) significantly increase the duration and nature of Father's three-hour period of supervised partial physical custody to nine hours of unsupervised custody *734 on alternating Saturdays. It further recommended that Father's custodial periods increase to overnights in May 2019.

Grandparents filed exceptions to the custody officer's report and recommendation. In relevant part, Grandparents challenged the hearing officer's findings regarding Father's alleged medical condition and purported certification for medical marijuana, and its reliance upon the certification to discount Father's history of recreational drug use, and to remove the requirement that he submit negative drug-screens before exercising unsupervised physical custody. Subsumed within these arguments is Grandparents' contention that the custody officer erred in admitting into evidence Father's documentation concerning both his medical condition and his certification to use medical marijuana. They also complained that the hearing officer neglected to consider the presence of Father's housemates before awarding unsupervised overnight custody, and that the record did not sustain Father's supposition that Grandparents moved from Tamaqua out of spite or that Father was the primary caretaker when the family lived in Maryland.

While Father filed “counter exceptions,” he did not assert any challenges relating to the hearing, report, or recommendation.

Father simply responded to Grandparents' exceptions by presenting countervailing statements in opposition to Grandparents' contentions. Upon review of the record, the trial court entered the above-referenced order that granted all eight of Grandparents' exceptions and denied Father's counter exceptions.

Specifically, the trial court concluded that, upon review of the § 5328(a) factors and the safety concerns raised by Mother and Grandparents, it served L.P.'s best interests to continue with the prior custody arrangement and to reinstate the hair-follicle-testing condition to unsupervised physical custody. Trial Court Opinion, 4/5/19, at 12. The court continued,

it is unknown from the record what effect Father's alleged medical condition and use of marijuana, whether medically prescribed or used recreationally, may have on his ability to care for and parent the child. [Additional] ... admissible evidence is necessary before an increase in Father's custodial time would be warranted to insure the child's safety and well-being.

Id. Significantly, the trial court determined that the custody officer erred in relying upon Father's contention that he was certified to use medical marijuana, as Father failed to present medical evidence to establish either a wrist affliction that necessitates its use or the effect that the use of medical marijuana will have on Father's parenting ability. *Id.* at 12-13. It concluded, "without benefit of testimony from the doctor who Father alleges authorized the use of medical marijuana, it is not in the best interest of the child to expand Father's partial custody." *Id.* at 13.

This timely *pro se* appeal followed. Father initially failed to comply with Pa.R.A.P. 1925(a)(2)(i) by contemporaneously filing a concise statement of errors complained of on appeal. On June 5, 2019, this Court entered an order directing Father to file and serve the Rule 1925(b) statement with the trial court by June 12, 2019. He filed the required statement within the designated period, and the trial court entered an order directing our attention to its opinion entered on April 5, 2019.

Father presents two issues for our review:

1. Whether the court may ignore a properly [*bona fide*] registered medical marijuana card & certificate as substantiated evidence.

*735 2. [The trial court relied upon h]earsay or [un]substantiated evidence to show [Father's] abuse of [marijuana].

Father's brief at unnumbered 2.

Our standard of review is well-settled.

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.

V.B. v. J.E.B., 55 A.3d 1193, 1197 (Pa.Super. 2012) (citations omitted). As it relates to our deference to the trial court's role in reviewing the factual findings of a custody officer, we previously explained that

the trial court is required to make an independent review of the record to determine whether the hearing officer's findings and recommendations are appropriate. Although advisory, the hearing officer's report and recommendations are given the fullest consideration particularly on the issue of credibility of witnesses, which the trial court is not empowered to second-guess.

T.B. v. L.R.M., 753 A.2d 873, 881-82 (Pa.Super. 2000) (*en banc*) (cleaned up).

The argument section of Father's brief is deficient.³ In its entirety, the section provides:

Argument

My personal good track record and trying to be the most fit – presenting father I can be and use a safe natural medicine now approved by the PA state law should assumedly [sic] be considered fit and allow... my natural rights as [F]ather [to be] restored - as well as ... [M]other in my argument as we both should be by default fit until proven unfit. There [are] no grounds to assume otherwise and request natural parents be given full rights back to raise our child as we see fit and by default assume that is one to fulfill the 16 factors of best interest of the child since naturally we have instinct to care for our own flesh and blood and successor

to our genetics. [M]other and myself both love our child very much and should be given in light of this a chance to be free of control in the raising of our child.^[4]

Conclusion

I am a [*bona fide*] medical marijuana participant with [a Pennsylvania] ID *736 card[.] [Grandparents did not present] substantiated evidence to show abuse or suggest [that] I would be unsafe around my child (as protected by medical marijuana act). [M]other is an excellent parent and has shown to be responsible with finding work and being there for my son as much as [G]randparents allow. ...

Father's brief at 4-5. No relief is due.

Father's claims invoke the Medical Marijuana Act, which provides, in pertinent part,

(c) Custody determination.--The fact that an individual is certified to use medical marijuana and acting in accordance with this act shall not by itself be considered by a court in a custody proceeding. In determining the best interest of a child with respect to custody, the provisions of 23 Pa.C.S. Ch. 53 (relating to child custody) shall apply.

35 P.S. § 10231.2103(c).

From the foregoing excerpt, the statements of questions presented, and other declarative statements that Father asserts in his brief, we can discern two facets to Father's argument. Preliminarily, he contends that the trial court erred in discounting as inadmissible the evidence that he produced to establish his medical condition and his certification to use medical marijuana in Pennsylvania. Father argues that the medical marijuana identification card issued by the Commonwealth was admissible evidence under the business record exception to the prohibition against hearsay. As to the evidence of his underlying [wrist injury](#) and medical diagnosis, Father asserts that it would be impractical to require him to present the testimony of his physician.

Unfortunately for Father, these arguments are predicated upon the faulty legal position that, upon demonstrating his certification to use medicinal marijuana, the Medical Marijuana Act barred the court from considering any aspect of its use in reaching the best interest determination. As our review of this latter aspect of Father's claim is dispositive, we need only address the merits of that component.

We reject Father's contention that the trial court flouted the legislature's directive to forego consideration of marijuana

use in the determination of L.P.'s best interests. Chiefly, this argument fails because the trial court did not weigh the fact of Father's purported certification against him. In reality, the court examined Father's well-documented history of recreational drug use, including the allegations that Father laced his toddler's food with marijuana, incorporated those considerations into its best-interest determination, and concluded that it served L.P.'s best interests to employ the proven custody arrangement that had been in effect since 2012 and to reinstate the hair-follicle-testing conditions of unsupervised custody. Trial Court Opinion, 4/5/19, at 12.

Plainly, the Medical Marijuana Act does not preclude the trial court from making relevant findings concerning the effect of marijuana use, whether medical or recreational, on a parent's ability to care for his or her child. Indeed, contrary to Father's assertion, the Medical Marijuana Act expressly reaffirms § 5328(a) as the controlling mechanism for determining a child's best interest. *See* 35 P.S. § 10231.2103(c) ("In determining the best interest of a child with respect to custody, the provisions of 23 Pa.C.S. Ch. 53 (relating to child custody) shall apply."). That statutory framework explicitly requires the fact-finder to consider not only a parent's history of drug and alcohol use but also their mental health and physical conditions. Thus, rather than requiring the court to ignore Father's marijuana use, the *737 Medical Marijuana Act obligated the trial court to contemplate Father's physical condition, *i.e.* the nerve pain he complains of in his right wrist, and his reliance upon medication to subdue that pain. By way of comparison, [OxyContin®](#), [Vicodin®](#), [codeine](#), and [morphine](#) are legal substances when prescribed by a physician; however, it is beyond cavil that, prior to making a custody determination, § 5328(a)(14) and (15) mandates that a trial court consider how a parent's legal use of any of these substances impacts his or her child's best interest. That is precisely the analysis that the trial court performed in the case at bar.

Moreover, notwithstanding Father's protestations to the contrary, the certified record establishes that Father previously abused marijuana and was unsafe around his child. In this vein, during the October 2018 evidentiary hearing, Mother confirmed that she and Father engaged in the illegal use of marijuana recreationally and recounted Father's feeding to L.P. a marijuana-laced snack. N.T., 10/17/18, at 47-48. While Father continues to challenge the veracity of Mother's testimony, the trial court made credibility determinations in Mother's favor on these precise points during the 2015 litigation, and since the certified record

supports those findings, we will not disturb them. *See* Trial Court Opinion, 6/25/15, at 8-9.

Accordingly, for all of the foregoing reasons, Father's argument that the trial court violated the Medical Marijuana Act is baseless. While that act prohibits the fact-finder from penalizing a parent **simply** for utilizing medical marijuana, the trial court did not deny Father's motion to modify custody simply because Father sought to utilize a medical marijuana card. In actuality, following its consideration of the enumerated best-interest factors in light of the testimony presented during the two-day evidentiary hearing, the trial

court concluded that it was not in L.P.'s best interests to expand Father's three-hour period of supervised partial custody to unsupervised overnight custody without requiring Father to continue to submit to the drug screening regimen. Thus, no relief is due.⁵

Order affirmed.

All Citations

224 A.3d 729, 2019 PA Super 357

Footnotes

1 According to the custody report that the court-appointed custody evaluator prepared in 2012, Father acknowledged that he "us[ed] marijuana for recreational and social purposes" since he was eighteen. N.T., 6/25/15, Exhibit 1, Custody Evaluation, 5/30/12 at 10. Likewise, Mother reported that Father's fixation with marijuana use was "definitely an issue" for the couple. *Id.* at 9. She explained, "[Father] was more interested in growing marijuana than anything else, and he discussed this openly. After [Father's] mother found plants growing [in the home that Mother, Father, and L.P. were staying as guests], she asked [Father] to leave." *Id.* at 8.

2 Pursuant to [23 Pa.C.S. § 5328\(a\)](#), the determination of a child's best interest requires the examination of the following factors:

(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.

(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).

(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. § 5328](#). It is within the trial court's purview as the finder of fact to determine which enumerated best-interest factors are most salient and critical in each particular child custody case. *M.J.M. v. M.L.G.*, 63 A.3d 331 (Pa.Super. 2013). The trial court weighed the applicable custody factors in awarding Grandparents primary physical custody. In this vein,

it found that thirteen of the applicable factors militated to varying degrees in favor of Grandparents. Factors six, seven, and eight were either neutral or inapplicable. None of the factors favored Father.

- 3 Father's legal argument is undeveloped and without citation to any legal authority. It is beyond cavil that, "where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived." *In re W.H.*, 25 A.3d 330, 339 n.3 (Pa.Super. 2011). Instantly, however, we address the merits of Father's claim because the deficiency does not interfere with our review of his central claim that the trial court ignored the Medical Marijuana Act.
- 4 Mother did not file a brief in this appeal. During the October 2018 custody hearing, she noted her support of Grandparents' continuing exercise of primary custody, at least until she "can provide a nice home and a good school and everything that comes along with that." N.T., 10/17/18, at 52.
- 5 In addition to sustaining Grandparents' exceptions for the above-referenced reasons, the trial court accurately determined that the custody officer neglected to address best interest factors two, fourteen, and fifteen in relation to the unidentified members of Father's household. **See** Trial Court Opinion, 4/5/19, at 14 ("It is unknown whether Father's home is safe and appropriate for the child at the present time. The Custody Conciliation Officer failed to establish the identity and the background of the residents of Father's home in accordance with the [best interest] factors[.]").

The Superior Court's custody decision in *Rishel v. Fuller* highlights the application of 23 Pa.C.S. §§5328 and 5329. The Court affirmed the trial court's denial of Father's Petition for Modification of a custody order in which Father requested monthly video visits or telephone calls with his son from jail. No other relief was requested in Father's Petition.

This decision is remarkable because the Court examined extensively the custody factors in §5328, but failed to address, as required, the application of §5329 Consideration of Criminal Convictions. The Court's failure to review the Consideration of Criminal Convictions in §5329 foreclosed its review of Father's "threat of harm" in his request for remote contact, via video or telephone, with his child.

The parties' son was born in 2013. On October 28, 2019, Mother was granted sole legal and physical custody of their son. On February 24, 2020, Father filed his Petition for Modification. His Petition was denied and Father filed Exceptions.

Father was incarcerated for the manufacture, sale or delivery or possession of drugs. After Father was released after serving his sentence for the drug conviction, he was charged with terroristic threats towards Mother and reincarcerated for a parole violation, where he remained as of the date of this decision.

Rishel v. Fuller

Superior Court of Pennsylvania

March 9, 2022, Decided; March 9, 2022, Filed

No. 1184 MDA 2021

Reporter

2022 Pa. Super. Unpub. LEXIS 614 *

TEAL PATRICE RISHEL v. ANDRE DASHAWN
FULLER, Appellant

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

Prior History: [*1] Appeal from the Order Entered
August 2, 2021. In the Court of Common Pleas of
Luzerne County Civil Division at No(s): 2019-11235.

Judges: BEFORE: OLSON, J., KUNSELMAN, J., and
STEVENS, P.J.E.* MEMORANDUM BY STEVENS,
P.J.E.

Opinion by: STEVENS

Opinion

MEMORANDUM BY STEVENS, P.J.E.:

Andre Dashawn Fuller ("Father") appeals *pro se* from
the August 2, 2021, order entered in the Court of
Common Pleas of Luzerne County, which denied his
petition for modification of an existing custody order to
provide him with monthly video visits or telephone calls

with his minor son, E.F., while Father is incarcerated.¹
After a careful review, we affirm.

The relevant facts and procedural history are as follows:
On September 10, 2019, Teal Patrice Rishel ("Mother")
filed a complaint in custody seeking sole physical and
legal custody of E.F., who was born in April of 2013.
Mother averred she and Father were never married, and
E.F. has always resided with her. She also averred:

[Father] is violent, vindictive, and abusive and had
been incarcerated during the life of [E.F.] and is
currently incarcerated again. [Father] is physically
abusive, verbally abusive, and violent towards
[E.F.], and [Mother] fears for [E.F.'s] safety as well
as [*2] her own.

Mother's Custody Complaint, filed 9/10/19, at ¶ 6.

Mother attached to her complaint a criminal

¹ This Court has noted that the current version of the Custody
Act does not contain a provision for an award of "visitation."
See S.T. v. R.W., 2018 PA Super 192, 192 A.3d 1155, 1165
(Pa. Super. 2018). In *S.T.*, *supra*, we held that an incarcerated
parent's request for the right to contact his or her child via
telephone is to be construed as a request seeking "supervised
physical custody" requiring the trial court's consideration of the
factors set forth in 23 Pa.C.S.A. § 5328(a). *Id.* at 1165. Here,
as discussed *infra*, the trial court undertook an extensive
assessment of these statutory factors.

* Former Justice specially assigned to the Superior Court.

record/abuse verification form indicating she has had no criminal convictions or juvenile adjudications of delinquency for a variety of listed crimes, including the manufacture, sale, delivery, or possession of a controlled substance or other drug or device.

On October 21, 2019, the matter proceeded to a hearing before a conference officer, and on October 28, 2019, the conference officer entered an order granting Mother sole legal and physical custody of E.F.

On February 24, 2020, Father filed a petition for modification of the custody order wherein he sought video visits or telephone calls with E.F.² Father attached to his petition a criminal record/abuse verification form indicating he was in jail for a 2013 conviction related to the manufacture, sale, delivery, or possession of a controlled substance or other drug or device, and, additionally, he had charges pending against him related to making terroristic threats, *18 Pa.C.S.A. § 2706*. He averred Mother had been previously arrested for possession of a controlled substance.

On November 18, 2020, the conference officer held a hearing, and on January [*3] 22, 2021, the conference officer filed a recommendation and interim order denying Father's petition for modification of the custody order. Father filed exceptions at which point the conference officer discovered the November 18, 2020, hearing had not been recorded due to faulty equipment. Thus, the trial court remanded the matter for a new hearing, which was held before the conference officer on May 25, 2021.

²Although Father's petition was time-stamped and docketed on March 4, 2020, we shall deem it to have been filed on February 24, 2020, when it was handed to prison authorities. *See Commonwealth v. Castro, 2001 PA Super 17, 766 A.2d 1283 (Pa.Super. 2001)* (holding document deemed filed by prisoner when delivered to prison authorities for mailing).

Mother and Father appeared *pro se* at the May 25, 2021, hearing. Father testified he is the biological father of E.F., and he is currently incarcerated at SCI Benner Township, N.T., 5/25/21, at 5. Father asserted he was seeking monthly video visits or telephone calls with E.F. *Id.* at 5-6.

Father testified he loves E.F., and he has been "kind of depressed not being able to hear from [E.F.]." *Id.* at 7. Father testified he was incarcerated for six years at SCI Frackville, and during this time, he spoke to E.F. on the telephone "regularly" and sent him birthday cards. *Id.* at 8. He indicated that, during this time of incarceration, he and Mother had "a good relationship," and she brought E.F. to the prison "monthly" to visit Father. *Id.* at 6, 8. However, Father indicated that, at some [*4] point during his incarceration, he agreed to a protection from abuse ("PFA") no-contact order as to Mother. *Id.* at 8-9. The PFA order does not expire until October of 2023. *Id.* at 9.

On August 27, 2019, Father was released on parole from SCI Frackville; however, he was reincarcerated on September 2, 2019. *Id.* at 8. Father testified that during his week on parole he took E.F. to Chuck E. Cheese and a festival. *Id.* at 7. He explained he was arrested for making terroristic threats on September 2, 2019, after he tried to take E.F. to a family cookout in New Jersey, but Mother refused to release E.F. into his custody. *Id.*

Father testified the last time he had contact with E.F. was on September 1, 2019, prior to his most recent reincarceration. *Id.* Father acknowledged he has taken no steps to modify the PFA order to provide for him to have contact with Mother as it relates to E.F. *Id.* at 9. Father proposed that the conference officer issue an order directing a three-way conference call whereby his mother (E.F.'s paternal grandmother) would be the connection between Father and E.F. *Id.* at 10.

Father testified his parole was revoked after his September 2, 2019, arrest, and he is expecting a parole [*5] hearing in the next six months. *Id.* at 11. He noted that his terroristic threats case is still pending. *Id.* However, he is hoping to be released from prison in 2024. *Id.*

Mother testified there is a lot of history between her and Father. *Id.* She indicated she does not believe the prison will permit a three-way conference call, so that is not a viable option. *Id.* at 11-12. Mother testified she refused to allow E.F. to travel to New Jersey with Father on September 1, 2019, because Father was on parole. *Id.* at 12. She indicated Father was "trying to take [E.F.] along while he violated parole. So, that is very irresponsible as a parent in my opinion." *Id.*

Mother testified Father does not have her home address per the PFA order, so he sends letters addressed to E.F. to maternal grandmother's residence. *Id.* She testified that in a recent letter Father made statements to E.F. insinuating Mother does not protect E.F., and, thus, he would not be surprised to learn that E.F. has had the COVID-19 virus. *Id.* Mother testified E.F. has never tested positive for the virus. *Id.* She also noted Father made comments in the letter suggesting Mother is not a good parent because she insists that E.F. wears [*6] eyeglasses. *Id.* at 13. Mother testified she makes E.F. wear eyeglasses because "he needs glasses." *Id.* She indicated "I took him for glasses as any good parent would because he couldn't see...[and] was complaining of headaches." *Id.*

Mother testified that during Father's six years of incarceration she gave Father "multiple opportunities to be the father that [E.F.] deserves to have in his life from phone calls to visits." *Id.* She indicated she tried to help them build a relationship, but Father kept focusing on her. *Id.* For instance, if she put E.F. on the telephone, Father would "say a few words to [E.F.] and then tell him

to give the phone back to me even though I expressed I was only answering the phone so he [could] speak to [E.F.], not me." *Id.*

Mother testified that during some of the telephone conversations Father would speak negatively about her to E.F. *Id.* Father blamed Mother for the fact he was in prison, and he told E.F. that when he got out of prison E.F. would be living with him. *Id.* Mother noted Father made these comments without having any home plan, job ideas, or stability to provide for E.F. *Id.* at 14.

Mother testified she took E.F. to visit Father while he was in prison [*7] at SCI Frackville before he was released on parole, and she clarified the only reason she did so was for E.F. and Father to build a bond. *Id.* However, Mother testified that, instead of focusing on E.F., Father focused on her. *Id.* She testified Father paid "very minimal attention to [E.F.]" and spent the visit mainly trying to touch Mother inappropriately. *Id.*

Mother acknowledged she took E.F. to the festival in Scranton when Father was on parole in 2019 so that Father could see E.F. *Id.* She indicated Father arrived at the festival during the middle of the afternoon and came with one of his friends, who was visibly intoxicated. *Id.* Father wanted his friend to walk around the festival with E.F. while Father talked to Mother; however, Mother would not allow this to occur, which visibly upset Father. *Id.* Mother testified Father then called her inappropriate names in front of E.F. *Id.*

Mother testified Father surrounds himself with "gang members," and he says he is the "gang leader." *Id.* Mother confirmed Father took a parenting class while he was in prison; however, she testified that, judging by Father's actions while he was on parole, he did not learn anything from the class. *Id.* at 15. [*8] Mother testified Father has poor judgment as to the boundaries between an adult conversation and a child being present during

the conversation. *Id.*

Mother testified she has a full-time job, takes good care of E.F., and provides for everything he needs financially. *Id.* She confirmed Father has had no contact with E.F. since September of 2019. *Id.* She requested the conference officer deny Father's request for video visits or telephone calls because Father speaks inappropriately about her to E.F. and confuses E.F. *Id.* She noted that, since Father's arrest on September 2, 2019, she has not afforded Father the opportunity to speak to E.F. because Father made threats directly towards Mother and her loved ones. *Id.* at 16.

Mother testified E.F. knows that Father is his biological father, and he is in prison. *Id.* She indicated E.F. does not express any interest in speaking to Father, and E.F. is not missing anything from not having a relationship with Father as he has a different stable father figure in his life. *Id.*

Mother testified E.F. has no contact with his paternal grandmother or aunt because when Father was arrested on September 2, 2019, paternal grandmother blamed Mother while paternal [*9] aunt threatened to have a physical altercation with Mother for calling the police. *Id.* at 17. Mother testified she has not permitted E.F. to have contact with his paternal grandmother or aunt because she believes they will poison E.F. against her and convince him "Father has done nothing wrong." *Id.* Mother testified she is trying to raise a respectful child, and Father's family is not acting accordingly. *Id.*

Father cross-examined Mother and asked her whether he has ever been physically abusive or violent towards E.F. *Id.* at 19. Mother responded that, while she was pregnant with E.F., Father threw her onto a bed with such force that the bed broke, and Father stated he did not care if the child died. *Id.* at 18-19. She testified that, in her mind, that constituted physical violence towards

E.F. *Id.* at 19. She noted that Father has not had many opportunities to show his physically violent side towards E.F. because he has been in prison for most of E.F.'s life. *Id.* at 19-20.

Father asked Mother why it would be confusing for E.F. to have contact with him. Mother explained that it would be confusing and detrimental for E.F. to have contact with Father because Father neither knows how to have [*10] a relationship with a child nor speak to E.F. like a father. *Id.* Mother testified she expects E.F. to grow up and be a good father someday, and Father is not able to show E.F. the necessary qualities. *Id.* at 20.

Father asked Mother why, if she had a problem with E.F. being around his intoxicated friend at the festival, she permitted E.F. to go on a trip to New York with maternal grandmother, who is a heroin addict. *Id.* at 21. Mother testified that maternal grandmother is a recovering addict; however, she was not under the influence of drugs when she took E.F. to New York to visit maternal aunt. *Id.* Mother confirmed she viewed maternal grandmother before she left for the trip, and she was "100 percent sure" maternal grandmother was not under the influence. *Id.* at 21-22. Mother noted several other family members, none of whom use drugs, were present during the four-day vacation, and Mother was "very certain that [E.F.] was completely safe." *Id.*

Father asked Mother whether she is a gang member. Mother testified she is not, and never has been, a member of a gang. *Id.* at 22. She admitted that, when she was sixteen years old, she had friends who were affiliated with a gang; however, aside [*11] from Father, she has spent no time with any gang affiliated people since well before the time E.F. was born. *Id.*

The following relevant exchange then occurred:

[FATHER]: And, one last question. You said that I violated my parole by going to New Jersey to see

my family; but, you and your boyfriend had a firearm that was inside of your house that you said was in a safe.

[MOTHER]: What is your question?

[FATHER]: Did you own—do you or your boyfriend own a firearm that you stated was in a safe at your house in a safe spot?

THE COURT: Okay, sir. I'm going to ask you for a timeframe. When are we speaking of?

[FATHER]: August 27th of 2019 and between—and between the time I got arrested.

THE COURT: Okay. So, sir, I'm going to ask you this question. You're requesting to have a monthly contact with your son, [E.F.] What does this question have to do with your request here today?

[FATHER]: Because she stated that I was violating my parole by doing this; but she, herself, was on probation—on parole for possession of a controlled substance; but, that is a violation of her conditions of parole to be around firearms, alcohol, or any other type of things like that.

So, by her having this firearm in her apartment [*12] knowing that violates her parole and her probation, so by her trying to say that I was violating my parole by going to see my parents in another state, I believe that would, you know, show that she's trying to be vindictive of trying to bring up reasons to not allow me to talk to [E.F.] on her own—

THE COURT: Here's the thing, sir. I will tell you this. I mean, all of this information, all the testimony being given to me, is something I'm going to take into consideration and give the appropriate weight to when it comes to who is on parole and who was on probation; and, if there were any possible violations of those, I mean, those aren't really the crux as to why we're here today.

We're here today to determine if it's in the child's

best interest to begin the video contact. I understand there is a history here, and we can go back a long ways [*sic*] and say he said/she said; but, I can tell you, sir, that when it comes to Mom's testimony that you made a decision to apparently leave, a violation of your obligations, that is not really the crux of why we're here.

Id. at 22-24.

The conference officer asked Mother whether E.F. was in counseling, and she indicated that he was not in counseling [*13] but that she would be "open" to placing him in counseling. *Id.* at 25. She also indicated that, if a counselor spoke with E.F. and determined it would be in his best interest to have telephone calls or video visits with Father, she would take it into consideration. *Id.* She noted she wants "to do whatever is right for [E.F.]." *Id.* at 25-26. She indicated she wanted E.F. to have a relationship with Father; however, Father kept saying inappropriate things to E.F. such that she concluded it was not in E.F.'s best interest. *Id.*

On June 9, 2021, the conference officer denied Father's petition for modification of the custody order in the form of video visits or telephone calls, and Father filed a timely exception to the trial court. On August 2, 2021, the trial court held a hearing on the matter, and on that same date, the trial court dismissed Father's exceptions.

Father filed a timely *pro se* notice of appeal. He failed to file a contemporaneous concise statement of errors complained of on appeal pursuant to *Pa.R.A.P. 1925(a)(2)(i)* and *(b)*; however, after the trial court directed Father to file a *Rule 1925(b)* statement, Father did so.³ The trial court filed a *Pa.R.A.P. 1925(a)* opinion

³We note the trial court filed its *Rule 1925(b)* order on September 9, 2021. Therein, the trial court indicated Appellant was required to file his *Rule 1925(b)* statement within thirty

on October 5, 2021, wherein it set forth its specific analysis [*14] of the sixteen factors set forth in 23 Pa.C.S.A. § 5328(a).

On appeal, Father contends the trial court erred in denying his petition for modification of custody to allow for him to visit monthly with E.F. via video or telephone. Specifically, Father contends the trial court failed to consider Mother intentionally lied about Father being physically abusive towards E.F., as well as about her conviction for possession of a controlled substance. Father contends that, in light of Mother's intentional falsehoods, the trial court erred in deeming her testimony to be credible.

Initially, we note that "[w]e review a trial court's determination in a custody case for an abuse of discretion, and our scope of review is broad." S.W.D. v. S.A.R., 2014 PA Super 146, 96 A.3d 396, 400 (Pa.Super. 2014). We will not find an abuse of discretion "merely because a reviewing court would have reached a different conclusion." In re K.D., 2016 PA Super 162, 144 A.3d 145, 151 (Pa.Super. 2016) (citation omitted). Rather, "[a]ppellate courts will find a trial court abuses its discretion if, in reaching a conclusion, it overrides or misapplies the law, or the record shows that the trial

days from the date the order was filed. Although Father's Rule 1925(b) statement was time-stamped and docketed on October 19, 2021, we shall deem it to have been filed on October 4, 2021, when it was handed to prison authorities. See Castro, supra.

As Father complied with the trial court's order to file the Rule 1925(b) statement by October 9, 2021, and there is no assertion of prejudice, we overlook any defect. See In re K.T.E.L., 2009 PA Super 205, 983 A.2d 745 (Pa.Super. 2009) (holding the failure to file a 1925(b) concomitantly with a children's fast track appeal is considered a defective notice of appeal and will not be dismissed since failure to file the statement is a violation of a procedural rule and not an order of court).

court's judgment was either manifestly unreasonable or the product of partiality, prejudice, bias or ill will." *Id.*

[O]n issues of credibility and weight of the evidence, we defer [*15] to the findings of the trial [court] who has had the opportunity to observe the proceedings and demeanor of the witnesses.

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

R.M.G., Jr., v. F.M.G., 2009 PA Super 244, 986 A.2d 1234, 1237 (Pa.Super. 2009) (quotations omitted). The test is whether the evidence of record supports the trial court's conclusions. Ketterer v. Seifert, 2006 PA Super 144, 902 A.2d 533, 539 (Pa.Super. 2006).

It is well settled that "[t]he paramount concern in child custody cases is the best interests of the child." C.G. v. J.H., 648 Pa. 418, 193 A.3d 891, 909 (2018). "The best-interests standard, decided on a case-by-case basis, considers all factors which legitimately have an effect upon the child's physical, intellectual, moral and spiritual well-being." M.J.N. v. J.K., 2017 PA Super 268, 169 A.3d 108, 112 (Pa.Super. 2017).

This case is governed by the Child Custody Act ("Act"), 23 Pa.C.S.A. §§ 5321-5340, which became effective on January 24, 2011. The Act enumerates the following types of custody awards that a court may order:

(a) **Types of award.** — After considering the factors set forth in section 5328 (relating to factors to consider when awarding custody), the court [*16] 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(a) (bold in original).

Instantly, as indicated *supra*, we deem Father's request in his petition for modification as a request for "supervised physical custody." *S.T. v. R.W., 2018 PA Super 192, 192 A.3d 1155, 1165 (Pa.Super. 2018)* (footnote omitted) ("[I]ncarcerated parents who seek some form of contact with their children—whether it be a request that the children visit them or otherwise—are seeking an award of 'supervised physical custody' as defined under § 5323.").

The trial court was required to consider the following enumerated list of factors in determining E.F.'s best interests related to Father's request for supervised physical custody at SCI Benner Township, where he is currently incarcerated:

(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 [*17] 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.

(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).

(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, [*18] 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).

Further, we note that in deciding custody cases where a parent is incarcerated, this Court has stated that the factors delineated in Etter v. Rose, 454 Pa. Super. 138, 684 A.2d 1092 (Pa. Super. 1996), which was decided prior to the effective date of the Act, "are now assimilated into § 5328(a) analysis under § 5328(a)(16)." S.T., 192 A.3d at 1167 (citations omitted).

Those factors include:

- (1) age of the child;
- (2) distance and hardship to the child in traveling to the visitation site;
- (3) the type of supervision at the visit;
- (4) identification of the person(s) transporting the child and by what means;
- (5) the effect [*19] on the child both physically and emotionally;
- (6) whether the parent has and does exhibit a genuine interest in the child; and
- (7) whether reasonable contacts were maintained in the past.

S.T., 192 A.3d at 1167 (quoting M.G. v. L.D., 2017 PA Super 29, 155 A.3d 1083, 1094 (Pa. Super. 2017)) (citation omitted).

In S.T., supra, we also noted that our Supreme Court included another relevant consideration, namely:

- (8) the nature of the criminal conduct that culminated in the parent's incarceration, regardless of whether that incarceration is the result of a crime enumerated in [section 5329(b)].

M.G. v. L.D., 155 A.3d at 1094.] Although Etter was decided prior to the amendments to our current Custody Law, in M.G. we determined they still played a role in deciding prison cases.

S.T., 192 A.3d at 1167.

In the case *sub judice*, in its opinion, the trial court initially recognized E.F.'s age, noted the difficulties related to E.F. speaking to Father due to the PFA order, recognized the type of communication Father was seeking, and recognized the contacts Father had in the past with E.F. *See* Trial Court Opinion, filed 10/5/21, at 1-2. The trial court noted it found "the testimony presented by Mother to be credible and did not find the Father credible." Trial Court Opinion, filed 10/5/21, at 2. The trial court then assessed the Section 5328(a) factors as follows:

1. Which party is more likely [*20] to encourage and permit frequent and continuing contact between the child and another party.

This factor is in favor of Mother. Mother has encouraged contact because she met with Father in prison with E.F., as well as telephone and video calls. Father is currently incarcerated until 2024. Mother is open to taking E.F. to professional counseling for talking with Father. Mother is willing to then take a second look at Father's contact with E.F. Further, there has been no testimony regarding Father as it relates to this factor, as he has been incarcerated since E.F. was born.

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 is in favor of Mother. Father was

reincarcerated [in] 2019 due to terroristic threats on Mother's life and the life of others around Mother. When Mother was pregnant, Father threw her on the bed, [broke] the bed, [and said] he did not care if Mother or child died. Mother has since obtained a PFA order against Father. There has been no testimony regarding [*21] abuse committed by either party against E.F.

(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).

Not applicable. There has been no testimony of abuse from Father or Mother. Father has been incarcerated for E.F.'s entire life.

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

This factor is in Mother's favor. Mother cared for E.F. throughout E.F.'s entire life, as Father has been incarcerated and will not be released from prison until 2024.

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

Applicable in favor of Mother. E.F. currently resides with Mother. It is nearly impossible for Father to attend to E.F.'s needs, as he is incarcerated. On one occasion when Father had a gap between his incarcerations, he attempted to [visit] the child [at] a festival, but Mother would not allow Father to take E.F., as Father showed up with an intoxicated friend. Father was irritated and called Mother inappropriate names in front of E.F. Further, Mother states Father surrounds himself with gang members and brags that he is a gang leader. Continuity and stability in [*22] E.F.'s life is best achieved by Mother.

(5) The availability of extended family.

Father has a mother and a sister[;] however, Mother does not have a good relationship with Father's family. When Father was incarcerated for terroristic threats against Mother, Father's mother and sister called Mother, screaming and threatening her. Mother believed Father's sister wanted to have a physical altercation with Mother.

(6) The child's sibling relationships.

Not applicable. There has been no testimony concerning this factor.

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

Not applicable. There has been no testimony from the child concerning this factor.

(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.

Applicable in favor of Mother. Father has spoken negatively about Mother to E.F., saying it was Mother's "fault he couldn't live [with] us or that he couldn't be around."

(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 [*23] .

The court finds that Mother is more likely to maintain a loving, stable, consistent, and nurturing relationship with the child adequate for the child's emotional needs. Father is currently incarcerated and cannot provide or care for E.F. Further, during a gap between Father's incarceration, Father attempted to take E.F. to a family function in New Jersey, which would have violated his parole. Additionally, Father was reincarcerated in 2019 due

to terroristic threats on Mother's life and the life of others around Mother. Moreover, Mother testified that Father talks to E.F. inappropriately, not knowing the difference between a conversation with an adult versus a child. Father also would make promises to E.F. that Father could not fulfill while incarcerated, [thus] further confusing E.F.

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

Applicable in favor of Mother, as E.F. resides with Mother and Father is incarcerated until 2024. Father would not be able to attend to E.F.'s daily physical, emotional, developmental, educational and special needs.

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

Not [*24] applicable. There has been no testimony regarding this factor. Mother's address is confidential [because of the PFA order], and Father is currently incarcerated.

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

Applicable in favor of Mother as Father is incarcerated and cannot care for E.F. or make any 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.

Applicable in favor of Mother. Father was reincarcerated [in] 2019 due to terroristic threats on Mother's life and the life of others around Mother. Mother has a PFA order against Father, which

expires on October 23, 2023. The PFA order has no provision for Father to contact Mother for purposes of custody or E.F.'s well-being. When E.F. talked to Father on the phone or visit[ed] him in prison, Father would only say a few words to E.F., then concentrated on talking to Mother and attempting to convince her to kiss or hug him.

(14) The history of drug [*25] or alcohol abuse of a party or member of a party's household.

There was some testimony of Mother being on parole for possession of a controlled substance.

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

Not applicable. There has been no testimony regarding this factor.

(16) Any other relevant factor.

Mother has a PFA order against Father. The PFA order has no provision for Father to contact Mother for purposes of custody or E.F.'s well-being. As such, any contact Father has with Mother, for any reason, could result in a PFA violation, which may add more time to Father's incarceration.

CONCLUSION:

The evidence persuades the [trial] court that Mother is currently the parent that can care for E.F., and provide for E.F.'s educational, physical, and emotional needs. Therefore, it is not in E.F.'s best interest to have telephone/video conference calls with Father.

Trial Court Opinion, filed 10/5/21, at 3-7 (bold in original) (citations to record omitted).

We find no abuse of discretion or error of law. *See V.B. v. J.E.B., 2012 PA Super 200, 55 A.3d 1193 (Pa. Super. 2012)*. The trial court's factual findings are supported by the competent evidence of record, and the trial court's

conclusions are reasonable. *See id.*

Affirmed.

To the extent [*26] Father contends the trial court erred in deeming Mother's testimony to be more credible than his testimony, we note it was properly within the trial court's province to make such a determination. *See R.M.G., Jr., supra.*

Judgment Entered.

Date: 03/09/2022

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Further, to the extent Father contends the trial court did not properly weigh the veracity of Mother's assertions regarding her allegation that Father physically abused E.F.⁴ and/or that she was not convicted of possession of a controlled substance, we note "[t]he parties cannot dictate the amount of weight the trial court places on evidence." *R.M.G., Jr., 986 A.2d at 1237* (quotations omitted).

In any event, in considering the factors under *Section 5328(a)*, the trial court found there was no evidence suggesting Father abused E.F., and the trial court acknowledged there was testimony that Mother was on parole for possession of a controlled substance. To the extent Father is asking us to re-weigh the evidence, we decline to do so. *See id.* The paramount concern in this matter was the best interest of E.F., and our interference is unwarranted given the trial court considered the best interest of E.F. in a careful and thorough manner. *See R.M.G., Jr., supra.*

For all of the aforementioned reasons, we affirm the trial court's order denying Father's [*27] petition for modification of custody with respect to E.F.

⁴As indicated *supra*, Mother explained during her testimony that, when Father pushed her onto a bed while she was pregnant with E.F., she believed this constituted physical abuse of E.F. The trial court considered this evidence and found that while Father's actions constituted abuse towards Mother it did not constitute abuse towards E.F. *See* Trial Court Opinion, filed 10/5/21, at 3 (pertaining to factor 2 and 2.1).

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 78 Session of
2021

INTRODUCED BY BAKER, SANTARSIERO, VOGEL, KEARNEY, FONTANA,
BARTOLOTTA, COLLETT, HUGHES, MARTIN, YUDICHAK, BLAKE, COSTA,
SCHWANK, BROWNE, PHILLIPS-HILL, MENSCH, YAW, MUTH, KANE,
COMITTA AND STEFANO, JANUARY 22, 2021

AS AMENDED ON THIRD CONSIDERATION, JUNE 21, 2021

AN ACT

Amending Titles 23 (Domestic Relations) and 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, in child custody, further providing for definitions, for award of custody, for factors to consider when awarding custody, for consideration of criminal conviction, for guardian ad litem for child, for counsel for child and for award of counsel fees, costs and expenses; and, in Administrative Office of Pennsylvania Courts, providing for child abuse and domestic abuse education and training program for judges and court personnel.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The General Assembly finds and declares as follows:

(1) The Commonwealth has a duty to protect all children in this Commonwealth and all three branches of the State government play important roles in fulfilling that duty.

(2) Domestic abuse is a pattern of abuse within the family or household and can include abuse of a partner, spouse, child or pet.

(3) Although abusers often use physical violence as one

of the tactics to commit domestic abuse, these tactics are not necessarily physical or illegal.

(4) These tactics can include verbal, emotional, psychological and economic abuse, isolation, threats, controlling behaviors, monitoring, litigation abuse and threats to seek or demands for custody or joint custody to pressure the partner to return or punish the partner for leaving.

(5) The health and safety of all children in this Commonwealth must be the first priority in all decisions concerning child custody.

(6) It is the intent of the General Assembly to ensure that in all cases and controversies before the courts involving questions of child custody, the health, safety and welfare of the child are protected and regarded as issues of paramount importance.

Section 2. The definition of "abuse" in section 5322(a) of Title 23 of the Pennsylvania Consolidated Statutes is amended and the subsection is amended by adding definitions to read:
§ 5322. Definitions.

(a) This chapter.--The following words and phrases when used in this chapter shall have the meanings given to them in this subsection unless the context clearly indicates otherwise:

"Abuse." As follows:

(1) As defined in section 6102 (relating to definitions) [.] and the term includes the crime of stalking pursuant to 18 Pa.C.S. § 2709.1 (relating to stalking).

(2) The term does not include the justified use of force in self-protection or for the protection of other persons in

accordance with 18 Pa.C.S. § 505 (relating to use of force in self-protection) by a party in response to abuse or domestic abuse by the other party.

* * *

"Health and safety of the child." The term includes, but is not limited to, the physical, emotional and psychological well-being of the child.

"HOUSEHOLD MEMBER." A SPOUSE OR AN INDIVIDUAL WHO HAS BEEN A SPOUSE, AN INDIVIDUAL LIVING AS A SPOUSE OR WHO LIVED AS A SPOUSE, A PARENT OR CHILD, ANOTHER INDIVIDUAL RELATED BY CONSANGUINITY OR AFFINITY, A CURRENT OR FORMER SEXUAL OR INTIMATE PARTNER OR AN INDIVIDUAL WHO SHARES BIOLOGICAL PARENTHOOD, CURRENTLY SHARING A HOUSEHOLD WITH THE CHILD OR A PARTY.

* * *

"Nonprofessional supervised physical custody." Custodial time during which ~~an agency or an adult, who is not a licensed professional,~~ designated by the court or agreed upon by the parties, monitors the interaction between the child and the individual with those rights.

"Professional supervised physical custody." Custodial time during which a ~~licensed~~ professional ~~monitors,~~ WITH EDUCATION AND TRAINING ON THE DYNAMICS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, CHILD ABUSE AND THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN, OVERSEES the interaction between the child and the individual with those custody rights and promotes the ~~child's~~ health and safety OF THE CHILD during the interaction.

* * *

"TEMPORARY HOUSING INSTABILITY." A PERIOD NOT TO EXCEED SIX

MONTHS FROM THE DATE OF THE LAST INCIDENT OF ABUSE AS DETERMINED BY A COURT.

Section 3. Section 5323(e) of Title 23 is amended and the section is amended by adding subsections to read:

§ 5323. Award of custody.

* * *

(e) Safety conditions.--After considering the factors under [section 5328(a)(2)] sections 5328, 5329 (relating to consideration of criminal conviction), 5329.1 (relating to consideration of child abuse and involvement with protective services) and 5330 (relating to consideration of criminal charge), if the court finds [that there is an ongoing] a history of abuse of the child or a household member by a party or A PRESENT risk of harm to the child or an abused party and awards any form of custody to a party who committed the abuse or who has a household member who committed the abuse, the court shall include in the custody order safety conditions [designed], restrictions or safeguards as REASONABLY necessary to protect the child or the abused party~~f.~~, ~~including:~~ THE COURT SHALL INCLUDE IN THE CUSTODY ORDER THE REASON FOR IMPOSING THE SAFETY CONDITIONS, RESTRICTIONS OR SAFEGUARDS AND AN EXPLANATION WHY THE SAFETY CONDITIONS, RESTRICTIONS OR SAFEGUARDS ARE IN THE BEST INTEREST OF THE CHILD OR THE ABUSED PARTY. IF SUPERVISED CONTACT IS ORDERED, THERE SHALL BE A REVIEW OF THE RISK OF HARM AND NEED FOR CONTINUED SUPERVISION ON AT LEAST AN ANNUAL BASIS. THE SAFETY CONDITIONS, RESTRICTIONS OR SAFEGUARDS MAY INCLUDE ANY OF THE FOLLOWING:

- (1) Nonprofessional supervised physical custody.
- (2) Professional supervised physical custody.

(3) Limitations on the time of day that physical custody is permitted or on the number of hours of physical custody and the maximum number of hours of physical custody permitted per day or per week.

~~(4) Appoint a qualified professional specializing in treatment relating to the history of abuse or risk of harm to provide counseling. Counseling may include a program of treatment or individual therapy designed to rehabilitate the offending individual, which includes issues regarding physical or sexual abuse, domestic abuse, the psychology of the offender and the effects of abuse on the victim and the child. If counseling is ordered the court may require an evaluation by the appointed qualified professional to determine whether further counseling of the offender is necessary.~~ THE APPOINTMENT OF A QUALIFIED PROFESSIONAL SPECIALIZING IN PROGRAMMING RELATING TO THE HISTORY OF ABUSE OR RISK OF HARM TO PROVIDE BATTERER'S INTERVENTION OR HARM PREVENTION PROGRAMMING. BATTERER'S INTERVENTION AND HARM PREVENTION PROGRAMMING MAY INCLUDE PROGRAMMING DESIGNED TO REHABILITATE THE OFFENDING INDIVIDUAL, INCLUDING PRIORITIZING A BATTERER'S INTERVENTION OR HARM PREVENTION PROGRAM, IF AVAILABLE, OR THE IMPACTS OF PHYSICAL, SEXUAL OR DOMESTIC ABUSE ON THE VICTIM. THE COURT MAY ORDER AN EVALUATION BY THE APPOINTED QUALIFIED PROFESSIONAL UNDER THIS PARAGRAPH TO DETERMINE WHETHER ADDITIONAL PROGRAMMING IS NECESSARY.

(5) Limitations on legal custody.

(6) Any other safety condition, restriction or safeguard as necessary to ensure the health and safety of the child OR TO PROTECT A HOUSEHOLD MEMBER.

(e.1) Supervision.--If a court finds by a preponderance of the evidence that a party has subjected ABUSED the child or any household member to abuse, the court shall be presumed to, THERE SHALL BE A REBUTTABLE PRESUMPTION THAT THE COURT SHALL only allow nonprofessional supervised physical custody or professional supervised physical custody between the child and the party who committed the abuse unless the court makes a finding on the record that it finds by a preponderance of the evidence that the party no longer poses a risk of abuse to the child or any other household member and that another custody arrangement is in the best interest of the child and will not cause physical, emotional or psychological harm to the child.. A COURT MAY FIND THAT AN INDICATED REPORT FOR PHYSICAL OR SEXUAL ABUSE UNDER CHAPTER 63 (RELATING TO CHILD PROTECTIVE SERVICES) IS A BASIS FOR A FINDING OF ABUSE UNDER THIS SUBSECTION ONLY AFTER A DE NOVO REVIEW OF THE CIRCUMSTANCES LEADING TO THE INDICATED REPORT. NOTWITHSTANDING THE PROVISIONS OF THIS SUBSECTION, THE COURT MAY AWARD AN ALTERNATIVE FORM OF CUSTODY IF THE COURT FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT:

(1) THE PARTY NO LONGER POSES A RISK OF ABUSE TO THE CHILD OR ANY OTHER HOUSEHOLD MEMBER; AND

(2) ANOTHER CUSTODY ARRANGEMENT IS IN THE BEST INTEREST OF THE CHILD AND WILL NOT JEOPARDIZE THE HEALTH AND SAFETY OF THE CHILD.

(e.2) Professional supervision.--If a court finds by a preponderance of the evidence that there is an ongoing risk of abuse of the child, the court shall be presumed to THERE SHALL BE A REBUTTABLE PRESUMPTION THAT THE COURT SHALL only allow professional supervised physical custody between the child and

~~the party who committed the abuse unless the court makes a finding on the record that it finds by a preponderance of the evidence that the party no longer poses a risk of abuse to the child or any other household member and that another custody arrangement is in the best interest of the child and will not cause physical, emotional or psychological harm to the child.~~
POSES THE RISK OF ABUSE. A COURT MAY FIND THAT AN INDICATED REPORT FOR PHYSICAL OR SEXUAL ABUSE UNDER CHAPTER 63 IS A BASIS FOR A FINDING OF ABUSE UNDER THIS SUBSECTION ONLY AFTER A DE NOVO REVIEW OF THE CIRCUMSTANCES LEADING TO THE INDICATED REPORT. NOTWITHSTANDING THE PROVISIONS OF THIS SUBSECTION, THE COURT MAY AWARD AN ALTERNATIVE FORM OF CUSTODY IF THE COURT FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT:

(1) THE PARTY NO LONGER POSES A RISK OF ABUSE TO THE CHILD OR ANY OTHER HOUSEHOLD MEMBER; AND

(2) ANOTHER CUSTODY ARRANGEMENT IS IN THE BEST INTEREST OF THE CHILD AND WILL NOT JEOPARDIZE THE HEALTH AND SAFETY OF THE CHILD.

* * *

Section 4. Section 5328(a) of Title 23 is amended and the section is amended by adding a subsection to read:

§ 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 health and safety of the child, including the following:

~~(1) Which party is more likely to ensure the health and safety of the child.~~

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

(1) WHICH PARTY IS MORE LIKELY TO ENSURE THE HEALTH AND SAFETY OF THE CHILD.

(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.]

(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).

(2.2) Violent or assaultive behavior committed by a party, including past or current protection from abuse and sexual violence abuse protection orders WHERE THERE HAS BEEN A FINDING OF ABUSE.

(2.3) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party if contact is consistent with the health and safety needs of the child.

(2.4) THE EXISTENCE OF A PROTECTION FROM ABUSE ORDER ENTERED ON CONSENT OF THE PARTIES, WITH NO ADMISSION OR FINDING OF ABUSE, IF, UPON REVIEW OF THE FACTS PRESENTED AT THE CUSTODY HEARING, THE COURT FINDS THAT ABUSE OCCURRED.

(3) The ~~present and past~~ parental {duties} ~~and caretaker 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 except if changes

are necessary to protect the health and safety of the child
OR A PARTY.

(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 developmental stage, maturity and judgment. In assessing the factor under this paragraph, IF THE COURT FINDS THAT the child's fear of a party IS based on the party's ACTUAL AND specific conduct that is contrary to the child's best interest, THE FINDING shall be considered well-reasoned.

(8) The attempts of a [parent] party to turn the child against the other [parent] party, except in cases of abuse ABUSE [domestic violence] where reasonable safety measures are necessary to protect the health and safety of the child from harm. A PARTY'S REASONABLE CONCERNS FOR A CHILD'S HEALTH AND WELFARE AND THE PARTY'S REASONABLE EFFORTS TO PROTECT THE CHILD SHALL NOT BE CONSIDERED ATTEMPTS TO TURN THE CHILD AGAINST THE OTHER PARTY. A CHILD'S DEFICIENT OR NEGATIVE RELATIONSHIP WITH A PARTY SHALL NOT BE PRESUMED TO BE CAUSED BY THE OTHER PARTY.

A party's reasonable concerns for a child's health and welfare and the party's reasonable efforts to protect the child shall not be considered attempts to turn the child against the other party. A child's deficient or negative relationship with a party shall not be presumed to be caused by the other party.

(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 or self 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.

(a.1) Exception.--None of the factors in A FACTOR UNDER subsection (a) shall NOT be adversely weighed against a party if that party or the child was subjected to abuse by the other party. THE CIRCUMSTANCES RELATED TO THE FACTOR WERE IN RESPONSE TO ABUSE OR NECESSARY TO PROTECT THE CHILD OR THE ABUSED PARTY FROM HARM AND THE PARTY ALLEGING ABUSE DOES NOT POSE A RISK TO THE HEALTH AND SAFETY OF THE CHILD AT THE TIME OF THE CUSTODY HEARING. TEMPORARY HOUSING INSTABILITY AS A RESULT OF ABUSE SHALL NOT BE CONSIDERED AGAINST THE PARTY ALLEGING ABUSE.

(A.2) DETERMINATION.--NO SINGLE FACTOR UNDER SUBSECTION (A) SHALL BY ITSELF BE DETERMINATIVE IN THE AWARDING OF CUSTODY. THE COURT SHALL EXAMINE THE TOTALITY OF THE CIRCUMSTANCES, GIVING WEIGHTED CONSIDERATION TO THE FACTORS THAT AFFECT THE

HEALTH AND SAFETY OF THE CHILD, WHEN ISSUING A CUSTODY ORDER
THAT IS IN THE BEST INTEREST OF THE CHILD.

* * *

Section 5. Section 5329(a) of Title 23, amended June 5, 2020 (P.L.246, No.32), is amended AND THE SECTION IS AMENDED BY ADDING A SUBSECTION to read:

§ 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 party when considering the following offenses:

18 Pa.C.S. Ch. 25 (relating to criminal homicide).

18 Pa.C.S. § 2701 (relating to simple assault).

18 Pa.C.S. § 2702 (relating to aggravated assault).

18 Pa.C.S. § 2705 (relating to recklessly endangering another person).

18 Pa.C.S. § 2706 (relating to terroristic threats).

18 Pa.C.S. § 2709.1 (relating to stalking).

18 Pa.C.S. § 2718 (relating to strangulation).

18 Pa.C.S. § 2901 (relating to kidnapping).

18 Pa.C.S. § 2902 (relating to unlawful restraint).

18 Pa.C.S. § 2903 (relating to false imprisonment).

18 Pa.C.S. § 2910 (relating to luring a child into a motor vehicle or structure).

18 Pa.C.S. § 3011 (relating to trafficking in individuals).

18 Pa.C.S. § 3012 (relating to involuntary servitude).

18 Pa.C.S. § 3013 (relating to patronizing a victim of sexual servitude).

18 Pa.C.S. § 3121 (relating to rape).

18 Pa.C.S. § 3122.1 (relating to statutory sexual assault).

18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).

18 Pa.C.S. § 3124.1 (relating to sexual assault).

18 Pa.C.S. § 3125 (relating to aggravated indecent assault).

18 Pa.C.S. § 3126 (relating to indecent assault).

18 Pa.C.S. § 3127 (relating to indecent exposure).

18 Pa.C.S. § 3129 (relating to sexual intercourse with animal).

18 Pa.C.S. § 3130 (relating to conduct relating to sex offenders).

18 Pa.C.S. § 3301 (relating to arson and related offenses).

18 Pa.C.S. § 4302 (relating to incest).

18 Pa.C.S. § 4303 (relating to concealing death of child).

18 Pa.C.S. § 4304 (relating to endangering welfare of children).

18 Pa.C.S. § 5533 (relating to cruelty to animal).

18 Pa.C.S. § 5534 (relating to aggravated cruelty to animal).

18 Pa.C.S. § 5543 (relating to animal ~~infighting~~ FIGHTING).

18 Pa.C.S. § 5544 (relating to possession of animal fighting paraphernalia).

18 Pa.C.S. § 4305 (relating to dealing in infant children).

18 Pa.C.S. § 5902(b) (relating to prostitution and related offenses).

18 Pa.C.S. § 5903(c) or (d) (relating to obscene and other sexual materials and performances).

18 Pa.C.S. § 6301 (relating to corruption of minors).

18 Pa.C.S. § 6312 (relating to sexual abuse of children).

18 Pa.C.S. § 6318 (relating to unlawful contact with minor).

18 Pa.C.S. § 6320 (relating to sexual exploitation of children).

Section 6114 (relating to contempt for violation of order or agreement).

The former 75 Pa.C.S. § 3731 (relating to driving under influence of alcohol or controlled substance).

75 Pa.C.S. Ch. 38 (relating to driving after imbibing alcohol or utilizing drugs).

Section 13(a)(1) of the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act, to the extent that it prohibits the manufacture, sale or delivery, holding, offering for sale or possession of any controlled substance or other drug or device.

(A.1) DETERMINATION.--A CRIMINAL CONVICTION SPECIFIED UNDER SUBSECTION (A) SHALL NOT BY ITSELF BE DETERMINATIVE IN THE AWARDING OF CUSTODY. THE COURT SHALL EXAMINE THE TOTALITY OF THE CIRCUMSTANCES WHEN ISSUING A CUSTODY ORDER THAT IS IN THE BEST INTEREST OF THE CHILD.

* * *

~~Section 6. Sections 5334(c), 5335(b) and 5339 of Title 23 are amended to read:~~

SECTION 6. SECTION 5334(C) OF TITLE 23 IS AMENDED AND THE SECTION IS AMENDED BY ADDING A SUBSECTION TO READ:

§ 5334. Guardian ad litem for child.

* * *

(c) Abuse.--If substantial allegations of abuse [of the child] are made, the court [shall] may appoint a guardian ad litem for the child if:

(1) counsel for the child is not appointed under section 5335 (relating to counsel for child); [or] AND

(2) the court is satisfied that the relevant information will be presented to the court only with such appointment~~;~~;

or

~~(3) a guardian ad litem appointed under this section shall establish that the guardian ad litem received education and training under the program specified under 42 Pa.C.S. § 1908 (relating to child abuse and domestic abuse education and training program for judges and court personnel) or substantially similar training prior to appointment.~~

* * *

(F) EDUCATION AND TRAINING.--A COURT APPOINTING A GUARDIAN AD LITEM UNDER THIS SECTION SHALL MAKE REASONABLE EFFORTS TO APPOINT A GUARDIAN AD LITEM WHO RECEIVED EVIDENCE-BASED EDUCATION AND TRAINING RELATING TO CHILD ABUSE, INCLUDING CHILD SEXUAL ABUSE, DOMESTIC ABUSE EDUCATION AND THE EFFECT OF CHILD SEXUAL ABUSE AND DOMESTIC ABUSE ON CHILDREN.

SECTION 7. SECTIONS 5335(B) AND 5339 OF TITLE 23 ARE AMENDED TO READ:

§ 5335. Counsel for child.

* * *

(b) Abuse.--Substantial allegations of abuse [of the child] constitute a reasonable basis for appointing counsel for the child.

* * *

§ 5339. Award of counsel fees, costs and expenses.

~~(a) Award.--~~Under this chapter, a court may award reasonable interim or final counsel fees, costs and expenses to a party if the court finds that the conduct of another party was obdurate, vexatious[,] OR repetitive [or in bad faith]. This section may not apply if that party engaged the judicial process in good faith to protect the child from harm.

~~(b) Other costs.--~~The court may direct that a party who has been found to have perpetrated abuse to pay all or a portion of the fees, costs and expenses incurred by the other party, including attorney fees, costs relating to any counsel for the child and treatment expenses incurred relating to the abuse, including fees associated with any form of supervised physical custody.

Section 7 8. Title 42 is amended by adding a section to read:

§ 1908. Child abuse and domestic abuse education and training program for judges and court personnel.

The Administrative Office of Pennsylvania Courts may develop and implement an ongoing education and training program for judges, magisterial district judges and relevant court personnel, including guardians ad litem, counsel for children, masters and mediators, regarding child abuse, which includes all aspects of maltreatment, including sexual abuse, physical abuse, emotional abuse, implicit and explicit bias, trauma and neglect and the impact of child abuse and domestic violence on children. The education and training program shall include the latest best practices from evidence-based and peer-reviewed research by

recognized experts in the types of abuse designated under this section. The education and training program shall be designed to improve the ability of courts to recognize and respond to the impact of child abuse, domestic abuse and trauma on all victims, specifically children, and make appropriate custody decisions that are in the best interest of the child.

(A) PROGRAM.--THE ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS MAY DEVELOP AND IMPLEMENT AN ONGOING EDUCATION AND TRAINING PROGRAM FOR JUDGES, MAGISTERIAL DISTRICT JUDGES AND RELEVANT COURT PERSONNEL, INCLUDING GUARDIANS AD LITEM, COUNSEL FOR CHILDREN, MASTERS AND MEDIATORS REGARDING CHILD ABUSE. THE EDUCATION AND TRAINING PROGRAM SHALL INCLUDE ALL ASPECTS OF THE MALTREATMENT OF CHILDREN, INCLUDING ALL OF THE FOLLOWING:

- (1) SEXUAL ABUSE.
- (2) PHYSICAL ABUSE.
- (3) IMPLICIT AND EXPLICIT BIAS.
- (4) TRAUMA AND NEGLECT.
- (5) THE IMPACT OF CHILD ABUSE AND DOMESTIC VIOLENCE ON CHILDREN.

(B) BEST PRACTICES.--THE EDUCATION AND TRAINING PROGRAM UNDER SUBSECTION (A) SHALL INCLUDE THE LATEST BEST PRACTICES FROM EVIDENCE-BASED, PEER-REVIEWED RESEARCH BY RECOGNIZED EXPERTS IN THE TYPES OF CHILD ABUSE SPECIFIED UNDER SUBSECTION (A). THE ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS SHALL DESIGN THE EDUCATION AND TRAINING PROGRAM UNDER SUBSECTION (A) TO EDUCATE AND TRAIN RELEVANT COURT PERSONNEL ON ALL OF THE FACTORS LISTED UNDER 23 PA.C.S. § 5328 (A) (RELATING TO FACTORS TO CONSIDER WHEN AWARDING CUSTODY) AND IMPROVE THE ABILITY OF COURTS TO MAKE APPROPRIATE CUSTODY DECISIONS THAT ARE IN THE

BEST INTEREST OF THE CHILD, INCLUDING EDUCATION AND TRAINING
REGARDING THE IMPACT OF CHILD ABUSE, DOMESTIC ABUSE AND TRAUMA
ON A VICTIM, SPECIFICALLY A CHILD, AND SITUATIONS WHEN ONE PARTY
ATTEMPTS TO TURN A CHILD AGAINST ANOTHER PARTY.

Section 9. This act shall take effect in 120 days.