NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

J.A.M., SR., Appellant v. C.M.A., Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1887 MDA 2013

Appeal from the Order entered September 9, 2013,
in the Court of Common Pleas of Lancaster County,
Civil Division, at No(s): CI-11-08249

BEFORE: BOWES, OLSON, and FITZGERALD*, JJ.

MEMORANDUM BY OLSON, J.: **FILED APRIL 17, 2014**

J.A.M., Sr., ("Father") appeals, *pro se*, from the custody order entered on September 9, 2013, which denied Father's petition for contempt and petition to modify the prior court order, dated November 28, 2011, and granted the petition to modify the November 28, 2011 custody order filed by C.M.A. ("Mother"). We affirm.

In its Opinion entered on October 31, 2013, the trial court carefully and accurately set forth the factual background and procedural history of this appeal.

> Father was arrested and incarcerated on February 28, 2009. On August 3, 2010, Father pleaded guilty [to two counts of involuntary deviate sexual intercourse, two counts of indecent assault, and one count of corruption of minors] and received a sentence of [ten to 20 years'] incarceration in the state

* Former Justice specially assigned to Superior Court.

correctional institution. Father's earliest possible parole date is in 2019. There was one victim, who was ages 12 and 13 when the separate incidents occurred. These offenses occurred at the home where Father resided with [Mother] and their four children, while Mother was working and the children were present in the home. Father has remained incarcerated since February 28, 2009.

Although Father was not classified as a sexually violent predator, Megan's Law [registration] provisions were applicable. Additionally, Father has not yet begun any counseling sessions designed specifically for sex offenders, which will be required before he can be paroled. Moreover, Father has not begun counseling for violence prevention.

On August 1, 2011, while incarcerated in state prison, Father filed a [c]omplaint for [c]ustody seeking visitation with his children. Therefore, on November 28, 2011, a hearing was held to determine whether Father posed a risk of harm to the children or was in need of further counseling.[] Because Father was incarcerated in SCI Frackville, he participated through video-conference.

At the conclusion of the hearing, the [trial c]ourt found that Father [posed] a risk of harm to the children given the nature of the offenses and the fact that they occurred when the children were present. The [trial c]ourt also found that Father was in need of sex offender counseling, which Father stated would be mandated before he could be paroled.

Consistent with the mandates of ***Etter v. Rose***, 684 A.2d 1092 (Pa. Super. 1996), the [trial c]ourt also conducted a hearing to determine whether said visits would be in the best interest of the children.[] Father testified he wanted the children to visit him in state prison so the children would not grow up without a father and so he could teach them about his mistakes. The four children are ages [seven, six, six, and three]. Father stated he has taken parenting classes and attends counseling to deal with stress. However, Father's prison is located [one and one-half] hours away from the children, and Father acknowledged such a long drive could create a hardship on the children. In fact, Father stated "I'm not too crazy right now for the visitation rights to them."

Father also recognized that it would have an emotional impact on the children to see him in prison "behind a glass wall." Thus, Father asked if he could just write to the children until they get older and it was more appropriate for them to visit.

Mother was opposed to any visitation. According to testimony from Mother, the oldest child was awake when Father sexually abused another minor in their house, and that child witnessed the activity. Consequently, the oldest child is seeing a counselor based upon what occurred. While that child's temper tantrums have diminished and his grades have improved in school, any visit with Father would be a setback. Additionally, during the sexual assaults the younger children were left unattended by Father while Mother was at work. The youngest three are not seeing a counselor because they don't remember Father. The younger girls are in kindergarten, they are doing extremely well, and they have never asked about Father. According to Mother, Father did not spend much time with the children before he went to [prison]. Mother also stated that transporting the children to SCI Frackville and paying for gas would be a financial hardship on her, as she is the sole supporter of all four children.

Following testimony and after considering the factors enumerated in ***Etter, supra***, the [trial c]ourt found it would not be in the best interests of the children to visit Father in state prison at the present time. Consequently, Mother was granted sole legal and sole physical custody of the children. However, Mother was directed to provide Father regular and timely information regarding any major medical or educational decisions involving the children, and forward to Father an updated photograph of each child and a copy of their final report cards at the end of each school year. Father was permitted to communicate with the children by mailing letters to [them], provided the letters were non-abusive and did not reference Mother. Father was also permitted to communicate by telephone with the children provided those telephone conversations were supervised by [p]aternal [g]randparents.[fn] Father did not file an appeal to th[e November 28, 2011 order].

[fn] Mother testified that when Father was first sent to [prison] she would let him call her cell[ular telephone] and speak to the children. However, Father would talk to the children for only a couple of seconds before having Mother get back on the line so he could curse and yell at her.

> Therefore, Mother eventually changed her [telephone] number and Mother did not want Father to have her present [] number. Mother also received one or two letters from Father while he was in [prison], that were sent to the children. However, the letters did not ask much about the children. Rather, they were apologetic to Mother and asked that she forgive him. Nonetheless, Mother had no objection to Father writing letters to the children provided they did not reference Mother, allowing [p]aternal [g]randparents to supervise telephone conversations between the children and Father, and notifying Father about major medical or educational decisions. The requirement that Mother provide an updated photograph and a copy of the final report card for each child at the end of each school year was not specifically discussed with Mother at the hearing.

On March 5, 2012, Father filed a [p]etition for [c]ontempt, which he amended on December 12, 2012, based upon an allegation that Mother had moved and failed to file a relocation notice, which prevented Father from sending letters to the children. On May 29, 2013, Father also filed a [p]etition for [m]odification of a [p]artial [c]ustody or [v]isitation [o]rder, stating that his father had been arrested for a sex crime and Father wanted a new person appointed to supervise his telephone calls with the children.

On May 29, 2013, Mother filed a [p]etition for [m]odification of a [p]artial [c]ustody or [v]isitation [o]rder, based on the fact that Father was a convicted sex offender and he was a danger to the children.

On September 6, 2013, the [trial c]ourt held a hearing on all three [p]etitions, with Father again participating by video-conference. Regarding his [p]etition to [m]odify, Father testified that his father was arrested for a sex crime in May or June of 2012, and he received five years[`] probation when he pled guilty, so Father wanted a new supervisor appointed to facilitate his telephone calls with the children. Father suggested his cousin, his brother, his sister, or Mother's fiancé as possible supervisors.

In response, Mother objected to Father's sister because she was molested by Father's father, and she had spent time in [psychiatric treatment] after threatening to kill herself. Mother

objected to Father's brother because he was also molested by Father's father, and he has anger issues that resulted in an arrest for assaulting Father. Father did not dispute Mother's testimony in this regard, acknowledging that his sister did threaten to kill her [children] and herself, his brother did assault him, and his brother told Father he was sexually abused by their father. In fact, Father stated he understood why Mother would have concerns about letting Father's brother around the children. Mother stated she did not know Father's cousin, and her fiancé was not willing to serve as a supervisor.

Father also wanted the [trial c]ourt to require that the children write back to him, so Father would know the children were receiving his letters. Father indicated he did not know whether the children were actually receiving his letters, although no letters have been returned to him as undelivered.

In response, Mother testified the children have received all of Father's letters but they do not wish to write back. Mother stated the three youngest children do not know Father, because they were very young when he was arrested. The youngest was not even one year old. The oldest child has only faint memories of Father, and that child was in counseling because of what he witnessed during one of Father's sexual assaults.

Regarding Father's contempt petition, Father wanted Mother's actual current address, noting that Mother had moved again in April 2013 and provided only a Post Office box address within the relocation notice Mother sent to Father. In response, Mother stated that an attorney advised her to include only the Post Office box address on the relocation notice because Mother was concerned about a possible threat to the children if Father knows the actual address. Specifically, Mother does not want Father to discuss with other inmates where the children reside, out of fear that one of those inmates could be a sexual predator who would attempt to locate and harm the children upon release from prison.

Additionally, Father stated he had not received any report cards or photographs of the children since entry of the [o]rder dated November 28, 2011. In response, Mother testified that she sent report cards to Father at the end of the 2012 school year. Nonetheless, Mother raised the same fears about the photographs and report cards as she did regarding Father

knowing her actual address. Mother did not want Father to be able to share the photographs of the children or discuss where the children go to school with other sexual predators.

Mother's [p]etition to [m]odify was based upon her concerns for the safety of the children. As such, Mother sought to keep her home address and school information [for] the children confidential, while eliminating the requirement that she must send report cards and photographs of the children to Father. Mother acknowledged she did not previously object to these provisions during the prior custody hearing, because she was still recovering from abuse that was committed by Father.[fn] Mother now felt modification of the [o]rder was necessary to protect the children.

[fn] Father was arrested for simple assault against Mother in 2008, but Mother dropped the charges at the preliminary hearing. Mother also obtained a [protection from abuse (PFA) order] against Father but dropped that at the hearing. According to Mother, Father was "really abusive" during their relationship. She finally got the courage to call the police and have Father arrested when he strangled her on one occasion. Mother later dropped the criminal charges and the PFA because she found out she was pregnant with [the couple's] youngest child and because Father threatened her. At the hearing held on November 28, 2011, Mother asked if she could sit away from the video camera so Father could not see her as she testified, based upon the history of abuse committed by Father.

By [o]rder dated September 9, 2013, the [trial c]ourt denied Father's [c]ontempt [p]etition.[fn] The [trial c]ourt also denied Father's [p]etition to [m]odify because he did not propose an acceptable supervisor to replace his father.

[fn] In his [p]etition for [c]ontempt, Father alleged that Mother failed to comply with provisions of the [trial c]ourt [o]rder dated November 28, 2011, where Mother was directed to send notice of any proposed move to every other individual who has custody rights to the children. Consequently, this prevented Father from sending letters to the children. However, testimony established that Mother did provide said notice on the one occasion subsequent to the [o]rder when Mother did relocate, and letters sent by

> Father were then provided by Mother to the children. Father further alleged that Mother prevented him from having any telephone contact with the children. However, Father acknowledged that [p]aternal [g]randfather could no longer supervise any telephone calls after being arrested for a sex crime in May 2012. Additionally, Mother stated she sent Father report cards at the end of the 2012 school year as required.

The [trial c]ourt granted Mother's [p]etition for [m]odification, after finding that [the] changes [she requested] were in the best interest of the children. More specifically, the [trial c]ourt noted that: (1) Mother would no longer be required to provide Father regular and timely information regarding any major medical or educational decisions involving the children; (2) Father would be permitted to communicate with the children by telephone only at the discretion of Mother; and (3) Mother would no longer be required to forward Father any photographs of the children or copies of any report cards. However, the [trial c]ourt directed that Father would still be permitted to communicate with the children by sending letters to the children through the mail and Mother would be required to ensure that any such letters are provided to the children.[fn]

> [fn] Mother and the children are not required to respond to Father's letters as requested by Father, but the children may do so at their own discretion.

On September 24, 2013, Father filed a [n]otice of [a]ppeal from the September 9, 2013 [o]rder. Although the appeal was classified as a children's fast track appeal, Father failed to file a [s]tatement of [errors c]omplained of on [a]ppeal ("[concise s]tatement") along with his [n]otice of [a]ppeal, as was required by Pa.R.A.P. 905(a)(2) and 1925(a)(2)(i). Despite Father's failure to follow applicable procedural rules, the [trial c]ourt granted Father additional time to file his [concise s]tatement. Thus, on September 24, 2013, the [trial c]ourt entered an [o]rder requiring Father to file his [concise s]tatement no later than twenty-one (21) days after entry of the [o]rder, or October 15, 2013.

By correspondence dated October 9, 2013, Father requested additional time to prepare and file his [concise s]tatement because Father stated he was incarcerated, he had limited time

> in the law library, he had limited access to legal research, and he was [acting] *pro se*. Father's request was denied on October 11, 2012, the same date Father's correspondence was received by the [trial c]ourt, because Father failed to demonstrate good cause for further enlarging the time period for filing his [concise s]tatement. Additionally, the [trial c]ourt noted that Father did not request an extension or raise any of those issues at the time he filed his [n]otice of [a]ppeal. Father was again instructed to file his [concise s]tatement by no later than October 15, 2013.
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> On October 18, 2013, Father submitted his untimely [concise s]tatement to [the trial court's chambers], while failing to file his statement with the [p]rothonotary's [o]ffice as required by applicable rules of appellate procedure.[] [The trial court forwarded Father's concise statement to the prothonotary's office for filing.]
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> In his [concise s]tatement, Father alleges the [trial c]ourt erred by: (1) failing in the [o]rder dated November 28, 2011 to appoint a qualified professional to counsel Father, as set forth in 23 Pa.C.S.A. § 5329(d)(1); (2) amending [p]aragraph III(c) of the [o]rder dated November 28, 2011, relating to photographs and report cards; (3) amending [p]aragraphs III(a) and III(B) of the [o]rder dated November 28, 2011, relating to telephone contact and mail; and (4) failing to consider the holding in ***D.R.C., Sr. v. J.A.Z. v. Pennsylvania, Department of Corrections, Intervenor***, 31 A.3d 677, 686-687 (Pa. 2011). [The trial court issued its opinion pursuant to Pa.R.A.P. 1925(a) on October 31, 2013.]

Trial Court Opinion, 10/31/13, at 1-10 (record citations and certain footnotes omitted).

On appeal, Father raises two issues, as follows:

> I. Did the lower court err or abuse its discretion in reversing its previous order and siding with the respondent?
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> II. Did the lower court err or abuse its discretion in failing to take into consideration specific holdings dealing with visitation of incarcerated parents and their children?

Father's Brief, at 4.[1]

Before we reach the merits of Father's claims, we address whether Father waived appellate review of his contentions for failure to file a timely concise statement and for failure to file said statement with the prothonotary, as the trial court suggests.[2] ***See*** Trial Court Opinion, 10/31/13, at 9. In his October 18, 2013 submission, Father explained why he filed his concise statement after the deadline imposed by the trial court. Father stated that, when the trial court denied his request for an extension, it sent him a copy of its order, via facsimile, on Friday October 11, 2013, at 3:45 p.m., and that there was no one present to deliver the order to him at that time. Father claimed that he received the court's order on Tuesday, October 15, 2013, at 4:00 p.m., and that, thereafter, he completed his concise statement and filed it.

"Whenever a trial court orders an appellant to file a concise statement of [errors] complained of on appeal pursuant to Rule 1925(b), the appellant must comply in a timely manner." ***Hess v. Fox Rothschild, LLP***, 925 A.2d

[1] We observe that Father did not frame his issues exactly the same in his concise statement, but, we, nevertheless, find them adequately preserved for this Court's review.

[2] The trial court found that Father's failure to comply with the deadline set forth in the court's September 24, 2013 order, and not his failure to file his concise statement contemporaneously with his notice of appeal, constituted grounds for finding waiver. This conclusion comports with our decisions that have addressed this issue. ***See J.P. v. S.P.***, 991 A.2d 904, 907 (Pa. Super. 2010) (failure to file concise statement contemporaneously with notice of appeal in children's fast track case does not trigger application of bright-line waiver rule).

798, 803 (Pa. Super. 2007); ***see also Feingold v. Hendrzak***, 15 A.3d 937, 940 (Pa. Super. 2011). The penalty for noncompliance, even in family law cases, is waiver of the claims raised on appeal. ***J.P.***, 991 A.2d at 908.

"[I]n determining whether an appellant has waived his issues on appeal based on non-compliance with Pa.R.A.P.1925, it is the trial court's order that triggers an appellant's obligation ... therefore, we look first to the language of that order." ***In re Estate of Boyle***, 77 A.3d 674, 676 (Pa. Super. 2013).

The terms of Rule 1925(b) state the relevant requirements for a trial court's order. In relevant part, Pa.R.A.P.1925(b) provides as follows:

> **(b) Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court.**—If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").
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> (2) *Time for filing and service*.—The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental statement to be filed. In extraordinary circumstances, the judge may allow for the filing of a Statement or amended or supplemental Statement *nunc pro tunc*.
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> (3) *Contents of order.*—The judge's order directing the filing and service of a Statement shall specify:

> (i) the number of days after the date of entry of the judge's order within which the appellant must file and serve the Statement;
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> (ii) that the Statement shall be filed of record;
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> (iii) that the Statement shall be served on the judge pursuant to paragraph (b)(1);
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> (iv) that any issue not properly included in the Statement timely filed and served pursuant to subdivision (b) shall be deemed waived.

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

In this case, the record reveals that, on September 24, 2013, the trial court ordered Father to file a Rule 1925(b) statement. Specifically, the trial court stated that Father's concise statement "shall be filed no later than twenty-one (21) days from the date of entry of this [o]rder." Trial Court Order, 9/24/13. The trial court's order also provided: "Any issue not properly included in the [concise s]tatement timely filed and served shall be deemed waived." ***Id.*** Lastly, the trial court informed Father that "the [concise s]tatement shall be filed of record and a copy must be delivered to the Chambers of Judge Donald R. Totaro by no later than October 15, 2013." ***Id.*** Thus, the trial court's order conforms with Pa.R.A.P.1925(b).

We have held, however, that "strict application of the bright-line [waiver] rule . . . necessitates strict interpretation of the rules regarding notice of Rule 1925(b) orders." ***In re L.M.***, 923 A.2d 505, 509–510 (Pa. Super. 2007). In ***In re L.M.***, we held that a failure by the prothonotary to "give written notice of the entry of a court order and to note on the docket

that notice was given" will prevent waiver for timeliness pursuant to Pa.R.A.P.1925(b). ***Id*.** at 510.

Here, a notation appears in the trial court's docket stating that the prothonotary provided notice of the trial court's September 24, 2013 order to Father on September 26, 2013. In addition, the trial court's Rule 1925(b) order bears a stamp indicating that notice of entry of the order was forwarded on September 26, 2013. For these reasons, we conclude that the trial court's order complies with the technical requirements of Pa.R.A.P.1925(b). ***See In re L.M.***, at 509–510.

Having confirmed the validity of the trial court's Rule 1925(b) order and the fact that due notice was given to Father, we turn to Father's filing. On September 24, 2013, the trial court ordered Father to file his concise statement within 21 days "from the date of entry of this [o]rder." Trial Court Order, 9/24/13. Notice of the order was sent to Father on September 26, 2013, and a confirming notation was placed in the docket. Pursuant to Pa.R.A.P. 108(b), "[t]he date of entry of an order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk makes the notation in the docket that notice of entry of the order has been given." Pa.R.A.P. 108. Consequently, we consider the date of entry of the trial court's order to be September 26, 2013.

To compute the relevant filing deadline, we turn to Pa.R.C.P. 106, which provides: "When any period of time is referred to in any rule, such

period in all cases ... shall be so computed as to exclude the first and include the last day of such period." Pa.R.C .P. 106(a). Accordingly, we will exclude September 26, 2013, from our computation, as the "first" date the order was entered, and begin from September 27, 2013. Under his approach, we calculate that the 21st day after the entry of the trial court's order was October 18, 2013. Father's concise statement was dated October 16, 2013 and the trial court docketed the statement on October 18, 2013.

In its Rule 1925(a) opinion, the trial court suggests that we quash or dismiss Father's appeal for his failure to file a timely concise statement or because he failed to file his concise statement with the prothonotary's office. Under an application of the prisoner mailbox rule,[3] we find that Father's concise statement, dated October 16, 2013, was a timely response to the trial court's order entered on September 24, 2013 and served on September 26, 2013. However, Father's failure to file his concise statement with the prothonotary compels us to find that he has waived appellate review of his claims. ***In re Estate of Boyle***, 77 A.3d at 677 ("If an appellant does not comply with an order to file a Rule 1925(b) statement, all issues on appeal are waived—even if the Rule 1925(b) statement was served on the trial

[3] ***See e.g.***, ***Commonwealth v. Jones***, 700 A.2d 423 (Pa. 1997) (extending time for prisoner to mail document from prison); ***see also Thomas v. Elash***, 781 A.2d 170 (Pa. Super. 2001) (extending the prisoner mailbox rule to service in civil proceedings); ***In re J.N.F.***, 887 A.2d 775, 779 n.2. (Pa. Super. 2005) (applying the prisoner mailbox rule in a family law case).

judge who subsequently addressed in an opinion the issues raised in the Rule 1925(b) statement.")

Even if we did not find waiver, we would conclude that Father is not entitled to relief. Initially, we observe that, as the hearing in this matter was held in September of 2013, the Child Custody Act ("Act"), 23 Pa.C.S.A. §§ 5321 to 5340, is applicable. ***C.R.F. v. S.E.F.***, 45 A.3d 441, 445 (Pa. Super. 2012) (holding that, if the custody evidentiary proceeding commences on or after the effective date of the Act, *i.e.*, January 24, 2011, the provisions of the Act apply). In custody modification cases, our standard of review is as follows:

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

Id. at 443 (citation omitted).

> We have stated:
>
> [t]he discretion that a trial court employs in custody matters should be accorded the utmost respect, given the special nature of the proceeding and the lasting impact the result will have on the lives of the parties concerned. Indeed, the knowledge gained by a trial court in observing witnesses in a custody

> proceeding cannot adequately be imparted to an appellate court by a printed record.

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

In ***M.A.T. v. G.S.T.***, 989 A.2d 11 (Pa. Super. 2010) (*en banc*), we stated the following regarding an abuse of discretion standard.

> Although we are given a broad power of review, we are constrained by an abuse of discretion standard when evaluating the court's order. An abuse of discretion is not merely an error of judgment, but if the court's judgment is manifestly unreasonable as shown by the evidence of record, discretion is abused. An abuse of discretion is also made out where it appears from a review of the record that there is no evidence to support the court's findings or that there is a capricious disbelief of evidence.

Id. at 18-19 (quotation and citations omitted).

Our standard of review in contempt proceedings is as follows:

> Each court is the exclusive judge of contempts against its process. The contempt power is essential to the preservation of the court's authority and prevents the administration of justice from failing into disrepute. When reviewing an appeal from a contempt order, the [appellate] court must place great reliance upon the discretion of the trial judge. On appeal from a court's order holding a party in contempt, our scope of review is very narrow. We are limited to determining whether the trial court committed a clear abuse of discretion.

Garr v. Peters, 773 A.2d 183, 189 (Pa. Super. 2001) (citations and quotations omitted). ***See P.H.D. v. R.R.D.***, 56 A.3d 702, 706 (Pa. Super. 2012 (applying the same scope and standard of review where petition for contempt was denied).

In his first claim, Father argues that the trial court abused its discretion in reversing its previous order and "siding with Mother," and in failing to consider other options available to safeguard the children, where Mother has never attempted to keep the avenues of communication open with regard to Father. Father also asserts that the trial court should have appointed a counselor to meet with him pursuant to 23 Pa.C.S.A. § 5303.

To support his opening claim, Father asks us to alter the factual determinations made by the trial court, and to make different credibility and weight decisions. Our role as an appellate court does not include making independent factual determinations. ***C.R.F.***, 45 A.3d at 443. Moreover, determinations regarding credibility and weight of the evidence are within the province of the trial court. ***Id.*** Therefore, as we find no abuse of the trial court's discretion, no relief is due Father.

We also find that Father waived any argument concerning the trial court's refusal to sanction Mother by granting the relief he requested in his petition for contempt. Father failed to raise this issue in his statement of questions involved on appeal and in his concise statement. ***See Krebs v. United Refining Company of Pennsylvania***, 893 A.2d 776, 797 (Pa. Super. 2006) (stating that any issue not raised in an appellate brief and concise statement of errors complained of on appeal is waived). In any event, even if we were to address the claims advanced in Father's contempt petition, we would find that the trial court correctly chose not to hold Mother

in contempt and sanction her for the reasons proffered by Father. Mindful that this Court must place great reliance upon the discretion of the trial judge, and that we are limited to determining whether the trial court committed a clear abuse of discretion, we would find no abuse of the trial court's discretion in denying Father's petition for contempt. ***Garr***, 773 A.2d at 189.

Finally, we must reject Father's claim that the trial court should have appointed a counselor to meet with him pursuant to 23 Pa.C.S.A. § 5303. In ***D.R.C., Sr., v. J.A.Z. v. Pennsylvania, Department of Corrections, Intervenor***, 31 A.3d 677 (Pa. 2011), our Supreme Court held that counseling is not a prerequisite to the examination of the child's best interest in the context of a request for visitation with an incarcerated parent. ***Id.*** at 686-687. Section 5303, the provision cited by Father, was repealed when revisions to the Act became effective on January 24, 2011. Hence, there is no legal support for Father's claim that the trial court erred in failing to appoint a counselor in this case.

In his second claim, Father asserts that the trial court abused its discretion in failing to take into consideration the holding in ***D.R.C.***, regarding the visitation of an incarcerated parent with is children. He contends that the trial court erred in holding a risk of harm hearing under 23 Pa.C.S.A. § 5329, because that statute deals with custody, not visitation. Father posits that visitation in a prison is restrictive and would not allow for

harm to a child since prison visitation does not involve contact between the prisoner and the child. Father claims that the crimes for which he has been incarcerated render him unable to have physical contact with the children. Father argues, therefore, that the trial court erred in holding a risk of harm hearing and issuing its order with a direction to Father to obtain counseling prior to the court's grant of visitation. Thus, Father requests this Court to vacate the trial court's order, and remand the matter with instructions.

With any custody case decided under the Act, the paramount concern is the best interests of the child. ***See*** 23 Pa.C.S.A. §§ 5328, 5338. Section 5338 of the Act provides that, upon petition, a trial court may modify a custody order if it serves the best interests of the child. 23 Pa.C.S.A. § 5338. Section 5328(a) of the Act, 23 Pa.C.S.A. § 5328(a), sets forth the sixteen "best interest" factors that the trial court must consider when awarding custody. ***See E.D. v. M.P.***, 33 A.3d 73, 80-81, n.2 (Pa. Super. 2011).

Section 5323 provides for the following types of custody awards:

> **(a) Types of award.—**After considering the factors set forth in section 5328 (relating to factors to consider when awarding custody), the court may award any of the following types of custody if it in the best interest of the child:
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> (1) Shared physical custody.
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> (2) Primary physical custody.
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> (3) Partial physical custody.
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> (4) Sole physical custody.

(5) Supervised physical custody.

(6) Shared legal custody.

(7) Sole legal custody.

23 Pa.C.S.A. § 5323.

Section 5323 mandates that, when the trial court awards custody, it "shall delineate the reasons for its decision on the record in open court or in a written opinion or order." 23 Pa.C.S.A. § 5323(d). Here, Father filed a petition to modify certain limited features of the parties' custody arrangement, dealing mainly with the manner and frequency of Father's communications with the children.[4] We have described the applicable statutory scheme in the following manner:

> Section 5338 discusses modification of a custody order: "Upon petition, a court may modify a custody order to serve the best interest of the child." 23 Pa.C.S.A. § 5338(a).
>
> The plain language of Section 5328(a) requires that the sixteen enumerated factors be considered when the court is determining a child's best interest for the purpose of making an award of custody. 23 Pa.C.S.A. §§ 5323(a), 5328(a). By contrast, while the court must consider the child's best interest when modifying a custody order, the modification provision does not refer to the sixteen factors of Section 5328. 23 Pa.C.S.A. § 5338(a). The cases in which we have applied Section 5328(a) have involved the award of custody as defined by Section 5323(a) or have involved a modification that also entailed a change to an award of custody.

[4] Contrary to the argument Father raises in his brief, only the original complaint for custody filed on August 1, 2011 requested prison visitation. The instant request for modification of custody did not involve visits with Father in prison.

> . . . While the court's ruling modified its prior order, it did not change the underlying award of custody. Therefore, under the facts of this case, Section 5328(a) was not implicated directly.
>
> Because the trial court did not make an award of custody, but merely modified a discrete custody-related issue, it was not bound to address the sixteen statutory factors in determining the [c]hildren's best interest. However, under Section 5338, the trial court was required to determine that the modification that it did order was in the [c]hildren's best interest.

M.O. v. J.T.R., 2014 PA Super 15, *4-5 (Pa. Super. 2014) (footnotes omitted).

In this case, Father pursued modification to a discrete custody-related issue; he did not ask the trial court to make an award of custody. Thus, applying the foregoing principles, the trial court properly considered Father's claim as a custody modification matter and correctly examined the best interests of the children, giving weighted consideration to the factors that affected their safety. ***See*** Trial Court Opinion, 10/31/13, at 11-14. Moreover, the order challenged on appeal merely modified limited aspects of the parties' prior custody arrangement. Under these circumstances, section 5328(a) was not directly implicated and it was not necessary for the trial court to address all 16 "best interest" factors in its opinion. ***See M.O.***, 2014 PA Super 15, *4-5. Because we find that the trial court's determinations were supported by the facts of record and free of legal error, we discern no abuse of discretion.

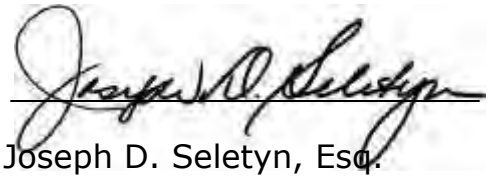
We also find ***D.R.C.*** inapposite to the case before this Court. As a preliminary matter, ***D.R.C.*** involved a request for prison visitation, which

was the subject of Father's original complaint for custody but not the basis for his present request to modify the parties' custody arrangement. Moreover, even if we were to consider the denial of prison visits with Father under the rule announced in ***D.R.C.***, we would not conclude that Father is entitled to relief. In ***D.R.C.***, an incarcerated father challenged an order by the trial court that dismissed his petition for visitation with his son at the prison on grounds that the father failed to undergo statutorily mandated counseling. The Supreme Court ruled that the statutorily mandated counseling was not a prerequisite to the court undertaking an evaluation of a child's best interest in the context of a request for prison visits. ***D.R.C.***, 31 A.3d at 687.

Here, when passing upon Father's original complaint for custody (including his request for prison visits), the trial court did not treat the requirement that Father undergo counseling as a prerequisite to its evaluation of the "best interests" of the children. Indeed, the trial court conducted a separate hearing, consistent with ***D.R.C.*** and ***Etter v. Rose***, 684 A.2d 1092 (Pa. Super. 1996), to determine whether visits with Father in prison would be consistent with the best interests of the children. Thus, the trial court's original denial of prison visits as contrary to the children's best interests did not conflict with our Supreme Court's holding in ***D.R.C.***, as Father suggests. For these reasons, we affirm the order of the trial court.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/17/2014