NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

B.K.A., Appellant v. T.M.Z. (F/K/A T.M.A.), Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1865 EDA 2013

Appeal from the Order entered June 5, 2013,
in the Court of Common Pleas of Northampton County,
Civil Division, at No(s): CV2007-9468

BEFORE: BENDER, P.J., OTT, and STRASSBURGER*, JJ.

MEMORANDUM BY OTT, J.: **FILED FEBRUARY 03, 2014**

B.K.A. ("Father") appeals from the custody order entered in the Court of Common Pleas of Northampton County that granted T.M.Z. (f/k/a T.M.A.) ("Mother") primary physical custody, and Father partial custody, *inter alia*, of the parties' two sons, B.A., born in November of 1999, and T.A., born in April of 2001 (collectively, "the children"). We vacate and remand.

The trial court aptly described the procedural and factual history of this case as follows:

> The instant matter is the most recent dispute in a long custody battle which began in Lehigh County in 2006. . . . [O]n December 5, 2012[,] . . . [Father] filed a Petition for Emergency Relief in which [Father] sought primary physical custody of one of the minor children, [T.A.]. The Petition . . . alleged that [S.M.], . . . Mother's paramour, physically disciplined [T.A.] in violation of the Order of [the] Court [of Common Pleas of

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* Retired Senior Judge assigned to Superior Court.

> Northampton County] dated December 16, 2008.[1] Prior to these allegations, and according to the same Order dated December 16, 2008, the parties had shared legal and physical custody of both [T.A.] and [B.A.] on a bi-weekly rotating basis with a midweek dinner visit to the noncustodial parent. An Order dated December 5, 2012 was granted by this Court giving [Father] exclusive physical custody of [T.A.] for the week of December 9, 2012 to December 16, 2012[,] as [Mother] was found to have violated the Order of Court by allowing her paramour, [S.M.], to participate in the physical discipline of [T.A.].[2] After this week, however, the parties were to resume the bi-weekly schedule as ordered.
>
> On December 21, 2012, [Father] filed a Petition for Contempt and Modification of Custody Order seeking an Order granting him primary physical custody of both children, allowing the children to attend his preference of Wilson High School.[3] This Petition also contained further allegations that [Mother] continued to allow her paramour to physically discipline [T.A.]. [Mother] accordingly filed an Answer and Counterclaim on February 22, 2013. The Answer indicated that while [S.M.] may have assisted her in the discipline of the children, he never used any physical force toward the children. [Mother's] Counterclaim also sought primary physical custody of both children, allowing the children to attend Liberty High School.[4]

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[1] The relevant provision provides that "[Mother's] paramour, [S.M.], shall not physically discipline the children." Order, 12/16/08 at ¶ 16.

[2] On December 5, 2012, the hearing was held on Father's petition for emergency relief, but it was presided over by a different trial judge than the judge who presided over the proceedings that resulted in the subject order.

[3] At the time Father filed the petition for contempt and modification of custody order, B.A. was in seventh grade, and T.A. was in sixth grade. ***See*** N.T., 5/14/13, at 16. Father alleged that the children were in Catholic grade school, and that they will begin high school upon the completion of eighth grade. ***See*** Petition, 12/21/12, at ¶ 14.

[4] In addition to Liberty High School, Mother alleged she would agree to the children attending either Lehigh Valley Academy or Lehigh Valley Charter School. ***See*** Answer to Petition for Contempt and Modification, 2/22/13, at ¶ 27.

> . . . Pursuant to an Order dated February 27, 2013, the existing custody arrangement was to remain in effect in the interim and [T.A.] was to meet with Dr. Terrence Brennan, psychologist, for a counseling assessment to determine whether the child or the family had issues which should be addressed through counseling.
>
> This matter was then assigned for a non-jury hearing, which was held on May 14, 2013, and lasted one day. At trial, this Court heard testimony from [ ] Mother, [ ] Father, Jessica Weeks, an unbiased witness and mother of a friend of the minor children, [S.Z.], brother of [Mother], and [T.A.] and [B.A.]. . . .

Trial Court Opinion, 7/22/13, at 1-3 (original footnote omitted).

Prior to the testimonial evidence, the trial court requested that counsel focus the hearing on an incident it described as "the primary motivating factor for filing of primary physical custody, an incident where mother allegedly contacted physicians regarding the mental state of [T.A.]." N.T., 5/14/13, at 4. Mother then testified on direct examination with respect to an incident in her home on December 26 or 27, 2012, when T.A. was "acting out" and told Mother he did not want to live with her and S.M., but with Father.[5] *Id.* at 4-5. Mother testified T.A. became violent, including, but not limited to, pushing her against the wall and punching B.A. ***See*** *id.* at 4-7. Mother testified, "I told [S.M.], you go in the room. So he was not involved.

[5] Mother indicated a similar incident occurred with T.A. on December 3, 2012. N.T., 5/14/13, at 5.

Take [B.M.][6] in the room. And [B.A.] said we would try to calm [T.A.] down." *Id.* at 6. Mother's testimony on direct examination continued,

> Q. . . . Had the children just come back from a visit with their father [when the incident occurred]?
>
> A. Yeah. [T.A.] actually had an extended visit with his father over Christmas vacation, and the kids were here on Christmas, and then back again with their dad, and then back again with me. So it was a really disjointed week [ ] – filled with transitions. . . .

Id. at 7.

Mother testified that, on the evening of the incident in late December of 2012, she telephoned the office of T.A.'s pediatrician, and that a woman from the office insisted that Mother take T.A. to the hospital to be evaluated. *Id.* at 8-11. Mother testified that she took T.A. to the emergency room the following day, and that the medical personnel wanted to admit him. *Id.* at 11-12. Mother testified that Father did not permit T.A. to be admitted to the hospital. *Id.* at 13-15.

Mother testified on direct examination with respect to T.A.'s behavior as follows:

> Q. Have you noticed that these episodes occur – is there any pattern that you have noticed when these escalate?
>
> A. Yeah. I noticed there is a lot of episodes that happen right after a transition. Like Sunday evenings are difficult. Sunday evenings we try to make everything as bland as possible so that, you know, let's just watch a movie or, you know, go over and take a shower, go to bed because [T.A.] has a real problem

[6] B.M. is a male, age three at the time of the subject proceedings, who is the biological child of Mother and S.M. N.T., 5/14/13, at 5, 21.

> coming home and says, I don't want to be here, I want to go back with my dad. . . .

Id. at 16-17.[7] Mother testified that T.A. needs structure, and so she requested primary physical custody of the children during the school year. *Id.* at 21.

In addition, Mother entered as an exhibit the report of Terrence P. Brennan, M.A., who, pursuant to the order of court dated February 27, 2013, performed an assessment to determine T.A.'s therapeutic needs. ***See*** *id.* at Defendant's Exhibit 3. Mr. Brennan stated in his report as follows, in part:

> Regarding anger, his mother views [T.A.] as quick to anger. She reported that when angry [T.A.] has banged his head, slammed doors, screamed, cursed, thrown objects and hit his brother. [Mother] stated that [T.A.] angers [one] or [two] times per day with a moderate intensity. The duration is 30 minutes or longer.

Id. at 2. Mr. Brennan stated in his report that T.A. presented for two examination dates, one with Mother and one with Father. He continued,

> With his mother [T.A.] was surly, avoided all eye contact and was difficult to engage. He was much more outgoing in the presence of his father. [Mother] is intimidated by [T.A.'s] anger and it is my belief that [T.A.] exploits this when in the presence of his mother.

Id. Mr. Brennan concluded:

> My assessment is that [T.A.'s] parents see very different sides of him. He is more cooperative for his father than for his mother. He has too much power over his mother. This is not in his best

[7] Nevertheless, Mother testified that "[t]he majority of time [T.A. is] fine. It is like few and far between we have these episodes that escalate. . . ." N.T., 5/14/13, at 20.

> interests. He is able to pit his mother against his father and vice versa. . . .
>
> My recommendation is that his parents need to work together for [T.A.'s] well[-]being. Their contentiousness is having a negative impact on him. It is coloring his relationships, at least 50 per cent of the time, with his family. Until this is accomplished I am afraid [T.A.] will be the individual who bears the brunt of the disagreements between his parents.

Id. at 3.

With respect to T.A.'s temper tantrum with Mother in late December of 2012, Father indicated upon questioning by the trial court that T.A. "wanted [Mother] hurt emotionally because of the way she stood by and allowed [S.M.] to assault him." *Id.* at 34. Father continued,

> Because [T.A.] was scared from the time that [S.M.] assaulted him back in November, on November 29th.[8] And with that, you know, he openly stated that mom did nothing. And to this day he still, you know, expresses to me that he's afraid to be in [Mother's] house. And it really bothers him that mom stood by and did nothing when [S.M.] was doing that.

Id. at 34. As such, Father requested primary physical custody of the children. *Id.* at 36.

In T.A.'s *in camera* interview with the trial court, at which time he was twelve years old, he testified regarding the incident at Mother's home in December of 2012, as follows:

> [THE COURT]: Now, there was an incident at your house, right?
>
> [T.A.]: Yes.

[8] This allegation was the subject of Father's petition for emergency relief filed on December 5, 2012.

[THE COURT]: Around Christmastime?

[T.A.]: Yes.

[THE COURT]: Maybe you were doing some things maybe you shouldn't have been doing, right?

[T.A.]: Yes.

[THE COURT]: Do you want to tell me what is happening?

[T.A.]: What happened? Well, I was downstairs when I was supposed to be in my room. And my mom's fiancé screamed at me to get into my room. And I didn't so he started chasing me. So I went to the nearest bathroom . . . to the closest door I can lock but I didn't get to lock it and he slammed the door on me and grabbed my arm and dragged me up the stairs into my room. Then he threw me into my room.

[THE COURT]: Was there also a time that maybe you were yelling and screaming at your mom?

[T.A.]: Yes.

[THE COURT]: And she took you to the hospital?

[T.A.]: Yes.

[THE COURT]: What happened that day?

[T.A.]: Well, I started to cry and started to cry that I needed my dad.

. . .

[THE COURT]: Do you want to live with your dad?

[T.A.]: Yes.

[THE COURT]: Why?

[T.A.]: I feel safe there.

[THE COURT]: Don't you like your mom?

> [T.A.]: No.
>
> [THE COURT]: You don't like living at your mom's house with your brother, your [two] brothers?
>
> [T.A.]: No.

Id. at 76-77.

By order dated and entered on June 5, 2013, the trial court granted Mother primary physical custody and Father partial physical custody every Friday from 3:00 p.m. to 8:00 p.m., and on alternating weekends from Friday at 3:00 p.m. to Monday at 9:00 a.m., during the school year. ***See*** Order, 6/5/13, at ¶ 2(a). During the summer, the order granted Mother and Father shared physical custody on an alternating weekly basis. ***See*** *id.* at ¶ 2(b). The court granted the parties shared legal custody. Further, the order directed that T.A. shall receive outpatient counseling services, and it provided the names and contact information of three separate professionals for the parties to choose to counsel T.A. *Id.* at ¶¶ 7-8. With respect to the parties' request regarding which high school the children will attend, the order directed that either party may apply for the children's acceptance into "Lehigh Valley Academy Charter School o[r] the Lehigh Valley Performing Arts School. Upon acceptance[,] the parties shall confer and decide where to send each child."[9] *Id.* at ¶ 4. Father timely filed a notice of appeal and a

[9] During the trial, Mother testified that she wanted the children to attend Lehigh Valley Academy for high school, but that Father disagreed with her

concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2(i) and (b).

> Father presents the following issues for our review:
>
> 1. Whether the [t]rial [c]ourt erred when it did not hold a full evidentiary hearing on the issues of modification of the existing custody [o]rder, including refusing to permit [ ] Father's counsel to present witnesses in support thereof?
>
> 2. Whether the [t]rial [c]ourt erred when it did not permit counsel into chambers during its *in camera* interview of the minor children who are the subjects of the custody action?
>
> 3. Whether the [t]rial [c]ourt erred when it issued an [o]rder without sufficient evidence on the record as to whether modification of the existing [o]rder was in the best interests of the minor children?

Father's brief at 6.

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

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

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choice and would not permit her to apply for the children's admission. N.T., 5/14/13, at 66-67.

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

Relevant to this case are the best interest factors set forth in Section 5328(a) of the Child Custody Act ("Act"), 23 Pa.C.S.A. §§ 5321-5340, which provides:

> § 5328. Factors to consider when awarding custody.
>
> (a) *Factors.* – In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:
>
> (1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.
>
> (2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.
>
> (3) The parental duties performed by each party on behalf of the child.
>
> (4) The need for stability and continuity in the child's education, family life and community life.
>
> (5) The availability of extended family.
>
> (6) The child's sibling relationships.

> (7) The well-reasoned preference of the child, based on the child's maturity and judgment.
>
> (8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.
>
> (9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.
>
> (10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.
>
> (11) The proximity of the residences of the parties.
>
> (12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.
>
> (13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.
>
> (14) The history of drug or alcohol abuse of a party or member of a party's household.
>
> (15) The mental and physical condition of a party or member of a party's household.
>
> (16) Any other relevant factor.

23 Pa.C.S.A. § 5328(a). This Court has held that "**[a]ll** of the factors listed in section 5328(a) are required to be considered by the trial court when entering a custody order." ***J.R.M. v. J.E.A.***, 33 A.3d 647, 652 (Pa. Super. 2011) (citation omitted) (emphasis in original).

In his first issue on appeal, Father argues the trial court failed to hold a full evidentiary hearing on his petition to modify filed on December 21, 2012. Specifically, Father argues the court abused its discretion in not permitting him to present the testimony of his own witness, *i.e.*, the children's paternal grandfather, and to cross-examine Mother.[10] For the reasons that follow, we conclude Father has not preserved this issue for our review.

With respect to Father's assertion regarding the court refusing the testimony of the children's paternal grandfather, the court stated in its opinion pursuant to Pa.R.A.P. 1925(a) that "in order to determine the best interest of [the] children, the children themselves were the most important witnesses and biased testimony would not have furthered these interests." Trial Court Opinion, 7/22/13, at 4; ***see also*** N.T., 5/14/13, at 42, 66. With respect to Father's assertion regarding the court not allowing him to cross-examine Mother, the record reveals that, at the conclusion of Mother's direct examination, Father's counsel requested permission to cross-examine, and the court stated "not yet." ***See*** N.T., 5/14/13, at 28.

[10] When faced with a question of the admissibility of evidence . . ., our standard of review is very narrow. Because this decision is committed to the discretion of the trial court, we may reverse only upon a showing of an abuse of discretion or error of law. ***Freed v. Geisinger Medical Center***, 910 A.2d 68, 72 (Pa. Super. 2006). "[T]o constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." ***Id.***

Upon review of the notes of testimony, we observe that Father failed to object to the court's rulings with respect to both evidentiary issues. Therefore, Father has not preserved these claims for our review. ***See MacNutt v. Temple Univ. Hosp.***, 932 A.2d 980, 992 (Pa. Super. 2007) (holding that in order to preserve an issue for appellate review, litigants must make timely and specific objections during trial).

In his second issue, Father argues the trial court erred by conducting the children's *in camera* interviews without the presence of counsel for Mother and Father. Pennsylvania Rule of Civil Procedure 1915.11(b) provides as follows, in relevant part:

> **Rule 1915.11. Appointment of Attorney for Child. Interrogation of Child. Attendance of Child at Hearing or Conference**
>
> . . .
>
> (b) The court may interrogate a child, whether or not the subject of the action, in open court or in chambers. The interrogation shall be conducted in the presence of the attorneys and, if permitted by the court, the parties. The attorneys shall have the right to interrogate the child under the supervision of the court. The interrogation shall be part of the record.
>
> . . .

Pa.R.C.P. 1915.11(b). In ***Ottolini v. Barrett***, 954 A.2d 610 (Pa. Super. 2008), this Court concluded that it is error for a trial court not to abide by the terms of Pa.R.C.P. 1915.11(b).

Instantly, the record indicates that Father failed to object to the trial court's decision to interview the children without the parties' counsel present. The colloquy between the court and counsel is as follows:

> [THE COURT]: . . . I want to talk to the kids.
>
> [FATHER'S COUNSEL]: Do you want to talk to them alone?
>
> [THE COURT]: I'm talking to them alone.
>
> [FATHER'S COUNSEL]: Can I ask a question?
>
> [MOTHER'S COUNSEL]: Did you say you are doing this on your own, Judge?
>
> [THE COURT]: Yes.

N.T., 5/14/13, at 71-72.

We are unaware of any authority providing that this is a non-waivable clam of error. As stated above, it is axiomatic that in order to preserve a claim for appeal, a party must make a timely and specific objection at trial, and that this Court will not consider a claim that was not called to the trial court's attention at a time when any error committed could have been corrected. ***See Thompson v. Thompson***, 963 A.2d 474 (Pa. Super. 2008). Therefore, by failing to object to the trial court's stated intention to interview the children without the presence of counsel, Father likewise waived his second issue for purposes of appeal.

In this third issue, Father argues that the court abused its discretion in not hearing testimony from Mother's paramour, S.M. The record indicates

that Father did not present S.M. as a witness.[11] It is axiomatic that claims not raised in the trial court may not be raised for the first time on appeal. ***See Thompson***, ***supra***, 475-476; ***see also*** Pa.R.A.P. 302(a) (stating "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal"). Therefore, Father's claim in this regard is waived.

In addition, Father argues that, "Certain [Section 5328(a)] factors were not referenced by the Trial Court, and others were simply referred to in a most cursory manner." Father's brief at 14. Upon thorough review, we are constrained to agree.

In its opinion pursuant to Pa.R.A.P. 1925(a), the trial court stated that it "took into account each of the [Section 5328(a)] factors." Trial Court Opinion, 7/22/13, at 7. The court indicated that it found credible Mother's testimony "that the children, particularly [T.A.], had a difficult time making the frequent adjustments that resulted from the shared 50/50 custody arrangement, particularly during the school year. [Mother] further testified that she believed [T.A.] needed structure, and keeping up with the constant transitioning was too difficult for him." *Id.* at 5-6 (footnotes omitted). The court continued,

> At trial, [Mother] testified that she believed that the best custody arrangement for the minor children would be with her, as she has a flexible schedule that would ensure the boys with the stability and continuity that they need in the[ir] lives. As to the boys' sibling relationships, [Mother] also testified that [T.A.] loves his family, and often enjoys playing with his brother

[11] Likewise, Mother did not present S.M. as a witness.

> [B.M.]. When questioned by the court as to the name of his brother, [T.A.] responded by saying that he had two brothers and identified his half-brother [B.M.] before his brother [B.A.]. Additionally, [Mother] submitted photos, marked Defendant's Exhibit 1, of the minor children playing with [B.M.] in numerous settings, including playing baseball, building snowmen, and pushing [B.M.] on a swingset. These photos also evidence what appear to be happy and healthy relationships with [Mother's] paramour, [S.M.] and [Mother's] brother, [S.Z.]. Additionally, this Court also found [Mother] more willing to cooperate, and more likely to encourage continuing contact with the other party . . . ."

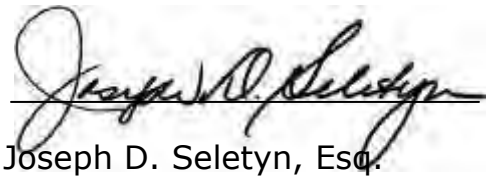
Id. at 7-8 (footnotes omitted).

Upon careful review of the trial court's Rule 1925(a) opinion, we conclude the trial court considered the Section 5328(a) factors in cursory fashion and without reference to all of the factors, which we hold is an error of law pursuant to ***J.R.M.***, ***supra.*** Most notably, we conclude the court failed to consider Section 5328(a)(7), *i.e.*, the well-reasoned preference of the child, based on the child's maturity and judgment. The record indicates that the primary issues underlying the parties' requests for primary physical custody involved T.A.'s mental state and his relationship with Mother and her paramour, S.M. The court's opinion is devoid of any consideration of T.A.'s express preference to live with Father, or of his anger toward Mother and S.M. and his physically aggressive behavior in Mother's household. In addition, the court's opinion is devoid of any consideration of the report of Mr. Brennan, whom it had ordered to perform an assessment of T.A., and who indicated a problematic relationship between T.A. and Mother that was not in T.A.'s best interest. Accordingly, we vacate the order, and remand

the matter for the trial court to consider all of the Section 5328(a) factors including, but not limited to, T.A.'s custody preference, T.A.'s anger issues, and Mr. Brennan's report.[12]

Order vacated. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/3/2014

[12] In addition, we remind the trial court that our decision in ***C.B. v. J.B.***, 65 A.3d 946 (Pa. Super. 2013), is applicable to this matter. In that case, we held that Section 5323(d) of the Act "requires a trial court to set forth its mandatory assessment of the [Section 5328(a)] factors prior to the deadline by which a litigant must file a notice of appeal." ***Id.*** at 955.