

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

HEIDI BRUSH : IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellant

v.

LELAND FELDMAN : No. 952 MDA 2021

Appeal from the Order Entered June 22, 2021
In the Court of Common Pleas of Centre County Civil Division at No(s):
2012-3103

HEIDI BRUSH : IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellant

v.

LELAND FELDMAN : No. 1126 MDA 2021

Appeal from the Order Entered July 30, 2021
In the Court of Common Pleas of Centre County Civil Division at No(s):
2012-3103

BEFORE: LAZARUS, J., NICHOLS, J., and KING, J.

MEMORANDUM BY NICHOLS, J.:

FILED APRIL 07, 2022

Heidi Brush (Mother) appeals from the orders granting the petition for modification of custody of her minor child, A.B., filed by Leland Feldman (Father). We affirm the order docketed at 952 MDA 2021 and quash Mother's appeal docketed at 1126 MDA 2021.

The custody court discussed the facts as elicited at trial as follows:

[Mother] resides in the State College area of Centre County at an address which is undisclosed at her request throughout these proceedings. She is forty-eight years of age [Father] resides [in Oro Valley, Arizona]. [Father] is fifty years of age [Child] was born of the parties [in January 2008].

Father graduated from the University of Wisconsin in 1988 and enlisted in the United States Marine Corps, from which he received an honorable discharge. He thereafter served as a Field Training Officer for the Milwaukee, Wisconsin Police Department for in excess of nine years. Mother achieved Bachelors and Masters degrees in English at the Pennsylvania State University and a PhD from the University of Illinois.

Following the date of their marriage in February 2007, [Mother] became pregnant, and she asserts that [Father] became a different person in his belligerence and apparent unwillingness to have a child. The parties had moved to Steamboat Springs, Colorado, in an effort to find police work of a less stressful nature for [Father].

On November 1, 2008, at a time when [Child] was approximately ten months of age, a domestic disturbance occurred in which [Father] "punched" [Mother] in the chest which caused the wind to be knocked out of her as she fell. At some point in time, consistent with the foregoing, [Father] had also thrown a coffee cup [in Mother's direction] which, it is admitted, did not strike but did scare her.

Within days, [Father's] position as a police officer for the Steamboat springs Police Department ended as 3rd degree assault charges had been filed by [Mother] against him. As of January 7, 2009, two months after the incident, the charges were dismissed pursuant to [Mother's] notification to the District Attorney that she would no longer be of assistance in the investigation and prosecution as she was moving away from Colorado.

[Mother] moved to Fayette County, Pennsylvania, where a divorce was filed in June. A consent order for custody was issued on October 15, 2009, in Fayette County whereupon the parties shared legal custody, Mother had primary physical custody, and Father had periods of partial physical custody. Mother proceeded to move with [Child] to Centre County, Pennsylvania, where she was engaged as an educator with the Pennsylvania State University.

On March 17, 2010, Father received an order to pay child support in the amount of \$295 per month while he was residing in Milwaukee, Wisconsin. Father attended Bryant and Stratton College where he received an Associates Degree in nursing in August 2011 and commenced a career as a registered nurse.

Father had one visit in downtown State College, Pennsylvania with [Child] during the year 2010. Father had a visit with [Child] in January 2011 and a subsequent visit in August 2011. In a desire to obtain a specific schedule for visitation, Father filed a petition for modification of custody in Fayette County, Pennsylvania, on April 3, 2012; however, the court properly acknowledged that custody jurisdiction resided in Centre County.

In May 2012, the parties had a meeting in State College to discuss a custody modification. On December 12, 2012, a custody conference occurred before the court which conference was attended primarily by counsel as Father was in Wisconsin at the time. An agreed order of custody was issued provided for shared legal custody, [Mother] having primary physical custody, and [Father] having supervised custody.

Later that same afternoon, [Mother] was physically assaulted on the campus of the Pennsylvania State University whereupon she was strangled from behind and her throat was subjected to a slashing which required seventeen stitches. Although there was no evidence presented to suggest that [Father] was in the Commonwealth of Pennsylvania on that occasion, [Mother], to this day, believes that [Father] engaged an individual to assault her because he was unhappy with the result of the morning custody agreement. To this day [Father] denies any involvement whatsoever with the incident and was never questioned or charged in connection with the assault.

On December 14, 2012 [Mother] proceeded to apply for and received an *ex parte* emergency Protection From Abuse order which precluded Father from having any contact with Mother or [Child]. Although there was no allegation of threat to [Child,] she was included as a "protected party." On January 11, 2013, the court issued an "agreed" temporary PFA order extending for eighteen months without hearing the underlying merits of [Father's] defense.

Father, in later correspondence to his attorney, Racquel Ross, complained that he thought by his agreement to the PFA order he would be gaining access to [Child] for custody purposes. In fact,

[Child] was listed as a protected party and any hope he had of reaching an agreement for custody was lost.

In March 2013, Father exchanged emails with [Attorney Ross] regarding how unhappy he was with the "bargain" which had been reached for the PFA. He was expecting that although he had a no contact order with Mother, he would at least have visitation with his daughter. Attorney Ross, believing that the emails represented a threat to Mother and the trial judge, telephoned counsel for Mother of her concerns about her client. This contact to Attorney Bierly set off a wave of alerts regarding Father to the State College Borough Police Department, the Pennsylvania State University Police Department, and the FBI.

In conjunction with a status conference in May, 2013, Father's new attorney, Mark Weaver, requested that Attorney Ross supply the court and parties with copies of the so-called "threatening" communications from Father. On June 5, 2013, in a conference call with the [custody] court, Attorney Bierly, Attorney Ross, and a representative from Attorney Weaver's office, Attorney Bierly had to admit that the email communications from Father were, indeed, non-threatening.

On December 27, 2013, the court entered a temporary PFA custody order which provided for shared legal custody, Mother to have primary physical custody, and Father to have regular Skype conversations with [Child]. In addition, Father was to have supervised visits through the Centre County Child Access Center. Based on Mother's Petition to Modify Custody from the December 27, 2013 order, an order was issued on May 20, 2014 providing for Mother's sole legal custody, Father's Skype access on Thursdays, and supervised visits at the Child Resource Center.

With the January 2013 PFA to expire in July 2014 Mother alleged that although Father was not to approach her and [Child] outside of the supervised visitation site, he approached toward her, albeit at some distance, with a smirk on his face. Based on this, Mother raised new concerns regarding her safety. On July 24, 2014, the director of the visitation facility issued a letter regarding his observations of the July 2nd event and indicated that the encounter was not at the fault of Father, but rather was of Mother's failure to leave the premises as instructed.

On August 18, 2014, another temporary [PFA] was issued with an expiration date of December 14, 2014. The order provided that Father should have contact with [Child] at the Child Access Center

and through Skype as set forth in the prior order of December 27, 2013. Following PFA extensions granted at Mother's request, a final hearing on the PFA petition filed in 2012 was conducted on September 10, 2015. The final PFA order was entered on September 15, 2015, and while providing for no contact with Mother, Father was afforded contact with [Child] through the Child Access Center. The order was fixed to expire on September 10, 2018.

The aforesaid final PFA order was appealed to the Pennsylvania Superior Court where it was sustained on August 5, 2016.^[1]

On June 1, 2017[,] a custody order was entered providing for delivery of letters and gifts through Attorney Douglas Hearn. For the period of June 13, 2017 to November 13, 2017[,] Father sent regular checks to [Child] which were not cashed on [Child's] behalf for quite some time.

On February 1, 2019[,] Mother filed another PFA action against Father alleging that he was "stalking" her by virtue of an email he had sent to Mother's custody attorney asking for details of two listed medical events which had occurred to [Child]. For this filing Mother received a temporary order with a scheduled hearing for February 15, 2019.

From the hearing, it became apparent that Father had learned of the medical events by virtue of his insurance coverage and had done nothing that he was not otherwise authorized and encouraged to do; to wit: be made aware of the health status of his daughter. The final protection order was denied following hearing on February 15, 2019.

Custody Ct. Op., 6/22/21, at 1-7 (unpaginated) (formatting altered).

On August 27, 2019, Father, representing himself *pro se*, filed a 90-page petition to modify custody, seeking sole legal custody and primary

¹ This Court affirmed the trial court's entry of the final PFA order, agreeing that "[Father] had engaged in a course of conduct towards [Mother] and [Child] that would place them in reasonable fear of bodily injury, and it issued an order in accordance with section 6108 of the PFA Act." **H.B. v. L.F.**, 1777 MDA 2015, 2016 WL 5401676, at *5 (Pa. Super. filed Aug. 5, 2016) (unpublished memorandum).

physical custody of Child. **See** Pet. to Modify Custody, 8/27/19, at 1. On February 6, 2020, Father filed a second petition to modify custody, seeking the same relief. **See** Pet. to Modify Custody, 2/6/20, at 1.

A trial was held on both petitions on July 22, 2020. At the trial, Father testified on his own behalf and presented the testimony of Linda Bannier, his ex-wife; Laura Brantman-Johnson, a former classmate and paramour; Jillian Fraser Quandt, his sister and Child's aunt; and called Mother as an adverse witness on cross. Mother testified on her own behalf and presented the testimony of Police Officer Michael Todd Walter; Jennifer Bierly, Mother's former attorney; Jack Bratich, an academic colleague of Mother's; and Jacqueline Gum, the guidance counselor at Child's school. At the conclusion of the trial, the court informed the parties it would issue an order and opinion at a later date.

On June 22, 2021, the custody court entered a final custody order granting shared legal and physical custody to both parties, including an accompanying opinion which detailed its findings of fact and legal conclusions that also addressed Child's best interests, namely, that it was in Child's best interests to maintain a relationship with both parents to experience growing up in a two-parent household albeit Child's parents are now physically separated. **See** Custody Order, 6/22/21, at 1-4. The custody court explained that was in Child's best interest for the parties to work together, and that this cooperation would greatly benefit Child. Specifically, the custody court concluded as follows:

We conclude that there should be no impediment going forward to the establishment of a normal father-daughter relationship, even under the circumstances of the geographical separation of the parties. [Child] should continue to reside primarily with [Mother], however, every effort should be made to allow Father to make an impact on [Child's] life as we believe that [Child] will benefitted greatly by it. As indicated at the onset, we find no abusive behavior by Father toward [Child that] should deny him a normal relationship with [Child].

At this point it is almost impossible to dictate a reunification program which will be acceptable to both parties and [Child]. Nonetheless, it must start somewhere. We anticipate that Father will jump hurdles to make this work, and we can only ask that Mother recognize that it is in [Child's] best interest to enjoy a two-parent family while she is still a minor.

Trial Ct. Op., 6/22/21, at 12-13.

On July 19, 2021, Mother filed an emergency motion to stay the custody order pending appeal, as well as a notice of appeal and contemporaneously filed a Pa.R.A.P. 1925(a)(2)(i) statement of errors complained of on appeal.

While Mother's appeal was still pending, Mother filed an additional emergency motion to postpone implementation of the custody order. Despite Mother's pending appeal which effectively removed jurisdiction from the custody court,² on July 28, 2021, the custody court held a hearing on Mother's motion in addition to her requested modifications, which included a provision for therapy for Child and a more graduated introduction schedule to facilitate a relationship between Father and Child. N.T., 7/28/21, at 3-50.

At the conclusion of the hearing the custody court denied Mother's motion but indicated its intention to enter a modified custody order. ***Id.*** The

² We will discuss the jurisdictional issue in more detail below.

custody court purported to enter a second order, on the same docket, also dated June 22, 2021, but filed on July 30, 2021. **See** Custody Order, 7/30/21 at 1-4. In addition to the provisions already included in the first Order, the second Order provided additional relief, namely, counseling and therapy for Child, a compromise of “phase-in” time for Child and Father and an adjusted schedule which included Zoom contact and in-person contact over the course of the month of August. ***Id.*** at 1-3. As noted, ***supra***, there was no *supersedeas*, and this order was not an instance of the custody court enforcing its prior order nor maintaining the status quo. ***Cf. Glynn v. Glynn***, 789 A.2d 242, 245 n.4 (Pa. Super. 2001) (noting that, even in absence of *supersedeas*, order for contempt allowed pursuant to Pa.R.A.P. 1701(b) to enforce court’s prior order).

Although the July 30 Order was entered in error by the custody court because the first appeal effectively removed jurisdiction from the custody court, Mother attempted to timely appeal that order, and contemporaneously filed her Pa.R.A.P. 1925(a)(2) statement of errors complained of on appeal. Mother’s appeals were consolidated in error by this Court at her request, and this Court granted her emergency motion to stay enforcement of the custody order. We note that many of Mother’s issues in both appeals overlap and are duplicative.

On appeal, Mother raises the following issues for our review:

1. Whether the [custody] court erred as a matter of law and/or abused its discretion by finding [Mother’s] “claim” of child abuse was bogus, that [Child] was never placed in danger and

that there was no evidence of abuse by [Father] since there was a three-year Protection from Abuse order entered following a hearing naming [Mother] and [Child] as protected parties, and that Order was affirmed by [this Court?]

2. Whether the [custody] court erred as a matter of law and/or abused its discretion when it based its decisions, in part, on the [custody] court's personal opinion on the Protection from Abuse Act?
3. Whether the [custody] court erred as a matter of law and/or abused its discretion when it analyzed the factors [of] 23 Pa.C.S. § 5328(a), as the findings are not supported by the record and/or there was a capricious disbelief of evidence?
4. Whether the [custody] court erred as a matter of law and/or abused its discretion by failing to give weighted consideration to those factors in Section 5328(a) which affect the safety of the child?
5. Whether the [custody] court erred as a matter of law and/or abused its discretion by failing to provide conditions in its order designed to protect [Child] and/or [Mother], as abused parties, pursuant to 23 Pa.C.S. § 5323(e)?
6. Whether the [custody] court erred as a matter of law and/or abused its discretion by failing to fully consider and discuss the possible effect that the change in custody will have on the child?
7. Whether the [custody] court erred as a matter of law and/or abused its discretion in ordering shared legal custody when the record in this case does not support a finding that [Child] recognizes both parents as a source of security and love or that there is a possibility of a minimum degree of cooperation between the parents?

Mother's Brief at 4-5 (some formatting altered).

Jurisdictional Issues

Prior to examining Mother's appeals on the merits, we must first determine whether we have jurisdiction to hear them. It is well established that an appellate court may raise the issue of subject-matter jurisdiction *sua*

sponte. **See Commonwealth v. Parker**, 173 A.3d 294, 296 (Pa. Super. 2017) (explaining that “[a] court may consider the issue of jurisdiction *sua sponte*” (citations omitted)). “Jurisdiction is purely a question of law; the appellate standard of review is *de novo* and the scope of review plenary.” **Kapcsos v. Benshoff**, 194 A.3d 139, 141 (Pa. Super. 2018) (citation omitted).

After an appeal is filed,

[p]ursuant to Rule of Appellate Procedure 1701, a lower court generally loses jurisdiction to proceed further in a matter after the filing of an appeal. Pa.R.A.P. 1701(a). “Where only a particular item, claim or assessment adjudged in the matter is involved in the appeal, [. . .] the appeal [. . .] shall operate to prevent the trial court [. . .] from proceeding further with only such item, claim or assessment,” unless the lower court or this Court otherwise orders. Pa.R.A.P. 1701(c).

In re J.A., 107 A.3d 799, 809 (Pa. Super. 2015) (footnote omitted). While a trial court may grant reconsideration of the order which is subject to appeal during the pendency of appeal, an application for reconsideration must be timely filed and expressly granted. Pa.R.A.P. 1701(b)(3). The general rule is that “an action taken by a court without jurisdiction is a nullity.” **Mischchenko v. Gowton**, 453 A.2d 658, 660 (Pa. Super. 1982).

Here, the custody court entered its custody order on June 22, 2021. Mother then filed her first appeal on July 19, 2021, in addition to a motion to stay the order filed on the same date, on the same docket. No motion for reconsideration was filed or expressly granted. It appears that to the extent Mother’s application to stay could be considered a motion for reconsideration,

the custody court denied it. Thereafter, the custody court issued, without jurisdiction because of the pending appeal, its modified custody order on July 30, 2021, at this single docket. Mother then filed her second appeal. However, both appeals essentially concern the entirety of the custody orders and the custody court's rulings during the custody trial. In fact, identical briefs were filed for both appeals. For these reasons, the custody court did not have jurisdiction to modify the custody order because Mother had already appealed the June 22 Order, therefore, her appeal was pending in this Court. Pa.R.A.P. 1701(a)-(c).

Accordingly, we quash Mother's appeal docketed at 1126 MDA 2021, because the July 30 Order from which Mother appealed is a legal nullity.³ ***Mischchenko***, 453 A.2d at 660. We now address Mother's appeal from the June 22 Order at 952 MDA 2021 on the merits.

Custody Issues

Our standard and scope of review of modifications to custody orders are as follows:

The appellate court is not bound by the deductions or inferences made by the trial court from its findings of fact, nor must the

³ As will be discussed below, one aspect that was included in the second order that we are constrained to find a nullity, was a provision providing therapy for Child. **See** Custody Order, 7/30/21, at ¶ 4. Nothing in this Court's decision today precludes either party from filing a petition for modification including child therapy or a graduated schedule of introduction to Father. Additionally, the arguments concerning the 2021 summer schedule are moot because the custody order was stayed pending the resolution of the instant appeal. Going forward, the parties are not precluded from seeking additional modifications to address summer scheduling concerns.

reviewing court accept a finding that has no competent evidence to support it. However, this broad scope of review does not vest in the reviewing court the duty or the privilege of making its own independent determination. Thus, an appellate court is empowered to determine whether the trial court's incontrovertible factual findings support its factual conclusions, but it may not interfere with those conclusions unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion.

On issues of credibility and weight of the evidence, we defer 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.

A.V. v. S.T., 87 A.3d 818, 820 (Pa. Super. 2014) (some formatting altered and citations omitted). "The test is whether the evidence of record supports the trial court's conclusions" and whether the conclusions are grounded in a comprehensive evaluation of the best interest of the child. ***Id.***

Protection From Abuse Order

Mother's first two issues concern the custody court's discretionary findings and comments regarding the prior Protection From Abuse Order and the custody-factor analyses which corresponds to it. First, Mother claims that the custody court abused its discretion by finding Mother's claim of child abuse was bogus, because a prior panel of this Court affirmed the entry of a protection from abuse order that had named Mother and Child as protected parties, in violation of the *stare decisis* doctrine, law of the case doctrine, and

coordinate jurisdiction rule. Mother's Brief at 29. Second, Mother claims that the custody court abused its discretion when it based its decisions in part on its personal views of the Act and not on the law. Essentially, Mother claims that the court was not impartial. ***Id.*** at 36.

We note, briefly, that

[t]he basic legal principle of *stare decisis* generally commands judicial respect for prior decisions of this Court and the legal rules contained in those decisions. As recently noted by the United States Supreme Court, "*stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."

Stilp v. Com., 905 A.2d 918, 954 n.31 (Pa. 2006) (quoting ***Randall v. Sorrell***, 548 U.S. 230, 243 (2006) (plurality); **see also** STARE DECISIS, Black's Law Dictionary (11th ed. 2019) (defining *stare decisis* as "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation").

The law of the case doctrine comprises three rules:

(1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court.

Within this doctrine lies the directive that judges sitting on the same court in the same case should not overrule each other's decisions, otherwise known as the "coordinate jurisdiction rule." Only in exceptional circumstances, such as an intervening change in the controlling law, a substantial change in the facts or evidence

giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed, may the doctrine be disregarded.

To determine whether the law of the case doctrine applies, a court must examine the rulings at issue in the context of the procedural posture of the case.

S.G. v. R.G., 233 A.3d 903, 907-08 (Pa. Super. 2020) (some formatting altered and citations omitted). We reiterate that our standard of review concerning custody orders is to determine whether the court's factual findings support its factual conclusions and may only reverse for an abuse of discretion.

A.V., 87 A.3d at 820. Further, on issues of credibility and weight, we defer to the findings of the trial court. ***Id.***

In its unpublished memorandum decision on August 5, 2016, regarding the PFA order, this Court observed that

Here, [Mother] testified at length regarding [Father's] controlling behavior and verbal abuse, and indicated that he berated her with derogatory comments on a daily basis during their marriage. (**See** N.T. Hearing, 9/10/15, at 27-28). [Father's] behavior grew increasingly intimidating and volatile, and he threatened to kill her while she was pregnant, and to abort [Child] himself. (**See id.** at 29-31, 48). The abuse became physical, and [Mother] described instances during which [Father] knocked a metal clothing rack on her, and threw a mug of coffee at her and [Child] when [Child] was a few weeks old. (**See id.** at 31-34). In November of 2008, [Father] punched [Mother] in the chest, knocking her to the floor and the breath out of her lungs; police arrested him as a result. (**See id.** at 35-36, 62-63).

[Mother] further testified that in December of 2012, in the afternoon following a custody proceeding, an unidentified assailant attacked her with a knife. (**See id.** at 41-43). She suffered a deep cut in her throat very close to an artery, requiring fifteen stiches. (**See. id.** at 43-44). Although [Mother] does not think [Father] was the assailant, she believes he arranged the attack through contacts he developed working as an undercover

police officer. (**See id.** at 43). [Mother] and [Child] went into hiding on the advice of law enforcement as a result of the incident. (**See id.** at 44). In July 2014, during a supervised custody visit at which the parties were to have no contact, [Father] exhibited menacing behavior towards [Mother], walking towards her and smirking while [Child] cried. (**See id.** at 61-62, 71-73). [Mother] averred that she is afraid of [Father] and cannot trust him because of his pattern of volatile and abusive behavior, which shows that he is capable of extreme violence. (**See id.** at 44-45, 48).

After considering the testimony at the hearing, the trial court determined that [Father] had engaged in a course of conduct towards [Mother] and [Child] that would place them in reasonable fear of bodily injury, and it issued an order in accordance with section 6108 of the PFA Act. **See** 23 Pa.C.S.A. §§ 6108, 6102; (**see also** Trial Ct. Op., at 4-5; Final PFA Order, 9/15/15, at 1-5). After review of the record, we discern no basis on which to disturb the trial court's determination. **See** [**Ferko-Fox v. Fox**, 68 A.3d 917, 920 (Pa. Super. 2013)].

H.B., 2016 WL 5401676, at *4-5. As noted above, Father did not petition for *allocatur* with the Pennsylvania Supreme Court.

The custody court acknowledged the extensive history of PFA filings when discussing the procedural history of the case. Custody Ct. Op. at 1-7. Additionally, the custody court acknowledged the appeal and affirmance of the final PFA order in this Court. **Id.** However, in its Rule 1925(a) opinion in which it discussed the "present and past abuse committed by a party," the custody court observed,

[t]he sole incident of abuse which is admitted and documented in this case occurred during the 2008 altercation when Mother alleges that she was pushed or punched in the chest and had the wind knocked out of her. The allegations of verbal abuse prior to this event, in this [c]ourt's view, amount to exaggerated instances where "hot buttons" were pushed and excessive language was displayed.

Custody Ct. Op. at 8. The custody court observed that Mother had “aggressive[ly] suppress[ed]” Father’s parental rights and that “unfortunately the damage has been done, and it will be difficult to rehabilitate the father-daughter relationship.” ***Id.*** at 8-9.

Mother essentially argues that the custody court abused his discretion by misapplying the weight of the evidence of the 2013 PFA and concluding it was “bogus.” However, the custody court is permitted to place an appropriate weight on various custody factors so long as its conclusions are supported by the record. On this record, the custody court duly considered Mother’s PFA filings and no prior court orders were disregarded or overruled such that the law of the case was not ignored. **See A.V.**, 87 A.3d at 820. Therefore, Mother’s claim fails.

Mother continues that the custody court improperly based its decision on its own views of the Protection From Abuse Act, citing in support ***M.A.T. v. G.S.T.***, 989 A.2d 11, 20 (Pa. Super. 2010) (*en banc*) (finding that trial court abused its discretion when it ruled that in its personal opinion, shared custody was seldom in the best interest of a child). In ***M.A.T.***, the trial court stated, “I’m not going to expound at any great length on why I think primary physical custody is to be preferred. It’s based upon my many years on the bench, my own personal experience as a parent, a grandparent, a foster parent.” ***Id.*** at 14 (citation omitted). On appeal, this Court reversed, finding that the trial court had abused its discretion because its decision disregarding the custody

evaluator's recommendation had been based on its own personal views and was not supported by the evidence in the record. ***Id.*** at 20-21.

In the instant case, Mother takes issue with the court's remarks at the conclusion of the June 22, 2020 hearing:

I have always maintained, as long as I have been a judge, that one of the most powerful tools in the court system is the Protection from Abuse Act. It has the capability of stripping people of rights without even having had a hearing, at least for a temporary period of time, and that's what the rule requires that a hearing be held within 10 days. It can be extended by agreement, but, in my opinion, that's a disservice to everyone when those things are allowed to fester as I believe they have in this case. There has been way too long a period of [PFA] orders in place. The [PFA] Act requires fear of imminent, imminent serious bodily injury. That's the entering requirement. I haven't seen that in this case. So I do think that there has been a travesty from that standpoint. I do believe that [Father] has been improperly denied access to his child and I candidly believe that [M]other has done practically everything in her power to make sure that he did not spend time with his daughter, and that is sort of echoed from the interview with the child. So, that being said, I am going to modify the custody order. I'm not going to change primary custody for the short term, but we are going to entertain increasing opportunities for dad to spend time with his daughter if it's not already too late. I don't know. I haven't had too many cases like this where a person has been denied access to the visits for practically ten years.

N.T. Trial, 6/22/20, at 280-81.

Clearly, the custody court expressed its personal views of the PFA Act. However, unlike ***M.A.T.***, its opinions were not general statements and were supported by the evidence of the record. The court discussed at length in its custody opinion the history of PFA filings, including the 2013 PFA which was extended by agreement, and Mother's additional filings in 2019. **See** Custody

Ct. Op. at 1-7. In custody matters, so long as the court's factual conclusions are not unreasonable in view of the court's factual findings, we must affirm.

See A.V., 87 A.3d at 820. The test is whether the evidence of record supports the custody court's conclusions and whether the conclusions are grounded in a comprehensive evaluation of the best interest of the child. **See id.** In the instant case, the custody court's personal views were permissible because they were supported by the record and, though Mother may take issue with its interpretation and conclusions, we do not find an abuse of discretion and no relief is due.

Custody Factors

In her third and fourth issues, Mother takes issue with the custody court's analysis of the 23 Pa.C.S. § 5328(a) custody factors and the weight the court placed on certain factors. Mother's Brief at 39-47. Mother challenges the custody court's findings regarding the first, second, fourth, seventh, eighth, ninth, thirteenth, and fifteenth factors.⁴

Section 5328(a) provides, in relevant part, as follows:

(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.

⁴ For ease of analysis, we will not discuss custody factors that Mother did not appeal.

(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.

* * *

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

* * *

(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.

* * *

(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.

* * *

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

23 Pa.C.S. § 5328(a). Moreover, "[t]he court shall delineate the reasons for its decision on the record in open court or in a written opinion or order." 23 Pa.C.S. § 5323(d).

First Custody Factor

Mother contends that the custody court abused its discretion in determining that no abuse occurred, and that this interpretation tainted its findings that regarding the first factor, "which party is more likely to encourage and permit frequent and continuing contact between the child and another party." Mother's Brief at 39-40.

The custody court observed that

[i]f any one thing is clear from the facts of this case it is evident that Mother has done everything in her power to deny Father contact with his daughter under circumstances where there has been no evidence whatsoever of any abuse or threat by Father to [Child]. Mother's claim of "child abuse" having occurred in the 2008 incident where an altercation occurred between Father and Mother is completely bogus. By all accounts [Child] was never placed in danger and Mother's continued use of this event as a reason for denying [F]ather periods of physical custody, even as recently as the February 1, 2018 PFA Petition, is disingenuous and solely calculated to deny Father physical custody for over ten years.

Custody Ct. Op. at 7-8.

Mother's statement of the case argues that Father threatened to kill her while she was pregnant; and Father threw a coffee mug at Mother and Child and coffee splashed everywhere in 2008. Mother's Brief at 6-7. She recounted other incidents including that Father knocked over a metal clothing rack on top of Mother and punched her in the chest. ***Id.*** at 7. These incidents as alleged by Mother are frightening and abhorrent but did not involve harm to Child. Further, they occurred in 2008, and Mother properly pursued protection for her safety under the Protection From Abuse Act which was affirmed by this Court on appeal. Mother's original *ex parte* emergency PFA

was filed in 2012 and extended by agreement several times; the final PFA order was appealed and upheld by this Court in 2016. **H.B.**, 2016 WL 5401676, at *5. Mother filed an additional PFA petition in February 2018; however, a final PFA was denied following a hearing in 2019. A review of the record does not reveal incidents demonstrating a threat that would cause physical harm to Child. Mother, however, has continued to file PFA petitions as recently as 2018, based on her personal safety concerns, which the custody court concluded, had the effect of preventing Father from contact with Child for ten years. On this record, we do not find an abuse of discretion in the court's analysis of this factor and no relief is due. **See A.V.**, 87 A.3d at 820.

Second Custody Factor

Regarding the second factor, present and past abuse committed by a party and whether there is a continued risk of harm to Child or an abused party, the custody court noted that

[t]he sole incident of abuse which is admitted and documented in this case occurred during the 2008 altercation when Mother alleges that she was pushed or punched in the chest and had the wind knocked out of her. The allegations of verbal abuse prior to this event, in this [c]ourt's view, amount to exaggerated instances where "hot buttons" were pushed and excessive language was displayed.

Mother has done an excellent job raising [Child] and has extended her love and guidance to the point that she is an excellent student and socially adjusted. At the same time, however, Father, by virtue of Mother's aggressive suppression of his parental rights, has been denied the opportunity to place a father's mark on her social development. While Mother has pursued a career in academics, Father has demonstrated a variety of talents which suggests that he could be an excellent role model. His military service, certification as a police officer, and his training and

employment as a registered nurse suggests that he could easily safeguard and supervise a child. Substantial damage has been afforded to Father's constitutional right to the parenting of his child by Mother's antics to paint him as abusive and not worthy of having a normal relationship with his daughter. The attack on Mother at a point in time when Father was not even in the Commonwealth of Pennsylvania represents such a stretch of circumstantial evidence of his involvement that he was never even questioned by the authorities who supposedly investigated the crime. Furthermore, the so-called "threat" by Father in walking out of the supervised visitation facility and just simply moving in the direction of Mother and [Child] is such an outrageous claim to perpetuate eight years of PFA orders that Mother's credibility in raising these matters to the court is nil. Unfortunately, however, the damage has been done, and it will be difficult to rehabilitate the father-daughter relationship.

Custody Ct. Op. at 8-9.

As we have discussed, Mother does not agree with the custody court's interpretation of the history of this case, the incidents in 2008 leading to the grant of the original PFA, and the additional PFA filings Mother made as the custody battle became more contentious. Based on the record and the custody court's opinion it is evident that the custody court considered, weighed, and thoroughly reviewed this matter and concluded that the instances of past abuse towards Mother, that primarily occurred in 2008, did not constitute a present threat to either Mother or Child. As this Court has observed, "[t]he parties cannot dictate the amount of weight the trial court places on evidence. Rather, the paramount concern" should be the best interest of the Child. **A.V.**, 87 A.3d at 820. Where the trial court's consideration of Child's best interest is "careful and thorough," we cannot find an abuse of discretion. ***Id.*** Here, the custody court's analysis was careful and

thorough, and the court appropriately concluded that it was in Child's best interest to attempt to foster a relationship with her Father, where there was no present threat to her safety or to Mother's safety. **See** Custody Ct. Op. at 8-9. We do not find an abuse of discretion and no relief is due. **See A.V.**, 87 A.3d at 820.

Fourth Custody Factor

With regard to the fourth factor, the need for stability and continuity in the child's education, family life, and community life, Mother argues that the custody court does not discuss how shared custody will affect the child and what measures could be taken to minimize the disruption and continuity for Child, and has not conducted an analysis of the manner in which this will affect Child. Mother's Brief at 42.

Here, the custody court explained:

[Child] has enjoyed stability and continuity in the custodial relationship for most of her life because she experienced a one[-]parent childhood to date. She has known nothing but stability and continuity because Father has been unable to get his foot in the door to spend time with [Child]. Going forward, a custody order extending to Father periods of physical custody will undoubtedly rock the boat of "stability and continuity"; however, in order for [Child] to experience the benefits of a two-parent childhood, the road forward will not necessarily be smooth.

Custody Ct. Op. at 9. The court has acknowledged that a shared custody arrangement will disrupt Child's life but places greater weight on the importance of Child's ability to develop a relationship with her father. Insofar as Mother argues that the custody court failed to discuss the effect on Child

or measures to minimize the disruption to Child to an appropriate degree, she provides no case law to support her contention that such an analysis is required; that there is any required length to which the court must go to analyze its reasoning; or that the failure to conduct such an analysis is reversible error or an abuse of discretion. **See R.L.P. v. R.F.M.**, 110 A.3d 201, 208-09 (Pa. Super. 2015). Mother's argument here is underdeveloped and cites no legal authority, therefore no relief is due. **See id.** (stating that "[a]rguments not appropriately developed include those where the party has failed to cite any authority in support of a contention" (citations omitted))

Seventh and Eighth Custody Factors

With regard to the seventh factor, the child's well-reasoned preference, Mother argues that Child's preference was to have video calls with Father to get to know him, and that given her age and maturity, more deference should have been given to her request. Mother's Brief at 43.

The custody court observed that it

had an opportunity to interview [Child] in chambers without the presence of counsel or parents. By all appearances she is a very intelligent and pleasant child who is fearful of the custody proceedings as a source of change to her world. Without really knowing her Father she has been placed in fear of him by Mother. Accordingly, she would prefer that she continue to reside with and be in the continuous care of Mother. A review of the many letters sent by Father to [Child] over the years reveals that Father attempted his best to give her some sense of his character outside of that fronted by Mother. There was no evidence of any kind demonstrating that Father exhibited any conduct to [Child] which would justify her independent conclusion that [F]ather was dangerous or a person of bad character.

Custody Ct. Op. at 10. Here, the custody court did consider the preference of Child but noted that there were extenuating factors, including Mother's actions in attempting to keep Child in fear of Father. ***Id.*** Additionally, the record shows that Skype and video calls had previously been attempted but were apparently unsuccessful in the attempt to foster a real relationship. ***Id.*** at 1-7. It is within the custody court's purview to decide what weight to place on both evidence and the custody factors as long as its conclusions are supported by the record. **See A.V.**, 87 A.3d at 820. The custody court did not abuse its discretion in considering, but disregarding, the stated preference of Child.

Mother argues that the custody court erred by failing to consider that Mother had been a victim of domestic violence, and that accordingly, it should have considered the eighth factor—attempt by a parent to turn the child against another parent—in that light. Mother's Brief at 43.

Here, the custody court observed that

it is the [c]ourt's conclusion that in Mother's course of conduct in throwing as many roadblocks as possible in front of Father's efforts to develop a relationship with [Child, who] was led to understand that Father was a threat to her and her happiness as a one parent child in State College, Pennsylvania.

Custody Ct. Op. at 10. We have reviewed the court's findings concerning the PFA orders and related filings and on this record, we find that the custody court did not abuse its discretion in its conclusion that Mother had attempted to keep Child from Father, despite instances of past abuse that occurred over a decade ago, therefore no relief is due. **See A.V.**, 87 A.3d at 820.

Ninth Custody Factor

Mother argues that, with regard to the ninth factor, which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child, the custody court erred by failing to consider Child's emotional needs in requiring physical contact and unsupervised custody between Child and Father. Mother's Brief at 44. Mother contends that the custody court erred in determining that because Father was a registered nurse, he had sufficient psychology training to establish a relationship with Child. ***Id.*** at 45.

Here the court observed that

Father has a lot of ground to make up in establishing a normal relationship with [Child]. By all appearances from his persistence in pursuing his legal rights and the openness of his correspondence to his daughter Father would ask for nothing more than to be able to establish a loving, consistent, and nurturing relationship with [Child]. Because of her exclusive custody since birth, Mother has been permitted to maintain a relationship which is loving, stable, consistent and nurturing and which is adequate for [Child]'s emotional needs.

Custody Ct. Op. at 10-11. Mother cites no support in the record or legal authority for her contention that the court erred in its observations regarding Father's job training or lack thereof. Therefore, no relief is due. **See, e.g., R.L.P.**, 110 A.3d at 208-09.

Thirteenth Custody Factor

With regard to the thirteenth factor, the level of conflict between the parties and their willingness to work together, Mother argues that her unwillingness to work with Father was due to her effort to protect a child from

abuse by another party. Mother's Brief at 45; **see also** 23 Pa.C.S. § 5328(a)(13).

Here the custody court observed that:

[o]bviously, the level of conflict between the parties is, and has been, significant. Mother clings to her ongoing claims of abuse thirteen years after the parties were together, and at this point in time, Father resents having been placed in a position where he has to start anew to develop a relationship.

Custody Ct. Op. at 11-12. On this record, the custody court appropriately determined that no present threat of harm to Child existed and that Mother's efforts to keep Child from Father were not founded on a reasonable fear of abuse. Accordingly, we do not find an abuse of discretion and no relief is due.

See A.V., 87 A.3d at 820.

Fifteenth Custody Factor

Finally, Mother argues with regard to the fifteenth factor, "the mental and physical condition of a party or member of a party's household," that the court committed an abuse of discretion by implying that Mother needed therapy and would potentially not cooperate or encourage Child. Mother's Brief at 46-47.

The custody court observed that

[t]he parties give all appearances of being in excellent physical health and clearly capable of carrying out an active parental role. The emotional aspects going forward, however, may require outside professional assistance. The degree of such assistance will be in direct proportion to Mother's personal level of cooperation and her encouragement to [Child]. Time can only tell if that cooperation and encouragement will be forthcoming.

Custody Ct. Op. at 12. Here, Mother does not provide citation to authority to support her argument that this observation is an abuse of discretion. In any event, based upon the extensive history of this case, the custody court's thorough opinion, and the trial court's record-based factual findings, we do not find an abuse of discretion and no relief is due. **See A.V.**, 87 A.3d at 820.

Weighted Consideration to Section 5328(a) Factors

Finally, Mother argues that the custody court committed an abuse of discretion by failing to give weighted consideration to the factors in Section 5328(a) that affect the safety of Child in that the custody court erred by not providing conditions in its order to protect abused parties. Mother's Brief at 47-48. We conclude that the custody court made appropriate findings supported by the record regarding each factor, including those affecting the safety of Child including the past instances of domestic abuse that occurred in 2008. For these reasons we cannot find an abuse of discretion merely because Mother is unhappy with the result. Accordingly, no relief is due.

Effect on Child

In her sixth appellate issue, Mother argues that the custody court abused its discretion by failing to fully consider and discuss the possible effect a change in custody would have on Child. Mother's Brief at 48. Mother contends that Mother had sole legal custody and primary physical custody of Child subject to Father's supervised visits, of which Father completed four visits. ***Id.*** at 53. Mother argues that the custody court's "analysis is devoid

of the possible effect this change in custody may have on [Child]," which she claims was an abuse of discretion. ***Id.***

In support of her argument, Mother cites ***R.S. v. T.T.***, 113 A.3d 1254, 1261 (Pa. Super. 2015), a custody matter where the trial court reduced shared physical custody between both parents to primary physical custody with the mother. In reversing the trial court, this Court held that

we note the "[i]n a case which presents the possibility of a change in custody, it is incumbent on the court to fully discuss the possible effect on the child of the proposed transfer of custody." ***E.A.L. v. L.J.W.***, [662 A.2d 1109, 1117 (Pa. Super. 1995)] (quotation and citation omitted). **See also *Masser v. Miller***, 913 A.2d 912, 921 (Pa. Super. 2006) (quoting ***Johns v. Cioci***, 865 A.2d 931, 937 (Pa. Super. 2004)) ("The court must give attention to the benefits of continuity and stability in custody arrangements and to the possibility of harm arising from disruption of longstanding patterns of care.").

In the instant case, there is no discussion by the trial court about the possibility of harm to [the c]hild in uprooting him from the care pattern he has known from a young age. We agree with [the f]ather that the trial court's decision is rendered more problematic by the conclusion that [the m]other is less likely than [the f]ather to encourage [the c]hild's relationship with the other parent. The court's decision dramatically reduces [the f]ather's custodial time with [the c]hild during most of the year, and may result in considerable damage to [the c]hild's relationship with [the f]ather, despite the court's conclusion that [the f]ather is a capable parent.

Accordingly, because we conclude that the trial court abused its discretion by awarding [the m]other primary physical custody during the school year, we vacate the trial court's order and remand this case for the court to enter a new custody order awarding both parties shared physical custody.

R.S., 113 A.3d at 1261.

R.S. is clearly distinguishable from the instant case. Here, the parties were granted shared custody in an attempt to encourage a relationship between Father and Child where there had been no relationship before. The custody court acknowledged that Child had enjoyed stability and continuity in Mother's care. **See** Custody Ct. Op. at 1-12. However, the court determined that that stability had been to the detriment to Father's custodial rights and that Mother had been responsible for keeping the relationship from developing. **See id.** Finally, the custody court noted that the transition might be difficult but determined that it was in Child's best interest to have a two-parent childhood for what remained of it.⁵ We find no abuse of discretion on this record and no relief is due. **See A.V.**, 87 A.3d at 820.

Child's Source of Security and Love

Finally, Mother argues that the custody court erred because the record does not support granting shared legal custody where the record does not support the finding that Child recognizes both parents as a source of security and love, or that there is possibility of a minimum degree of cooperation between the parents. Mother's Brief at 54. Mother argues that the court did not consider whether Child recognized both parents as a source of security and love. She argues that the record clearly demonstrates that Father does not, and will not cooperate because he would only engage in video calls with

⁵ As noted above, the trial court did attempt to order therapy for Child to mitigate the effects of the custody changes.

Child if they were recorded and required that communication with Mother be under surveillance. ***Id.*** at 55.

With regard to shared legal custody, this Court has held that

[f]our factors must be considered in determining whether to grant a parent's request for shared legal custody: (1) whether both parents are fit, capable of making reasonable child rearing decisions, and willing and able to provide love and care for their children; (2) whether both parents evidence a continuing desire for active involvement in the child's life; (3) whether the child recognizes both parents as a source of security and love; and (4) whether a minimal degree of cooperation between the parents is possible.

M.A.T., 989 A.2d at 22 (citations omitted).

Mother's arguments are unavailing. In the instant case, the custody court determined that insofar as Child does not view Father as a source of love and stability, Mother promoted these views. **See** Custody Ct. Op. at 7-11. Similarly, although the custody court determined that cooperation between the parties would be difficult for both parents, it was necessary for the parents to attempt to do so for Child's sake. **See id.** As discussed above, we will not find an abuse of discretion where the court considers the best interest of Child in fashioning its custody award, and we do not find an abuse of discretion here and no relief is due. **See A.V.**, 87 A.3d at 820.

For these reasons, we quash the appeal at docket 1126 MDA 2021 and affirm the custody court's order at docket 952 MDA 2021. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 04/07/2022