IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION

A.B.,	:	
Plaintiff	:	
vs.	:	NO. 09-0412
K.R.K.Y.,	:	
Defendant	:	

Civil Action - Child Custody – Children's Fast Track Appeal – Filing and Serving of Concise Statement - Required Specificity in Concise Statement - Best Interests of Child - Trial Court Discretion – Statutory and Other Factors to be Considered - Restrictions on Parental Authority During Periods of Physical Custody - Religion as a Factor in Awarding Custody – Constitutional Limitations – Parental Respect for the Law - Children's Preferences – Financial Ability of a Parent - Primary Caretaker Doctrine

1. Contemporaneously with the filing of a notice of appeal in a custody proceeding, appellant is required to file a concise statement of errors complained of on appeal. Failure to comply with this requirement does not automatically result in a waiver of all issues on appeal, the effect of such defect to be determined on a case-by-case basis taking into account whether any of the parties have been prejudiced by the failure and on the ability of the trial court to issue a thorough opinion.

2. For issues to be preserved on appeal, a concise statement must be sufficiently specific to enable the trial court to know what is complained of and what issues the appellant intends to raise, without having to guess. A concise statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of having failed to file a concise statement.

3. The focus and objective of every child custody proceeding is to determine the best interests of the child. In order to meet this standard, a fact specific, case-by-case analysis of all factors which legitimately impact upon the child's physical, intellectual, moral and spiritual well-being must be undertaken by the trial court.

4. Prior to an appeal being filed in a child custody case, the trial court is required to state the reasons for its custody decision and its consideration of those factors enumerated in 23 Pa.C.S.A. § 5328.

5. A trial court has broad discretion in making a child custody determination. Its factual findings are binding on the appellate court on review, if such findings are supported by competent evidence of record, and its determination of issues of credibility and of what weight should be given to the evidence are deferred to by the appellate court. An appellate court 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.

6. During those periods for which a parent has been awarded legal and partial physical custody, the parent has parental authority, and restrictions should only be imposed on that authority by consent, or upon a clear showing that in the absence of such restrictions, what the parent permits the child to do during these periods of legal and partial physical custody will have a detrimental impact on the child. Consistent with this principle, each parent must be free to provide religious exposure and instruction, as that parent sees fit, during any and all periods of legal and physical custody enjoyed by them, without restriction, unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional harm to the child in the absence of a requested restriction.

7. In making a best interest determination, it is constitutionally inappropriate for the trial court to value the relative merits of one religion over another or whether the beliefs and doctrines of a particular faith in and of themselves are harmful to the child. The impact of a parent's religious beliefs and practices on a child is, however, a legitimate factor for the trial court to consider in evaluating the child's best interests and setting the parameters of a custody order.

8. A parent's criminal acts or disrespect for legal process, including being held in contempt of an existing child custody order, is a proper factor to be considered by the trial court in assessing the fitness of a parent to be awarded custody of a child and what is in a child's best interests.

9. The primary concern in custody matters lies not with the past but with the present and future. For this reason, a parent's ability to care for a child must be determined as of the time of the custody hearing, not as of an earlier time, and should not be determined on the basis of a parent's "unsettled past," unless such past behavior has an

ongoing negative effect on the child's welfare.

10. The weight placed on a child's preference in determining a child's best interests varies with the age, maturity and intelligence of that child, together with the reasons given for the preference. A child's preference, while an important factor, is not the only factor, or necessarily a critical factor, and may be outweighed by other factors, including the benefits of not separating siblings, of maintaining continuity and stability in the child's life, and in the insight and attention to the child's needs one parent can provide over the other.

11. In a custody proceeding, the sole permissible inquiry into the relative wealth of the parties is whether either parent is unable to provide adequately for the child. Unless the income of one party is so inadequate as to preclude raising the child in a decent manner, the matter of relative income is irrelevant.

12. Under the "primary caretaker doctrine" - a doctrine judicially created prior to enactment of the statutory factors set forth in Section 5328(a) - where two natural parents were both fit, and the child was of tender years, the trial court in awarding primary custody was required to give positive consideration to the parent who had been the primary caretaker. Although this doctrine is not one of factors enumerated in Section 5328(a), the considerations underlying the doctrine have been woven into the statutory factors, such that they are part and parcel of the mandatory inquiry. Consequently, not only is the role of a parent as a primary caretaker implicit in the court's consideration of the Section 5328(a) factors, the court may, if it so chooses, explicitly consider a parent's status as the primary caretaker.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION

A.B.,	:	
Plaintiff	:	
vs.	:	NO. 09-0412
K.R.K.Y.,	:	
Defendant	:	

Jennifer L. Rapa, Esquire — Counsel for Plaintiff
Robert S. Frycklund, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – November 28, 2018

Defendant, K.R.K.Y. (Father), has appealed the final custody order entered September 13, 2018, providing, in relevant part, that the parties share legal custody and awarding primary physical custody of the parties' three children (collectively Children) to the Plaintiff, A.B. (Mother).[1] The order grants Father partial physical custody every weekend, except one, each month during the school year; alternating weeks during the summer months; and certain holidays.

PROCEDURAL AND FACTUAL BACKGROUND

The parties were married on October 8, 2005, separated on February 1, 2009, and were divorced on December 13, 2011. (N.T., 8/13/18, p.12; N.T., 9/12/18, p.161). Since their

[1] Two orders were entered in this case by the court on September 13, 2018: one awarding Mother primary custody with respect to the parties' respective requests for modification of the existing custody order, and the second finding Mother in contempt of the former custody order dated November 12, 2013. Father failed to identify which of these two orders was the subject of his appeal filed on October 1, 2018, however, by letter dated October 23, 2018, in response to an order of the Superior Court dated October 18, 2018, Father confirmed that the appeal was from the final custody order.

divorce, both parties have remarried: Father to C.Y. (Wife), who has three children - ages 12, 18 and 20 - from a previous relationship, and Mother to J.B. (Husband), who has two sons from a previous relationship, ages 12 and 13, and a five-year-old daughter, Taylor, with Mother. (N.T., 8/13/18, pp.4-5). The three children who are the subject of these custody proceedings are D.A.Y. (David), age 10 (D.O.B. 10/23/08); M.R.Y. (Megan), age 12 (D.O.B. 9/25/06); and M.P.Y. (Madisyn), age 13 (D.O.B. 4/18/05). Father presently lives in Perkasie, Bucks County, Pennsylvania, and Mother resides in Lehighton, Carbon County, Pennsylvania. (N.T., 8/13/18, p.4).

Following the parties' separation, Mother was the primary caretaker of the Children. (N.T., 9/12/18, pp.118-19). This arrangement was confirmed by court order dated February 18, 2009, which approved and incorporated the parties' February 12, 2009 agreement to this effect. Subsequent final custody orders dated March 16, 2012, and November 12, 2013, agreed to by Father and entered with respect to petitions for modification Father filed, maintained primary physical custody of the Children with Mother. The instant matter was heard on Father's petition for modification filed on September 21, 2017 and Mother's responsive answer and request for modification filed on November 14, 2017.

All three Children attend the public schools in Lehighton, which they have attended most recently for the past two years,

are doing well academically, and are involved in various extracurricular activities. (N.T., 8/13/18, pp.7-9). Each Child was separately questioned in chambers with counsel present. Madisyn, who is in eighth grade, testified that she prefers living with Mother: she has a very close relationship with Mother in contrast to that with Father; she is involved in cheerleading, softball and chorus through the school; her friends are all in Lehighton; and she feels pressured by Father to become a Jehovah's Witness which she opposes, wanting instead to attend church with Mother. (N.T., 8/13/18, pp.21, 23, 170-75, 178, 181-84, 186-87, 195-96, 212; N.T., 9/12/18, pp.135-37). Madisyn is strongly against living with Father and does not get along well with Father's Wife. (N.T., 8/13/18, pp.194-95, 217-18, 221-222).

Megan, who is in sixth grade, testified that she wants to live with Father: she has a better relationship with Father than with Mother, Mother and Husband like her sister and brother more than her and treat them better, students at school bully her, which she believes is not taken seriously by Mother, and she wants to become a Jehovah's Witness. (N.T., 8/13/18, pp.229-238, 258-263, 268, 286). Megan plays softball and also wanted to join the football team but was too late for sign-ups. (N.T., 9/12/18, pp.137-38). Given the choice between being separated from Madisyn but living with Father or living with her sister

and Mother at Mother's home, she preferred to live separate from her sister rather than live with Mother. (N.T., 8/13/18, p.262).

David, who is in the fourth grade, would like to spend more time with Father than under the current order. He has a good relationship with both his parents, is closer with Megan than with Madisyn, wants to be home-schooled, started baseball this fall, and appeared to be less sure on what the custody arrangements should be and what the effects of a change would mean. (N.T., 8/13/18, pp.297-319; N.T., 9/12/18, p.138).

Unfortunately, the stress of the custody proceedings, and the tension and disagreements between Mother and Father over the Children's religious upbringing and the relative importance of the Children attending activities they want to attend on weekends when they are scheduled to be with Father, have created emotional issues for the Children requiring medical treatment and therapy. (N.T., 8/13/18, pp.56, 116-17, 206-207, 246-47, 272; N.T., 9/12/18, pp.57, 62-63, 174-76). In February 2018, Madisyn was admitted to Kids Peace for a few days when she made threats to harm herself. (N.T., 8/13/18, pp.49-50, 184-86; N.T., 9/12/18, p.180). Megan was hospitalized for a week in January 2018 and for another week in March 2018 when she threatened to harm herself and began making cutting marks. (N.T., 8/13/18, pp.60-61, 248, 275-76; N.T., 9/12/18, p.181).

Both Madisyn and Megan have been diagnosed with depression and have been prescribed and take anti-depressant medication. (N.T., 8/13/18, pp.41, 49, 71). All three Children have been in counseling, and Megan and David still receive therapy.

Father is a practicing Jehovah's Witness and is active in his faith with Wife. Father's desire to have the Children receive religious instruction as Jehovah's Witnesses, to have the Children participate in door-to-door ministry, and to attend gatherings and functions of the Jehovah's Witnesses has strained the relationship between Father and Madisyn and created divisions between the parties. (N.T., 8/13/18, pp.20-21, 29, 31). Father is unwilling to transport the Children to extracurricular activities in which they are engaged on weekends when they are scheduled to be with him, believing that this interferes with his time with the Children and that the Children's attendance at activities of the Jehovah's Witnesses is more important. Additionally, Father testified that he does not celebrate the Children's birthdays or religious holidays, such as Christmas or Easter, since this is contrary to the teachings of the Jehovah's Witnesses. (N.T., 8/13/18, pp.14-15, 37, 159-60).

In contrast, Mother celebrates Christmas and Easter in her household and has yearly birthday parties for the Children, all of which are important family events. (N.T., 9/12/18, pp.141-

42). Mother is an active member of a non-denominational church and would like equal time in instructing the Children in her faith. (N.T., 9/12/18, pp.139-41). Mother attends all of the Children's practices and games and is dedicated to having the Children participate in these and other activities. (N.T., 9/12/18, p.142).

Testimony in this case was taken over two full days: August 13 and September 12, 2018. At the conclusion of the testimony, and after hearing argument of counsel, the court reviewed the evidence in light of each of the seventeen factors required to be considered pursuant to 23 Pa.C.S.A. § 5328. (N.T., 9/12/18, pp.235-256). Ultimately, the court determined that the fact that the Children have been primarily in Mother's care since the parties' separation in 2009 – an arrangement agreed to by Father - and been well taken care of, and that to divide and separate the Children between the parties would do more harm than good, was significant, and that the best interests of the Children was to award primary custody to Mother.[2]

Father's notice of appeal was filed on October 1, 2018. Under the appellate rules applicable to a children's fast track appeal, which this is, Father was required to file a concise

[2] Although the custody order entered on September 13, 2018, continued in place, for the most part, the terms of the immediately preceding custody order dated November 12, 2013, which had been agreed upon by the parties, it did significantly increase Father's time with the Children during the summer months by dividing physical custody equally between the parties on a rotating weekly basis.

statement of the errors complained of on appeal together with his notice of appeal and serve this in accordance with Pa.R.A.P. 1925(b)(1). *See* Pa.R.A.P. 102 (definitions – "children's fast track appeal"), 905(a)(2), 1925(a)(2)(i). This, Father failed to do.[3]

Nevertheless, acting in response to an order of the Superior Court dated October 18, 2018, Father filed a Concise Statement of Errors Complained of on Appeal on October 23, 2018. Therein, under the caption "Statement of Issues," Father identifies sixteen errors which he contends have been made by the court and which we address separately below.[4]

---

[3] In In re K.T.E.L., 983 A.2d 745 (Pa.Super. 2009), the Superior Court held that in a children's fast track case, failure to file a concise statement along with the notice of appeal will result in a defective notice of appeal, the effect of which is to be decided on a case-by-case basis. *Id.* at 747. The failure does not automatically result in a waiver of all issues intended to be raised on appeal. *Id.* Whether waiver will result depends, in part, on whether any of the parties have been prejudiced by the failure and on the ability of the trial court to issue a thorough opinion.

In this case, waiver for failing to file a timely concise statement is not in issue since the Superior Court elected by a *per curiam* order entered on October 18, 2018, to allow Father to file a concise statement with this court no later than October 29, 2018. Father has complied with this directive. Cf. J.M.R. v. J.M., 1 A.3d 902 (Pa.Super. 2010) (holding that in contrast to a failure to comply with Pa.R.A.P. 1925(a)(2)(i), failure to comply with an order of the Superior Court directing the filing of a concise statement by a certain date automatically waives any issues on appeal).

[4] As a nominal seventeenth issue, Father requests an enlargement of time to "more fully develop" his statement of errors after he receives and has a chance to review the trial transcript. This request is clearly contrary to the objective of Pennsylvania Rules of Appellate Procedure 905(a)(2) and 1925(a)(2) adopted January 13, 2009 and effective sixty days thereafter to "fast track" those cases designated within the meaning of "children's fast track appeal." Not only did Father fail to file his concise statement simultaneously with the filing of his appeal, he failed to order a transcript of the proceedings until on or about September 27, 2018, two weeks after the court announced its decision in open court at the conclusion of the second day of the custody hearing and reviewed, on the record, the basis of its decision in the context of the seventeen factors enumerated in 23 Pa.C.S.A. §

DISCUSSION

The focus and objective of every child custody proceeding is to determine the best interests of the child. To do so, the court is required to "consider all factors which legitimately impact upon the child's physical, intellectual, moral and spiritual well-being." M.J.N. v. J.K., 169 A.3d 108, 112 (Pa.Super. 2017). Factors to be considered include, but are not limited to, those set forth in 23 Pa.C.S.A. § 5328.[5] *Id.* This

---

5328. *See* M.J.M. v. M.L.G., 63 A.3d 331, 335 (Pa.Super. 2013) (re-affirming the need for the trial court to state the reasons for its custody decision as mandated by Section 5328 prior to the filing of an appeal), *appeal denied*, 68 A.3d. 909 (Pa. 2013). Moreover, the Superior Court order directing Father to file his concise statement by October 29, 2018, was one issued by the Superior Court and this court does not believe it has the authority to enlarge that period. Accordingly, Father's request to file additional grounds for appeal beyond the date set by the Superior Court has been denied.

[5] The factors to be considered by a court when awarding custody as set forth in Section 5328(a) are:

> § 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.
>
> (2.1) The information set forth in section 5329.1(a)(1) and (2) (relating to consideration of child abuse and involvement with protective services).
>
> (3) The parental duties performed by each party on behalf of the child.

standard requires a fact specific, case-by-case analysis of all relevant factors affecting the child's best interests. B.C.S. v. J.A.S., 994 A.2d 600, 602, 605 (Pa.Super. 2010). It is the best interests of the child, and not of the parents, which are at stake. Commonwealth ex. rel. Bordlemay v. Bordlemay, 193

---

(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).

A.2d 845, 848 (Pa.Super. 1963).

By its very nature, the decision in a custody case requires the exercise of discretion by the court and

> the 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. Siefert, 902 A.2d 533, 540 (Pa.Super. 2006). (citation omitted).

Consistent with this deference to the exercise of discretion by the trial court, the standard of review on appeal 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. v. S.E.F., 45 A.3d 441, 443 (Pa.Super. 2012) (citation omitted).

As we view the errors claimed by Father in his concise statement, with the exception of the first claim of error, all assert that the court improperly disregarded certain evidence which Father contends should have been accepted by the court. The wording of the sixteenth claim differs only in stating that the court failed to give proper weight to what Father characterizes as "Father's and stepmother's demonstrated stability in his career, relationships, finances and residences." Given these claims, each of which involves issues of credibility and the weight of the evidence, we address each claim of error numerically in the sequence presented by Father in his concise statement and reference other evidence which we found more credible and persuasive in ultimately deciding what was in the best interests of the Children.

General Claim of Error

Issue 1: Father's claim that the court failed "to address and properly consider all of the pertinent factors relating to custody as set forth at 23 Pa.C.S.A. § 5328(a)," fails to identify any specific factor of the seventeen factors enumerated in Section 5328(a) which Father claims was not addressed and/or was not properly considered. To state generally only that the court erred, without identifying what the error consists of with

sufficient specificity for the trial court to know what is complained of, without guessing, fails to preserve any specific issue. *See* Commonwealth v. Dowling, 778 A.2d 683, 686-87 (Pa.Super. 2001) ("[A] Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all."). In consequence, no purported error has been preserved in this first issue.

Mother's Attempt to Turn Children Against Father

Issues 2,3,4: With respect to these three issues, Father contends the court erred in disregarding evidence he presented to establish that Mother attempted to alienate the Children from Father and Wife; made inappropriate and conspiratorial communications with the parties' minor daughter, Madisyn; and posted on social media inappropriate and derogatory comments about Father and Wife which were also accessible to the parties' daughters, Madisyn and Megan. Such information was not ignored, but was considered and balanced in the context of the strained relationship between Mother and Wife and the difficulties and disagreements which exist between the parties over the Children's religious upbringing and how this impacts on the

Children's attendance at other scheduled activities during Father's custodial time.[6]

For the most part, since the parties separated, Mother and Father have dealt directly with one another in discussing and resolving custodial issues involving the Children. At times, however, Wife has interjected herself into these discussions, often exacerbating the situation.

Approximately three years ago, the parties agreed to meet at Panther Park to discuss difficulties they were experiencing with the custodial arrangements and possible solutions. (N.T., 9/12/18, p.166). At this meeting while Mother and Father remained in one area of the park, Wife and Husband took the Children to another area of the park so the parties could talk

[6] Indeed, it was with respect to one such disagreement that Mother was held in contempt. During the October 20, 2017 weekend, Madisyn and Megan wanted to attend a school dance and march in a Halloween parade with their teammates. Mother had attempted for days in advance to obtain Father's permission for Madisyn and Megan to participate in these activities which were scheduled on one of Father's weekends, offering to give Father additional time with the Children and to switch her scheduled weekend with the Children with Father to accommodate this request. Notwithstanding multiple texts from Mother to Father making this request and explaining the importance to the Children of attending these events, Father refused to respond, indicating only that he had received the text. Ultimately, Mother unilaterally decided to keep the Children for the weekend. (N.T., 9/12/18, pp.145-47; Father's Exhibit No.1).

Although we accepted as true Mother's repeated efforts to reach an agreement with Father and her good intentions for keeping the Children on this particular weekend, absent Father's consent, Mother's unilateral decision to withhold the Children was a violation of the custody order for which we found Mother in contempt. Nevertheless, because of the mitigating circumstances, a fine of $100.00 was the only sanction imposed; however, Mother was also advised of the significance of this violation and how disrespect for legal process can factor into the fitness of a parent to be awarded custody of children. (N.T., 9/12/18, pp.239-240). *See also*, Brooks v. Brooks, 466 A.2d 152, 157 (Pa.Super. 1983) (citation omitted). Neither party has appealed the order of contempt.

privately between themselves outside the presence of the Children.

The parties met for approximately two hours and were still in discussion when Wife returned and heard Mother telling Father that she felt Father was too zealous in his efforts to involve the Children in his faith and requiring them to attend various meetings and functions of the Jehovah's Witnesses. (N.T., 9/12/18, p.167). Wife interpreted this as a criticism of her religion and inserted herself into the conversation. This led to a shouting match, the Children in tears, and Father directing Wife to leave. (N.T., 9/12/18, p.167).

More recently, on August 23, 2017, when Mother was requesting Father to give up some of his weekend time with the Children so the Children could attend activities they were enrolled in, Wife, feeling Father was being taken advantage of, broke into the conversation and, communicating directly with Mother, accused Mother of laying a guilt trip on Father. (N.T., 9/12/18, pp.41-42, 44-45). Mother responded that the issue was between her and Father, that Wife was intermeddling. (N.T., 9/12/18, pp.45, 164). The exchange between Mother and Wife rapidly deteriorated into both demeaning the other, questioning their respective parenting abilities, and Mother comparing Wife's religion to a cult and blaming Wife for the death of Wife's newborn child. (N.T., 9/12/18, pp.42-43, 47-53). As a

result of this heated exchange, in which both said things that should never have been said, the relationship between Mother and Wife today is non-existent. (N.T., 9/12/18, pp.54, 164-65).

On another occasion – the date was not disclosed – after Mother learned that Father had obtained a continuance of a custody hearing scheduled in the instant matter, Mother texted Madisyn that the case was continued and that she was upset. (N.T., 9/12/18, pp.187-88; Father's Exhibit No.3). When Madisyn also expressed displeasure and asked why, Mother wrote that Father may have continued the case to take his "precious family," referring to Wife and her children, to Knoebels. (N.T., 9/12/18, pp.187-90; Father's Exhibit No.3). In the past, Father chose to give up time with the Children in preference to going to Knoebels with Wife and her children, causing the Children to feel slighted. (N.T., 8/13/18, pp.205-206; N.T., 9/12/18, p.189). Mother testified that this reference to Knoebels and Father's other family was an isolated incident and acknowledged this should not have been said. (N.T., 9/12/18, pp.180-90).

Finally, testimony was presented about another occasion where Wife had posted conversations she had with the Children on Facebook to her friends in which she referred to the Children as her children. (N.T., 9/12/18, p.17). When Madisyn learned of this, she was offended and wrote Wife that the Children were not hers. (N.T., 9/12/18, p.17). Mother wrote Wife that she would

have Madisyn delete the comments. (N.T., 9/12/18, p.17). Because Mother was subsequently blocked from Wife's Facebook page and no longer able to access these postings directly, Mother later asked Madisyn to take screenshots of some of the comments posted on Mother's Facebook page which Mother intended to use in court to prove that she had apologized to Wife for what Madisyn had posted and requested Madisyn to delete the comments. (N.T., 9/12/18, pp.41, 185-86).

Although some of Mother's conduct as illustrated by this evidence was uncalled for and inappropriate, particularly her communications and involvement of Madisyn - which Mother admitted were wrong - Father's implication that Mother alone has behaved badly and attempted to alienate the Children against the other parent is inaccurate. Mistakes were made on both sides. Both Father and Wife have disparaged Mother to Madisyn, and spoken badly of Mother in the presence of the Children. (N.T., 8/13/18, pp.200, 218-19). Wife has also compared Mother to her ex-husband and told one of the Children's therapists that Mother reminded her of a narcissist. (N.T., 9/12/18, pp.33-35).

In the end, both parties said or did things that were disrespectful of the other, some of which they knew or should have known would likely influence the Children against the other parent, or permitted others to do so on their behalf. Though this evidence was considered, it was not determinative in

deciding the overall best interests of the Children. Notwithstanding the parties' disagreement over what activities the Children should be permitted to attend on weekends when they were scheduled to be with Father, a disagreement premised on an honest difference of what was in the Children's best interests, we believe neither parent has seriously attempted to discourage the Children from having a relationship with the other.

Mother's Disparagement of Father's and Wife's Religion

Issues 5,10: Father next argues that the court failed to consider Mother's condemnation to the Children of his and his Wife's religious faith as Jehovah's Witnesses. There is very little if any clear evidence that Mother disparages Father's and Wife's religious faith to the Children, and no evidence as to what specifically Father claims Mother tells the Children. (N.T., 8/13/18, p.75).

Without question, the religious upbringing of the Children has been a source of tension between the parties and stress to the Children, not because Father, Wife, and Wife's parents, with whom Father resides, are practicing Jehovah's Witnesses, or because of differences in the religious convictions of Father's faith as compared to Mother's, but because of the effect the amount of time the Children are required to spend in congregation meetings, assemblies, conventions, and door-to-door ministry of the Jehovah's Witnesses when they are with Father

has on their ability to participate in other activities which they have committed to or want to attend. Mother believes Father's immersion of the Children in his faith is excessive and deprives the Children of participating in other worthwhile activities.

Before the parties separated, they agreed that each would raise the Children in their own faith and that when the Children became old enough to make a decision what faith they wanted to practice, each child would decide for himself or herself. (N.T., 8/13/18, pp.25, 31). Under the November 1, 2013 custody order, Mother had the Children the first and third Sunday of each month and Father had partial physical custody on the remaining Sundays, thus giving the parties relatively equal time attending to the religious instruction of the Children. This continued until the November 22, 2017, interim order which awarded Father partial physical custody on the first three weekends of every month. In consequence, Mother has been more limited in raising the Children in her faith and taking them to her church. (N.T., 8/13/18, pp.23, 115, 304; N.T., 9/12/18, pp.139-141, 163).

The effect of the November 22, 2017, interim order has further interfered with the Children's attendance at games on Sundays when they are with their Father. (N.T., 9/12/18, pp.144-45). Father has taken the position that these Sundays are his

time with the Children, that taking the Children to their games on Sundays takes time away from him, and that it's his decision what the Children do when they are scheduled to be with him; Father also contends that he cannot afford the expense of transporting the Children to their games. (N.T., 8/13/18, pp.10-11, 106-108; N.T., 9/12/18, pp.144-45). Because the Children, especially Madisyn, want to attend their games and because their absence jeopardizes their ability to remain on the team, Father's unwillingness to allow and arrange for the Children's attendance has been a source of frequent contention between the parties. (N.T., 8/13/18, pp.10, 103). But *see* Zummo v. Zummo, 574 A.2d 1130, 1138 (Pa.Super. 1990) ("During lawful periods of visitation a non-custodial parent has parental authority, and restrictions will only be imposed on that authority by consent, or upon clear demonstration that in absence of the proposed restriction, visitation will have a detrimental impact on the child.").

Mother repeatedly testified that she is not opposed to Father educating the Children in his faith but that she believes he has been overbearing and overzealous in this regard. (N.T., 9/12/18, p.161-63). Mother's biggest concern with respect to religion is that she would like to have the same amount of time as Father does on Sundays in order that she also can have the Children attend and be instructed in her faith. (N.T., 9/12/18,

p.163). In support of her stance that she is not opposed to Father's religion, Mother testified how she had recently switched weekends with Father in order to allow him to take Megan and David to a weeklong convention of the Jehovah's Witnesses. (N.T., 8/13/18, pp.77-78; N.T., 9/12/18, pp.163-64).

This is not a case directly involving Father's religious freedom or his right to educate and raise the Children in his faith versus Mother's similar right to have the Children raised in her faith, as much as it is a disagreement over whether the amount of time the Children are involved with the Jehovah's Witnesses when they are with Father unreasonably and contrary to their best interests impedes their ability to participate in other worthwhile activities. The constitutional limitations upon the application of the spiritual component of the best interests analysis in the context of valuing the relative merits of one religion over another or whether the beliefs and doctrines of a particular faith in and of themselves are harmful to the child, are therefore not an issue in this case. *See* Morris v. Morris, 412 A.2d 139, 142 (Pa.Super. 1979) (holding that it is legitimate for a court to examine the impact of a parent's religious beliefs and practices on a child in evaluating the child's best interests and setting the parameters of a custody order); *see also* Zummo, 574 A.2d at 1154-55 (holding that "each parent must be free to provide religious

exposure and instruction, as that parent sees fit, during any and all periods of legal custody or visitation without restriction, unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional harm to the child in absence of the proposed restriction").[7]

Mother's Falsely Accusing Father of Being Court-Ordered to Take Anger Management

Issue 6: Father also contends Mother has falsely told the Children that Father was court ordered to undergo anger management and that he failed to comply, when there exists no such order, and that the court erred in disregarding such evidence. While Mother has texted Father about his inability to control his anger, the effect this has had on the Children, and his failure to complete anger management classes, there is no evidence of Mother telling the Children that Father was court ordered to undergo anger management and failed to do so. (N.T., 8/13/18, pp.81-85; Father's Exhibit No.1).

Further, that Father has anger issues which affect and terrify the Children was testified to by Madisyn. When

[7] We note, however, that Zummo's precedential value is in question since one judge wrote for the majority, one concurred in the result, and one dissented. While the Superior Court has cited the Zummo decision as authoritative, the Pennsylvania Supreme Court in Shepp v. Shepp, 906 A.2d 1165, 1178 n.6 (Pa.2006) (Baer, J. dissenting), has noted that because the lead opinion in Zummo did not garner a second vote, the decision is without precedential effect. *See* P.J.A. v. H.C.N., 2016 WL 661752 *8 n.9 (Pa.Super. 2016) (Memorandum Opinion).

questioned by Father's counsel, Madisyn testified how Father is easily angered; yells at Wife, pushes her into a bedroom and shuts the door; throws his phone across the room when angry, on one or two occasions hitting Madisyn; and slams his fist on the table. (N.T., 8/13/18, pp.222-23). Madisyn also explained that both parties have bad moods and upset the entire home. (N.T., 8/13/18, pp.201-202).

Mother's Lack of Stability

Issue 7: Father's next claim of error is that the court disregarded "Mother's demonstrated lack of stability in her career, relationships, finances and residences." A brief review of the evidence dispels this issue.

Mother was injured in a fall three years ago and is a stay-at-home mother. With the exception of an eight month separation which immediately preceded her marriage to Husband in November 2017, Mother and Husband have been together for the past seven to eight years. (N.T., 9/12/18, pp.93-94).[8] During this period, which encompasses the majority of the Children's lives, Husband has been a constant part of their lives. (N.T., 9/12/18, pp.83, 168). Husband has full-time employment, is the sole source of income to Mother's household, and earns enough to provide for himself, Mother and the Children. (N.T., 9/12/18, pp.80, 82-83,

[8] The separation was caused by a dispute between Mother's landlord at the time and Husband in which the landlord required Husband to vacate the premises. (N.T., 9/12/18, p.190).

168).

Regarding Mother's residences, between July 2006 and August 2014, Mother resided at 12A Cornell Avenue in Palmerton, Carbon County, Pennsylvania, moving when the home became overcrowded following the birth of Taylor in 2013. (N.T., 9/12/18, pp.128-29). Mother next lived at 836 Main Road in Lehighton, Carbon County, Pennsylvania, where she lived between August 2014 and July 2015, moving because of a dispute with her landlord over needed repairs and because it was at this property where she fell and injured herself in 2015. (N.T., 9/12/18, p.128). Mother's next home was in Coopersburg, Lehigh County, Pennsylvania, where she resided between July 2015 and July 2016, moving to return to Carbon County for the Children to be with their friends, in an area they knew, and in a school district they liked. (N.T., 9/12/18, pp.127-28). Mother moved to 202 Held Street, Lehighton, Carbon County, Pennsylvania, where she lived from approximately July 2016 to August 2017, moving when the owners sold the home to another couple. (N.T., 9/12/18, pp.126-27). Finally, Mother moved in August 2017 to her current address at 390 Center Street, Parryville, Carbon County, Pennsylvania, where she continues to reside at the present time and recently signed an additional one year lease. (N.T., 9/12/18, pp.94, 125).

The court accepted Mother's explanations for these moves as

reasonable and appropriate, and not an indication of instability as argued by Father. Further, notwithstanding that these moves resulted in the Children being enrolled in three separate school districts, the majority of the Children's time in school has been in the Lehighton Area School District, where they are now enrolled and have been for the past two years, and where they are active in sports and doing well academically. *See* Witmayer v. Witmayer, 467 A.2d 371, 376 (Pa.Super. 1983) ("The primary concern in custody matters lies not with the past but with the present and future."); Wheeler v. Mazur, 793 A.2d 929, 936 (Pa.Super. 2002) (stating that custody can not "reasonably be granted on the basis of the parent's 'unsettled past' unless 'the past behavior has an ongoing negative effect on the child's welfare.'").

Status of Mother's Mental Health
and Ability to Care for the Children

Issues 8,11: In 2015, Mother fell approximately fifteen to eighteen feet from a porch at her residence at 836 Main Road in Lehighton and sustained multiple serious injuries: a broken back in three or four locations; broken ribs, resulting in a punctured lung; a laceration to the back of her head, requiring staples to close; and crushing of the inner bones of her left ear, causing her to be deaf in that ear. (N.T., 9/12/18, pp.89, 118, 120-21).

These injuries and the medication she takes do not affect her ability to care for the Children. (N.T., 9/12/18, pp.89-90, 121-122). Father, however, complains in paragraph 11 of his concise statement that on one occasion Madisyn was asked to retrieve Xanax from Mother's purse and take this medication to Mother, thereby evidencing, according to Father, that the Children have easy and ready access to Mother's medication. On this occasion, after Mother had had recent surgery to her left ear following her fall and was at home lying in bed, in tears, experiencing severe pain, Husband called Madisyn from work and asked her to take medication from Mother's purse to Mother. (N.T., 8/13/18, p.201; N.T., 9/12/18, pp.99-102, 173-74; Father's Exhibit No.2). Madisyn took the bottle of Xanax to Mother without opening the bottle and without incident. (N.T., 9/12/18, pp.173-74). Under the circumstances, we see nothing about this isolated incident which renders Mother unfit or for which Mother can be criticized, and there is no other evidence of any other incident or risk to the Children from Mother's medications.

With respect to Father's complaint that Mother's history of mental health issues impairs her ability to properly supervise and care for the Children, again, the evidence does not support this assertion. Instead, what the evidence shows, is that when Mother was fourteen years old, her father died, and she became

depressed. (N.T., 9/12/18, p.178). She was suicidal, cut herself, and received treatment. (N.T., 9/12/18, pp.178-180). Since then, for more than twenty years Mother has been free of any thoughts of self-harm, and there is no evidence that this past history or the occasional depression she currently experiences and receives treatment for somehow adversely affects her ability to care for the Children. (N.T., 9/12/18, pp.178-180). Brooks v. Brooks, 466 A.2d 152, 155-57 (Pa.Super. 1983) (citation and quotation marks omitted) (holding that past emotional and psychiatric problems do not preclude an award of custody to that parent and that "[p]ast conduct is not relevant unless it will produce an ongoing negative affect on the child's welfare.").

Cause and Effect of Children's Mental Health Issues

Issue 9: Father's claim that the court disregarded the evidence concerning Madisyn and Megan's mental health and treatment is without basis, and his contention that Mother or the living conditions at Mother's home are the cause of Madisyn and Megan's thoughts of self-harm because the first time Madisyn expressed such thoughts, which she revealed to Mother, and the first time Megan engaged in conduct hinting at a desire to harm herself occurred at a time when the Children were in the custody of Mother is not only speculative, but ignores the evidence the effect of this litigation and the disputes and arguments between

the parties regarding custody and their disparagement of one another has on the Children.

Father testified that he first became aware of the symptoms of depression and self-harm with Madisyn approximately three years ago when she was living in Coopersburg, that Madisyn first opened up to Mother, and that when Father inquired, Madisyn told him that the reasons for her feelings were because of school and the custody dispute. (N.T., 8/13/18, pp.41-42, 56). Consistent with this, Wife testified that her relationship with Madisyn deteriorated and worsened when the custody litigation began again in October or November, 2017 (*i.e.*, soon after Father filed for modification on September 21, 2017). (N.T., 9/12/18, p.57). With respect to Megan, Father testified he first noticed difficulties approximately two years ago. (N.T., 8/13/18, pp.41-42).

Contrary to Father's blaming Mother for these mental health issues, Mother's relationship with Madisyn and Megan has made it easier for her to know and understand what her daughters are experiencing. Megan and Madisyn are open and honest with Mother about their feelings. (N.T., 9/12/18, p.180). It is easier for Madisyn to talk to Mother than Father, and when Madisyn has thoughts of self-harm, she confides in Mother, not Father. (N.T., 8/13/18, pp.28, 47). Moreover, Mother's past experience with depression and cutting herself when she was fourteen gives

her a better understanding of what her daughters are experiencing and how to talk to them about it. (N.T., 8/13/18, p.68; N.T., 9/12/18, pp.68, 178-180).

Recognizing their daughters' needs for help, Mother and Father working together arranged for Madisyn's treatment at Kids Peace in February of this year, and for Megan's hospitalization at First Hospital earlier in January. (N.T., 8/13/18, pp.60-61, 117-18). When Megan was hospitalized a second time two months later, in March of this year, Father opposed the hospitalization, yet when Megan was evaluated by health care professionals in the field, it was determined that Megan needed to be hospitalized for almost a week. (N.T., 8/13/18, pp.119, 123-24). During this time, Megan's prescribed dosage of Zoloft was increased, a change which has had dramatic effects on improving Megan's behavior and thoughts, and Megan herself testified that this hospitalization was the best hospital experience she had. (N.T., 8/13/18, pp.249, 277; N.T., 9/12/18, pp.199-200).

As to this issue, not only did we take into account when awarding primary custody the mental health needs of Madisyn and Megan, we also considered Mother's insight into these needs, her relationship with her daughters, and the actions and decisions she took and treatment she sought for her daughters. Father's belief that the cause of his daughters' problems is stress in

the Mother's household is speculative at best given the complicated nature of diagnosing the source and cause of mental health issues and his lack of expertise in this area; fails to fairly consider the impact and effect of the custody litigation itself and the stress and divisions caused by the parties' disagreements, particularly those involving their Children's religious upbringing and attendance at activities; and fails to take into account that the threats made by Madisyn and Megan occurred on Fridays when they were scheduled to go to Father's home. (N.T., 8/13/18, p.72; N.T., 9/12/18, pp.197-200).

Children's Preferences

Issue 12: In awarding Mother primary custody, Father contends we erred in disregarding the "clear, unambiguous and well-reasoned preferences" of Megan and David to live with Father. In presenting this argument, Father appears not to dispute that his relationship with Madisyn has been strained for the past few years and that Madisyn strongly desires to remain with Mother. (N.T., 8/13/18, pp.20-21, 178).

As to Megan and David's preferences, neither was "clear, unambiguous and well-reasoned." Megan testified that she gets along fine with Madisyn, that she did not believe she and Madisyn should be separated, and that the best arrangement would be to equally divide the parties' time with the Children and keep the Children together. (N.T., 8/13/18, pp.244, 261).

Recognizing that this was not possible since the parties live in different school districts and approximately forty-five minutes apart, Megan testified that as between living with Madisyn at Mother's home or being separated from Madisyn but living with Father, she preferred the latter. (N.T., 8/13/18, pp.97-98, 262).

David's preference to live with Father was weaker still. Madisyn testified that when she and David discussed where to live, David wanted to remain with Mother. (N.T., 8/13/18, pp.188-89). Megan testified that she believed David was on the fence and could not decide. (N.T., 8/13/18, pp.260-61). David himself testified that he would like to go to Father's "a little longer." (N.T., 8/13/18, p.299). However, when David was asked for reasons why he said certain things, such as wanting to become a Jehovah's Witness, why he gets along better with Megan than Madisyn, or how staying with his Father a little longer would affect his schooling, he couldn't explain. (N.T., 8/13/18, pp.299-300, 307, 316-17). Gianvito v. Gianvito, 975 A.2d 1164, 1170 (Pa.Super. 2009) (holding that where a child is unable to fully understand the nature of the proceedings and the effect they will have upon the child's future, the court acted appropriately in not placing great weight on the child's preference).

While a child's preference is an important factor in

determining a child's best interests, it is not the only factor, or necessarily the critical factor. Johns v. Cioci, 865 A.2d 931, 943 (Pa.Super. 2004).

> The weight to be accorded a child's preference varies with the age, maturity and intelligence of that child, together with the reasons given for the preference. Moreover, as children grow older, more weight must be given to the preference of the child. As this Court has recently reaffirmed, where the households of both parents were equally suitable, a child's preference to live with one parent could not but tip the evidentiary scale in favor of that parent.

B.C.S. v. J.A.S., 994 A.2d at 604. This, of course, did not contemplate the present situation where the Children's preferences are divided. In awarding primary custody of Megan to Mother, rather than Father, we have not ignored Megan's preference, but found that in addition to being a backup choice, it was outweighed by other factors, including the benefits of having the Children reside together - rather than being separated, of the continuity and stability established during the nine years she has resided with Mother since the parties' separation, and of the insight and concern Mother has evidenced for Megan's mental health.

As we understand Father's position, Father believes it would be best to separate and divide the Children and to award primary physical custody of Megan and David to him and primary physical custody of Madisyn to Mother. Wife shares this belief.

(N.T., 9/12/18, pp.64-65). This, however, we believe would not be in the Children's best interests, would do more harm than good, and ignores the relationship the Children have with one another and with their half-sister, Taylor.

First, although there are inevitable sibling rivalries, the Children have lived together their entire lives and they do in fact get along with one another. (N.T., 8/13/18, pp.188, 244). Father seeks to change the status quo and the continuity and stability in the Children's relationships with one another, and with Mother, and with Husband. *See* Tomlinson v. Tomlinson, 374 A.2d 1386, 1389 (Pa.Super. 1977) (discussing the importance of not disrupting an established relationship); Johns, 865 A.2d at 937 (noting the need for the court to "give attention to the benefits of continuity and stability in custody arrangements and to the possibility of harm arising from disruption of long-standing patterns of care"). Second, the importance of raising siblings together and maintaining a family unit should not be ignored. In addition to the relationship with one another, all of the Children have a good relationship with their half-sister, Taylor, especially David. (N.T., 8/13/18, p.309, 314; N.T., 9/12/18, pp.86, 92-93, 177). *See* Johns, 865 A.2d at 942 ("Absent compelling reasons to separate siblings, they should be reared in the same household to permit the 'continuity and stability necessary for a young child's development.'"); L.F.F.

v. P.R.F., 828 A.2d 1148, 1152 (Pa.Super. 2003) (absent compelling reasons to the contrary, it is the policy of this Commonwealth to raise siblings together whenever possible); Wiskoski v. Wiskoski, 629 A.2d 996 (Pa.Super. 1993) (policy applies equally to half siblings), *appeal denied*, 639 A.2d 33 (Pa. 1994). "[T]o meet this standard [of compelling reasons], the evidence must indicate it was necessary to separate the children and the evidence was forceful in this regard." Watters v. Watters, 757 A.2d 966, 971 (Pa.Super. 2000).

Mother and Husband's Favoritism of Madisyn

Issue 13: In this issue, Father contends Mother and Husband unduly and unfairly favor Madisyn over Megan. The primary source for this contention is Megan's testimony that her sister and brother had a phone and she didn't and that her brother was given a TV before she was. (N.T., 8/13/18, pp.236-38). The reasons for this, however, were explained elsewhere. Madisyn had a full service phone because she was older and needed it for her activities; David was given a used phone by his grandmother which was connected to Wi-Fi only and was used for playing video games and not making telephone calls; and Megan had broken every phone she was given within two weeks. (N.T., 9/12/18, pp.106-109, 113, 172-73, 196-97).

More importantly, Mother and Husband both credibly testified that to the extent the Children were treated

differently it was because of their ages and maturity levels. (N.T., 9/12/18, pp.91, 171-72). They also testified that Megan had anger issues, that she didn't take care of the electronic devices given to her, that she was addicted to electronics, and that, as a form of discipline, electronics were sometimes taken away from Megan to get her attention. (N.T., 8/13/18, pp.267, 281; N.T., 9/12/18, pp.92, 105-108, 110, 174, 196-97).

Megan's Fear of Husband

Issue 14: Father also contends that we disregarded Megan's fear of Husband. On this issue, Father testified that two to three years ago Husband had pinned Megan against the wall, restrained her a few times, and that Megan was terrified of him. (N.T., 8/13/18, pp.162, 164-65). This is contrary to the testimony of Mother and Husband. (N.T., 9/12/18, pp.90, 109-110, 168-69).

Megan began acting out approximately two to three years ago, before she was hospitalized earlier this year. Her anger manifested itself by uncontrolled screaming and cursing during which she threw and broke various items; hit, bit, kicked, and punched others; cut herself; and overturned furniture. (N.T., 8/13/18, pp.164-65, 274-275; N.T., 9/12/18, pp.110-16, 174-76). On at least one occasion, Megan hit and struck Mother in the face and ribs, and Mother was unable to control and restrain Megan on her own. (N.T., 9/12/18, pp.116, 175-76). It was at

these times that Husband intervened to restrain Megan and protect Mother. (N.T., 9/12/18, pp.110-16). *See also* Stoyko v. Stoyko, 405 A.2d 1284 (Pa.Super. 1979) (holding that a child's bold claim of resentment and fear of a parent is insufficient, absent a judicial inquiry into the past and present relationship between the parent and child, to deny visitation rights).

School Absenteeism

Issue 15: Father's claim that the court disregarded evidence of the Children's excessive school absences when in Mother's custody is not supported by the record. First, Father testified that no such problems existed with respect to Megan and David. (N.T., 8/13/18, p.9). Although Father testified that there had been issues with Madisyn's attendance at school in the past, when this occurred, why, and the frequency was never provided. (N.T., 8/13/18, p.9). Moreover, at least as of the time of hearing, Madisyn was a straight A student and active in school activities: cheerleading, chorus and softball.

Father's Stability

Issue 16: Father's final claim of error, that the court failed to give proper weight to his stability – in his career, relationships, finances, and residences - is baseless. No evidence was presented contradicting Father's testimony that he has been employed in maintenance at Uline for almost eleven years, or that he and Wife are married to one another and have

lived together at the same location with Wife's children in a home owned by Wife's parents, who reside in the same home. (N.T., 8/13/18, pp.6-7; N.T., 9/12/18, p.62). That this is true does not in any manner diminish the current stability in Mother's life, her proven ability to care for the Children, and her status as the Children's primary caretaker. As to Father's finances, no evidence was presented as to the amount Father earns or the relative wealth of the parties, nor was this necessary, it appearing that both had adequate financial means to care for the Children. Brooks, 466 A.2d at 156 ("In a custody proceeding, the sole permissible inquiry into the relative wealth of the parties is whether either parent is unable to provide adequately for the child; unless the income of one party is so inadequate as to preclude raising the children in a decent manner, the matter of relative income is irrelevant.").

CONCLUSION

The best interest standard, decided in child custody cases on a case-by-case basis, is easy to state but difficult to apply. All factors which legitimately have an effect upon the child's physical, intellectual, moral and spiritual well-being must be considered. However, what weight these factors are to be given is for the presiding judge to decide. *See* M.J.M., 63 A.3d 331, 339 (Pa.Super. 2013); Robinson v. Robinson, 645 A.2d

836, 838 (Pa. 1994). Each case is unique and must be decided in the context of all the facts and circumstances impinging on the child's best interests, without presumptions or mechanically applied rules.

In this case, we have carefully considered and weighed the evidence of record and the relevant factors required by 23 Pa.C.S.A. § 5328 to be considered. In awarding primary physical custody of the Children to Mother, we gave significant weight to Mother's status as primary caretaker of the Children for over nine years and her proven ability to take care of the Children;[9] the importance and benefits of preserving stability in the Children's lives, attendance in the same school district, and not separating the Children, but of continuing the sibling

[9] Prior to enactment of the Child Custody Act, 23 Pa.C.S.A. §§ 5321-5340, which took effect on January 24, 2011, the judicially created "primary caretaker doctrine" provided that "in cases involving an award of primary custody where two natural parents are both fit, and the child is of tender years, the trial court must give positive consideration to the parent who has been the primary caretaker." M.J.M., 63 A.3d at 337 (citation and quotation marks omitted). In accordance with this doctrine "when both parents are otherwise fit, one parent's role as the primary caretaker may be given weight as the determining factor in a custody determination." Wiseman v. Wall, 718 A.2d 844, 851 (Pa.Super. 1998). "This positive consideration is not a mechanical presumption, but part of 'a close scrutiny of all particular facts relevant to determining the child's best interests.'" Johnson v. Lewis, 870 A.2d 368, 372 (Pa.Super. 2005) (citation and quotation marks omitted).

Although the primary caretaker doctrine is not included within the list of factors enumerated in 23 Pa.C.S.A. § 5328(a), "[t]he considerations embraced by [this doctrine] have been woven into the statutory factors, such that they have become part and parcel of the mandatory inquiry." M.J.M., 63 A.3d at 339 (citing 23 Pa.C.S.A. §§ 5328(a)(3) ("The parental duties performed by each party on behalf of the child.") and (a)(4) ("The need for stability and continuity in the child's education, family life and community life.")). Furthermore, not only will a trial court "necessarily consider a parent's status as a primary caretaker implicitly as it considers the Section 5328(a) factors," "to the extent the trial court finds it necessary to explicitly consider one parent's role as the primary caretaker, it is free to do so under Section (a)(16)." M.J.M, 63 A.3d at 339.

relationship which exists between them and has developed over the time they have resided together; and of the Children's mental health needs, particularly those of Madisyn and Megan, for which Mother has demonstrated a better insight and understanding than Father. At the same time, the order entered recognizes the importance of Father in the Children's lives and provides Father with substantial, frequent partial physical custody to foster an ongoing relationship, provides for Father's participation in family counseling,[10] and provides Father with an opportunity to educate and instruct the Children in his faith, recognizing the importance of religion in Father's life and that of his family. This decision, we respectively submit, is one both supported by the record and within our discretion.

BY THE COURT:

_____

P.J.

[10] Custody Order, ¶23. *See* 23 Pa.C.S.A. § 5333. (Counseling as part of order).