

PITTSBURGH LEGAL JOURNAL

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Shared Custody

Mother appeals from an Order of Court entered on May 12, 2023. The Order granted Father shared custody of the parties' child on the count for Custody in Father's Complaint in Divorce. Mother filed a timely appeal in which she asserts the Court erred in granting Father's request. Based on the facts and applicable law, Mother's appeal should be dismissed, and the Memorandum and Order of Court dated May 12, 2023 should be affirmed.

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Complex Child Support

On December 22, 2022, the hearing officer entered recommendations after a complex child support hearing in which he recommended establishing Appellant/Father's monthly child support obligation at \$1,764.17 per month plus \$170.00 per month on arrears. Father filed exceptions which this court dismissed. Father filed a timely appeal challenging the calculation of both Mother's and Father's income. For the reasons set forth in the opinion, this court's decision should be affirmed.

PLJ

The Pittsburgh Legal Journal Opinions are published fortnightly by the Allegheny County Bar Association
400 Koppers Building
Pittsburgh, Pennsylvania 15219
412-261-6255
www.acba.org
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Circulation 5,272

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OPINIONS

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AGNIESZKA PATKOWSKA vs. KEVIN FRENCH

Shared Custody

Mother appeals from an Order of Court entered on May 12, 2023. The Order granted Father shared custody of the parties' child on the count for Custody in Father's Complaint in Divorce. Mother filed a timely appeal in which she asserts the Court erred in granting Father's request. Based on the facts and applicable law, Mother's appeal should be dismissed, and the Memorandum and Order of Court dated May 12, 2023 should be affirmed.

Case No.: FD-21-007549-007. Sup Ct. No. 696 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Family Division. Henry-Taylor, J. August 4, 2023.

OPINION

Agnieszka Patkowska ("Mother") appeals from an Order of Court entered on May 12, 2023. The Order granted Kevin French's ("Father") shared custody of the parties' child, Flora French ("Child"), on the count for Custody in Father's Complaint in Divorce. Mother filed a timely appeal in which she asserts the Court erred in granting Father's request.

I. Procedural and Factual Background

Father and Mother are the parents of one (1) minor child, Flora French (DOB: 11/22/2015), who is the subject of these proceedings. Mother currently resides in the former marital residence, in the Squirrel Hill neighborhood of the City of Pittsburgh, Allegheny County, Pennsylvania. Father currently resides in Millvale, Allegheny County, Pennsylvania. The parties were married in 2009 and separated on or around February 2021. On March 24, 2021, Father filed a Complaint in Divorce raising claims of divorce, custody, and equitable distribution of property. The claims of divorce and equitable distribution of property are still pending. In his claim for custody, Father requested shared physical and shared legal custody of Child.

On April 22, 2021, Mother filed a Petition for Protection from Abuse ("PFA") against Father. In her Petition, Mother alleged that on April 15, 2021, while Mother was putting Child in her car seat, Father was standing in the driveway and opened the car door and was screaming profanities at Mother. Mother told Father to let go or she would call the police. Additionally, Mother alleged that on April 21, 2021, Father drove up to Mother's car and blocked her in with his van, leading Mother to feel "afraid to put Child inside of her car." Mother further alleged that she is fearful of Father because he is "increasingly erratic," throws things at Mother and causes her to bleed. Mother's Petition also alleged prior incidents of abuse including Father strangling Mother three (3) times while they were still married and an incident where Father threw a metal tool at Mother's head leading to a cut that "took a long time to heal." The court granted Mother's PFA and scheduled a Final PFA hearing for April 29, 2021.

Following the issuance of the PFA, Father was evicted from the marital home and prohibited from contacting Mother. Father was additionally ordered to contact the MENS' Group and enroll in its program until completion or discharge and submit to a risk-assessment evaluation. Mother was granted temporary custody of Child and Father's custody was suspended pending the Final PFA Hearing. Mother was also ordered to contact Three Rivers Adoption Council ("TRAC") to establish therapy for Child. Counsel for both parties filed a Consent Order to continue the Final PFA Hearing to May 25, 2021. The court issued an Order of Court on May 25, 2021 stating that the PFA would remain in full force and effect until April 21, 2022. Further, Father was "not prejudiced from seeking contact with, and custody of [Child] despite the continued PFA Order."

The parties proceeded through the Generations program² on Father's claim for custody and were scheduled for a Mediation on May 20, 2021. Mother filed a Domestic Violence Waiver³ and the Mediation was subsequently cancelled. The court issued an Order on May 18, 2021 cancelling the Mediation and scheduling a Conciliation before the Domestic Relations Officer ("DRO") for August 9, 2021.

On June 10, 2021, Father filed a Petition for Special Relief requesting an Interim Relief Hearing. Also in his Petition, Father alleged that Mother's PFA Petition did not include any allegations of abuse against Child and that the parties disagreed as to the extent of Father's parenting role. A Consent Order was entered on June 23, 2021, resolving Father's Petition. By separate Order of Court, an Interim Relief Hearing was scheduled for September 1, 2021.

The parties were unable to reach an agreement regarding custody at the Conciliation on August 9, 2021 and were therefore ordered to proceed to the Interim Relief Hearing on September 1, 2021. On August 24, 2021, a Judicial Conciliation was scheduled for December 1, 2021 before the Honorable Judge Daniel Regan.

On September 7, 2021, the parties entered into an Interim Custody Consent Order. The court granted Mother primary physical custody and Father supervised partial physical custody. Father was to have custody on a "step-up" basis, with weekend visits increasing by one (1) hour on weekends. Additionally, the December 1, 2021 Conciliation was rescheduled to February 1, 2022.

On October 23, 2021, Mother filed an Indirect Criminal Contempt ("ICC") Complaint against Father. Mother alleged that, on October 21, 2021, Mother saw Father's vehicle parked three (3) vehicles ahead of her at Child's school pick up and that Father was standing in a "very aggressive stance."⁴ Mother further alleged that Father stared at Mother while he walked twenty (20) feet towards her, causing her to panic then load Child into her vehicle and leave. Mother claims that Father did this in order to "intimidate and threaten [Mother]." An ICC Hearing was scheduled for November 3, 2021; however, on November 2, 2021, the Hearing was continued until November 30, 2021. Father did not admit guilt to the allegations in the ICC Complaint and was released on his own recognizance ("ROR") pending the Hearing. Father was granted custody time with Child from 4:30 p.m. until 6:30 p.m. on November 9, 15, and 25, 2021. By Order of Court dated November 30, 2021, the ICC Complaint was continued generally for six (6) months. Additionally, the PFA was extended until July 21, 2022.⁵

A second Interim Custody Consent Order was entered by the parties on December 6, 2021. The Order granted Father partial custody on Sundays from 10:00 a.m. until 4:00 p.m. and Tuesdays from 4:30 p.m. until 6:30 p.m. under the supervision of an agreed-upon supervisor. On January 25, 2022, this matter was reassigned from the Honorable Judge Sabrina Korbel to the undersigned.⁶ A Judicial Conciliation before the undersigned was scheduled for March 7, 2022,

On February 1, 2022, Father submitted a Motion for Special Custody Relief, requesting that supervision be lifted or that the court assign a different supervisor or allow Happy Child Supervision to be utilized.⁷ Mother submitted a response to Father's Motion on February 8, 2022 where she averred that there was "no basis" to remove Father's supervision and requested that the court deny Father's Motion. Mother further averred that if Happy Child Supervision was the only option available, that Father should be responsible for the full cost. The court denied Father's Motion for Special Custody Relief by Order of Court dated February 11, 2022. The court issued a subsequent order stating that Father could utilize the supervisors named in the September

7, 2021 Consent Order. Moreover, the parties may only use Happy Child Supervision as an absolute last resort and Father would be responsible for one hundred percent (100%) of the costs.

Following a Judicial Conciliation held on March 7, 2022⁸, the court entered an Interim Order on March 8, 2022. The Order required Father to submit a letter from his therapist explaining his attendance, frequency, duration, and compliance with individual therapy. Additionally, Child's therapist, Dr. Andrea Schachner, would provide a summary of Child's diagnosis, prognosis, treatment plan, and frequency of visits. An expedited follow-up Judicial Conciliation was scheduled for April 12, 2021.⁹

At the expedited Judicial Conciliation on April 12, 2022, Father provided the letter from his individual therapist, as well as a report from the MENS Group of the Women's Center & Shelter of Greater Pittsburgh showing that he satisfactorily completed the program. Mother provided a letter from Dr. Schachner with the required information regarding Child's therapy. The court was notably concerned that Mother was participating in Child's individual therapy. Father discussed his difficulty in finding an alternate supervisor to supervise his custodial time since Paternal Grandmother was leaving the area. Father believed that there was no reason for supervision to continue after he conducted a risk assessment evaluation with Dr. Terry O'Hara which stated, "the assessment did not result in a definitive conclusion but did not state Father was a risk to [Child]." Mother stated that there was "no basis" to remove Father's supervision; the reason for the supervision was Father's "systemic abuse inflicted upon Mother which was witnessed by [Child]."

In an Interim Order of Court dated April 13, 2022, the court ordered both parents to inquire as to Child's progress in therapy; however, the court instructed the parties that "neither party shall actively participate in or sit in with Child during her individual therapy." Further, Mother was to provide Father with the names of Child's teachers, doctors, therapists and other providers. The parties agreed to go through mediation with a private provider, not through the Generations process or the Custody Department. A separate Order of Court was issued on April 13, 2022 directing the parties to undergo a full custody evaluation and appointing Dr. Bruce Chambers to conduct that evaluation with the family on May 9, 2022.¹⁰ Another separate Order of Court dated April 13, 2022 scheduled a follow-up Judicial Conciliation for June 15, 2022.

An Interim Order of Court was entered on June 21, 2022 following the Judicial Conciliation on June 15, 2022. The Order stated that the parties would contact Dr. Chambers and complete any necessary paperwork and that the parties were not to discontinue the evaluation without leave of court. The Order also expanded Father's custodial time to unsupervised visits on Tuesdays, Saturdays, and Sundays during Week One (1), and on Tuesdays and Thursdays during Week Two (2). Custody exchanges were ordered to occur at the Squirrel Hill Library or the Phipps Conservatory, with exchanges to be silent and law enforcement not to be called upon to escort either party for an exchange.

On June 22, 2022, a Pre-Trial Conference was scheduled for August 31, 2022 and a one and a half (1 ½) day trial was scheduled for October 20 and 25, 2022. At the Pre-Trial Conference on August 31, 2022, counsel expressed concern that one and a half (1 ½) days may not be sufficient to present all of the parties' evidence and testimony. The court issued an Order for the parties to inform the court as to whether an In Camera interview with Child was requested and when Dr. Chambers was expected to have his evaluation and report completed.

Further, the Order specified that if the trial were to be continued, then three (3) days would be allotted for testimony. Dr. Chambers was unable to complete his evaluation and report by the scheduled trial date resulting in an Order of Court dated September 2, 2022 continuing the trial to a later date with three (3) days allotted for testimony. The court also ordered an In Camera interview with Child and a Polish interpreter to be scheduled for October 26, 2022.¹¹ For approximately fifteen (15) minutes during the In Camera interview, the court tried to engage Child in conversation, but Child would not speak. Thus, no substantial testimony from Child was taken.

A second Pre-Trial Conference was held on December 8, 2022. The court issued an Order expanding Father's custodial time to one (1) overnight from Saturday at 10:00 a.m. until Sunday at 6:00 p.m. Mother was ordered to provide her and Child's passports to Mother's counsel for safekeeping. Additionally, Mother and Father were directed to undergo assessments for individual therapy. A separate Order of Court appointed Kathy Firestine, JD, MST, LPC as co-parenting counselor for Mother and Father.

On January 17, 2023, Father submitted a Motion for Special Custody Relief where he requested proof by an affidavit that Mother turned over her and Child's passports or that Child's passport was lost. Mother submitted a response to Father's Motion on January 23, 2023 requesting that Father's Motion be denied because she did not have Child's passport, she did not know where the passports were, and that she already signed the affidavit Father requested. On January 26, 2023 the court issued an Order requiring Mother to deliver Child's passport to her counsel's office and execute a verified affidavit stating the passports were with Mother's counsel and would remain there pending further Order of Court. If the passports were not in Mother's possession, Mother was to execute an affidavit stating the same and execute any documentation for the United States and/or European Union governments notifying them that Child's passport was lost.¹²

Both parties filed their Pre-Trial Statements on January 26, 2023. Father communicated to the court that he would object to Mother requesting to call Dr. Beth Bliss and Dr. Kelly Champion¹³ as opposing experts to Dr. Chambers' testimony at trial.¹⁴ On January 27, 2023, the court issued an Order directing Father to file a Motion in Limine. Mother was directed in the Order to prepare a Trial Memorandum with authority regarding whether the court must hear the testimony of opposing experts.

Father submitted his Motion in Limine on January 27, 2023. Mother submitted her Trial Memorandum and Response on January 30, 2023. On January 31, 2023 the court granted Father's Motion in Limine as to Dr. Champion, therefore precluding her from testifying or offering any evidence at trial; however, the court denied Father's Motion in Limine as to Dr. Bliss, who was allowed to testify.

Three (3) days of trial were held on February 1, 2, and 9, 2023. Mother presented an oral Motion for Reconsideration regarding the ruling on Father's Motion in Limine on February 2, 2023. Following that day of trial, the court issued an Order denying Mother's Motion for Reconsideration.¹⁵ Following the third day of trial on February 9, 2023, it was determined that a fourth day was necessary.¹⁶ On February 10, 2023 an Interim and Interlocutory Order of Court was issued stating that, pending the outcome of the custody trial, Mother was to have primary physical custody of Child, Father was to have partial physical custody of Child on Fridays after school until Sundays at 6:00 p.m. and on Wednesdays after school until 7:00 p.m. and the parties were to continue sharing legal custody of Child.

On March 20, 2023, Mother's counsel presented a Motion for Reconsideration regarding the court disallowing Dr. Champion's testimony. The Motion was denied by Order of Court on March 24, 2023. The fourth and final day of trial was held on March 27, 2023. The parties were allowed to submit Proposed Findings of Fact and Conclusions of Law. Following the four (4) day trial, the court entered a Memorandum and Order of Court on May 12, 2023 which granted Father's claim for shared physical and shared legal custody.

II. Issues on Appeal

Mother raised six (6) errors in her Concise Statement of Matters Complained on Appeal.

1) Whether the trial court erred in granting Father's Motion in Limine and denying Mother's Motion for Reconsideration, excluding Dr. Kelly Champion from testifying or offering any evidence at the custody trial that was relevant and probative to, among other things, the effects of spousal abuse on the children;

2) Whether the trial court erred by excluding a key factual witness (Maternal Grandmother, Evonna Windack) in circumstances where the witness would have testified to Father's abuse;

3) Whether the trial court erred in excluding a key factual witness (Mother's neighbor, Elizabeth Green) in circumstances where the witness would have testified to Father's abuse;

4) Whether the trial court erred by denying Mother a full and fair hearing, in circumstances where Father was permitted to present his case each day of trial in the four (4) day custody trial, resting on the final day of trial, but where Mother was permitted only less than one (1) full day to present her case;

5) Whether the trial court erred in allowing Father to introduce the September 9, 2022 video of the custody exchange of the parties' Child, in circumstances where the video was unauthenticated, incomplete, and made in violation of Pennsylvania's wiretapping and electronic surveillance control act, 18 Pa.C.S. § 5701, et seq.;

6) Whether the trial court erred by misapplying the custody factors required under 23 Pa.C.S. § 5328, namely Factor 1, Factor 2, Factor 3, Factor 4, Factor 5, Factor 8, Factor 9, Factor 10, and Factor 13.

III. Standard of Review

When a trial court orders a form of custody, modifies custody, or permits relocation, the best interests of the children are paramount.¹⁷ To determine the children's best interests, the trial court must consider the custody factors enumerated in 23 Pa.C.S. §5328(a).

When reviewing the trial court's decision, the Superior Court applies the following standard of review:

In reviewing a custody order, . . . [w]e 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.¹⁸

IV. Discussion

With regards to Mother's first claim, the court must examine Pa.R.C.P. 207.1, Motion to Exclude Testimony Which Relies Upon Novel Scientific Evidence. This rule allows the trial judge to choose to decide the motion (1) before the expert witness testifies on the basis of evidence offered outside the presence of the jury or (2) after the expert witness testifies on the basis of testimony offered at trial, in which event the trial judge will strike the testimony of the expert witness if it is found to be inadmissible under Pa.R.E. 702 or 703.¹⁹

The instant case is procedurally similar to the case *A.J.B v. M.P.B.*, 945 A.2d 744 (Pa. Super. 2008). The central issue in *A.J.B.* concerns Appellee's objection to Appellant's pervasive use of Pornography.²⁰ In prior proceeding, the trial court reviewed a battery of psychosexual exams which determined Appellant was not addicted to pornography.²¹ All three (3) psychologists, in that case, who evaluated Appellant for the purpose of the underlying custody matter concluded that Appellant's use of pornography was not a threat to the child's physical safety.²² Appellee then sought to present an expert witness to testify about pornography, "brain science," and the probability of harm to the child.²³

Appellant averred that the expert witness should be excluded.²⁴ The expert witnesses report rehashed evidence the Court had previously confronted, weighed, and ruled upon in prior proceedings.²⁵ Further, the report challenged the findings and conclusions of the psychologists that had testified in the earlier proceedings.²⁶ Additionally, the expert witness had "purposefully overstepped the bounds of her putative expertise as determined by the trial court," and the Court denounced both of the court appointed experts.²⁷

The Superior Court has previously stated that "the decision to admit or to exclude evidence, including expert testimony, lies within the sound discretion of the trial court."²⁸ Further, the Court held that the expert witness is not a physician, psychiatrist, or even a psychologist, her qualifications were limited to general human responses to pornography and academic sexuality.²⁹ Therefore, she was not qualified to discuss the psychological effect that prolonged use of pornography has upon an individual, including Appellant.³⁰ The Superior Court held that "as this finding is clearly supported by the record, the trial court had independent ground for denying Father's petition to extend custody apart from its reference to the improperly admitted evidence submitted by [expert witness]. Hence, the error was harmless."³¹

In the instant case, the Court granted Father's Motion in Limine and precluded Dr. Kelly Champion from testifying or offering any evidence at trial; however, the Court did allow Mother to call Dr. Beth Bliss as an opposing expert at trial. Dr. Bliss was being called to critique Dr. Chambers's evaluation, whereas Dr. Champion was being called as a general expert witness to provide testimony regarding the impact of Intimate Partner Violence (IPV) on children in child custody cases. While the Court acknowledges that Dr. Champion has experience in child psychology and custody cases, she had never met with the parties involved in the matter. Further, Dr. Champion's opinions were well within the court's knowledge base as a number of psychologists, such as Dr. Bliss, provided reports and testimony to the Court in regard to this matter. Therefore, the Court found that Dr. Champion's testimony would not aid in the Court's understanding of IPV.

Issues 2 and 3 can be addressed together. According to Pa.R.C.P. 223, the court may make and enforce rules and orders in limiting the number of witnesses whose testimony is similar or cumulative.³²

In *Commonwealth v. Johnson*, 139 A.3d 1257 (Pa. 2016), a number of fact witnesses were excluded from testifying during trial.³³ The Court noted that most of the information the fact witnesses would have presented if called would have been cumulative of the testimony already in the record.³⁴ Therefore, no prejudice arose by virtue of the witnesses' absence.³⁵ None of the proposed witnesses, had they testified, would have altered the outcome of the trial or undermined the verdict in any way.³⁶

In the matter at hand, both factual witnesses were set to testify to Mother's allegations; however, the record is replete with testimony alleging Father's abuse of Mother. Mother presented two (2) therapists, Dr. Roger Brooke and Dr. Nicholas Summa. Both testified that Mother may have PTSD³⁷ and/or that they diagnosed Mother with "Spouse or Partner Violence – Physical Suspected."³⁸ Additionally, the Court heard a number of expert witnesses and reviewed multiple expert reports.

Testimony was heard from Bruce Chambers, Ph.D., and Beth A. Bliss, Psy.D. Dr. Chambers described some of the alleged instances of abuse Mother suffered within his report.³⁹ Accordingly, the testimony of Mother's aforementioned factual witnesses would have been cumulative. Both witnesses were set to testify to Mother's alleged abuse, which had already been discussed in great detail. Further, the testimony from the two (2) witnesses would not have affected the outcome of the trial. Thus, any error would have been harmless.

The case at hand is similar to that of *J.F.D. v. M.A.D.*, 285 A.3d 937 (Pa. Super. 2022). In *J.F.D.*, Appellant used his time to elicit testimony as a means to persuade the court.⁴⁰ Further, Appellant continued to argue with the court over the validity of testimony.⁴¹ By the conclusion of the second scheduled day of testimony, Appellant had effectively been given one and a half (1 ½) days to testify, through direct and cross examination.⁴² The court had yet to hear Appellee's testimony, therefore scheduling a third day of testimony.⁴³ Appellant filed a Motion for Reconsideration which was denied. Appellant had been provided with "ample time to present his case within the four (4) days of hearings and, furthermore, he was given the opportunity to make closing argument and submit written Findings of Fact."⁴⁴

In the instant case, the Court provided Mother with an additional day of trial. Both parties shared the four (4) days of trial, and ample time to present their case during the proceedings. The Court issued a number of Orders in an attempt to keep counsel organized and on task so as to avoid further delays. At the start of trial Mother's attorney had a witness present, when it was specified in the Order that all expert witnesses would testify via Microsoft Teams. This ultimately caused a delay in the start of trial. Additionally, counsel was cautioned a number of times throughout trial to be judicious.⁴⁵ Due to the Court wanting to provide Mother with a fair trial, the Court allowed her witnesses to be called out of order. Therefore, it is inaccurate to state that Mother only received one (1) day to present her case.

Additionally, Mother asserts that the Court erred by allowing Father to introduce the September 9, 2022 video of the custody exchange of the parties' child. Claiming this video was unauthenticated, incomplete, and made in violation of Pennsylvania's Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701, et seq.

According to 18 Pa.C.S. § 5702, any transfer of signs, signals, writings, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system, except: (1) deleted; (2) any wire or oral communication; (3) any communication made through a tone-only paging device; (4) any communication from a tracking device.⁴⁶ Additionally, the act does not prohibit the video's disclosure at trial, nor does it provide a vehicle for the video's exclusion.

Furthermore, the issue at hand is similar to that presented in *Commonwealth v. Mason*, 247 A.3d 1070 (Pa. 2021). The Commonwealth appealed the exclusion of audio and video recording that the court found was obtained in violation of the Wiretapping Act.⁴⁷ A recording device captured appellant yelling at the young children and shoving child into a crib where she purportedly struck her several times.⁴⁸ The Appellee asserted that she had no reason to believe that her communications would be intercepted.⁴⁹ This Court held that Appellee was unable to demonstrate that she had a justifiable expectation that the oral communications would not be intercepted by a device.⁵⁰

Therefore, in accordance with the Wiretapping Act, the Court did not err in admitting the video presented at trial. Father told Mother that he "will be video recording the exchange whenever and wherever it's taking place."⁵¹ Thus, Mother was aware of the recording and should not have expected that her communications would not be intercepted. Additionally, Mother also provided recorded evidence of Father during her testimony.⁵² In the recording provided by Mother, it is unclear whether or not Father was aware the recording was being taken.

Mother further contends that the Court erred by misapplying custody Factors 1, 2, 3, 4, 5, 8, 9, 10, and 13. Child custody is governed by the Child Custody Act (Act), 23 Pa.C.S.A. §§ 5321-5340. The statute provides:

§ 5328. Factors to consider when awarding custody.

(a) Factors. – In ordering any form of custody, the court shall determine the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including the following:

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

(2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.

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

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

(5) The availability of extended family.

(6) The child's sibling relationships.

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

(8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.

(9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.

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

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

(12) The 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.

Regarding the statutory factors the trial court found Factor 1 (the party more likely to encourage contact between the child and other party), to favor Father. The Court found that Mother has previously and continually thwarts Father's contact with Child. Father testified that Mother would block or limit him from spending alone time with Child. Further, Mother has filed a PFA

against Father which precluded Father from having any contact with Child. Mother withheld Child from Father from April 22, 2021 until the entry of the September 7, 2021 Order. Additionally, Father tried to increase his custody time on numerous occasions, but Mother refused. Father underwent a risk assessment evaluation and was deemed not a risk to the child. Further, Father's supervised custody time went well and there were no allegations to the contrary. The Court increased Father's custody time on its own accord which Mother recognized during testimony. Thus, Mother did the opposite of encouraging frequent and continuing contact with Father.

The Court next addressed Factor 2 (present and past abuse) recognizing the importance of this factor due to the safety of the Child. After careful consideration, the Court found this factor neutral. Mother previously filed a Petition for Protection from Abuse ("PFA") against Father. She alleged, that when she was putting Child in her car Father opened the car door and was screaming profanities at Mother. Further, Mother alleged that she is fearful of Father, that he is "increasingly erratic," throws things at Mother and causes her to bleed. Mother filed an Indirect Criminal Contempt ("ICC") Complaint against Father. In her complaint, Mother alleged that when picking Child up from school Father was parked three (3) vehicles ahead of her. Father was standing in a "very aggressive stance," and began walking towards Mother. Father was released on his own recognizance ("ROR") and an ICC hearing was scheduled.

At the time the original PFA Petition and ICC were filed and resolved, Father adamantly denied the allegations within both and continues to do so through the present. Thus, there has been no finding of fact that Father had been abusive towards Mother or Child, or that Father violated the TPFA Order. On cross-examination Father credibly denied each alleged incident or actions of abuse. Although there was extensive testimony regarding Mother's allegations of Father abusing Mother, the Court did not resolve the conflicting testimony in favor of Mother, and very little testimony was directed to the impact it had on Child.

Regarding Factor 3 (the parental duties performed by each party on behalf of child), the court found this factor slightly favors Mother. The Court found that both parties performed parental duties on behalf of their daughter; however, Mother either withheld Child from Father or limited his time with Child. Thus, precluding Father from being involved with fulfilling parental duties as much as he desired. The Superior Court has held that the Child Custody Act does not intend to give additional, or "weighted" consideration to a parent's role as the primary caretaker.⁵³ "[T]he primary caretaker doctrine, insofar as it required positive emphasis on the primary caretaker's status, is no longer viable."⁵⁴

Addressing Factor 4 (child's need for stability) and Factor 5 (availability of extended family) the Court found both factors to be neutral. Both parties are able to provide stability and continuity in Child's life. Additionally, both parties have the availability and support of extended family.

In regard to Factor 8 (attempt of parent to turn the child against the other) the court found this factor to favor Father. Due to the high level of conflict between the parents, Father had called for a police escort for custody exchanges; however, once the Court ordered Father to discontinue the police escort, he complied. Further, the Court did not find Mother's therapist, Dr. Brooke, to be credible on the issue of coercion and IPV by Father.

Additionally the Court found that Factor 9 (party more likely to maintain a loving and stable home) and Factor 10 (party more likely to attend to child's daily needs) did not favor either party. The Court found that both parents are appropriate with child, and both clearly love Child and want what is in her best interest. Regarding Factor 10, both parents are capable of providing for Child's daily needs, including physical and emotional needs.

The Court weighed Factor 13 (conflict between parties and parties' willingness and ability to cooperate) in Father's favor. The level of conflict between the parties has been high; however, Father has exhibited a desire to have cordial interactions with Mother. Father contacted the co-parenting counselor, Kathy Firestine, to initiate the parties engaging in co-parenting counseling. Conversely, Mother has not exhibited the willingness and/or ability to cooperate with Father.⁵⁵

When the trial Court's findings and determinations are supported by competent evidence in the record, the Superior Court should not disturb those findings and determinations.⁵⁶ As demonstrated above and in the Court's analysis of the factors in its Memorandum and Order of Court from May 12, 2023, the extensive record in this case supports the Court's findings and analysis of the custody factors and determinations as to the Child's best interests.⁵⁷

V. Conclusion

Based on the above facts and applicable law, Mother's appeal should be dismissed, and the Memorandum and Order of Court dated May 12, 2023 should be affirmed.

BY THE COURT:
/s/The Hon. Nicola Henry-Taylor

¹ The MENS Group (Men Embracing Non-Violence & Safety) is an education and intervention group to help men who are alleged or who have been found responsible of using abuse (physical, psychological, and financial) to be accountable for their actions through self-awareness techniques. The program is a Batterer's Intervention Program offered by the Women's Center & Shelter of Greater Pittsburgh.

² The Generations program is administered by the Allegheny County Family Division Custody Department. The program provides information to parents and children about engaging families and offers parents and caregivers skills to reach their own resolution.

³ In Allegheny County, an alleged victim of abuse may elect not to attend the mediation session. The opposing party shall have the opportunity to consent to cancellation of the mediation in Motions Court. Penn. Allegh. Cty. 1915.3(c).

⁴ Father conceded that he was parked near Child's school; however, he maintained that he was there due to a work obligation.

⁵ The November 30, 2021 Order of Court further stated that Father was not to be present at Child's school during drop off and pick up times.

⁶ This matter was transferred from Judge Regan to Judge Korbel in January 2022 when Judge Regan was transferred to the Allegheny County Court of Common Pleas Civil Division and Judge Korbel took the bench in the Allegheny County Court of Common Pleas Family Division.

⁷ The previous supervisor, Paternal Grandmother, would no longer be able to supervise Father's custodial periods because she would be leaving the Pittsburgh area for a significant amount of time.

⁸ This was the first Judicial Conciliation before the undersigned which provided the first opportunity to hear the case outside of Motions Court, which was held virtually during that time period due to the COVID-19 pandemic.

⁹ This was an expedited time period of thirty (30) days between conciliations rather than the usual time period of ninety (90) days between conciliations.

¹⁰ Mother's attorney requested, and Father's attorney agreed, to pause the psychological evaluation despite an Order of Court ordering the same.

¹¹ The court was made aware that Polish is Mother's native language and that Mother and Maternal Grandmother regularly spoke Polish to Child and that she was comfortable speaking Polish. Out of an abundance of caution, the court secured the interpreter for the proceeding.

¹² Due to Mother's Polish background, Child may have had two (2) passports, one from the European Union and one from the United States.

¹³ Dr. Bliss was being called to critique Dr. Chambers' evaluation. Dr. Champion was being called as a general expert witness to provide testimony regarding the impact of intimate partner violence on children in child custody cases.

¹⁴ Father was notified of Dr. Bliss and Dr. Champion's possible testimony upon receipt of Mother's Pre-Trial Statement.

¹⁵ The court allowed Mother to re-present her Motion after the expert testimony had been taken but prior to the conclusion of trial.

¹⁶ The court issued a number of Orders in an attempt to keep counsel organized and on task so as to avoid further delays.

¹⁷ 23 Pa.C.S. §5328.

¹⁸ C.R.F. v. S.E.F., 45 A.3d 441, 443 (Pa. Super. 2012).

¹⁹ See Note to Pa.R.C.P. 207.1(a).

²⁰ A.J.B. at 747.

²¹ Id.

²² Id.

²³ Id.

²⁴ A.J.B. at 747.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id. at 749.

²⁹ A.J.B. at 750.

³⁰ Id. at 750.

³¹ Id. at 752.

³² Pa.R.C.P. 223.

³³ Johnson at 1283.

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Transcript of Day 2, p. 72-73.

³⁸ Id. at p. 103, 110.

³⁹ The Court admitted Dr. Chambers's CV and Report over Mother's counsel's objections. Dr. Chambers opined that there was no basis for Mother's allegations of intimate partner violence (IPV). Although this Court admitted the exhibits into evidence and allowed Dr. Chambers to testify, this Court gives no weight to his report and testimony. Under the Pennsylvania Rules of Evidence, if an expert testified, the trier of fact determines how much weight to give the expert testimony. See Pa.R.E. 702. This Court ultimately did not give any weight to Dr. Chambers's testimony and report.

⁴⁰ J.F.D. at 3.

⁴¹ Id. at 4.

⁴² Id.

⁴³ Id.

⁴⁴ Id. at 6.

⁴⁵ Transcript of Day 2, p. 85.

⁴⁶ 18 Pa.C.S. § 5702.

⁴⁷ Mason at 1074.

⁴⁸ Id.

⁴⁹ Id. at 1077.

⁵⁰ Id. at 1082.

⁵¹ Transcript of Day 4, p. 235.

⁵² Transcript of Day 2, p. 178.

⁵³ H.S. v. Y.F., 2014 WL 10915508 at *8 (Pa. Super. 2014).

⁵⁴ Id.

⁵⁵ The Court also fully analyzed the other factors not raised by Mother in her Concise Statement of Errors—namely Factors 6, 7, 11, 12, 14, 15, and 16.

⁵⁶ J.G.B. v. K.G., 2021 WL 462365 at *8 (Pa. Super. 2021).

⁵⁷ See J.G.B. at *7.

MICHAEL A. FAZIO vs. JOAN M. GIVENS

Complex Child Support

On December 22, 2022, the hearing officer entered recommendations after a complex child support hearing in which he recommended establishing Appellant/Father's monthly child support obligation at \$1,764.17 per month plus \$170.00 per month on arrears. Father filed exceptions which this court dismissed. Father filed a timely appeal challenging the calculation of both Mother's and Father's income. For the reasons set forth in the opinion, this court's decision should be affirmed.

Case No.: FD-16-002023-007. Sup Ct. No. 619 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Family Division. Henry-Taylor, J. September 1, 2023.

OPINION

On December 22, 2022, Hearing Officer Chester Beattie entered recommendations after a complex child support hearing held on November 15, 2022, in which he recommended establishing Appellant/Father's monthly child support obligation at \$1,764.17 per month plus \$170.00 per month on arrears. Father filed exceptions which this court dismissed on May 18, 2023. Father filed a timely appeal challenging the calculation of both Mother's and Father's income. For the reasons set forth below, this court's decision should be affirmed.

Procedural and Factual Background

Joan M. Givens (hereinafter "Mother") and Michael A. Fazio (hereinafter "Father") are the parents to two (2) minor children, N.F. (DOB: 11/08/2007) and M.F. (DOB: 09/23/2013). The parties were never married but lived together until on or around October 2018. Following the parties' separation, in lieu of child support, the parties agreed that Father would pay for the children's parochial school tuition, which was approximately six thousand dollars (\$6,000.00) per year. For the 2022- 23 school year, Mother applied and received scholarships for both children which substantially reduced the amount owed in tuition. Consequently, Mother requested that Father pay her child support directly. Father refused, leading Mother to file a Complaint in Support on June 15, 2022.

A support hearing was to be held on September 6, 2022; however, Mother filed a Motion to Declare Case Complex on August 9, 2022.¹ An Order of Court dated August 17, 2022, granted the Motion to Declare Case Complex and rescheduled the September 6, 2022 hearing into a Conciliation before a Domestic Relations Officer (hereinafter "DRO") on the same date. Additionally, the Order granted the parties leave to engage in discovery and allowed the Hearing Officer to coordinate the scheduling of a (2) hour complex hearing when the parties were at the Conciliation.

On September 12, 2022, the court entered an Interim Order following the Conciliation to guide the parties until the Complex Hearing. The Interim Order of Court directed Father to pay nine-hundred seventy-three dollars (\$973.00) per month, with nine-hundred sixty-eight dollars (\$968.00) for support, and five dollars (\$5.00) for arrears. The Order of Court also directed both parties to provide medical coverage for the children and stipulated that Father would be responsible for forty- eight percent (48%) of unreimbursed medical expenses after Mother paid two- hundred fifty dollars (\$250.00) per child per year.

A Complex Support Hearing was held before Hearing Officer Chester Beattie (hereinafter "H.O. Beattie") on November 15, 2022. H.O. Beattie made findings regarding both parents' employment and income. Mother testified that she is employed full-time as an outside sales representative with UniFirst. She earns a base salary of forty-five thousand dollars (\$45,000.00) annually and receives bonuses and commission. Mother submitted a paystub as an exhibit at the hearing reflecting her salary. Based on Mother's testimony and exhibit, H.O. Beattie determined Mother's monthly net income to be four thousand one hundred thirty-nine dollars (\$4,139.00)².

Father derives income from three (3) sources. First, he receives commissions from his work as a real estate agent for Berkshire Hathaway Home Services (hereinafter "Berkshire Hathaway"), amounting to thirty-three thousand seven hundred ten dollars and seventy-eight cents (\$33,710.78) annually. Second, he works for and bi-weekly income payments of six hundred eighty-seven dollars and fifty cents (\$687.50) from Building Material Distributors, Inc. (hereinafter "BMD"), earning six hundred eighty-seven dollars and fifty cents (\$687.50) bi-weekly, which would amount to approximately sixteen thousand five hundred dollars (\$16,500.00) annually. Third, Father owns interest in I&J Capital, LLC, (hereinafter "I&J"), which sells real estate.

Father's testimony was vague and inconsistent concerning how much of I&J he actually owns. H.O. Beattie did not find Father credible in his testimony regarding his income from I&J.³ H.O. Beattie did determine that his real estate profits from I&J totaled to three hundred and forty-three thousand seventy-five dollars and forty- one cents (\$343,075.41). H.O. Beattie amortized these profits over a period of one hundred eight (108) months, the amount of time until the youngest child reaches the age of majority, for a total of three thousand one hundred seventy-six dollars and sixty-two cents (\$3,176.62) from I&J. Adding these sources together, H.O. Beattie determined Father's monthly net income to be six thousand three hundred fifty-six dollars (\$6,356.00).

H.O. Beattie submitted his recommendations to the court and the parties on December 22, 2022. H.O. Beattie determined arrears to be eight thousand five hundred ninety-four dollars and two cents (\$8,594.02). Father was ordered to pay one thousand nine hundred thirty-four dollars and seventeen cents (\$1,934.17) per month to Mother, with one thousand seven hundred sixty-four dollars and seventeen cents (\$1,764.17) for support and one hundred seventy dollars (\$170.00) for arrears.

H.O. Beattie's recommendations took Father's proportionate share of the children's private school tuition and Father's costs for the children's extracurricular activities into consideration.

On January 6, 2023, Father timely filed his Exceptions to H.O. Beattie's Recommendations raising the following errors:

1. The Court erred in calculating Mother's income at her base pay rate, when she earns bonus income, perquisites, and other pay that should have been factored into the Guideline calculation."
2. The Court erred in failing to require Mother to provide accurate and/or any documentation of her self-employment income.
3. The Court erred in failing to consider the parties' physical custody schedule as a reason to deviate downward in the Guideline calculation.
4. The Court erred in calculating Father's alleged real estate profits and in annualizing them over [one hundred eight (108)] months.

Both parties filed briefs and, on March 23, 2023, the parties appeared before the court for oral argument on Father's Exceptions. During oral argument, the parties consented to the dismissal of Father's first, second, and third Exceptions. The

parties agreed that Mother's income was calculated at her base pay, that Father agreed that Mother is self-employed, and that there is no status quo for custody at the time of the hearing. The parties also stipulated that the main issue at hand was the calculation of Father's real estate profits.

After oral argument, the court took the matter under advisement and on May 18, 2023, the court issued its Order dismissing all four (4) exceptions. The court explicitly stated that it dismissed Father's fourth Exception because the court found that H.O. Beattie did not err in his calculations of Father's real estate profits and annualizing them over one-hundred eight (108) months. Father, through his counsel, timely filed a Notice of Appeal and his Concise Statement of Matters Complained of on Appeal on May 26, 2023.

Issues on Appeal

In his Statement of Errors on Appeal, Father asserts the following challenges to this court's Order of Court dated May 18, 2023:

I. The trial court erred in calculating Mother's income at her base pay rate, when she earns bonus income, perquisites and other pay that should have been factored into the Guideline calculation.

II. The trial court erred in calculating Father's alleged real estate profits and in annualizing them over one hundred eight (108) months.

Standard of Review

The standard of review in support cases is abuse of discretion.⁴ "A finding that the court abused its discretion requires proof of more than a mere error in judgment, but rather evidence that the law was misapplied or overridden, or that the judgment was manifestly unreasonable or based on bias, ill will, prejudice or partiality."⁵ Thus, this Court may interfere with the trial court's determination only if there is a clear abuse of discretion shown by clear and convincing evidence.⁶

This Court also notes the standard that applies to the Court's review of a Hearing Officer's recommendations. "A [hearing officer's] report and recommendation, although only advisory, is to be given the fullest consideration, particularly on the question of credibility of witnesses, because the [hearing officer] has the opportunity to observe and assess the behavior and demeanor of the parties."⁷ In determining issues of credibility, the Hearing Officer's findings must be given the greatest weight.⁸

Analysis

I. Father's challenge to the calculation of Mother's income is waived.

Father's first argument is that the trial court erred in calculating Mother's income at her base pay rate, when she earns bonus income, perquisites and other pay that should have been factored into the Guideline calculation.

H.O. Beattie stated in his Explanation of Recommendations that Mother's net income was based on the year-to-date paystub dated October 28, 2022, submitted as Exhibit 2. The paystub indicated that Mother's total earnings at that time had been forty-five thousand six hundred eighty-five dollars and thirty-five cents (\$45,685.35).

When Mother's counsel presented the paystub as an exhibit, counsel stated that Mother's gross income included not only her base salary, but also any commissions and/or bonuses Mother had earned. In response to Father filing Exceptions to the Hearing Officer's Recommendations, Mother submitted a Brief in Opposition to Father's Exceptions in which the testimony of Mother's counsel was referenced in order to restate the fact that all of Mother's income was accounted for in H.O. Beattie's original recommendations. At the Exceptions Argument on March 23, 2023, the parties consented to dismiss this Exception as demonstrated by the Order of Court dated May 18, 2023.

In sum, H.O. Beattie considered Mother's base pay rate in addition to any bonuses or commissions she earned when H.O. Beattie based Mother's net income on her year-to-date paystub presented at the hearing. Because Father consented to the dismissal of this issue at the Exceptions Argument, the issue is waived and cannot be raised on appeal.⁹

II. The Hearing Officer properly calculated Father's real estate profits.

Father's second argument is that the trial court erred in calculating Father's alleged real estate profits and in annualizing them over one hundred and eight (108) months.

Pa.R.C.P. 1910.16-2 lays out the support guidelines for calculation of monthly gross income. Rule 1910.16-2(a) states:

"Monthly gross income is ordinarily based on at least a six-month average of a party's income. The support law, 23 Pa.C.S.A. §4302, defines the term 'income' and includes income from any source. The statute lists many types of income including, but not limited to: wages, salaries, bonuses, fees, and commissions; net income from business or dealings in property; interest, rents, royalties, and dividends; pensions and all forms of retirement; income from an interest in a estate or trust; Social Security disability benefits, Social security retirement benefits, temporary and permanent disability benefits, workers' compensation, and unemployment; alimony if, in the trier of fact's discretion, inclusion of all or part of it is appropriate; and other entitlements to money or lump sum awards, without regard to source, including lottery winnings, income tax refunds, insurance compensation or settlements, awards and verdicts, and payments due to and collectible by an individual regardless of source."

Under this rule, Father's real estate profits qualify as income. Furthermore, the explanatory comment to Pa.R.C.P. 1910.16-2(a)(8) states "The trier of fact determines the most appropriate method for imputing lump-sum awards as income for purposes of establishing or modifying the party's support obligation. These awards may be annualized or averaged over a shorter or longer period depending on the case's circumstances. The trier-of-fact may require all or part of the lump sum award escrowed to secure the support obligation during that period."

Father's real estate profits were calculated using the profits from the real estate sales made in 2022. In 2022, I&J sold two (2) properties. 1804 Maple Street, Homestead, Pennsylvania 15120 (hereinafter "1804 Maple") sold for \$270,614.23.¹⁰ 309 West 14th Avenue, Homestead, Pennsylvania 15120 (hereinafter "309 W 14th") sold for \$72,461.18.¹¹ Adding these profits together gives Father a total real estate income of three hundred thousand forty-three thousand seventy-five dollars and forty-one cents (\$343,075.41) for the year 2022. Rule 1910.16-2(a) states that income is ordinarily based on at least six (6) months of income. Here, H.O. Beattie used Father's real estate income for the year 2022, therefore satisfying the requirement of using at least six (6) months of income.

Additionally, Father testified that he only had a minority interest in I&J, the company who sold 1804 Maple. Father's testimony about his ownership interest in I&J was vague and inconsistent. For example, Father first testified that he had only a "minor interest" in I&J, but later testified that he owned fifty percent (50%) of the company. Consequently, H.O. Beattie assigned all the income from the sale of the two (2) properties to Father. Similarly, Father's testimony regarding the properties did not make sense; Father testified that he sold 1804 Maple to I&J in February 2022 for one dollar (\$1.00) and four months later the property was sold for over two- hundred and seventy thousand dollars (\$270,000.00). Father provided no explanation to the court as to why he sold the property to I&J for such a low amount leading to H.O. Beattie finding Father's testimony to not be credible.¹²

To arrive at Father's monthly income, H.O. Beattie added Father's monthly real estate commission income, his monthly BMD salary, and a portion of the I&J real estate income. Rather than treat the I&J profits as if they were all received in one year, H.O. Beattie apportioned them equally one-hundred eight (108) months, the number of months until the youngest child reaches the age of majority.

The explanatory comment to Rule 1910.16-2(a)(8) gives the trier-of-fact, in this case, H.O. Beattie, the discretion to annualize the amount over the appropriate time period based on the case's circumstances. Here, the real estate income was annualized over the number of months until the youngest child reaches the age of majority which is when Father would no longer be obligated to pay any support. It was within H.O. Beattie's discretion to annualize the real estate profits over any such time period he saw fit, thus it was not error to annualize the income over one-hundred eight (108) months. Because it was within H.O. Beattie's discretion as the finder of fact, he could have annualized Father's real estate profits over a shorter time period, such as twelve (12) or twenty-four (24) months; however, H.O. Beattie chose to annualize Father's 2022 real estate profits over the number of months until the youngest child reaches the age of majority.

Conclusion

Based on the above facts and applicable law, Father's appeal should be dismissed, and the Order of Court dated May 18, 2023, should be affirmed.

BY THE COURT:

/s/The Hon. Nicola Henry-Taylor

¹ Mother's Motion was based on her belief that the parties would need more time for the support hearing because Father is not a W-2 employee and has multiple sources of income related to real estate.

² Based on Mother's year-to-date paystub of October 28, 2022, Mother's gross annual income was forty-five thousand six hundred eighty-five dollars and thirty-five cents (\$45,685.35) which amounts to a weekly gross average of nine hundred fifty-four dollars and seventy-nine cents (\$954.79).

³ Throughout the hearing, Father's testimony regarding how much capital he had in I&J changed. Additionally, Father provided no explanation as to why he transferred a property to I&J for one dollar (\$1). The transferred property was sold a few months later for over two hundred and seventy thousand dollars (\$270,000.00).

⁴ Spahr v. Spahr, 869 A.2d 548, 551 (Pa. Super. 2005).

⁵ Isralsky v. Isralsky, 824 A.2d 1178, 1186 (Pa. Super. 2003).

⁶ Darby v. Darby, 686 A.2d 1346, 1348 (Pa. Super. 1996)

⁷ Childress v. Bogosian, 12 A.3d 448, 456 (Pa. Super. 2011).

⁸ See Mott v. Mott, 453 A.2d 1038 (Pa. Super. 1982).

⁹ While not binding authority, the Fourth Circuit held in Keena v. Groupon, Inc., 886 F.3d 360, 365 (4th Cir. 2018) that a party is not entitled to appeal an issue they consented to dismiss.

¹⁰ See Mother's Exhibit 9.

¹¹ See Mother's Exhibit 13.

¹² See Smith v. Smith, 653 A.2d 1259, 1264 (Pa. Super. 1995) ("The fact finder is free to believe all, part, or none of the evidence and the Superior Court will not disturb the credibility determinations of the court below.")
