Chapter Nine

Post-trial Practice

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9-1 Modification

The form for a petition to modify a child custody order appears in Pa.R.C.P. 1915.15(b). The form requires an assertion explaining why modification is sought, and a general assertion that modification would serve the child's best interests. The procedure for processing petitions to modify is generally the same as for initial complaints, and is described in the custody rules.

The decision in *Karis v. Karis,* 544 A.2d 1328 (Pa. 1988), along with the decisions in *Jaindl v. Myers,* 553 A.2d 407 (Pa. 1989), and *McMillen v. McMillen,* 602 A.2d 845 (Pa. 1992), established that it is unnecessary to prove a change of circumstances to justify modification of a child custody order.

Justice McDermott, writing for the court, stated the arguments in favor of liberal intervention. Chief Justice Nix, in an opinion concurring with the result, stated the argument in favor of a restrictive approach. Justice McDermott wrote:

> [T]hough we share the Superior Court's concern over the possibility of spurious petitions for modification from partial to shared custody orders, we must be mindful of the dynamism of the process of growth and maturity of children, as well as the circumstances of their parents' lives, where the only constant is change. These are factors which may require

> continuing review of the best interest of the child, and demand a degree of flexibility such as would allow the court the discretion to make necessary changes when the best interest of the child require such.
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> When parents fall out, children are often victims of conflicting loves; loves sometimes stronger than what their best interests require. Childhood is a small stretch of time in which events and changes can alter life to its last day. Doubtless such loves will foster spurious petitions and unsubstantiated contentions, but they cannot go unheard, as the Act clearly indicates. Courts must remain vigilant, patient, and perhaps even indulgent to such deep human needs. Because we cannot undo the past we must be more careful of the present, all too soon in the life of a child, to be the past.

Karis, 544 A.2d at 1331–32.[1]

9-1.1 Frivolous Modification Petitions

Both Justice McDermott and Justice Nix expressed valid points. Different masters and trial judges will react with differing levels of sensitivity to the two poles described by Justice McDermott and Justice Nix—the need for flexibility and the need to control endless streams of litigation. The vast majority of petitions to modify are supported by arguably valid reasons. However, some petitions to modify are frivolous and abusive, the product of a parent who cannot lose,

1. Chief Justice Nix wrote, in concurring only in the result:
   > To permit parents to petition the court for modification of the custody award merely upon an allegation of the child's best interest would result in an endless stream of litigation, which in turn, would be unduly burdensome to our trial courts as well as unsettling to the parties. The stability of a relationship is essential to the best interest of the child and should be left undisturbed, absent a substantial change in circumstances which suggests that the previous judgment of the best interest of the child may no longer be valid.

   Id. at 1332.

who cannot give up the fight, who wants to wear down the other parent financially and emotionally, who cannot see the damage to the children associated with continued litigation.

Because a change of circumstances is not a prerequisite, a small number of respondents are forced to deal with unrelenting litigation about the custody of children. In such cases, knowledge about the fact finder's views is important, because some judges will dismiss repetitive petitions without hearing, wait for an appeal to be filed, and then justify their decision. Other judges will order mediation, evaluation, and discovery in cases where a petition to modify is filed within months of an initial custody order. Other judges will enforce some streamlined and expedited approach to hearing and disposition.

No matter how inclined the master or judge may be to flexibly considering petitions to modify, there comes a point where the petitioner's motivation is viewed as one of argumentativeness and frivolity rather than integrity. Judge Thomas Kistler described such a case in *Washington v. Hamilton,* 8 Pa.D.&C.5th 117, 119 (C.P. Centre 2009):

> The following is this Court's Opinion in Response to Appellant's Notice of Appeal and Matters Complained of on Appeal filed May 14, 2009. Although this Court has never done so before, this Court would like to preface this Opinion by noting that this Opinion marks Appellant's 8th Appeal filed in the immediate action. Taken together with the Appeals filed by Appellant's Mother and Father in actions 06-4974 and 07-0041 respectively, this brings the total number of Appeals filed pursuant to the issue of custody to 10 and a total of 548 filings in all these cases to date.
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> It was famously stated by George Washington, this nation's founding father that, "The administration of justice is the firmest pillar of government." This Court would submit to the honorable Superior Court that throughout the past *six* years, Appellant has

> worked to obstruct the administration of justice by manipulating and impeding the judicial process which is designed to find a prompt resolution to what almost certainly is a traumatic experience for any child. Appellant's toil has resulted in not only a draining of the resources of the Wife, but also of the judicial system and most importantly stability to the child. The flood of litigation works not only to hamstring both of our Courts' ability to render a prompt resolution and devote resources to other matters; it also drains the resources of the child's Mother which this Court believes would be better served providing necessities for the child. For these reasons the Court asks the honorable Superior Court to please consider the section of this Opinion addressing the abuse of judicial process and perhaps find a way to facilitate a resolution.

Citing *Lal v. Borough of Kennett Square,* 786 A.2d 1019 (Pa.Cmwlth. 2001), app. denied, 805 A.2d 527 (Pa. 2002), Judge Kistler asked the Superior Court to remand the case to him together with directions to appoint a guardian *ad litem* for the parties' son, the identity of whom should not be disclosed to the parents; and to enter an order barring the prothonotary from accepting any filing relative to the child's custody except filings by the guardian *ad litem*.[2]

In *Yates v. Yates,* 963 A.2d 535 (Pa.Super. 2008), the trial court appointed a parenting coordinator in a case involving unrelentingly contentious parents who had a highly destructive, inflammatory, and hostile relationship. In affirming this portion of the trial court's order, the Superior Court noted that parenting coordination was a relatively novel concept in Pennsylvania. Appointment of a parenting coordinator, however, is no longer an option available to trial courts as a result of the promulgation of Pa.R.C.P. 1915.11-1, effective May 23, 2013.

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2. A total of 10 Superior Court appeals were filed in this case between February 7, 2007, and January 19, 2010.

Another option to consider when dealing with vexatious conduct is a claim for legal fees pursuant to 23 Pa.C.S. § 5339 and 42 Pa.C.S. § 2503(7). In *Holler v. Smith,* 928 A.2d 330 (Pa.Super. 2007), the court affirmed an award of legal fees pursuant to 42 Pa.C.S. § 2503(7), which allows legal fee awards as a sanction for dilatory, obdurate, or vexatious conduct during the pendency of a matter. Among the improper conduct in the *Holler* case was a claim of sexual abuse found to be unsubstantiated. Although *Holler* affirmed a legal fee award made on a claim apparently filed more than 30 days after the final custody order, it did so on the holding that custody matters are a "special creature." To be safe, legal fee claims pursuant to section 2503(7) should be filed no later than 30 days after the final order, and perhaps earlier as a means of encouraging the other side of the case to think about the potential disadvantages of continued litigation.

Other possibilities for consideration in extreme cases are claims for abuse of process and claims under the Dragonetti Act.

A tort claim for abuse of process alleges improper use of judicial proceedings against another primarily to accomplish a purpose for which it is not designed. "The gravamen of abuse of process is the perversion of the particular legal process for a purpose of benefit to the defendant, which is not an authorized goal of the procedure." *Lerner v. Lerner*, 954 A.2d 1229, 1238 (Pa.Super. 2008). To succeed, the plaintiff must show "some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process." Id. Even if the defendant had ill intent, there can be no liability if he or she merely carried out the process to its authorized conclusion. Id. The complaint must factually allege that the proceeding was not used for the purpose for which those proceedings are intended.

The Dragonetti Act provides that a person who takes part in the procurement, initiation, or continuation of civil proceedings against another is liable for wrongful use of civil proceedings if:

(1) he acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and

(2) the proceedings have terminated in favor of the person against whom they are brought.

42 Pa.C.S. § 8351(a).

Probable cause is satisfied if the person who procures, initiates, or continues the suit reasonably believes in the existence of the facts on which the claim is based, and:

(1) reasonably believes that under those facts the claim may be valid under the existing or developing law;

(2) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or

(3) believes as an attorney of record, in good faith that his procurement, initiation or continuation of a civil cause is not intended to merely harass or maliciously injure the opposite party.

Id. § 8352.

9-2 Appeals

The following information focuses primarily on matters specifically related to child custody cases. For material related to appeals generally, the best reference is the Rules of Ap-

pellate Procedure, which provide a wealth of data about deadlines, filing requirements, contents of motions and briefs, petitions for Supreme Court review, and so forth.

9-2.1 Preservation of Issues

Issues must be preserved for appeal in child custody matters. Accordingly, a father's failure to object to admission of certain evidence constituted waiver. *Schwarcz v. Schwarcz,* 548 A.2d 556 (Pa.Super. 1988), app. denied, 559 A.2d 39 (Pa. 1989), cert. denied, 498 U.S. 815 (1990). However, if a party has no opportunity to object, then no waiver may be found. *Cyran v. Cyran,* 566 A.2d 878 (Pa.Super. 1989). Failure to raise objections to personal jurisdiction or venue waives the right to appeal for review. *Goodman v. Goodman,* 556 A.2d 1379 (Pa.Super. 1989), app. denied, 565 A.2d 1167 (Pa. 1989). However, parties cannot confer subject matter jurisdiction on a court that does not have it, and it is well settled that the question of subject matter jurisdiction may be raised at any time, by any party, or by the court sua sponte. *J.M.R. v. J.M.,* 1 A.3d 902 (Pa.Super. 2010). Failure to preserve constitutional issues, including the required notice to the attorney general, also causes waiver of appellate review. *Hill v. Divecchio,* 625 A.2d 642 (Pa.Super. 1993), app. denied, 645 A.2d 1316 (Pa. 1994); *In re J.Y.*, 754 A.2d 5 (Pa.Super. 2000). Failure to object to an order limiting the number of witnesses and time for testimony waives the issue of whether a party was denied a full de novo hearing. *Bednarek v. Velazquez*, 830 A.2d 1267 (Pa.Super. 2003). Similarly, failure to object to a hearing limited to facts relevant to one issue on which the parties disagree constitutes waiver. *M.O. v. J.T.R.*, 85 A.3d 1058 (Pa.Super. 2014).

9-2.2 Date of Entry of Order and Time for Filing Appeal

Pa.R.A.P. 903(a) provides that, except as otherwise specified by that rule, the notice of appeal must be filed within 30 days after entry of the order from which the appeal is taken.

Pa.R.A.P. 108 provides that the date of entry of an order in a civil matter is the day on which the clerk mails or delivers copies of the order to the parties, and this date should be noted in the docket pursuant to Pa.R.C.P. 236(b). Entry of final judgment is not required. *Ashford v. Ashford,* 576 A.2d 1076, 1077, n.1 (Pa.Super. 1990).

In counties that use the procedure in Pa.R.C.P. 1915.4-2(b), allowing a hearing officer to conduct a hearing on partial custody issues, an order that simply dismisses exceptions may not be considered a final order. *Aloi v. Aloi,* 434 A.2d 161 (Pa.Super. 1981). It is the order containing substantive provisions as to the custody of the children from which an appeal must be taken.

9-2.3 Deadlines and Children's Fast-Track Requirements

All appeals from orders involving dependency, termination of parental rights, adoptions, custody, and paternity are defined as "children's fast track appeals" in the definitional section of the Rules of Appellate Procedure. Pa.R.A.P. 102. In practice, certain child support cases are also fast tracked, including those where child support may be decreased. Certain child custody cases may be exempted from the fast-track system if both parents live in the same geographical area and primary custody is not at issue. The Superior Court identifies fast-track cases by letter to the trial court judge and attorneys of record. Oral argument may be limited to five minutes in fast-track cases.

The concise statement of errors complained of on appeal must be filed with the notice of appeal, Pa.R.A.P. 905(a)(2), and the notice of appeal must include a statement advising that the matter is a children's fast-track appeal.

The trial court must file at least a brief opinion setting forth its reasoning within 30 days of receipt of the notice of appeal and concise statement. Pa.R.A.P. 1925(a)(2)(ii).

The prothonotary must transmit the record, including the transcript and exhibits, within 30 days after filing of the notice of appeal. Pa.R.A.P. 1931(a)(2).

The appellant's designation of the record must be filed not later than 23 days before the due date of the brief for appellant. Pa.R.A.P. 2154(c). (The "designation of the record" indicates the parts of the record the appellant intends to reproduce and provides a brief statement of the issues presented for review.)

If the appellee wants the reproduced record to include parts of the record not designated by the appellant, the appellee must file and serve a designation within seven days after receipt of the appellant's designation. Pa.R.A.P. 2154(c).

The appellant must include in the reproduced record both the items designated by the appellant and the items designated by the appellee. Pa.R.A.P. 2154(c). The reproduced record must be filed together with the appellant's brief. Pa.R.A.P. 2186. The rules allowing deferral of filing of reproduced records do not apply to children's fast-track appeals. Pa.R.A.P. 2154(c).

The appellant's brief is due 30 days after the record is transmitted to the Superior Court. The appellee's brief is due 21 days after the appellant's brief and the reproduced record have been served. A reply brief may be filed within seven days after service of the preceding brief. The rule also provides for brief deadlines in cases of cross appeals. Briefs filed by mail are deemed filed on the date of mailing if first class, express, or priority United States Postal Service mail is used. Pa.R.A.P. 2185(a)(2). Cover sheets on all briefs must include a statement indicating that the matter is a children's fast-track appeal. Pa.R.A.P. 2172(b).

Applications for reargument must be filed within seven days of entry of the judgment or order of the appellate court, and answers are due within seven days of service. Pa.R.A.P. 2542(a)(2) and 2545(b).

If a petition for allowance of appeal is filed with the Supreme Court, the prothonotary will stamp the petition with a children's fast-track designation. The filing deadline for the petition is not expedited—it is 30 days from entry of the order of the Superior Court that the petitioner wants to be reviewed. Pa.R.A.P. 1113(a).

In cases where an application for reargument has been filed with the Superior Court and if the Superior Court does not act on the application within 45 days of filing, the Superior Court will not be permitted to consider the application. Instead, the application will be deemed denied. The Superior Court prothonotary will issue an order denying the application. The petition for allowance of appeal must then be filed within 30 days of the date of the order denying the application. Pa.R.A.P. 1113(a)(3).

A petition for allowance of appeal filed before disposition of an application for reargument has no effect. If a petitioner files both a petition for allowance of appeal and an application for reargument, the petitioner must file another petition for allowance of appeal within the required time frame measured from the order denying or otherwise disposing of the application for reargument. Pa.R.A.P. 1113(a)(3).

An answer to a petition for allowance of appeal must be filed within 10 days after service of the petition instead of 14 days. Pa.R.A.P. 1116(b).

An application for reconsideration of the denial of a petition for allowance of appeal must be filed within seven days after entry of the denial order. Pa.R.A.P. 1123(b). The rules specifically note that reconsideration requests are not favored. Answers to these petitions are not permitted unless requested by the Supreme Court. Second or subsequent petitions for reconsideration are not permitted, nor are untimely requests for reconsideration. Pa.R.A.P. 1123(b).

Failure to file the concise statement together with the notice of appeal results in a defective notice of appeal, but does not divest the Superior Court of the power to address the merits

of the case. The court decides whether to address the merits in such situations on a case-by-case basis. *In re K.T.E.L.*, 983 A.2d 745, 747 (Pa.Super. 2009). The court distinguishes between violation of the procedural rule requiring filing of the concise statement simultaneously with the notice of appeal and violation of an order to produce the concise statement. Id.

In *Durning v. Balent/Kurdilla,* 19 A.3d 1125 (Pa.Super. 2011), the Superior Court addressed the merits of the mother's appeal despite the mother's failure to file the concise statement together with the notice of appeal, finding that the appellee raised no objection, the trial court addressed the issues raised by the mother, and no prejudice was evident. Similarly, in *Harrell v. Pecynski,* 11 A.3d 1000 (Pa.Super. 2011), the father filed his concise statement on the same day that the trial judge filed her statement in lieu of a memorandum opinion. A few days later, the trial judge filed an addendum to her statement in lieu of a memorandum opinion. The Superior Court addressed the merits because there was no objection to the father's late filing, no claim of prejudice as a result of the late filing, and because the trial court had the opportunity to address the father's claims of error. However, in *Mudge v. Walter,* 6 A.3d 1031 (Pa.Super. 2010), the Superior Court found that all issues were waived, and affirmed the trial court order where the father failed to comply with an order of the Superior Court to file his concise statement with the trial court. Similarly, in *J.P. v. S.P.*, 991 A.2d 904 (Pa.Super. 2010), a mother's failure to file the concise statement within the ordered 21-day deadline was found to constitute a waiver of all of her objections (although the court also observed that even if the mother had filed a timely statement, she would not have been entitled to relief, as there was no abuse of discretion in the trial court's order).

9-2.4 Post-trial Motions

Post-trial motions are not permitted in domestic relations matters, including child custody matters. Pa.R.C.P. 1915.10(d) and Pa.R.C.P. 1930.2. Motions for reconsideration are permitted but not required. Pa.R.C.P. 1930.2(b). Motions for reconsideration must be filed within the 30-day appeal period. Pa.R.A.P. 1701(b)(3)(ii). Attentiveness to deadlines for filing a notice of appeal is important if reconsideration is sought.

Rule 1930.2 provides as follows:

- If the trial court does not enter an order providing that it will reconsider, then the time for filing a notice of appeal will run as if the motion for reconsideration had never been filed.
- If the trial court enters an order providing that it will reconsider, then the time for filing a notice of appeal begins to run anew from the date of entry of the reconsidered decision, which must be issued within 120 days of the date of the order granting reconsideration.
- If the trial court enters an order providing that it will reconsider but does not issue a reconsidered order within 120 days of the date of its order granting reconsideration, then the time for filing a notice of appeal begins to run anew from the 121st day.
- If the trial court grants reconsideration, then it may direct that additional testimony be taken during the 120-day period. If the trial court directs additional testimony to be taken, then the reconsidered decision does not have to be rendered within 120 days, and the time for filing a notice of appeal will run from the date the reconsidered decision is rendered.

In cases where a notice of appeal is filed simultaneously with a motion for reconsideration, the granting of reconsideration may require the filing of a second notice of appeal where one or both parties remain aggrieved even after reconsideration. Pa.R.A.P. 1701(b) provides that a grant of re-

consideration makes a pending notice of appeal inoperative, and the notice of appeal may be stricken on praecipe of either party. The rule provides that if a second notice of appeal is necessary, no additional fees shall be required.

9-2.5 Final and Interlocutory Orders

Pa.R.A.P. 341 provides that appeals may be taken from final orders of the lower court and defines a final order as one that:

1. disposes of all claims and of all parties; or
2. is expressly defined as a final order by statute; or
3. is entered as a final order pursuant to subdivision (c) of the rule, which addresses cases where there are multiple claims for relief or multiple parties and the trial court certifies that an immediate appeal would facilitate resolution of the entire case.

A custody order is considered final and appealable only if it is entered after completion of hearings on the merits and is intended by the court to constitute a complete resolution of the pending custody claims. *Moyer v. Gresh,* 904 A.2d 958 (Pa.Super. 2006).

Interlocutory Orders: An order allowing a biological father to intervene in a custody action between a biological mother and her husband is interlocutory. *Beltran v. Piersody,* 748 A.2d 715 (Pa.Super. 2000). An order denying a petition for modification, increasing the petitioner's partial custody, and scheduling a review hearing is interlocutory. *Sawko v. Sawko,* 625 A.2d 692, 696 (Pa.Super. 1993). An order terminating the father's partial custody after an emergency hearing but before a final hearing on the father's outstanding petition is interlocutory. *Williams v. Thornton,* 577 A.2d 215 (Pa.Super. 1990). An order establishing shared legal custody and a physical custody schedule but that also expressly retains jurisdiction and provides for a review hearing to be

held approximately eight months later on a date certain is interlocutory. *Kassam v. Kassam*, 811 A.2d 1023 (Pa.Super. 2002). Scheduling a date certain for review of the order indicates that the trial court does not intend the custody order to be a complete resolution. The review period would allow the court more time to study the effects of the order on the children before issuing a final order. *Kassam*, 811 A.2d at 1027. Allowing piecemeal appeals would interfere with judicial economy and the integrity of the trial court's process in deciding custody matters, as well as threaten the stability of the children by subjecting them to the uncertainties of ongoing litigation. Id.

Final Orders: An order allowing relocation and directing the parties to resolve the details of the new partial custody schedule is final. *Vineski v. Vineski,* 675 A.2d 722, 723, n.3 (Pa.Super. 1996). An order changing primary custody after a full hearing on the merits was final even though the order stated it was "temporarily" changing custody. *G.B. v. M.M.B.,* 670 A.2d 714 (Pa.Super. 1996) (en banc). An order providing that the best interests of the children would be served by the eventual transfer of custody to the mother is final, since a future order would merely implement the transfer. *Cady v. Weber,* 464 A.2d 423, 426 (Pa.Super. 1983). In *Parker v. MacDonald,* 496 A.2d 1244, 1246–47 (Pa.Super. 1985), the court found that the order was final despite language indicating availability of subsequent review upon application of either party. A custody order that allowed the mother to request a review hearing if the military did not reassign her to a Pennsylvania location was final because anticipation of future hearings that might take place on application of one of the parties indicated that the trial court's review was concluded and not that the matter was still under consideration. *Wagner v. Wagner*, 887 A.2d 282 (Pa.Super. 2005).

In *G.B. v. M.M.B.,* 670 A.2d 714 (Pa.Super. 1996) (en banc), the court overruled cases suggesting that failure to appeal an interlocutory order constituted a waiver. For example, a father did not waive his right to appeal an order allowing re-

location of a child where the relocation was permitted by an interim order issued before full hearing and entry of a final order. *Plowman v. Plowman,* 597 A.2d 701 (Pa.Super. 1991).

9-2.6 Contempt

An order finding a party in contempt is interlocutory and not appealable unless it imposes sanctions. *Rhoades v. Pryce,* 874 A.2d 148 (Pa.Super. 2005), app. denied, 899 A.2d 1124 (Pa. 2006). Sanctions must be more than an order directing compliance. *Sonder v. Sonder,* 549 A.2d 155 (Pa.Super. 1988). If sanctions take effect only in the future if compliance is not forthcoming, the contempt adjudication is not final. *Deichert v. Deichert,* 587 A.2d 319 (Pa.Super. 1991). The imposition of counsel fees is a sanction. *Rhoades,* above. If actual sanctions are directed, the order may be appealable even if the issue is mooted by compliance with the sanctions. For example, in *Ingebrethsen v. Ingebrethsen,* 661 A.2d 403 (Pa.Super. 1995), the appeal was permitted although the mother had already served her jail sentence.

9-2.7 Collateral Orders

Pa.R.A.P. 313(b) defines an appealable collateral order as:

> an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

In *Duttry v. Talkish,* 576 A.2d 53 (Pa.Super. 1990), the court held that denial of an incarcerated and indigent father's motion for appointment of counsel in a child custody matter was not an appealable collateral order.

9-2.8 Interlocutory Appeals as of Right—Jurisdiction, Venue, Injunctions

Before raising an issue of jurisdiction or venue in a child custody case, it is important to forecast the potential impact that Pa.R.A.P. 311 may have on the case, because an interlocutory appeal as of right may cause a delay in the final custody determination and may aggravate an imbalance in the financial resources available to the parties to fund the litigation. Even children's fast-track cases take time to move through the appellate process.

Pa.R.A.P. 311(b)(1) provides that an order sustaining venue or personal jurisdiction may be appealed as of right if the plaintiff, petitioner, or other party benefiting from the order files within 10 days an election that the order will be deemed final. As long as no election is filed, the failure of a party (whether the plaintiff or the defendant) to file a notice of appeal will not result in waiver of the right to raise the issue in a subsequent appeal from a determination on the merits. However, if the election is filed but the appeal is not taken, there will be a waiver. Pa.R.A.P. 311(g)(1)(ii) and (g)(2). If the right of appeal is exercised, the trial court will lose the power to act in the case while the appeal is pending. The appeal deadline is 30 days from the date of filing of the election. Pa.R.A.P. 903(c)(2). A prevailing party who files an election under Pa.R.A.P. 311(b)(1) is gambling that the trial court's determination will be upheld on appeal.

Pa.R.A.P. 311(b)(2) provides that an order sustaining venue or personal jurisdiction may be appealed as of right if the court states in the order that a substantial issue of venue or jurisdiction is presented. Failure to exercise this right of appeal does not waive the right to raise the issue after a determination on the merits. Pa.R.A.P. 311(g). *R.M. v. J.S.,* 20 A.3d 496 (Pa.Super. 2011), provides an example of this procedure.

Pa.R.A.P. 311(c) provides that an appeal may be taken as of right from orders changing venue, transferring the matter to another court of coordinate jurisdiction, or declining to proceed on the basis of forum *non conveniens*. If the appeal is not taken, the issue is waived. Pa.R.A.P. 311(g)(1)(ii).

Pa.R.A.P. 311(a)(4) provides that an order that grants or denies, modifies or refuses to modify, continues or refuses to continue, or dissolves or refuses to dissolve an injunction may be appealed as of right under certain circumstances. In child custody cases where an order that can accurately be characterized as an injunction has been issued, this section should be scrutinized. Failure to appeal under Pa.R.A.P. 311(a)(4) does not constitute a waiver of the objection to the order or the right to raise the issue in a subsequent appeal from a determination on the merits. Pa.R.A.P. 311(h) provides that Rule 1701(a) is not applicable to a matter in which an interlocutory order is appealed under Pa.R.A.P. 311(a)(4). Pa.R.A.P. 311 specifically disallows appeal of orders issued pursuant to section 3323(f) or 3505(a) of the Divorce Code, but no mention is made of special relief orders authorized by 23 Pa.C.S. § 5323 and Pa.R.C.P. 1915.13.

9-2.9 Interlocutory Appeals by Permission

When a trial court is of the opinion that (1) an interlocutory order involves a controlling question of law as to which there is substantial ground for difference of opinion, and (2) that an immediate appeal may materially advance the ultimate termination of the matter, then the trial court is required by 42 Pa.C.S. § 702 to so state in its order. Permission to appeal from an order containing the section 702 language is sought by filing with the Superior Court prothonotary within 30 days of the date of the order. The petition need not be set forth in numbered paragraphs, but it should contain all contentions in support of the relief sought because briefs will not be received. Pa.R.A.P. 1312(a) and (c). The petition does

not stay the proceedings below unless the appellate court so orders. Pa.R.A.P. 1313. An answer to the petition is due within 14 days after service. Pa.R.A.P. 1314.

If the trial court's order does not contain the section 702 language, then a petition may be filed with the trial court to include the language within 30 days after issuance of the interlocutory order. The application is deemed denied if the trial court fails to act within 30 days. Pa.R.A.P. 1311(b). If the trial court refuses to amend its order, a petition for review is the proper way to determine whether the case is so egregious as to justify prerogative appellate correction. (Note to Pa.R.A.P. 1311.)

9-2.10 Interlocutory Appeal of Some Claims

Pa.R.A.P. 341(c) provides that when the trial court enters a final order as to fewer than all of the claims, an interlocutory appeal is permitted if it is determined that this would facilitate resolution of the entire case. If the trial court's order does not provide that an interlocutory appeal would facilitate resolution of the entire case, an application for such a determination must be made within 30 days, and the action is stayed during the time the application is pending. The notice of appeal must be filed within 30 days of issuance of the order containing the required language. Pa.R.A.P. 341(c) also makes provision for filing of a petition to review if the lower court either refuses to enter an order containing the required language or does not act. In *G.B. v. M.M.B.,* 670 A.2d 714 (Pa.Super. 1996) (en banc), the Superior Court found Pa.R.A.P. 341(c) inapplicable to requests for interim partial custody pending final resolution of the custody proceedings. Failure to seek relief under Pa.R.A.P. 341 does not constitute waiver. (Note to Pa.R.A.P. 341.) A note to Pa.R.A.P. 341(c) says that factors to be considered in determining finality include whether there is a significant relationship between the adjudicated and unadjudicated claims, whether there is a possibility that an appeal would be mooted by further developments,

whether there is a possibility that the court will consider issues a second time, and whether an immediate appeal will enhance prospects of settlement.

9-2.11 Scope and Standard of Review—Child Custody

Scope of review refers to the confines within which an appellate court must conduct its examination—the matters the appellate court is permitted to examine. The *standard* of review refers to how that examination is conducted. *Morrison v. Department of Pub. Welfare, Office of Mental Health (Woodville State Hosp.),* 646 A.2d 565 (Pa. 1994).

In *M.A.T. v. G.S.T.,* 989 A.2d 11 (Pa.Super. 2010), where the Superior Court en banc reversed a child custody decision based in part on an evidentiary presumption against a homosexual parent, the court described the scope and standard of review as follows.

> The appellate court's scope of review in custody cases is of the broadest type. This broad power is limited to the extent that an appellate court may not nullify the fact finding function of the hearing judge. We are empowered to form our own independent deductions and inferences from the facts found by the hearing judge, but may only interfere with the decisions of the hearing court where there has been a gross abuse of discretion. We must determine whether the trial court's factual findings support the trial court's factual conclusions, but we may not disturb these conclusions unless they are unreasonable in light of the court's factual findings.
>
> Our appellate function is to make an independent judgment, based on the testimony and evidence before us, that is in the best interest of the child. We must make an independent examination of the record and make an order on the merits of the case which is right, just and will serve the best interest of the child. After we take full account of the hearing

> judge's reasoning, still, we must be easy in our own conscience that the judge's award will serve the best interest of the child, or children, in question.
>
> Although we are given a broad power of review, we are constrained by an abuse of discretion standard when evaluating the court's order. An abuse of discretion is not merely an error of judgment, but if the court's judgment is manifestly unreasonable as shown by the evidence of record, discretion is abused. An abuse of discretion is also made out where it appears from a review of the record that there is no evidence to support the court's findings or that there is a capricious disbelief of evidence.

989 A.2d at 18–19; *Murphey v. Hatala*, 504 A.2d 917, 920 (Pa.Super. 1986) (citations and quotation marks omitted), app. denied, 533 A.2d 93 (Pa. 1987); see also *McMillen v. McMillen*, 602 A.2d 845, 846–47 (Pa. 1992); *King v. King*, 889 A.2d 630, 632 (Pa.Super. 2005).

A similar but not identical description of the scope and standard of review appears in *Collins v. Collins*, 897 A.2d 466 (Pa.Super. 2006), app. denied, 903 A.2d 1232 (Pa.Super. 2006).

> In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. *Johns v. Cioci*, 865 A.2d 931, 936 (Pa.Super. 2004). 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. *Id.* 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. *Id.* However, we are not bound by the trial court's deductions or inferences from its factual findings. *Id.* Ultimately, the test is "whether the trial court's conclusions are unreasonable as shown by the evidence of record." *Landis v. Landis*, 869 A.2d 1003, 1011 (Pa.Super.

> 2005) (citations omitted). 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." *Hanson v. Hanson*, 878 A.2d 127, 129 (Pa.Super. 2005).
>
> With any child custody case, the paramount concern is the best interests of the child. *Landis*, *supra*, 869 A.2d at 1011. This standard requires a case-by-case assessment of all the factors that may legitimately affect the "physical, intellectual, moral and spiritual well-being" of the child. *Id.* (citations omitted).

Collins, 897 A.2d at 471 (parallel citations omitted).

If an appellate court were to review the record of a child custody case independently of the issues raised by the parties, this would exceed the proper scope of review, because issues not raised on appeal are waived. *Commonwealth ex rel. Robinson v. Robinson,* 478 A.2d 800, 804 (Pa. 1984). The court in *Robinson* recognized that the ultimate issue in custody cases is the best interests of the child, but held that "interminable and vexatious litigation," which abrogation of the waiver doctrine would promote, would not be a better method of achieving a just result in child custody cases. It should be noted that the decision in *Robinson* predated the decisions holding that it is unnecessary to prove a change of circumstances to justify modification of a child custody order.[3] The *Robinson* decision mentions that, "Just as a parent is not permitted to relitigate . . . by petitioning for modification . . . , an appellate court may not direct the parties to relitigate . . . by raising factual issues *sua sponte* and remanding for relitigation." *Robinson*, 478 A.2d at 805.

3. *Karis v. Karis,* 544 A.2d 1328 (Pa. 1988); *Jaindl v. Myers,* 553 A.2d 407 (Pa. 1989); and *McMillen v. McMillen,* 602 A.2d 845 (Pa. 1992), provided that it is unnecessary to prove a change of circumstances to justify modification of a child custody order.

9-2.12 Standard of Review—Jurisdiction

The standard of review for questions involving jurisdiction is as follows:

> A court's decision to exercise or decline jurisdiction is subject to an abuse of discretion standard of review and will not be disturbed absent an abuse of that discretion. Under Pennsylvania law, an abuse of discretion occurs when the court has overridden or misapplied the law, when its judgment is manifestly unreasonable, or when there is insufficient evidence of record to support the court's findings. An abuse of discretion requires clear and convincing evidence that the trial court misapplied the law or failed to follow proper legal procedures.

Wagner v. Wagner, 887 A.2d 282, 285 (Pa.Super. 2005).[4]

The abuse of discretion standard of review applies to trial court decisions to exercise or decline to exercise jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *J.M.R. v. J.M.,* 1 A.3d 902 (Pa.Super. 2010).

9-2.13 Scope and Standard of Review—Rules, Statutes, Subject Matter Jurisdiction

The correctness of the trial court's application of a statute or a rule of procedure raises a pure question of law. In these cases, the standard of review is de novo and the scope of review is plenary. *Harrell v. Pecynski,* 11 A.3d 1000 (Pa.Super. 2011).

Where the issue for review centers on the question of subject matter jurisdiction, the question is purely one of law. The "standard of review is *de novo,* and our scope of review is plenary." *Commonwealth v. Jones*, 929 A.2d 205, 211 (Pa. 2007). An example of the application of the de novo standard

4. Cited in *C.L. v. Z.M.F.H.,* 18 A.3d 1175 (Pa.Super. 2011), and *R.M. v. J.S.,* 20 A.3d 496 (Pa.Super. 2011).

of review and plenary scope of review as to an issue of subject matter jurisdiction appears in *B.J.D. v. D.L.C.,* 19 A.3d 1081 (Pa.Super. 2011).

In *B.J.D. v. D.L.C.,* a custody order issued in June 2009 granted the father primary physical custody of the child and allowed the father to relocate to Saipan. The father moved from Saipan to Canada with the child in June or July 2010, and moved from Canada to Maryland with the child in September 2010. In June 2010, the mother asked the trial court to transfer jurisdiction to Oklahoma, where she had been living since 2004. In September 2010, the father petitioned for modification to allow the child to live with him in Maryland. The trial court transferred jurisdiction to Oklahoma. The Superior Court found that the trial court lacked subject matter jurisdiction to enter that order pursuant to 23 Pa.C.S. § 5427, and held that the issue of jurisdiction should be decided by a state with a stake in the matter. Pennsylvania was neither the child's home state nor a significant connections state pursuant to 23 Pa.C.S. § 5421(a)(1) and (2). Under these circumstances, Pennsylvania could exercise custody jurisdiction only if no other state would be able to do so pursuant to 23 Pa.C.S. § 5421(a)(4). Based on the facts, either Maryland (as the child's home state, if the child had lived there for at least six months) or Oklahoma (because the mother lived there and may have significant connections to the child) would have jurisdiction.

9-2.14 Standard of Review—Contempt

The Superior Court described the standard of review in contempt matters in *Harcar v. Harcar,* 982 A.2d 1230 (Pa.Super. 2009), as follows:[5]

5. In *Harcar,* the father appealed from an order declining to issue contempt sanctions against the mother for remaining in the Republic of Turkey with the parties' son in violation of court orders. The Superior Court affirmed the contempt finding, reversed and remanded with respect to the failure to impose sanctions, and vacated the decision to exercise jurisdiction in the future.

> When considering an appeal from an Order holding a party in contempt for failure to comply with a court Order, our scope of review is narrow: we will reverse only upon a showing the court abused its discretion. *Hyle v. Hyle*, 868 A.2d 601 (Pa.Super. 2005), *appeal denied,* 890 A.2d 1059 (Pa. 2005). The court abuses its discretion if it misapplies the law or exercises its discretion in a manner lacking reason.

Id. at 1234 (parallel citations omitted).