Seeking Justice: Contempt and Sanctions Enforcement

Matrimonial Inns of Court
February 26, 2013

Hon. Susan Evashavik DiLucente
Joseph J. Chester
Jennifer Forbes
Christine Gale
Meri M. Iannetti
Alisa M. Lerman
Katherine L.W. Norton
Sally Miller
Sophie Paul
Robert Sebastian
Ashely Urik (Duquesne)
Tyler Foster (Pitt)

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COMMONWEALTH OF PENNSYLVANIA, Appellee v. KATRINA MOODY, Appellant; COMMONWEALTH OF PENNSYLVANIA, Appellee v. BARBARA IVERY, Appellant; COMMONWEALTH OF PENNSYLVANIA, Appellee v. BERNADETTE ARCHIE, Appellant

No. 1268 EDA 2011, No. 1310 EDA 2011, No. 1316 EDA 2011

SUPERIOR COURT OF PENNSYLVANIA

2012 PA Super 103*; *46 A.3d 765*; *2012 Pa. Super. LEXIS 543

March 14, 2012, Argued
May 15, 2012, Filed

SUBSEQUENT HISTORY: Reargument denied by *Commonwealth v. Moody, 2012 Pa. Super. LEXIS 1588 (Pa. Super. Ct., July 18, 2012)*

PRIOR HISTORY: [**1]
Appeal from the Judgment of Sentence of the Court of Common Pleas, Philadelphia County, Criminal Division, Nos. MC-51-MD-0000083-2011, MC-51-MD-0000085-2011 and MC-51-MD-0000084-2011. Before SHUTER, J.

COUNSEL: Bradley Bridge, Public Defender, Philadelphia, for Moody, appellant.

Andrew D. Montroy, Public Defender, Philadelphia, for Ivery, appellant.

Joseph J. Russo, Philadelphia, for Archie, appellant.

Karen B. Jordan, Assistant District Attorney, Philadelphia, for Commonwealth, appellee.

JUDGES: BEFORE: GANTMAN, SHOGAN, and WECHT, J.J. OPINION BY WECHT, J. Gantman, J., concurs in the result.

OPINION BY: WECHT

OPINION

[*767] OPINION BY WECHT, J.

Katrina Moody, Barbara Ivery, and Bernadette Archie ["Appellants"], appeal their May 6, 2011 judgments of sentence imposed after the Philadelphia Municipal Court found each of them in direct criminal contempt. [1] Because Appellants' due process rights were violated, we vacate the judgments of sentence and remand for proceedings consistent with this opinion. [2]

> 1 Pursuant to *42 Pa.C.S.A. § 1123(a.1)*, Appellants have the right to appeal to this Court a contempt citation issued by a municipal court judge, but the appeal "shall be limited to a review of the record." *42 Pa.C.S.A. § 1123(a.1)*.
>
> 2 These appeals previously were listed consecutively as related docket [**2] numbers. The three cases were consolidated for argument before this Court, and are disposed of in this opinion. These cases arise from the same incident, each Appellant presents identical issues, and all matters were argued together before us.

On April 6, 2011, during the preliminary hearing in a double homicide case, Appellant Archie stood up in the gallery and began screaming. This occurred as the court crier attempted to bring the homicide defendant's mother from the gallery to the bench to testify. Appellant Archie's act served to incite others seated in the gallery, including the other two Appellants, Moody and Ivery, who then attacked the homicide defendant's mother in the gallery. When the homicide defendant saw his mother being assaulted, he broke free from the deputy sheriff, began banging on the wall, and attempted to run into the gallery. Contempt Hearing Notes of Testimony ["N.T."], 4/6/11, at 6. The deputy sheriff had to wrestle with the defendant in order to prevent him from reaching the gallery. N.T. at 6. The trial court halted the proceedings and removed Appellants from the courtroom to an adjoining room for three hours.

After order was restored, the trial court held [**3] what it believed to be a summary contempt hearing. The court crier was sworn in as a witness, but the municipal [*768] court judge was not. N.T. at 4-5. In that proceeding, the municipal court judge and the court crier made a record of the melee, as follows:

> THE COURT: All right. For the record, what happened was -- let me just put on the record what happened that I observed.
>
> What happened that I observed was we tried to bring the defendant's mother in as a witness to testify as to whether or not she hired an attorney for the defendant. That's all.
>
> When the court officer went out to get the mother, a fight broke out in the gallery involving numerous people in which the court officer got stuck in the middle and his arm was hit during the proceeding. He can tell us more about what happened.
>
> Because of that, we had to shut down the court, call the sheriff. Almost every free sheriff in the building came running in here. We locked down the courtroom. The defendant went nuts and started banging on the wall because he saw his mother being assaulted. The door got locked. And the sheriff had to wrestle with the defendant while all this happened, all because of what happened in the gallery of the courtroom.
>
> All [**4] right. Mr. Brandt, do you want to tell me what happened when you were out there?
>
> * * *
>
> THE WITNESS: Yes, Your Honor. I went out there to get the mother of the defendant. And when I went out there, the people were screaming. There's a lady in a tan suit jacket. She was sitting on the left side of the court or the right side from the bubble. She was holding a piece of paper up, screaming F you. She was saying things, but I wasn't really paying attention. I just told her to sit down.
>
> Another staff member came out and told people to be quiet. The District Attorney was out there telling people to calm down.

As I approached the defendant's mom, someone on the second row - I cannot identify this person -- threw a pocketbook, and it hit the lady in the side of the face.

THE COURT: Which lady?

THE WITNESS: The defendant's mom.

THE COURT: Okay.

THE WITNESS: And when it did that, this lady here in the orange sweater -- [**5] between me and the District Attorney, she was running between us screaming. And we tried to hold her back. But as we were trying to hold her back, she got to the mother. And she reached for her hair and pulled her hair and then with a left hand threw and hit her on the left side of her head.

At which time there was [*sic*] other people coming towards us. I pushed her with my left hand and she went backwards. I believe another court staff member may have grabbed her from behind and pulled her away.

I pushed the woman who was being attacked to the right of that pillar. At which time this woman here can [*sic*] around the pillar.

THE COURT: Can you please describe--

THE WITNESS: I'm sorry. The woman in the white sweatshirt.

THE COURT: Thank you.

THE WITNESS: She came up from behind from the second row. She reached around to the defendant's mother. And all I remember seeing is her index finger going into the woman's eye and ripping her eye. Now, I don't know if she was trying to pull her or trying to [*769] rip her eye, but she was using a ripping motion at her eye. At which time they started to engage in a fight.

I tried to push the woman away.

Punches were being thrown back and forth. I was trying to push [**6] her away. And then the detective in the black suit - I think it was Pitts - he may have grabbed that woman from behind and

pulled her off. We separated the two parties.

At the same time other things were going on. I don't know who the people were. Somebody was trying to hit somebody with a cane. And some other people were throwing punches. And I just can't identify more than those two people and the lady in the tan jacket, who I thought started a lot of the situation.

THE COURT: The lady in the tan jacket, do you see her here?

THE WITNESS: She is the lady back there, Your Honor, in the third -- putting her hand up in the air, You Honor, right now. In fact, we even had communications outside the courtroom.

THE COURT: All right. Do you want to come in here, ma'am?

Sit down in the table between those two ladies.

All right. Go ahead. The lady in the tan was doing what?

THE WITNESS: Well, to be honest with you, I just forgot that part. Originally, when you were asking the defendant about his attorney status, he said something about a Mr. Sutton. And you said that if he doesn't have an attorney, Mr. Server, do you know about that, she jumped up with a picture in her hand and started screaming something [**7] out.

We can't really hear what she was screaming, but she was rising and she was starting, like, to screaming and get a little -- just a little crazy I guess. And I got on the mic and said, everybody calm down, sit down. And she did sit back down.

And then you asked me to go get the mother. I went to go get the mother. When I went out to get the mother, I didn't know who the mother was. So I went to my paperwork and I said, Miss Warrick, are you here? Is the mother of Shaun Warrick here?

And she didn't answer right away. And that lady said, she's right here. And the lady said, I can speak for myself. And then she started screaming at her. And that's when the District Attorney was telling her to calm down, ma'am, and trying to go to her. And that's when the whole -- that's when it started from A, B, and C.

THE COURT: Okay.

THE WITNESS: And then it went into the fight. She didn't throw any punches, not that I know of, or accost the lady. But she did excite the situation in the beginning.

THE COURT: All right.

THE WITNESS: That's about basically all I know. And then we locked the room down. And other than that, I can't remember much. I just focussed [*sic*] on those two things.

N.T. at 5-12.

At this [**8] hearing, Appellants were not represented by counsel, were not permitted to speak on their own behalves, and were not able to cross-examine the judge or crier who were the witnesses. N.T. at 14, 16. The trial court then required each Appellant to state her name on the record. N.T. at 12-13. An attorney who was not involved in the case interrupted the hearing and requested to meet with the judge at sidebar, a request which the judge allowed. N.T. at 12. The sidebar conference was not recorded. Thereafter, the [*770] municipal court judge told the Appellants that they had a *Fifth Amendment* right, instructed them not to testify, and stated that he would appoint an attorney for each Appellant. N.T. at 13. The trial court indicated that it was "making an initial finding of direct criminal contempt of court." N.T. at 13-14. The judge stated that "before I make a final finding, I want you to have attorneys to be able to talk to you so you can present your case." N.T. at 16. In accordance with this initial finding, the court set bail on each Appellant at $25,000, with only 10% required to be paid for release. Bail Order, 4/6/2011. Each Appellant posted bail that same day.

The counseled proceeding ensued [**9] approximately one week later, on April 13, 2011. It was, in effect, a sentencing hearing. The attorneys were allowed only to present mitigating evidence relevant to sentencing. Sentencing Hearing Notes of Testimony ["S.N.T."], 4/13/11, at 8, 14. The sentencing hearing of Appellant Archie was stayed because her attorney was recovering from surgery. S.N.T., 4/13/11, at 5. Counsel for the two Appellants present specifically requested permission to present evidence on the contempt charge and to cross-examine witnesses. S.N.T., 4/13/11, at 10, 13. The

trial court denied those requests. S.N.T., 4/13/11, at 13-14.

The trial court declined to allow counsel to provide any evidence regarding the events that transpired in court. The trial court proposed a flat, ten-day sentence as to the two Appellants present, but, at their request, stayed sentencing of all Appellants until May 6, 2011, the date of Appellant Archie's sentencing hearing. S.N.T. 4/13/11 at 23, 25-26.

On April 25, 2011, Appellant Moody filed a post-sentence motion seeking various forms of relief, including an arrest of the judgment, a new trial, or a new sentencing hearing. [3] At the subsequent sentencing hearing on May 6, 2011, the [**10] trial judge granted the motion in part and denied it in part. The sole portion of the motion that the trial court granted was Appellants' request to modify the sentence to five to ten days as to Appellants, in conformity with the Sentencing Code. [4] Sentencing Hearing Notes of Testimony ["S.N.T."], 5/6/11, at 11.

> 3 On May 3, 2011, Appellant Ivery filed a combined motion for continuance and post-sentence motion, which included a request to present witnesses. The trial court denied the motion. S.N.T, 5/6/11, at 11. Counsel for Appellant Archie requested to adopt the post-sentence motion filed by counsel for Appellant Moody for purposes of appeal, but the trial court denied such an adoption, instead giving Appellant Archie's counsel ten days to file post-sentence motions. S.N.T., 5/6/11, at 25-27. Appellant Archie filed no such motions.
>
> 4 The Sentencing Code does not permit the issuance of flat sentences. Sentences must have both a minimum and maximum term. *42 Pa.C.S.A. §§ 9756(a)-(b).*

Thereafter, Appellants appealed. [5] The trial court permitted Appellants to remain free on bond pending appeal. S.N.T., 5/6/11, at 13.

> 5 The trial court ordered a statement of errors complained of on appeal pursuant [**11] to *Pa.R.A.P. 1925(b).* Appellants timely complied. The trial court filed a *Rule 1925(a)* opinion.

The three Appellants present the same issues for our review:

> 1) The evidence against [Appellants] was legally insufficient and [their] contempt conviction[s] must be vacated because no one at [their] contempt trial identified [them] as having done anything.
>
> 2) [Appellants'] criminal contempt trial was defective where [Appellants] [*771] [were] denied [their] right to counsel, [were] denied [their] right to cross-examine the witness against [them], [were] denied [their] right to present evidence and [were] denied [their] right to testify on [their] own behalf.
>
> 3) By eschewing consideration of the character of [Appellants] and [their] rehabilitative needs, the trial judge abused his discretion and violated general sentencing principles when he focuses exclusively upon the crime involved (contempt) in sentencing [Appellants].

Brief of Appellant Moody at ii; [6] ***see*** Brief of Appellant Archie at 3; Brief of Appellant Ivery at 3.

> 6 Appellants' original issue contained several erroneous capital letters that we corrected for ease of reading. Otherwise, the issues are set forth *verbatim*.

Appellants' second issue [**12] on appeal amounts to a due process challenge to the validity of the entire proceeding that culminated in their convictions for direct criminal contempt. Whether Appellants were denied due process is a question of law. "As with all questions of law, the appellate standard of review is *de novo* and the appellate scope of review is plenary." ***In re Wilson****, 2005 PA Super 211, 879 A.2d 199, 214 (Pa. Super.2005)* (*en banc*).

In order to determine what process is due, we first must determine the nature of the contempt proceeding. Only then will we be in a position to evaluate Appellants' first issue, which concerns the sufficiency of the evidence, and their third issue, which concerns sentencing.

Use of the court's summary contempt power is reviewed under an abuse of discretion standard. ***Commonwealth v. Stevenson****, 482 Pa. 76, 393 A.2d 386, 393 (Pa. 1978)* (plurality opinion).

> We have held that in considering an appeal from a contempt order, we place great reliance on the discretion of the trial judge. Each court is the exclusive judge of contempts against its process, and on appeal its actions will be reversed only when a plain abuse of discretion occurs. In cases of direct criminal contempt, that is, where the contumacious act [**13] is committed in the presence of the court

> and disrupts the administration of justice, an appellate court is confined to an examination of the record to determine if the facts support the trial court's decision.

Commonwealth v. Jackson**, 367 Pa. Super. 6, 532 A.2d 28, 31-32 (Pa. Super. 1987)* (quotations and citations omitted); ***see also *42 Pa.C.S.A. § 1123(a.1)* ("the appeal shall be limited to a review of the record"). The trial court characterized the contempt proceeding as a summary hearing. For the reasons that follow, we find that this proceeding was not in the nature of a summary hearing.

Contempt is either civil or criminal in nature. "The determination of whether a particular order contemplates civil or criminal contempt is crucial, as each classification confers different and distinct procedural rights on the defendant." ***Commonwealth v. Ashton**, 2003 PA Super 194, 824 A.2d 1198, 1202 (Pa. Super. 2003)*. Indeed, "[t]he civil-criminal classification of contempt exists solely for determination of a contemnor's procedural rights and a court's sentencing options." ***Diamond v. Diamond**, 715 A.2d 1190, 1198 (Pa. Super. 1998)*. "If the dominant purpose of the court is to prospectively coerce the contemnor into compliance with the [**14] court's directive, the adjudication is one of civil contempt." ***Commonwealth v. Pruitt**, 2000 PA Super 381, 764 A.2d 569, 574 (Pa. Super. 2000)* (citing ***Diamond**, 715 A.2d at 1194*). "However, if the court's dominant purpose is to punish the contemnor for [*772] disobedience . . ., the adjudication is one of criminal contempt." ***Id.***

"Criminal contempts are further subdivided into direct and indirect contempts." ***Knaus v. Knaus**, 387 Pa. 370, 127 A.2d 669, 671 (Pa. 1956)*. Different procedural safeguards apply to direct and indirect criminal contempts. "A charge of indirect criminal contempt consists of a claim that a violation of an Order or Decree of court occurred outside the presence of the court." ***Commonwealth v. Brumbaugh**, 2007 PA Super 226, 932 A.2d 108, 109 (Pa. Super. 2007)* (citing ***Commonwealth v. Padilla**, 2005 PA Super 332, 885 A.2d 994 (Pa. Super. 2005))*. Direct contempt involves conduct occurring in the presence of a court. ***Commonwealth v. Patterson**, 452 Pa. 457, 308 A.2d 90, 92 (Pa. 1973)*. In the case *sub judice*, Appellants were found guilty of direct criminal contempt. Direct criminal contempt often requires immediate adjudication in the form of a summary hearing.

> A direct criminal contempt consists of misconduct of a person in the presence of the court, or so near thereto [**15] to interfere with its immediate business, and punishment for such contempts may be inflicted summarily.

Id. (quoting ***Knaus**, 127 A.2d at 671*).

Due process requirements necessarily are truncated in summary proceedings. "Summary proceedings for contempt of court are those in which the adjudication omits the usual steps of 'the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial.'" ***Stevenson**, 393 A.2d at 392* (quoting ***Sacher v. United States**, 343 U.S. 1, 13, 72 S. Ct. 451, 96 L. Ed. 717 (1952)*.

However, a defendant may not be summarily tried for an offense, including direct criminal contempt, in which he is subject to a term of imprisonment without being furnished counsel or without validly waiving counsel. ***See Commonwealth v. Crawford**, 466 Pa. 269, 352 A.2d 52, 53-4 (Pa. 1976)* (citing ***Argersinger v. Hamlin**, 407 U.S. 25, 32, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972))*; ***Commonwealth v. Bethea**, 445 Pa. 161, 282 A.2d 246, 247-48 (Pa. 1971)*. Further, "[w]hen the summary contempt power is exercised, there should normally be afforded 'at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.'" ***Stevenson**, 393 A.2d at 397 n.9*, [**16] (citations omitted).

The power to impose summary punishment for contempt is inherent in all courts, ***Id.**, 393 A.2d at 389*, but is limited in this Commonwealth by *42 Pa.C.S.A. § 4132*. That statute, denominated "Attachment and summary punishment for contempts," provides:

> The power of the several courts of this Commonwealth to issue attachments and to impose summary punishments for contempts of court shall be restricted to the following cases:
>
> (1) The official misconduct of the officers of such courts respectively.
>
> (2) Disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court.
>
> (3) The misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.

42 Pa.C.S.A. § 4132.

"To sustain a conviction pursuant to *section 4132(3)* . . . it must be established beyond a reasonable doubt that Appellant (1) committed misconduct, (2) in the presence of the court, (3) with the intent to obstruct the proceedings, and (4) Appellant's misconduct actually obstructed the administration of justice." ***Pruitt**, 764* [*773] *A.2d at 575* (citing ***Behr v. Behr**, 548 Pa. 144, 695 A.2d 776, 779 (Pa. 1997)).*

Summary contempt adjudication is appropriate only when [**17] the conduct occurred in the judge's presence:

> Where a court acts immediately to punish for contemptuous conduct committed under its eye, the contemnor is present, of course. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations.[FN 8]
>
> [FN8: The Court has been careful to limit strictly the exercise of the summary contempt power to cases in which it was clear that all of the elements of misconduct were personally observed by the judge. ***See Johnson v. Mississippi**, 403 U.S. 212, 214-215, 91 S. Ct. 1778, 29 L. Ed. 2d 423, (1971)*; ***In re Oliver**, 333 U.S. 257, 275-276, 68 S. Ct. 499, 92 L. Ed. 682 (1948)*.]

***Groppi v. Leslie**, 404 U.S. 496, 504, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972)*. "Only in these narrow circumstances may a court subject a contemnor to punishment without the procedural protections otherwise accorded the criminal accused." ***Commonwealth v. Edwards**, 703 A.2d 1058, 1059 (Pa. 1997).* [7]

> 7 ***See also Commonwealth v. Garrison**, 478 Pa. 356, 386 A.2d 971, 976 (Pa. 1978)*:
>
> > When acting to uphold its authority, however, a court must use the least possible power and should first consider less severe remedies such as civil contempt before imposing summary criminal contempt. The judge [**18] should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate. . . . [A]ppellate courts have reversed convictions for summary criminal contempt where a cautionary instruction to the jury would have restored order or negated any ill effects of counsel's behavior, where civil or nonsummary criminal contempt would have served the trial court's purpose, or where some other effective sanction was available.
>
> (internal citations omitted).

Our Courts have long required that the contemptuous conduct actually be observed by the Court:

> Except for a narrowly limited category of contempt, due process of law as explained in [***Cooke v. United States**, 267 U.S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925)]* requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's [**19] business, ***where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court***, and where immediate punishment is essential to prevent 'demoralization of the court's authority * * * before the public.' ***If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the Cooke case, that the accused be accorded notice and a fair hearing as above set out.***

***Edwards**, 703 A.2d at 1059* (quoting ***In re Oliver**, 333 U.S. at 275, 68 S. Ct. at 508-09, 92 L. Ed. at 695*. (emphasis added.))

While Pennsylvania courts have departed from the "observed by" or "in front of" requirement for summary hearings of direct contempt, they have done so only in [*774] very narrow circumstances. ***Id.*** Specifically, when a witness states that he will not testify, the Pennsylvania Supreme Court has held that the trial court is not required physically to put the witness on the stand, ask him questions, and have his silence noted on the record; it is sufficient that the witness state that, if placed on the stand, he would refuse [**20] to respond. ***See Commonwealth v. Crawford****, 466 Pa. 269, 352 A.2d 52, 53 (Pa. 1976)* (contemnor stated he would not testify, though he did not actually refuse to answer questions in open court). [8] In such circumstances, the record reflects that the trial judge has direct knowledge of the elements of contempt.

> 8 It is unclear whether the witness in ***Crawford*** was placed under oath. ***See also Commonwealth v. Brown****, 424 Pa. Super. 333, 622 A.2d 946, 949 (Pa. Super. 1993)* (contemnor's refusal to testify took place "in open court, on the record.").

In extending that line of reasoning, the Pennsylvania Supreme Court similarly has held that an appellant who does not appear in court, as ordered, can be held in direct criminal contempt. ***See Commonwealth v. Ferrara****, 487 Pa. 392, 409 A.2d 407, 411 (Pa. 1979)* (appellants failed to appear for either arraignment or trial; when brought in under warrant for arrest they were held in direct criminal contempt). The trial court in ***Ferrara*** questioned the appellants, who returned to court after a warrant was issued for their arrest, on the record, and found that the appellants willfully chose not to attend their court date. ***Id.*** *at 396*. Thus, all of the facts necessary to establish the elements of contempt were [**21] directly witnessed by the trial judge and placed on the record. [9] Herein lies the distinction between this case and ***Crawford, Brown, and Ferrara, supra***, where the Court has departed from the "in front of the judge" requirement; the judges in that line of cases had personal knowledge of the contempts and placed that knowledge on the record.

> 9 "We have held also that in proceedings before a grand jury, a witness' refusal to testify is considered as taking place in the presence of the court. ***See Rosenberg Appeal****, 186 Pa.Super. 509, 142 A.2d 449 (1958)*. Conversely, we have noted that the mere presence of an officer of the court during a contemptuous act does not make that act a direct contempt. ***See Altemose Constr. Co. v. Building & Constr. Trades Council****, 449 Pa. 194, 296 A.2d 504 (1972)* (acts committed at construction site do not constitute direct criminal contempt even though sheriff was present), *cert. denied, 411 U.S. 932, 93 S. Ct. 1901, 36 L. Ed. 2d 392 (1973)*."
>
> ***Edwards****, 703 A.2d at 1059* (citing ***Commonwealth v. Brown****, 424 Pa. Super. 333, 622 A.2d 946, 948 (Pa. Super. 1993))*.

Instantly, confining our review to an examination of the record alone, as is required by ***Jackson, supra***, there is no [**22] indication that the trial judge personally observed Appellants' specific actions. Instead, it appears that the trial judge relied substantially on the court crier's testimony to determine the identities of Appellants and the essential elements of Appellants' offenses.

> COURT CRIER: . . . I pushed the woman who was being attacked to the right of that pillar. At which time this woman here can [*sic*] around the pillar.
>
> THE COURT: Can you please describe--
>
> THE WITNESS: I'm sorry. The woman in the white sweatshirt.
>
> * * *
>
> COURT CRIER: . . . At the same time other things were going on. I don't know who the people were. Somebody was trying to hit somebody with a cane. And some other people were throwing punches. And I just can't identify more than those two people and the lady in [*775] the tan jacket, who I thought started a lot of the situation.
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> THE COURT: The lady in the tan jacket, do you see her here?
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> THE WITNESS: She is the lady back there, Your Honor, in the third -- putting her hand up in the air, You Honor, right now. In fact, we even had communications outside the courtroom.
>
> THE COURT: All right. Do you want to come in here, ma'am?
>
> Sit down in the table between those two ladies.
>
> All right. Go ahead. [**23] The lady in the tan was doing what?

N.T. at 5-12.

The only observations of the trial judge that are actually of record that describe the fight in the gallery are general and vague:

> THE COURT: When the court officer went out to get the mother, a fight broke out in the gallery involving numerous people in which the court officer got stuck in the middle and his arm was hit during the proceeding. He can tell us more about what happened.

S.H.N.T. at 5.

Thus, the record does not show that the judge personally observed the essential elements of each Appellant's contempt offenses. The judge relied substantially upon the statement made by the court crier, as a witness to the events, for the judge's knowledge about Appellants' identities and actions. We find that the "in the presence of the court" requirement of *42 Pa.C.S.A. § 4132(3)* [**24] was not established beyond a reasonable doubt. Because the trial court felt it necessary to take evidence from a witness, the court crier, the proceeding was not and should not have been deemed a summary hearing. The trial court abused its discretion in holding what it referred to as a summary hearing that, as a matter of law, violated Appellants' due process rights.

Appellants should have been permitted to cross-examine the court crier, and to present their own witnesses, in an adversary hearing with full due process protections. ***Edwards**, 703 A.2d at 1059*. (citing ***In re Oliver**, 333 U.S. at 275*). Because they were denied these rights, we remand for a new contempt hearing in which Appellants are "advised of the charges against [them], have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in [their] behalf, either by way of defense or explanation." ***In re Oliver**, 333 U.S. at 275*.

Because we decide that the trial court held a contempt hearing that violated Appellants' due process rights, Appellants' third issue, which pertains to sentencing, is moot.

The same is true of [**25] Appellants' first issue. Nonetheless, on this point, more explanation is required. Despite our determination that the process afforded Appellants was constitutionally deficient, we must nonetheless consider Appellants' challenge to the sufficiency of the evidence issue. If this challenge is meritorious, not only would we be compelled to vacate the convictions, but any further proceedings for criminal contempt would be barred by double jeopardy principles. We find, however, that Appellants' challenge to the sufficiency of the evidence fails.

Appellants challenge the adequacy of the evidence offered at their contempt proceeding to establish their identities and to attribute to each of them acts constituting contempt. Appellants rely upon the principles attendant to appellate review of the evidence established at a [*776] summary contempt hearing. Where such a hearing occurs, this Court is bound to review only the evidence dictated on the record by the trial court, as a summary hearing by definition entails only evidence observed first-hand from the bench. ***Jackson**, supra.* Above, however, we determined that what occurred in this case was a non-summary hearing because the trial judge was unable [**26] to make the findings necessary to support his conclusions solely based upon his own observations. Instead, the court appeared to require eyewitness testimony to establish or to help establish the contumacious acts and the identities of the respective actors. We must consider all of the evidence presented at the hearing, including the court crier's testimony. Although we agree that the evidence establishing the Appellants' identities and allegedly contumacious acts was poorly developed, we nonetheless conclude that the evidence presented was, as averred by the court in its *Rule 1925(a)* opinion, sufficient to enable a reasonable fact-finder to find each Appellant guilty of direct criminal contempt beyond a reasonable doubt. This conclusion, however, only returns us to our determination that Appellants were denied due process relative to the charges and proceedings below.

Judgment of sentence vacated. Remanded for proceedings consistent with this opinion. Jurisdiction relinquished.

Gantman, J., concurs in the result.

PENNSYLVANIA STATUTES, ANNOTATED BY LEXISNEXIS (R)
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* Pa.C.S. documents are current through 2012 Regular Session Act 211 Enacted November 1, 2012. *
P.S. documents are current through 2012 Regular Session Act 150 and 153 to 169 and 171 to 180, 183 to 187, 189 to 191, 193 to 206 and 208 to 211
* January 9, 2013 Annotation Service *

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 42. JUDICIARY AND JUDICIAL PROCEDURE
PART II. ORGANIZATION
SUBPART B. OTHER STRUCTURAL PROVISIONS
CHAPTER 25. REPRESENTATION OF LITIGANTS
SUBCHAPTER A. GENERAL PROVISIONS

Go to the Pennsylvania Code Archive Directory

42 Pa.C.S. § 2503 (2012)

§ 2503. Right of participants to receive counsel fees.

The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:

(1) The holder of bonds of a private corporation who successfully recovers due and unpaid interest, the liability for the payment of which was denied by the corporation.

(2) A garnishee who enters an appearance in a matter which is discontinued prior to answer filed.

(3) A garnishee who is found to have in his possession or control no indebtedness due to or other property of the debtor except such, if any, as has been admitted by answer filed.

(4) A possessor of property claimed by two or more other persons, if the possessor interpleads the rival claimants, disclaims all interest in the property and disposes of the property as the court may direct.

(5) The prevailing party in an interpleader proceeding in connection with execution upon a judgment.

(6) Any participant who is awarded counsel fees as a sanction against another participant for violation of any general rule which expressly prescribes the award of counsel fees as a sanction for dilatory, obdurate or vexatious conduct during the pendency of any matter.

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.

(8) Any participant who is awarded counsel fees out of a fund within the jurisdiction of the court pursuant to any general rule relating to an award of counsel fees from a fund within the jurisdiction of the court.

(9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

(10) Any other participant in such circumstances as may be specified by statute heretofore or hereafter enacted.

HISTORY: Act 1976-142 (S.B. 935), P.L. 586, § 2, approved July 9, 1976, See section of this act for effective date information.

PENNSYLVANIA RULES OF COURT, ANNOTATED BY LEXISNEXIS(R)

* This document is current with amendments received through January 1, 2013 *
*** August 16, 2012 Annotation Service ***

PENNSYLVANIA RULES OF CIVIL PROCEDURE
DEPOSITIONS AND DISCOVERY
PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY FOR INSPECTION AND OTHER ACTIVITIES
ENTRY UPON PROPERTY FOR INSPECTION AND OTHER ACTIVITIES

Pa. R.C.P. RULE 4019 (2013)

Rule 4019. Sanctions

(a)(1) The court may, on motion, make an appropriate order if

(i) a party fails to serve answers, sufficient answers or objections to written interrogatories under Rule 4005;

(ii) a corporation or other entity fails to make a designation under Rule 4004(a)(2) or 4007.1(e);

(iii) a person, including a person designated under Rule 4004(a)(2) to be examined, fails to answer, answer sufficiently or object to written interrogatories under Rule 4004;

(iv) a party or an officer, or managing agent of a party or a person designated under Rule 4007.1(e) to be examined, after notice under Rule 4007.1, fails to appear before the person who is to take the deposition;

(v) a party or deponent, or an officer or managing agent of a party or deponent, induces a witness not to appear;

(vi) a party or an officer, or managing agent of a party refuses or induces a person to refuse to obey an order of court made under subdivision (b) of this rule requiring such party or person to be sworn or to answer designated questions or an order of court made under Rule 4010;

(vii) a party, in response to a request for production or inspection made under Rule 4009, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested;

(viii) a party or person otherwise fails to make discovery or to obey an order of court respecting discovery.

(2) A failure to act described in subdivision (a)(1) may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has filed an appropriate objection or has applied for a protective order.

Note: Motions for sanctions are governed by the motion rules, Rule 208.1 et seq. A court of common pleas, by local rule numbered Local Rule 208.2(e), may require that the motion contain a certification that counsel has conferred or attempted to confer with all interested parties in order to resolve the matter without court action.

(b) If a deponent refuses to be sworn or to answer any question, the deposition shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, the proponent may apply to a proper court in the county where the deposition is being taken or to the court in which the action is pending, for an order compelling the witness to be sworn or to answer, under penalty of contempt, except that where the deposition of a witness not a party is to be taken outside the Commonwealth, the application shall be made only to a court of the jurisdiction in which the deposition is to be taken.

(c) The court, when acting under subdivision (a) of this rule, may make

(1) an order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing in evidence designated documents, things or testimony, or from introducing evidence of physical or mental condition;

(3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or entering a judgment of non pros or by default against the disobedient party or party advising the disobedience;

(4) an order imposing punishment for contempt, except that a party may not be punished for contempt for a refusal to submit to a physical or mental examination under Rule 4010;

(5) such order with regard to the failure to make discovery as is just.

(d) If at the trial or hearing, a party who has requested admissions as authorized by Rule 4014 proves the matter which the other party has failed to admit as requested, the court on motion may enter an order taxing as costs against the other party the reasonable expenses incurred in making such proof, including attorney's fees, unless the court finds that

(1) the request was or could have been held objectionable pursuant to Rule 4014, or

(2) the admission sought was of no substantial importance, or

(3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or

(4) there was other good reason for the failure to admit.

(e) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and his or her attorney in so attending, including attorney's fees.

(f) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and because of such failure the witness does not attend, and if another party attends in person or by attorney expecting the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and his or her attorney in so attending, including attorney's fees.

(g)(1) Except as otherwise provided in these rules, if following the refusal, objection or failure of a party or person to comply with any provision of this chapter, the court, after opportunity for hearing, enters an order compelling compliance and the order is not obeyed, the court on a subsequent motion for sanctions may, if the motion is granted, require the party or deponent whose conduct necessitated the motions or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses, including attorney's fees, incurred in obtaining the order of compliance and the order for sanctions, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(2) If the motion for sanctions is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion for sanctions is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

> *Note:* For other special provisions authorizing the award of expenses including attorney fees see Rule 4008 where a deposition is to be taken more than 100 miles from the courthouse; 4019(d) where a party unjustifiably refuses to admit causing the other party to incur expenses of proof at trial; 4019(e) and (f) where a party notices a deposition and fails to appear or to subpoena a witness to appear causing the other party to incur unnecessary expenses; and 4019(h) where a party files motions or applications for the purpose of delay or bad faith.

(h) If the filing of a motion or making of an application under this chapter is for the purpose of delay or in bad faith, the court may impose on the party making the motion or application the reasonable costs, including attorney's fees, actually incurred by the opposing party by reason of such delay or bad faith. A party upon whom such costs have been imposed may neither (1) take any further step in the suit without prior leave of court so long as such costs remain unpaid nor (2) recover such costs if ultimately successful in the action.

(i) A witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

(j) Expenses and attorney's fees may not be imposed upon the Commonwealth under this rule.

EXPLANATORY COMMENT--1978

Former Rule 4019 worked reasonably well since it was first adopted in 1950. Amendments were, however, necessary to reflect the many amendments in other Rules. Opportunity was taken to make additional amendments to approach more closely the language of *Fed.R.Civ.P. 37*.

An order of compliance entered in the first step of the proceedings, which is not obeyed, will ordinarily supply substantial justification for the second step procedure requesting sanctions including expenses and counsel fees. There may be exceptional circumstances where the second step will fail. For example, there may be a failure to notify the respondent and the failure to comply may have resulted from no knowledge of the order. Or, the order of compliance may have directed the respondent to do something which the Rules do not permit or which was beyond the jurisdiction of the court.

Reference is made in the commentary to Rule 4003 of a possible ambiguity in the availability of sanctions under the prior Rule for failure of a party to appear for a deposition taken on a petition, motion or rule. Any such ambiguity will be removed by the all-inclusive language of subdivision (g)(1).

The amendment authorizes the court, if it grants the motion for sanctions, to impose the payment of the expenses on the guilty party or deponent or on the attorney who advised the conduct or on both. If the motion for sanctions is refused, the court is authorized to impose the expenses on the moving party or on the attorney who advised the filing of the motion or on both.

These are powerful disciplinary tools, if the courts will use them. The placing of the burden to escape the expenses and counsel fees on the shoulders of the losing party, plus the new provision for imposing the sanction on the attorney, will hopefully assure compliance with the Discovery Rules and a minimum of sanction proceedings.

Subdivision (h) adds a new provision for expenses and counsel fees not expressly found in the Federal Rule. It provides that if the filing of a motion or application is in bad faith or for the purpose of delay, the court may impose on the party making the motion reasonable costs, including attorney's fees, incurred by the opposing party by reason of such delay or bad faith. The party on whom such costs have been imposed may take no further steps in the action without leave of court so long as the costs remain unpaid and may not recover such costs if ultimately successful in the action. The language of this Rule has been adapted from Rule 217 governing the imposition of costs in connection with continuances.

Independent of the above provisions, Rule 4008 provides that, as to oral depositions to be taken more than 100 miles from the courthouse, expenses including counsel fees may be imposed in the discretion of the court. This is of course not a sanction provision.

Subdivision (i) adds a new provision for sanctions for failure to identify witnesses as to whom discovery has been sought. A witness whose identity has not been revealed as provided by the Rules will not be permitted to testify at trial. If the failure to disclose his identity was the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

Subdivision (j) is former subdivision (g) with only a minor stylistic change. It forbids the imposition of expenses and counsel fees on the Commonwealth.

The amendment does not compel a party who has identified a witness under Rule 4003.1 as having "knowledge of discoverable matter" to call the witness at the trial. Nor, except as to the disclosure under Rule 4003.5(b) of the identity of experts expected to be called at trial, is a party required to present a "witness list" of those he intends to call at trial. Nor can an opponent claim surprise if an identified witness is not called on the ground that this tactic deprives him of the opportunity for cross-examination. He could have taken his deposition before trial.

The Rule does not deal specifically with the difficult problem of rebuttal witnesses. A plaintiff may not identify persons who can testify to rebut a particular defense because the defendant's pleadings and discovery do not clearly identify that defense. If the defendant introduces this defense at the trial, should the court exclude the plaintiff's rebuttal witness, on the ground that he did not "identify" this witness? A skilled plaintiff can avoid this danger by careful discovery from the defendant, which will force a disclosure of all the defenses.

The problem, of course, can arise only if the defendant has asked the plaintiff to identify all persons "having knowledge" and the plaintiff has done so.

EXPLANATORY COMMENT--2003

See Explanatory Comment following *Pa.R.C.P. No. 239*.

NOTES:

PENNSYLVANIA ADMINISTRATIVE CODE REFERENCES.

1. *25 Pa. Code § 1021.161* (2011), ENVIRONMENTAL HEARING BOARD.

PETER & JUDITH PAPADOPLOS, Appellants v. SCHMIDT, RONCA & KRAMER, PC. and JAMES R. RONCA, ESQUIRE, Appellee; JUDITH PAPADOPLOS and PETER PAPADOPLOS, Appellants v. SCHMIDT, RONCA & KRAMER, PC. and JAMES R. RONCA, ESQUIRE, Appellee

No. 310 MDA 2010, No. 311 MDA 2010

SUPERIOR COURT OF PENNSYLVANIA

2011 PA Super 95*; *21 A.3d 1216*; *2011 Pa. Super. LEXIS 598

February 7, 2011, Submitted
May 5, 2011, Filed

PRIOR HISTORY: [**1]
Appeal from the Order of the Court of Common Pleas, Dauphin County, Civil Division, No(s): 1930 CV 2002. Before CLARK, J.
Papadoplos v. Schmidt, 2010 Pa. Dist. & Cnty. Dec. LEXIS 168 (2010)

DISPOSITION: AFFIRMED.

COUNSEL: James F. Wiley, III, Philadelphia, for appellants.

Audrey J. Copeland, King of Prussia, for appellees.

JUDGES: BEFORE: STEVENS, P.J., ALLEN, and McEWEN, P.J.E. OPINION BY STEVENS, P.J.

OPINION BY: STEVENS

OPINION

[*1217] OPINION BY STEVENS, P.J.:

Following the willful spoliation[1] of evidence during the discovery process, the trial court dismissed Appellants Judith and Peter Papadoplos' (collectively Appellants) civil complaint in its entirety. Appellants contend (1) the trial court erred in *sua sponte* dismissing this action on the basis of spoliation since the issue of spoliation was not raised by Appellees Schmidt, Ronca & Kramer, P.C., and James R. Ronca, Esquire (collectively Appellees), (2) the trial court abused its discretion in substituting its judgment for that of an expert as to the sufficiency of the computer disk, and (3) the trial court abused its discretion in dismissing the complaint as to Mrs. Papadoplos in that there was no evidence she engaged in spoliation of evidence. We affirm the trial court's dismissal of Appellants' complaint with prejudice.

1 Spoliation relates to the loss or destruction of evidence. ***See Creazzo v. Medtronic, Inc.****, 2006 PA Super 152, 903 A.2d 24 (Pa.Super. 2006).*

The [**2] relevant facts and procedural history are as follows: On April 30, 2002, Appellants commenced this action by filing a writ of summons against Appellees, and on October 30, 2002, Appellants, as husband and wife, filed a complaint against Appellees presenting a professional negligence claim. Specifically, Appellants alleged that, on January 25, 1997, Mrs. Papadoplos was seriously injured in an automobile accident, and Appellants originally retained John B. Mancke, Esquire, to pursue legal claims arising from the automobile accident. On September 12, 1997, while receiving medical treatment at the Polyclinic Hospital-Pinnaclehealth (hereinafter the hospital), Mrs. Papadoplos was seriously injured by a rehabilitation device, which was manufactured by Valpar International Corporation (hereinafter the manufacturer). Thereafter, Appellants retained Attorney Ronca of the law firm of Schmidt, Ronca & Kramer, P.C., who agreed to represent Appellants with regard to the litigation related to the automobile accident, as well as claims arising from the use of the rehabilitation device. Ultimately, Appellants reached a settlement with the other driver involved in the underlying automobile accident; [**3] however, Appellants never filed a timely lawsuit against the hospital or manufacturer with regard to the September 12, 1997 incident.

On October 23, 2000, Appellants and Attorney Ronca met to discuss the status of the case against the hospital and the manufacturer. At the meeting, Attorney Ronca advised Appellants that he had not [*1218] filed any timely legal action against any of the potential defendants with regard to the injuries received by Mrs. Papadoplos at the hospital on September 12, 1997, and consequently, Appellants would be forever barred from pursuing any claims with regard thereto. As a result, with the assistance of James F. Wiley, Esquire, Appellants filed the instant professional negligence claim against Appellees.

Appellees filed preliminary objections, as well as an answer with new matter raising, *inter alia*, the defense of statute of limitations. That is, Appellees averred that it was undisputed that Mrs. Papadoplos suffered an injury in the hospital on September 12, 1997, and she had, as a matter of law, until September 12, 1999 to bring her cause of action against the hospital and manufacturer of the medical device. Moreover, the time period in which Appellants could sue [**4] Appellees for the alleged failure to file a lawsuit against the hospital and manufacturer within the two-year statute of limitations began to run as of September 13, 1999, barring application of the discovery rule. However, Appellants did not institute action against Appellees until April 30, 2002, when they filed their writ of summons. Accordingly, Appellees alleged that, if Appellants knew or had reason to know they had a potential claim for professional negligence as of September 13, 1999, their cause of action was precluded by the statute of limitations.

On January 17, 2003, Appellees served Appellants with interrogatories and requests for production of documents, which specifically included requests for written communications involving Appellants and Appellees, as well as any written memorialization reflecting any agreement by Appellees to provide legal services to Appellants.

On August 8, 2007, Mrs. Papadoplos was deposed. During her deposition, Mrs. Papadoplos testified that, during the October 23, 2000 meeting with Attorney Ronca, Mr. Papadoplos had made handwritten notes. Deposition of Judith Papadoplos dated 8/8/07 at 40. Appellees' attorney indicated that Appellees had never [**5] received the handwritten notes during discovery, and Appellants' attorney indicated that, if the notes were located, he would provide Appellees with a copy of the notes. ***Id.*** at 209-211.

Appellees subsequently filed a motion for a discovery conference, and following the conference, by order entered on January 15, 2008, the trial court indicated, *inter alia*, that "[Appellants] shall, within ten (10 days) of this Order, produce to [Appellees] any and all notes created and/or maintained by either Judith and/or Peter Papadoplos reflecting meetings, conversations and/or other communications with [Appellees.]" Trial Court Order filed 1/15/08 at 1. Thereafter, Appellants produced a partial response to Appellees' discovery request by providing Appellees with a five-page typewritten document dated October 23, 2000, and a single undated page of handwritten notes.

On September 11, 2008, Mr. Papadoplos, who is a retired police officer, appeared for a deposition, at which he testified, in relevant part, as follows upon examination by Appellees' attorney:

> **Q:** Can you tell me, have you reviewed some documents or other tangible things in order to prepare for your deposition, this deposition?
>
> **A:** I read one [**6] document yesterday. Other than that, no.
>
> **Q:** What document was it that you read yesterday?
>
> **A:** I read a memo that I wrote to myself concerning a meeting with Mr. Ronca that I had on--I think it was October 23rd, 2000.
>
> **Q:** Where were you when you did that?
>
> [*1219] **A:** At home.
>
> **Q:** Did you read it in a paper form?
>
> **A:** Yes.
>
> ***
>
> **Q:** Have you kept any sort of log or journal or diary, other written account that describes or memorializes contacts or conversations that you've had with people, including but not limited to, Mr. Ronca, pertaining to this litigation?
>
> Before you answer, let me just modify it and tell you I'm not interested about communications that you've had with Mr. Wiley. Do you understand what I'm asking?
>
> **A:** When Mr. Ronca was our attorney, yes, I kept a log of when him and I spoke. But after that we haven't spoken. I haven't kept any log as to anything because there was nothing there [that] was was said between us.
>
> **Q:** What do you mean when you say there was nothing there?
>
> **A:** We haven't talked since probably the 23rd, I believe of October. I only keep records or I only make personal notes of the conversation that I would have had

with my attorney or someone that was significant in the case, and I don't [**7] remember doing that with anybody else besides Mr. Ronca at the time when he was our attorney or now Mr. Wiley.

***

Q: You mentioned earlier that you had kept some and made some notes of contacts or communications that you've had with Mr. Ronca while he was representing you and Mrs. Papadoplos. Is that accurate?

A: Yes, sir.

Q: Did you do that-withdrawn. For what period of time did you do that?

A: For as long as he was our attorney.

Q: And in what format or formats were those notes kept by you?

A: Most of the time on a computer: Just basically date, who I talked with, the time, what was stated, what we had to do, what he was doing, whatever our conversation dealt with.

Q: Where did you make entries into a computer? What computer, in other words, did you use for that?

A: It could have been one of three or four, whichever ones are in our house. I didn't do any work like that out of my house. In other words, I didn't use like a job computer or anything like that for this. It was either one of our computers at home. It could have been my son's, mine.

Q: What were the other two?

A: They were either laptops, old ones, new ones, or a desktop.

Q: The notes or entries that you made concerning contacts or [**8] communications that you had with health care providers, were they in any manner kept separately or in some segregated fashion from the notes that you made concerning contacts with Mr. Ronca?

A: I don't believe so, no.

Q: Was there some format that was common to both types of entries? And by both types, to be clear, I mean those that reflected contacts you had with health care providers of Mrs. Papadoplos and contacts that you had with Mr. Ronca.

A: I don't believe so. Again, I think it was basically just a date and then a time and just a note of what we were talking about or what we needed to do.

Q: Was there some particular computer file that collected these or to which you made these entries?

A: I think it might have been like Judy's Accident, or something like that, file.

[*1220] **Q:** Do you know that, indeed, you made entries of the nature that we've been discussing by using more than one computer? Is that something that you're able to say with certainty?

A: I'm pretty sure.

Q: ....Was there any effort made by you to aggregate the entries made from one computer to those made by another? And if that doesn't apply, you can tell me that.

A: What do you mean by aggregate?

Q: Did the Judy's Accident file [**9] exist on a single computer or did it exist on multiple computers in the same format and form and substance?

A: It existed on multiple computers.

Q: In the same form, format and substance?

A: Yes, I tried to keep them the same.

Q: How did you do that?

A: By just transferring the same information or deleting the entire thing and--not reproducing but saving the time. Either way, whatever it allowed me to do at the time. I would try to keep them all consistent so there wasn't one--something here missing from there. So that's what I tried to do.

Q: Did you move the Judy's Accident file from one computer to another when circumstances caused you to think that was appropriate?

A: I don't think so. If you want to say move it, no. It might have been to save it....

Q: At some point or points in time, there were multiple computer files, which so far we've characterized them, given them a name of Judy's Accident file.

A: Yes.

Q: And those multiple files existed on separate computers in your home?

A: Yes.

Q: That's accurate?

A: Yes, I would say that.

Q:....Had you ever downloaded one of those files from a particular computer onto a disk and then uploaded it from that disk into another computer?

A: To save it, I [**10] may have[.]....To me, you're asking me if I saved from a downloaded position something from a--even a portable hard drive or another disk to another computer, which I'm going to say yes because I may have even changed to a newer laptop when one broke down. And I had to take those files off there, put them on a separate hard drive and incorporate that hard drive to put it on the new computer. So I had to have done that to save the file.

Q: Do you have a recollection of when you did that most recently?

A: No. It might have been--no, I wouldn't even guess. I would have to look on the computer to see when the dates might have been. I couldn't tell you or find a receipt for when I bought another computer or something.

Q: Have you acquired a new computer, new to you anyway, in the last two years or so?

A Yes.

***

Q: Was there a computer in your home that was used by you to make entries concerning contacts that you had with either Mr. Ronca or one or more of Mrs. Papadoplos' health care providers which computer is no longer in your home?

A: I would say probably yes. Being 10 years now, I'll venture to say one computer somewhere is probably thrown away. And it's that--it was that old that it's gone [**11] by now.

Q: Can you tell me what computer it is that you think was in your home--

A: No.

Q: --at some point in the past and isn't anymore?

[*1221] **A:** I was trying to think about which one it was, but right now I cannot think of which one. Something tells me that there's probably one at that age that I did get rid of because I know I have--I still have the hard drive to one. How long ago I threw it away, I'm not sure.

Q: Let me make sure I understand what you're telling me. When you say how long I've thrown it away, does it, as you've used that word, mean that a computer from which you've nonetheless retained the hard drive?

A: (Witness nods head negatively).

Q: Is that what you mean?

A: Um-hum.

Q: Is that a yes?

A: Yes.

Q: Let me be clearer. I apologize. At some point in the past, you disposed of a computer that had been in your home?

A: Yes.

Q: Yet, when disposing of that computer and prior to disposing of that computer, you nonetheless kept its hard drive?

A: Yes.

Q: Why did you do that?

A: Because you can never erase the information from it[.]

***

Q: [Y]ou retained the hard drive?

A: Correct.

Q: And that's true even to today?

A: Yes, I think I still have it.

***

Q: You had mentioned to me earlier that at least in [**12] some instances, you had handwritten notes and then made entries into a Judy's Accident file based upon some handwritten notes. Is that accurate?

A: If I had--if I was, say, like at the hospital or Mr. Ronca's office, I would probably jot down something that we were talking about that he would ask me, say, to do something; oh, you need to contact so-and-so. I'd write that down.

Then when I got home, I would put that down on the computer this is what we need to do, what date, so I could keep track of it, yes.

Q: So there were instances where you had handwritten notes?

A: Yes, occasionally.

Q: And based on those handwritten notes, you made some entry or entries--

A: Yes.

Q: --into an electronic file. And then did what with the handwritten notes after the entries--

A: Threw them away, destroyed them, whatever.

***

Q: Mr. Papadoplos, back when I was asking questions of Mrs. Papadoplos in early August of last year, one of the things

that I learned when asking her questions was her belief that, indeed, you had some notes that pertained to matters that are relevant to the litigation about which we're here today.

I will represent to you--I'm sure you're welcome to consult with your counsel on this subject--that [**13] prior to noticing either your deposition or Mrs. Papadoplos' deposition, I had made a request for all, and I emphasize all, such materials.

No such materials were produced to me prior to my beginning Mrs. Papadoplos' deposition in early August of last year. I renewed my requests multiple times to your counsel in writing following that deposition.

And to date--I mean that literally--up to this very minute, the only documents that I have been supplied--and that term in this context includes something that would exist in electronic format until one printed it onto a paper format--is a memorandum that is dated [*1222] October, I think, 23rd, 2000--It's a five-page document, at least in the format in which I have it--and a single page--I'll show you so there's no mystery--of handwritten notes that have been represented to me by your counsel to be your notes as such.

A: Okay. Yes, that's my writing.

Q: What I need for you to do, sir, is to go and get your notes and your laptop and come back. And we'll resume the deposition just as soon as you come back here this morning.

A: Okay. I don't--like I said, I could have notes. I may have, may not have notes. I don't know.

Q: You need to bring your file, your paper file[.] [**14] And to the extent--and you need to bring your laptop back here. Without any further discussion, it is simply unworkable that here we are a year after having asked for these materials--more than a year after having asked for these materials and we still don't have them.

***

[APPELLANTS' COUNSEL]: You can't have the access to the computer because that computer contains sensitive material from the Department of Defense, et cetera, et cetera. Okay?

[APPELLEES' COUNSEL]: Why is that a problem? In other words--

[APPELLANTS' COUNSEL]: Because you can't have it, but he can download the file for you.

[APPELLEES' COUNSEL]: I'm not asking for access to Department of Defense files at all. What I'm asking is that Mr. Papadoplos retrieve his laptop and bring it here and open the file that is labeled Judy's Accident so that we can read those entries.

[APPELLANTS' COUNSEL]: I understand what you're asking. But he is not--because of the sensitive nature of the material that's on that particular computer, he is not going to just bring the computer in.

He will copy it. He will copy that file. And he's not going to go in and make changes or anything. But he can copy that file and bring you that file. But he's now [**15] go to--he had a surgery and everything and he's got a severe migraine right now. So he's not going to do it today.

[APPELLEES' COUNSEL]: That's not acceptable, counsel.

[APPELLANTS' COUNSEL]: That may be.

Deposition of Peter Papadoplos dated 9/11/08 at 16, 18-28, 30-31, 33-35, 40-41.

After further discussions, Mr. Papadoplos agreed to go to his home to retrieve, *inter alia*, his laptop computer, and he returned to finish the deposition. During the deposition, Mr. Papadoplos opened on his laptop the file entitled "Judy's Accident" and "Ronca case," and Appellees' counsel briefly reviewed the files. In reviewing the files, Appellees' counsel discovered an anomaly in that a file with notations about Mr. Papadoplos' discussion with Attorney Ronca had a modification date that pre-dated its creation date. ***Id.*** at 90-91. Mr. Papadoplos was unable to explain the anomaly. ***Id.*** Mr. Papadoplos then downloaded the files onto a clean disk. With regard to when files were created, Mr. Papadoplos testified as follows upon questioning by Appellees' counsel:

Q: Do you know when you first created the Judy Accident file, when that file began?

A: '97? After her accident we hired John Mancke.

Q: From the time that [**16] that file was begun up to now, up to today, in fact this minute, have you deleted any portions of it?

A: Probably not. I can't say for sure, but probably not.

***

[*1223] **Q:** If I were to ask you, Mr. Papadoplos, to download the contents of your laptop to an external hard drive, is that something that you're prepared to do?

A: No....

***

Q: I'm struggling nonetheless here because it's important for me as counsel for the defendants in this case to know certain things that, without any disrespect intended towards you, you can't tell me.

Among them, for example, is--there's this file called Judy Accident file. I would like to know, because it's relevant, when that file came into existence. And I don't know of any way of getting to that information than looking at the date, the information that's on the hard drive of your laptop.

You've told me that, well, you can't do that....But from my perspective, I both need and I believe have a good-faith basis and a right, of course under the rules, to get to that relevant information. And I don't know of a way to do that other than by having someone take a look at this.

Deposition of Peter Papadoplos dated 9/11/08 at 85, 106-109.

On November 19, 2008, Appellees filed [**17] a motion for sanctions alleging that, despite repeated discovery requests and a court order, Appellees discovered for the first time during Mr. Papadoplos' deposition that he maintains a computer file on his personal laptop entitled "Judy's Accident" and "Ronca Case," which constituted a contemporaneous recording of conversations Mr. Papadoplos had with Mr. Ronca. Mr. Papadoplos was unable to to testify as to when he first created the "Judy's Accident" file. Appellees averred that "[t]he question of when Mr. Papadoplos first began to create and maintain documents in the "Judy's Accident" file, and particularly any documents pertaining to discussions Mr. Papadoplos may have had with Attorney Ronca concerning his wife's underlying personal injury claim, is critical to the [statute of limitations] defense of this action." Appellee's Motion for Sanctions filed 11/19/08 at 4. Specifically, Appellees averred that such evidence may yield relevant information concerning when Appellants knew or should have known that Appellees had not filed a lawsuit against the hospital and the manufacturer such that application of the discovery rule for statute of limitations purposes with regard to the professional [**18] negligence claim would be resolved. Due to Appellants' failure to make Appellees timely aware of and turn over the computer files, as well as other items, Appellees requested, *inter alia*, the trial court dismiss Appellants' complaint, in its entirety, with prejudice.

Appellants filed a response to Appellees' motion for sanctions, and on April 7, 2009 and July 23, 2009, the trial court held hearings on Appellees' motion for sanctions. At the conclusion of the hearings, by order entered on July 27, 2009, the trial court held, in relevant part, the following:

> [A]fter hearing, the Court is persuaded that there has been a substantial breach of the order of January 15, 2008 and generally the Rules of Discovery related to this matter.
>
> Therefore, the Court hereby awards to [Appellees'] counsel the sum of $3500 for his professional time and expenses.
>
> We further order that the digital evidence pertinent to this case shall be submitted to a forensic examiner in its natural state, and that the defense may submit a subsequent bill for consideration as an extension of this order.
>
> Additionally, a sanctions fee in the amount of $1000 is hereby jointly levied upon [Appellants] and their counsel.
>
> ***
>
> [*1224] The Court [**19] is going to retain jurisdiction of this matter through its full implementation.

Trial Court Order filed 7/27/09 at 1. On August 18, 2009, the trial court filed an order indicating the directives set forth in the court's July 27, 2009 order must be completed by September 1, 2009.

On October 2, 2009, Appellants filed a motion for a protective order seeking a court order precluding discovery of Mr. Papadoplos' computer's hard drives, i.e., the digital evidence in its natural state. In the motion, Appellants revealed, *inter alia*, that "Mr. Papadoplos pur-

chased new computers in early 2009 and destroyed the hard drives of his original computers as is recommended to prevent personal information from being discovered by unauthorized persons." Appellants' Motion for a Protective Order filed 10/2/09. Additionally, in a certified statement attached to the motion, Mr. Papadoplos averred that he is the individual in the family who maintains the computers, the family no longer possesses computers owned during the time Mr. Ronca represented Appellants, and Mr. Papadoplos destroyed the old computer's hard drives in the first quarter of 2008.

On October 5, 2009, Appellees filed a second motion for sanctions [**20] indicating that Appellants failed to comply with the trial court's July 27, 2009 order, which directed Appellants to submit the digital evidence in its natural state, i.e., provide the hard drives of Mr. Papadoplos' computers to Appellees for forensic examination. Appellees indicated that Appellants' dilatory conduct and repeated refusal to comply with the trial court's discovery orders "effectively robbed" Appellees of their ability to develop a potential statute of limitations defense. Thus, Appellees requested the trial court dismiss Appellants' complaint in its entirety with prejudice.

On October 19, 2009, Appellees filed a motion for contempt in which Appellees asserted, *inter alia*, that, as indicated in prior court orders, they were entitled to discovery of Mr. Papadoplos' computers' hard drives in their native electronic format so that a forensic specialist could determine when the documents were created. However, in Appellants' motion for a protective order, and accompanying certified statement, Appellants revealed that Mr. Papadoplos destroyed his old computers' hard drives in either 2008 or 2009. Appellees specifically asserted "[p]erhaps mo[st] disturbing...is [Appellants'] [**21] previously undisclosed contention that the hard drives which [Appellees] seek to have examined have been destroyed by Mr. Papadoplos." Appellees' Motion for Contempt filed 10/19/09.

Appellants filed a response to Appellees' second motion for sanctions and contempt, and on January 22, 2010, the trial court held a hearing. By order entered on January 25, 2010, the trial court held, in relevant part, the following:

> [The] Court is persuaded by clear and convincing evidence that knowing and willful spoliation of pertinent evidence in this case would accrue to the potential benefit of the [Appellees] has been destroyed at the hands of [Appellants]; therefore, it is hereby ordered that [Appellants'] action against [Appellees] is hereby dismissed with prejudice.

Trial Court Order filed 1/25/10 at 1.

On February 18, 2010, Appellants filed praecipes to enter the orders filed on July 27, 2009, August 18, 2009, and January 25, 2010 as final for purposes of appeal. On February 22, 2010, Appellants filed two separate notices of appeal[2] and contemporaneously [*1225] two separate Rule 1925(b) statements. On April 8, 2010, the trial court filed a detailed Rule 1925(b) opinion.

> 2 This Court has consolidated the notices [**22] of appeal filed in this matter *sua sponte*.

Appellants' first claim is that the the trial court erred in *sua sponte* dismissing this action on the basis of spoliation since the issue of spoliation was not raised by Appellees. That is, Appellants contend that Appellees never sought dismissal under the theory of spoliation as it relates to the destruction of Mr. Papadoplos' computers' hard drives, and therefore, Appellants contend they were unduly prejudiced by lack of notice to defend. After a careful review of the record, we conclude that the issue of spoliation was not raised *sua sponte* by the trial court, Appellants were not unfairly surprised by the issue of spoliation, and Appellants had an adequate opportunity to defend.

For instance, Appellees' October 5, 2009 motion for sanctions presented at length the issue regarding Appellants' failure to provide Appellees' with Mr. Papadoplos' computers' hard drives. In the motion, Appellees averred that they first learned of Mr. Papadoplos' computer files at his September 11, 2008 deposition. They further specifically averred the following:

> 19. It has been over one (1) year since [Appellees] learned of the existence of Mr. Papadoplos' "Judy's [**23] Accident" file and the information contained therein pertaining to [Appellants'] communications with Mr. Ronca, information which Mr. Papadoplos neglected to disclose in spite of the service of discovery requests specifically seeking such information some five (5) years prior to Mr. Papadoplos' September 11, 2008 deposition.
>
> 20. [Appellees] continued to be prejudiced in their ability to defend this claim in that [Appellants'] dilatory conduct, and their counsel's conflicting representations as to [Appellants'] intentions with respect to complying with the court's July 23, 2009 and August 18, 2009 Orders, have effectively robbed [Appellees] of their

> ability to develop a potential statute of limitations defense.
>
> 21. In addition to the ongoing prejudice suffered by [Appellees], [Appellants'] current activities mark the third time [Appellants] have failed to comply with this Honorable Court's Orders, and [Appellants] are now in contempt of the Orders of January 15, 2008, July 23, 2008, and August 18, 2009. Such blatant disregard for this Court's directives is inexcusable and warrants dismissal of [Appellants'] claims with prejudice.

Appellees' Motion for Sanctions filed 10/5/09.

Additionally, [**24] Appellees' October 19, 2009 motion for contempt presented at length the specific issue of spoliation. In the motion, Appellees specifically contended the following:

> 28. [Appellants'] Motion for Protective Order asserts numerous bases upon which [Appellants] contend the entry of a protective order is warranted. Among such reasons, [Appellants] allege that the hard drive contains "proprietary and sensitive information which is the property of the U.S. Army," and that in early 2009, when Mr. Papadoplos purchased new computers, he destroyed the hard drives of his old computers, including the hard drive upon which the "Judy Accident" file was created.
>
> 29. [Appellants'] Motion for Protective Order is accompanied by a "Certified Statement" of Peter Papadoplos, wherein Mr. Papadoplos avers that he destroyed his old hard drives "in the first quarter of 2008," and that the hard drives contain "U.S. Army information which is the property of the U.S. Army," including items such as physical security documents, octagon alert procedure, and [*1226] CID motorcade and movement training documents.
>
> ***
>
> 37. While [Appellees] acknowledge that they are in possession of a dis[k] containing copies of these documents, [**25] which dis[k] remains sealed and undisturbed, this copy does not allow [Appellees] to ascertain the date on which the documents were created. [Appellees] maintain that they are entitled to have the hard drive(s), in their native electronic format, examined by a forensic specialist to determine when these document were made. Both Mr. Papadoplos and Mr. Wiley were advised of [Appellees'] desire to submit Mr. Papadoplos' hard drive for analysis, and the basis for such analysis, during Mr. Papadoplos' September 11, 2008 deposition.
>
> ***
>
> 41. Perhaps more disturbing than [Appellants'] efforts to revive their waived assertion of privilege is [Appellants'] previously undisclosed contention that the hard drives which [Appellees] seek to have examined have been destroyed by Mr. Papadoplos.
>
> 42. As a preliminary matter, [Appellants'] Motion is a prime example of [Appellants'] less than candid representations concerning the hard drives. In their Motion, they represent that Mr. Papadoplos destroyed all of his old hard drives "in early 2009." However, in Mr. Papadoplos' Certified Statement,...Mr. Papadoplos represents that he destroyed the hard drives "in the first quarter of 2008."
>
> ***
>
> 44. Mr. Popodoplos [**26] was obviously in possession of an intact hard drive in September 2008 when he downloaded certain items from his laptop to an external hard drive. Additionally, Mr. Papadoplos testified during his [September 11, 2008] deposition that while he had replaced some of his older computers, he nevertheless retained their hard drives after disposing of the computers themselves. Thus, [Appellees] can only deduce that, as [Appellants] aver in their Motion, Mr. Papadoplos destroyed his laptop's hard drive in early 2009, after [Appellees] expressed their intention to seek judicial intervention for [Appellants'] failure to produce their hard drive pursuant to [Appellees'] original discovery requests and th[e] [trial] [c]ourt's subsequent January 15, 2008 Order.
>
> 45. Thus, [Appellants'] representation that the destruction of the hard drives oc-

curred "before any issue was raised regarding information contained on [Appellants'] computers" is patently false.

***

46. If indeed Mr. Papadoplos destroyed his hard drives in early 2009 as his Motion contends, such destruction not only post-dates the [trial] [c]ourt's January 15, 2008 Order, but it further post-dates Mr. Popodoplos' September 11, 2008 deposition, [**27] during which [Appellees] advised [Appellants'] counsel that they desired to have the hard drives examined by a forensic expert, as well as [Appellees'] November 19, 2008 Motion for Sanctions, wherein [Appellees] specifically requested that they be permitted to have Mr. Papadoplos' hard drives examined, in their native electronic format, by a forensic expert to determine the dates of creation of the documents contained in the "Judy Accident" file.

47. Regardless of when the hard drives were destroyed, [Appellees] would emphasize that [Appellants] have never represented that the hard drives which [Appellees] sought to examine had been destroyed until their October 22, 2009 Motion for Protective Order, in [*1227] spite of the fact that, according to [Appellants'] Motion, the hard drives were destroyed nearly one (1) year ago.

***

52. [Appellants'] well-documented history of discovery violations and defiance of court orders has now culminated in their acknowledgement that they destroyed discoverable evidence in spite of their ongoing litigation and their obligation to produce such evidence to [Appellees]. [Appellants] have magnified their culpability by neglecting to advise the Court and defense [**28] counsel of their destruction of the hard drive.

53. [Appellants] are unquestionably in contempt of court by virtue of their...intentional destruction of discoverable materials during the pendency of this litigation.

WHEREFORE, [Appellees] respectfully submit that this Honorable Court enter an Order holding [Appellants] in contempt of this Court; dismissing [Appellants'] claims against [Appellees] with prejudice, and further awarding all such other relief[.]

Appellees' Motion for Contempt filed 10/19/09 (underlining in original) (citations to record omitted).

Finally, during the January 22, 2010 hearing, Appellees specifically presented the issue of Appellants' recent omission that Mr. Papadoplos destroyed the computers' hard drives in either 2008 or 2009, Appellees argued that such destruction was a clear disregard of the trial court's orders, and Appellees specifically requested dismissal of Appellants' complaint as a sanction. N.T. 1/22/10 at 3-14, 31-32, 36.

As is evident, Appellees requested that Appellants be held in contempt for willfully disobeying the court's discovery order and, in fact, destroying evidence that was subject to the court's order. Appellees further requested dismissal [**29] of Appellants' claim with prejudice as a sanction for such spoliation of the evidence. ***See Creazzo v. Medtronic, Inc.****, 2006 PA Super 152, 903 A.2d 24 (Pa.Super. 2006)* (sanction of dismissal of claims was not an abuse of discretion where evidence was lost, i.e., where spoliation of medical device occurred); ***Mount Olivett Tabernacle Church v. Edwin L. Wiegand Division****, 2001 PA Super 232, 781 A.2d 1263 (Pa.Super. 2001)* (indicating that dismissal of complaint may be appropriate sanction for spoliation of evidence). Thus, as it is clear that Appellees specifically raised the issue of spoliation and requested the sanction of dismissal, and the trial court held a hearing on the motion at which Appellants had the opportunity to present evidence contrary to the assertions made by Appellees, we conclude the trial court did not *sua sponte* present the issue of spoliation, Appellants were not unfairly surprised, and Appellants had an adequate duty to defend. Therefore, Appellants' first issue is meritless.

Appellants' next claim is that the trial court abused its discretion in substituting its judgment for that of an expert as to the sufficiency of the computer disk. Specifically, Appellants suggest that, at the January 22, 2010 hearing, [**30] they requested an expert to testify as to "what information may be obtained from data that h[a]s been copied including the 2003 backup disk which was provided to counsel," and instead, "the court has impermissibly acted as the expert witness as to the data that could be recovered from backup copies of a hard drive." Appellants' Brief at 18.

At the January 22, 2010 hearing, the following relevant exchange occurred between Appellants' counsel and the trial court:

[APPELLANTS' COUNSEL]: When--I--I didn't understand that there was any question about the computers themselves until the deposition of Mr. McMahon--of [*1228] Mr. Papadoplos. Now, the issue--you're talking--going in here about the creation and that sort of thing is what happens with the computer. And I think a computer expert is the one who should tell you this, but when--when you copy something from one computer to another, it will show the creation of that date. The last modified date, to my understanding, would be the last time that document was opened and a change made to it.

THE COURT: Let me--let me enlighten you. I build from scratch computers and have been engaged in that hobby for approaching 20 years. I'm talking about from bare components. [**31] I have a significant working understanding, not only of the hardware, but of the software, including right down to the--what would be called kernel, K-E-R-N-E-L, level of the operating system and how it manages its file indexing and retrieval systems and many, many, many, many other attendant processes that undertake when you push the button and turn it on.

I also understand both the mechanical, electromechanical, and digital processes that undertake when you push the button and turn it on.

I also understand both the mechanical, electromechanical, and digital processes that occur on a hard drive, which is the primary storage medium in modern day computers, albeit there are removable storage of some kinds used a little bit, but not much on hard--or--excuse me--on laptops. So I have a better-than-average understanding of all of this.

I also know how data on a hard drive is digitally encoded, such that with proper retrieval tools one can see a multitude of things about such data that would not be otherwise viewable by someone accessing that hard drive.

Indeed, I have seen and been witness to the retrieval of information that had been intentionally overwritten by any number of different scrubbing [**32] programs to hide its existence and/or digitally encrypt it with extremely sophisticated algorithms to cause it to be not available to the average user.

There's not too much about personal computers, and even the home networking systems that are presently in use in this country, that I don't understand about. So we don't need to really go into all of that. The Court has a full grasp of those matters. Now, of course, if there is some specialized information that a, quote, computer expert, as you denominated the person, might illuminate for us, we're always glad to add to our body of knowledge about these things, because it is of significant interest to us, personally and professionally, inasmuch as we also give counsel to our colleagues on the bench about certain matters attendant to the Court's own secure system.

N.T. 1/22/10 at 17-20.

From the above excerpt, we conclude that Appellants never specifically requested that an expert be permitted to testify. In any event, as the trial court stated, in relevant part, in its opinion regarding this issue:

> [Appellees] repeatedly requested the hard drive(s), in its native electronic format, to be examined by a forensic specialist to determine when [**33] these documents were made. Now we will never know when the documents were created, as Mr. Papadoplos has willfully destroyed the only evidence that would provide the answers to [Appellees'] questions. [Appellants] had ample opportunity to present expert evidence that the [disk] was a sufficient substitute of the data on the hard drive, including [*1229] the true creation date and date(s) of any revisions or editing, but did not. [Appellants] stated that the hard drive was still intact at the time of Mr. Papadoplos' deposition of September 11, 2008. [Appellants] had sufficient notice that evidence from the hard drive(s) must be produced from the time that [Appellees] served their original discovery request to the the date of Mr. Papadoplos' September 11, 2008 deposition. The dismissal of this matter was not

> a result of this Court's supposed substitution of its computer knowledge for that of an expert, but alternately of [Appellants'] calculated and willful failure to comply with this Court's Orders and discovery requests. Therefore, the Sanction of Dismissal was appropriate.

Trial Court Opinion filed 5/26/10 at 11-12.

Appellants' final claim is that the trial court abused its discretion in dismissing [**34] the complaint as to Mrs. Papadoplos in that there was no evidence she engaged in spoliation of evidence. Appellants' entire argument in this regard is as follows:

> There has been no showing of any conduct engaged in by Judith Papadoplos. The transcript of her entire deposition testimony has been included in the reproduced record because a reading of this transcript clearly shows the disability under which Judith operates. It is abundantly clear that she was not involved with anything having to do with computers or the request to produce. Given that she is the primary Plaintiff in this action and her husband is a party on a consortium claim[,] [i]t is patently clear that the dismissal of her claims does not do justice.

Appellants' Brief at 18-19.

We find Appellants' cursory presentation without citation to any pertinent legal authority to be waived. It is a well settled principle of appellate jurisprudence that undeveloped claims are waived and unreviewable on appeal. ***See In re Estate of Johnson****, 2009 PA Super 54, 970 A.2d 433, 439 n.9 (Pa.Super. 2009)* (holding the failure to develop an argument in the brief results in waiver on appeal).

For all of the foregoing reasons, we affirm the dismissal of Appellants' [**35] complaint with prejudice.

AFFIRMED.

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

DEBORAH B. WHITLOCK, Appellee v. WENDELL R. WHITLOCK, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 232 EDA 2011

Appeal from the Order January 3, 2011
in the Court of Common Pleas of Philadelphia County
Domestic Relations at No.: D08088450

BEFORE: BOWES, ALLEN, and PLATT*, JJ.

MEMORANDUM BY PLATT, J.: Filed: October 26, 2011

Appellant, Wendell R. Whitlock (Husband), appeals from the order of January 3, 2011, finding him in contempt and ordering him to provide requested discovery. We affirm.

Appellee, Deborah B. Whitlock (Wife), filed a petition for divorce on August 12, 2008. She filed a petition to compel answers to her interrogatories on September 1, 2009, and the trial court entered an order sanctioning Appellant for his failure to provide discovery in the form of tax returns and supporting documentation from 2005 to 2008. (***See*** Order, 11/24/09, at 1-2). On May 6, 2010, the trial court granted a motion to compel, and granted "in part" a motion for contempt assessing counsel fees and ordering Appellant again to provide these tax records to Appellee by July 10, 2010. (***See*** Order, 5/06/10, at 1-2).

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* Retired Senior Judge assigned to the Superior Court.

Appellee filed a second petition for contempt in order to compel Appellant to provide his tax documents, and at a January 3, 2011 hearing, Appellant testified that he filed the tax returns and conceded that he had not complied with previous orders, but argued that he did not submit the requested documents in a timely manner because he was unable to pay his accountant, his mother had died, and he had been ill. At the conclusion of the hearing, the court entered the order at issue, stating in relevant part:

> Husband . . . is found non-compliant of this court[']s order and is fined $3,000.00 which is to be paid as follows:
>
> $1,000.00 within thirty (30) days to wife and $2,000.00 at equitable distribution to Wife.
>
> * * *
>
> Husband's attorney has 15 days to respond to any discovery request and if he fails to [then] he shall be held in contempt of court.

(Order, 1/03/11, at 1). Appellant timely filed an appeal from this order.[1]

Appellant raises five questions on appeal:

> 1. Does this Court have jurisdiction under the collateral order doctrine of the January 3, 2011 [trial c]ourt order finding [A]ppellant in contempt of court, sanctioning him $3,000.00, when prior to the hearing date, [A]ppellant had complied with a prior [c]ourt order requiring [A]ppellant to prepare and turn over copies of Federal Income Tax Returns to [A]ppellee?
>
> 2. Did the [t]rial [c]ourt err at law or abuse its discretion when it found [A]ppellant in contempt of court?
>
> 3. Was [A]ppellant denied due process and an opportunity to be heard when the [trial c]ourt:

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[1] Appellant filed a statement of matters complained of on appeal on February 23, 2011, and the trial court entered its opinion pursuant to Pa.R.A.P. 1925(a) on March 15, 2011.

a. failed to conduct an evidentiary hearing, relying on a colloquy of [A]ppellee's counsel and the court file;

b. relied on erroneous statements and misinformation in the contempt finding;

c. made accusatory comments and remarks in a prosecutorial manner, exhibiting open hostility towards [A]ppellant, without allowing [A]ppellant or his attorney an opportunity to defend or explain his late compliance with the prior [c]ourt order (entered by a fellow jurist of the Philadelphia Court of Common Pleas)?

4. Did the [t]rial [c]ourt err or abuse its discretion when it imposed as a sanction $3,000.00 payable to [A]ppellee's attorney when no evidence was presented to justify this amount as an attorney fee or reimbursement of costs and the prior order entered by [the trial court] clearly stated that attorney's fees are deferred to equitable distribution?

5. Did the [trial c]ourt err or abuse its discretion in holding [A]ppellant in contempt of court for not providing tax returns by a date set forth in a prior [c]ourt order when the returns were not available on that date, not having been prepared, but were turned over several weeks prior to the January 3, 2011 hearing, but with [A]ppellee's counsel refusing to withdraw the contempt petition despite being in receipt of the items allegedly not received?

(Appellant's Brief, at 3-4).

In his first issue, Appellant argues that this Court has jurisdiction to review his appeal under the collateral order doctrine, in response to the trial court's assertion that the order "was not a final order and therefore interlocutory in nature." (Trial Court Opinion, 3/15/11, at 6). We find that the January 3, 2011 order is a contempt order and therefore appealable.

"Generally, an appellate court only has jurisdiction to review final orders." ***Mortg. Elec. Registration Sys. v. Malehorn,*** 16 A.3d 1138, 1141 (Pa. Super. 2011); ***see also*** Pa.R.A.P. 341(a) (providing that "an appeal

may be taken as of right from any final order of [a] lower court"). "An order of contempt is final and appealable when the order contains a present finding of contempt and imposes sanctions." ***In re K.K.***, 957 A.2d 298, 303 (Pa. Super. 2008) (citation omitted).

However, "an order imposing sanctions for discovery violations is interlocutory and not reviewable until the final disposition of the underlying litigation." ***Diamond v. Diamond***, 715 A.2d 1190, 1193 (Pa. Super. 1998) (citations omitted); ***see also Stahl v. Redcay***, 897 A.2d 478, 487 n.2 (Pa. Super. 2006), *appeal denied*, 918 A.2d 747 (Pa. 2007) ("[U]nder prevailing Pennsylvania law a civil contempt ruling with sanctions involving discovery orders remains interlocutory and not immediately appealable.").

Here, Appellant argues that the order is appealable under the collateral order doctrine because the January 3, 2011 order finds him in criminal contempt. (***See*** Appellant's Brief, at 14-18 (citing ***Diamond***, ***supra***, for the proposition that criminal contempt is appealable under collateral order doctrine)). The court, however, asserts that the order is a discovery order, and therefore not final for purposes of appeal. (***See*** Trial Ct. Op., at 6); ***see also Stahl***, ***supra*** at 497 n.2. Appellant's argument is incorrect; however, the order is nonetheless appealable because it is a contempt order with a present finding and sanctions.

> If the dominant purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public, it is a proceeding for criminal contempt. But where the act of contempt complained of is the refusal to do or refrain from doing some act ordered or prohibited primarily for the benefit of some private party, proceedings to enforce compliance with the decree of the court are civil in nature.

Stahl, ***supra*** at 486 (citation omitted).

In the instant case, the trial court found that "[Appellant] failed to present any evidence to the trial court in support of his assertion that he had complied with previous discovery orders in a complete or timely manner." (Trial Ct. Op., 3/15/11, at 5). Furthermore, "the $3,000.00 fine was payable to [Appellee] . . . to remedy her situation and not payable to the court as a punishment." (***Id.*** at 6). Therefore, the court held Appellant in civil, not criminal, contempt, because the proceedings were undertaken to enforce compliance with discovery orders for Appellee's benefit. ***See Stahl*, *supra*** at 486.

Although the trial court reasons that the order in question is a discovery order, we note that it arises from Appellee's Motion for Contempt of the Court Order Dated July 27, 2010, and the subsequent hearing on the motion on January 3, 2011. (***See*** Motion, 10/25/10). The order finds Appellant "non-compliant" and fines him $3,000.00 to be paid to Appellee. (Order, 1/03/11, at 1). Accordingly, we find that the order is a contempt order, with a present finding of contempt and sanctions, and is therefore appealable. ***See In re K.K.*, *supra*** at 303.

In his second issue, Appellant asserts that the trial court erred or abused its discretion in finding him in contempt of court, because it did not hold an evidentiary hearing, hear witness testimony, or consider Appellant's statements that it was "beyond his power to comply" with previous discovery orders. (Appellant's Brief, at 18). We disagree.

> This Court has explained our standard of review for a civil contempt order as follows:
>
> > 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. The court abuses its discretion if it misapplies the law or exercises its discretion in a manner lacking reason. To be in contempt, a party must have violated a court Order, and the complaining party must satisfy that burden by a preponderance of the evidence.
>
> Attorney fees may be assessed as a sanction for the contemnor's refusal to comply with a court Order, causing the innocent party to incur fees in an effort to obtain what was rightfully his.
>
> . . . "[T]he essential due process requisites for a finding of civil contempt are notice and an opportunity to be heard." . . .
>
> Further, with regard to contempt orders, this Court has stated:
>
> > Each court is the exclusive judge of contempts against its process. The contempt power is essential to the preservation of the court's authority and prevents the administration of justice from falling into disrepute. When reviewing an appeal from a contempt order, the appellant [sic] court must place great reliance upon the discretion of the trial judge. On appeal from a court order holding a party in contempt of court, our scope of review is very narrow. We are limited to determining whether the trial court committed a clear abuse of discretion.
>
> In order to sustain a finding of civil contempt, the complainant must prove certain distinct elements by a preponderance of the evidence: (1) that the contemnor had notice of the specific order or decree which she is alleged to have disobeyed; (2) that the act constituting the contemnor's violation was volitional; and (3) that the contemnor acted with wrongful intent.

Harcar v. Harcar, 982 A.2d 1230, 1234-35 (Pa. Super. 2009) (citations omitted). "A contemner acts with wrongful intent if he knows or should reasonably be aware that his conduct is wrongful." ***Commonwealth v.***

Garrison, 386 A.2d 971, 979 (Pa. 1978) (citation and internal quotation marks omitted).

Appellant argues that the court erred in finding that his violation of the July 27, 2010 order was volitional or done with wrongful intent, because "Appellant did not comply because he could not afford to pay the accountant, a clear and simple reason, which did not show an intentional or wrongful intent to ignore or disobey the [c]ourt order." (Appellant's Brief, at 19). The trial court, however, notes that "Husband had violated and continued to violate the previous court orders by not providing the documents requested in a timely manner, and not providing complete information as ordered by the court numerous times." (Trial Ct. Op., 3/15/11, at 5).

The court established at the January 3, 2011 hearing that, although Appellant had provided Appellee with some tax documentation since the July 27 order, some schedules and signatures were still missing, as well as proof that his tax returns had been filed for the relevant years. (***See*** N.T. Hearing, 1/03/11, at 6-9, 18). Furthermore, this is the third time Appellant has been warned by the trial court to provide the requested discovery, after being sanctioned on November 24, 2009 and held in contempt on May 6, 2010. Appellant should "reasonably be aware" that the court required him to provide his complete tax records; his continuing failure to do so evinces his wrongful intent. ***Garrison***, ***supra*** at 979. The record therefore supports the trial court's finding that Appellant's failure to provide his complete tax records after multiple court orders directing him to do so was volitional and done with wrongful intent. ***See Harcar***, ***supra*** at 1235. Accordingly, the

trial court did not err or abuse its discretion in adjudging Appellant in contempt of court.

In his third issue, Appellant claims that he was denied due process and an opportunity to be heard when the trial court "failed to conduct an evidentiary hearing," "relied on erroneous statements and misinformation," and "made accusatory comments and remarks in a prosecutorial manner." (Appellant's Brief, at 21). We disagree.

"[T]he essential due process requisites for a finding of civil contempt are notice and an opportunity to be heard." ***Harcar*, *supra*** at 1234 (citation omitted). "It is settled that notice is a fundamental requirement of due process, for a proceeding to be respected as final. Notice is deemed adequate when it is reasonably calculated to inform a party of the pending action and provides the party an opportunity to present objections to the action." ***Pennsy Supply, Inc. v. Mumma***, 921 A.2d 1184, 1197 (Pa. Super. 2007), *appeal denied*, 934 A.2d 1278 (Pa. 2007) (citation omitted). Here, the court held a hearing on January 3, 2011 on Appellee's second petition for contempt before issuing its order. Appellant was present with his counsel, and a review of the notes of testimony indicates that they participated throughout the hearing. (***See, e.g.***, N.T. Hearing, 1/03/11, at 23-31). Appellant's claims that he was denied an opportunity to be heard or that the court prevented him from defending or explaining his late compliance are belied by the record.

Furthermore, Appellant's claim that the court relied on misinformation is equally unfounded. "Questions of credibility and conflicts in the evidence are for the [fact-finder] to resolve and the reviewing court should not

reweigh the evidence." ***Braun v. Wal-Mart Stores, Inc.***, 24 A.3d 875, 891 (Pa. Super. 2011) (citation omitted). The trial court was entitled to credit Appellee's testimony over that of Appellant at the hearing, and we decline to reweigh the court's determination. Therefore, Appellant's third issue is without merit.

In his fourth issue, Appellant argues that the court erred or abused its discretion "when it imposed a $3,000.00 sanction payable to Appellee's attorney when no evidence was presented to justify the amount as an attorney fee or reimbursement of costs[.]" (Appellant's Brief, at 25). Appellant claims that this award is in violation of a previous court order deferring requests for attorney's fees until equitable distribution, and that the court has abused its discretion in awarding attorneys' fees which are in fact punitive to him. (***Id.*** at 26; ***see also*** Order, 5/06/10). We disagree.

> Sanctions for civil contempt can be imposed for one or both of two purposes: to compel or coerce obedience to a court order and/or to compensate the contemnor's adversary for injuries resulting from the contemnor's noncompliance with a court order. Attorneys' fees and other disbursements necessitated by the contemnor's noncompliance may be recovered by the aggrieved party in a civil contempt case. Because an award of counsel fees is intended to reimburse an innocent litigant for expenses made necessary by the conduct of an opponent, it is coercive and compensatory, and not punitive. Counsel fees are a proper element of a civil contempt order. In reviewing a grant of attorney[s'] fees, we will not disturb the decision below absent a clear abuse of discretion.
>
> [Where] Appellants were ordered to pay compensatory damages to Appellees for attorneys' fees, . . . **[t]hese sanctions are proper elements of a civil contempt order because they are coercive and compensatory.** The award of attorneys['] fees is an appropriate remedy in a civil contempt

> case, separate and apart from the statutory provision for attorney[s'] fees under 42 Pa. C.S.A. [§] 2503(7).

Rhoades v. Pryce, 874 A.2d 148, 152 (Pa. Super. 2005), *appeal denied*, 899 A.2d 1124 (Pa. 2006) (emphasis in original) (citations omitted).

In the instant case, Appellee's attorney requested sanctions of $3,000 for Appellant's continued refusal to cooperate with previous discovery orders and sanctions. (***See*** N.T. Hearing, 1/03/03, at 30). After hearing arguments from both parties, the court ordered Appellant to pay the amount, stating, "I am finding that he is non-compliant and that's why he is getting fined $3,000. [$]1,000 payable within 30 days to counsel. $2,000 to be paid to wife as part of the equitable distribution." (***Id.*** at 35). The court also told Appellant, "You have been to court. In May you got an order, in November you got an order, and then you got another order. That's three orders to give to produce documents." (***Id.*** at 36). Accordingly, the record shows that the court properly ordered the fees to coerce compliance with previous orders, and to compensate Appellee for the expense necessitated by Appellant's noncompliance. ***See Rhoades***, ***supra*** at 152. The fees ordered need not be deferred until equitable distribution, because they are "separate and apart" from the issue of attorneys' fees incurred by litigating the parties' divorce action. ***Id.*** Appellant's argument that the court abused its discretion in ordering sanctions in the form of attorneys' fees, therefore, is without merit.

Appellant's fifth issue asserts that the trial erred or abused its discretion in holding him in contempt when he had complied with the prior discovery order before the January 3, 2011 hearing date. (Appellant's Brief, at 27). He further complains that Appellee should have withdrawn her

petition for contempt once in receipt of the requested documents. (***Id.***). We disagree.

Here, the court found that Appellant "had violated and continued to violate the previous court orders by not providing the documents requested in a timely manner, and not providing complete information as ordered by the court numerous times." (Trial Ct. Op., 3/15/11, at 5). At the hearing, Appellee's counsel stated that after granting two extensions to Appellant for time to provide discovery, "We're still not getting all our information." (N.T. Hearing, 1/03/11, at 4). Specifically, Appellee's counsel noted that the 2005 tax returns were missing signatures by the preparer and Appellant as well as a schedule of itemized deductions, (***id.*** at 6-7); the 2006 returns were missing signatures and schedules, and reported inconsistent incomes for which Appellant had not accounted, (***id.*** at 8-9); and the 2007 returns indicated that there were schedules of itemized deductions which were missing, (***id.*** at 18). Appellant himself conceded that "I didn't get them [the tax returns] done because I didn't have the money to get them," and his counsel stated that "[h]e just had them prepared." (***Id.*** at 24). Appellant's assertion that he had complied with the discovery order prior to the January 3, 2011 hearing is incorrect, as the record supports the trial court's finding that he had not.

Furthermore, "[t]he contempt power is essential to the preservation of the court's authority and prevents the administration of justice from falling into disrepute." ***Harcar***, ***supra*** at 1234. Even if Appellant had provided complete discovery to Appellee after the October 25, 2010 motion for contempt, Appellee had been seeking the requested information since at

least September 1, 2009. Appellant had been noncompliant for more than a year. Accordingly, the court did not abuse its discretion in finding him in contempt for his repeated failure to comply with Appellee's discovery requests, and was entitled to vindicate its authority in this manner. Appellant's fifth issue is without merit.

Order affirmed.

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

MARY ELLEN BALCHUNIS-HARRIS, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
STEPHEN R. HARRIS, Appellant	:	No. 490 EDA 2009

Appeal from the Order dated February 2, 2009
In the Court of Common Pleas of Delaware County
Civil, No. 06-14856

BEFORE: BOWES, GANTMAN, AND KELLY, JJ.

MEMORANDUM: Filed: August 3, 2010

Appellant, Stephen R. Harris ("Husband"), appeals from the order entered in the Delaware County Court of Common Pleas, directing him to provide specific wage, pension, insurance, and debt information to Appellee, Mary Ellen Balchunis-Harris ("Wife"), and to pay Wife counsel fees and costs incurred to review and enforce Husband's deficient document production. For the following reasons, we quash this appeal.

The relevant facts and procedural history of this case are as follows:

> Husband and Wife were married on [June] 7, 1996 in New York, New York. The parties are the parents of a daughter age fourteen (14). Wife has been employed for sixteen (16) years at LaSalle University as a Professor. Husband is an attorney in the Commonwealth of Pennsylvania and is currently employed with a Philadelphia law firm. The Delaware County divorce pre-trial statement, inventory and appraisement filed by Wife on July 28, 2008, avers

that she earns $57,000.00 per year and that Husband grosses approximately $275,000 per year.

Wife filed a Divorce Complaint on October 19, 2006, seeking Decree, Alimony, Alimony *Pendente Lite*, Spousal Support and Equitable Distribution. Affidavits of Consent to a no-fault decree pursuant to Section 3301(c) of the Divorce Code (23 Pa.C.S.A. Section 3301(c)) were filed in April and May 2007. Wife filed a Motion for Case Management Conference for Equitable Distribution on June 19, 2007. At the initial Discovery Conference before the Divorce Hearing Officer on October 15, 2007, Husband and Wife were each represented by able counsel. The parties agreed that discovery had not been completed but would exchange interrogatories, tax returns and that "both parties shall cooperate with discovery." The [court] approved this stipulated Discovery Order on October 18, 2007.

The dockets next reflect that pre-trial conferences before the Divorce Hearing Officer were adjourned and/or continued on December 13, 2007, February 25, 2008, May 12, 2008 and July 28, 2008. In Delaware County a full hearing in equitable distribution cannot be conducted until the pre-trial conference is completed. The conference acts as a settlement vehicle and is a productive management tool for the Divorce Hearing Officer.

On July 25, 2008, Wife filed a Petition in Contempt requesting the [c]ourt to direct Husband to answer a Request for Production of Documents and to pay $1,500.00 in attorney fees. Wife also on July 28, 2008, filed a detailed Delaware County pre-trial statement, inventory and appraisement pursuant to Pa.R.C.P. 1920.33. Husband on August 14, 2008, entered his Appearance on his own behalf as counsel of record and filed an Answer to the Petition for Contempt. On August 20, 2008, Husband filed a Motion to Compel the Production of Documents. On August 25, 2008, Husband filed a Delaware County pre-trial statement, inventory and appraisement. Wife answered the Motion to Compel on September 18, 2008. The [court], on September 29, 2008, entered [a]n Order allowing Husband's counsel of record to withdraw his appearance and for Husband to

appear on his own behalf.

The cross motions in Discovery were continued by the parties until they appeared on this [c]ourt's February 2, 2009 Special Relief list as an add-on.

The parties elected to proceed through colloquy. Wife's counsel proffered that on December 28, 2007, he forwarded a set of Interrogatories and a Request for a Production of Documents to Husband's then counsel of record. Wife's Petition attaches as exhibits repeated correspondences to obtain specific pension, tax and related documentation from Husband and/or his counsel. Wife's counsel acknowledge[d] receipt of certain specific financial records on March 6, 2008, but requested the balance as soon as possible. On January 23, 2009, Husband produced additional financial records. Unfortunately review of those documents still did not meet Husband's full obligation. In a proposed order for outstanding records, Wife's counsel at this [c]ourt's February 2, 2009 hearing requested specific tax, wage, life insurance, pension and debt information not yet produced in response to the formal Discovery request.

Husband in his Motion to Compel Production of Document attaches an email dated November 2, 2007, requesting twelve (12) separate financial, debt and related documents from Wife. Included in this request are documents related to expenditures by Wife from 1994 to 2008. Husband also demanded Wife produce pornographic photographs, mental health and medical records.

After review of argument, examination of the docket and the record, this [c]ourt on February [3], 2009,[1] entered an Order instructing Husband to produce specific wage, pension, insurance and debt information within ten (10) [days] and to pay Wife $5,500.00 in attorney's fees and $342.44 in costs within three (3) days.[2]

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[1] The record reveals the court's order was dated February 2, 2009, entered February 3, 2009, with notice sent to the parties on February 4, 2009.

[2] At the February 2, 2009 hearing, Wife amended the relief sought to include attorney's fees and costs.

(Trial Court Opinion, filed June 30, 2009, at 1-3). On February 10, 2009, Husband filed a notice of appeal. On February 12, 2009, the court ordered Husband to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b), which Husband filed on February 27, 2009.

Husband raises the following issues for our review:

> WHETHER THE TRIAL COURT ERRED IN HEARING THE PETITION FOR CONTEMPT AND ORDERING SANCTIONS.
>
> WHETHER THE TRIAL COURT ERRED BY NOT FOLLOWING THE PROPER PROCEDURE FOR ISSUING SANCTIONS.
>
> WHETHER THE AWARD OF COUNSEL FEES AND COSTS SHOULD BE SET ASIDE.
>
> WHETHER THE TRIAL COURT FAILED TO FOLLOW THE DELAWARE COUNTY RULES OF CIVIL PROCEDURE.
>
> WHETHER THE DUE PROCESS RIGHTS OF A LITIGANT ARE IMPLICATED BY HAVING TO DEFEND A PETITION FOR CONTEMPT WHICH DOES NOT IDENTIFY A SPECIFIC ORDER VIOLATED BY THE RESPONDENT AND BY ENTRY OF AN ORDER WHICH DOES NOT FIND A VIOLATION OF A SPECIFIC ORDER.

(Husband's Brief at 5).

As a prefatory matter, "[t]he appealability of an order directly implicates the jurisdiction of the court asked to review the order." ***In re Estate of Considine v. Wachovia Bank***, 966 A.2d 1148, 1151 (Pa.Super. 2009). As a result, "this Court has the power to inquire at any time, *sua sponte*, whether an order is appealable." ***Id.***; ***Stanton v. Lackawanna Energy, Ltd.***, 915 A.2d 668, 673 (Pa.Super. 2007).

Generally, a contempt order is interlocutory and not appealable unless the court made a specific finding of contempt **and** imposed sanctions. ***Rhoades v. Pryce***, 874 A.2d 148, 151 (Pa.Super. 2005) (*en banc*), *appeal denied*, 587 Pa. 724, 899 A.2d 1124 (2006) (holding orders requiring wife to pay husband attorney's fees were final and appealable where court made specific finding of contempt and imposed sanctions in form of counsel fees); ***Diamond v. Diamond***, 792 A.2d 597 (Pa.Super. 2002) (holding contempt order was appealable where court entered specific finding of contempt following hearing on husband's failure to comply with specific discovery order, and court imposed sanctions in form of counsel fees).

Similarly, discovery orders are interlocutory and not immediately appealable unless the order falls under the collateral order doctrine. ***Leber v. Stretton***, 928 A.2d 262, 265 (Pa.Super. 2007), *appeal denied*, 596 Pa. 733, 945 A.2d 172 (2008). ***See, e.g., Ben v. Schwartz***, 556 Pa. 475, 729 A.2d 547 (1999) (allowing appeal from discovery order compelling production of putatively privileged documents, where resolution of issue of whether documents were subject to executive or statutory privilege implicated rights rooted in public policy, and affected individuals other than those involved in particular litigation; in weighing competing consideration of costs of piecemeal review against costs of delay, public interests expressed in form of executive privilege and statutory privileges tipped balance in favor of immediate appellate review; order permitting discovery of investigative

files was such that if review were postponed until final judgment in case, claim would be irreparably lost, as disclosure of documents could not be undone). Otherwise, this Court has held:

> As a general rule, this Court will not provide interim supervision of discovery proceedings conducted in connection with litigation pending in the several trial courts. In the absence of unusual circumstances, we will not review discovery or sanction orders prior to a final judgment in the main action.

Markey v. Marino, 521 A.2d 942, 944 (Pa.Super. 1987), *appeal denied*, 516 Pa. 614, 531 A.2d 781 (1987). ***See, e.g., Harrison v. Hayes***, 870 A.2d 326 (Pa.Super. 2005), *appeal denied*, 584 Pa. 708, 885 A.2d 42 (2005) (holding discovery order was not appealable as collateral order and appeal from discovery order must be quashed, where order involved only parties to litigation, did not concern issues of public policy, and did not seek disclosure of privileged information).

Instantly, Wife filed her petition on July 25, 2008. Wife's petition requested the following relief: "...Petitioner requests this [c]ourt to enter an Order directing [Husband] to answer Petitioner's Request for Production of Documents, provide the remaining documents as stated herein, and pay to Petitioner the sum of $1,500.00 as counsel fees." (Wife's Petition for Contempt, filed 7/25/08, at 4). Significantly, Wife's petition did not request the court to find Husband in contempt. On August 14, 2008, Husband filed an answer to Wife's petition. On February 2, 2009, the court held a hearing on the matter. By order dated February 2, 2009, the court directed Husband

to provide specific wage, pension, insurance, and debt information to Wife, and to pay Wife counsel fees and costs incurred in reviewing Husband's deficient document production and enforcing the court's prior discovery orders.

Although Wife titled her filing as a "Petition for Contempt," the content of the filing makes clear Wife was really asking the court to enforce its prior orders and direct Husband to comply with outstanding discovery requests. ***See Liles v. Balmer***, 653 A.2d 1237 (Pa.Super. 1994), *appeal denied*, 541 Pa. 640, 663 A.2d 692 (1995) (explaining content of motion controls over party's designation of document); ***Cohen v. Jenkintown Cab Co.***, 446 A.2d 1284 (Pa.Super. 1982) (reasoning relief requested in petition and court's treatment of petition control over designation party gave to petition). In essence, the court treated Wife's petition as a motion to compel the production of documents and imposed sanctions for Husband's failure to comply with previous discovery orders.

Notwithstanding Husband's general statement of jurisdiction, the order appealed from is definitely not a final order. ***See*** Pa.R.A.P. 341 (defining final order as one that disposes of all claims and of all parties, is expressly defined as final order by statute, or is entered as final order pursuant to subdivision (c) of this rule (governing determination of finality by trial court or other governmental unit)). Nothing in the record demonstrates Husband requested certification of the order as final under Rule 341(c) or sought this

Court's permission to appeal under Rule 312. The order appealed from is also not among those listed under Rule 311 as interlocutory as of right. ***See Stahl v. Redcay***, 897 A.2d 478 (Pa.Super. 2006), *appeal denied*, 591 Pa. 704, 918 A.2d 747 (2007) (articulating orders which are immediately appeal). Further, Husband does not argue the order at issue is appealable as a collateral order. ***See Chase Manhattan Mortg. Corp. v. Hodes***, 784 A.2d 144 (Pa.Super. 2001) (stating appellant must affirmatively demonstrate collateral nature of order under review). Therefore, Husband has failed to state proper jurisdictional grounds for his appeal. ***See Stahl, supra***. As issued, the order on appeal simply directs Husband to produce documents pursuant to the discovery order and outstanding discovery requests; it is an unappealable discovery order. ***See Harrison, supra***.

Moreover, the court did not make a specific finding of contempt in this case. Instead, the court said: "This [c]ourt did not enter a finding of contempt against Husband. This [c]ourt anticipated future cooperation by Husband and preferred not to enter a specific finding due to his profession." (***See*** Trial Court Opinion at 5.) Thus, even if we were to consider Wife's petition as one for contempt and sanctions, absent a finding of contempt, the order on appeal would still be interlocutory and not subject to immediate review. ***See Rhoades, supra***; ***Diamond, supra***. Accordingly, we quash the appeal.

Appeal quashed.

JOHN W. JACOBS, Appellant (at 1618 and 1700) v. ROSEMARIE JACOBS, Appellent (at 1693)

No. 1618 MDA 2004, No. 1693 MDA 2004, No. 1700 MDA 2004

SUPERIOR COURT OF PENNSYLVANIA

2005 PA Super 324*; *884 A.2d 301*; *2005 Pa. Super. LEXIS 3605

April 12, 2005, Argued
September 20, 2005, Filed

PRIOR HISTORY: [***1] Appeal from the Orders of the Court of Common Pleas of York County, Civil Division, Nos. 1998 SE 00043, 632 Support Action 1999, 98-SU-00443-02D/S, 632 SA 1999. Before SNYDER and THOMPSON, JJ.

COUNSEL: Nora F. Blair, Harrisburg, for John Jacobs.

Karen L. Semmelman, Harrisburg, for Rosemarie Jacobs.

JUDGES: Before DEL SOLE, P.J., JOYCE and KLEIN, JJ. OPINION BY DEL SOLE, P.J.

OPINION BY: DEL SOLE

OPINION

[**303] OPINION BY DEL SOLE, P.J.:

[*P1] John J. Jacobs ("Husband") appeals two orders of court dated September 15, 2004, adopting the report and recommendations of the special master in divorce and an order dated March 24, 2000, imposing a sanction upon Husband for discovery violations. Rose Marie Jacobs cross-appeals, raising issues related to the resolution of her support and counsel fee claims. We affirm.

[*P2] Husband and Rose Marie Jacobs ("Wife") were married in 1974 and separated in 1998. Their only child was born in 1989. Husband filed for divorce, and Wife subsequently sought child and spousal support. As the parties moved toward the [***2] entry of a divorce decree, a special master [**304] was appointed to make recommendations with regard to equitable distribution of the marital estate. A long, torturous history of proceedings ensued, complicated, in large part, by large sums of money given to Husband by his uncle ("Uncle"). In an effort to determine exactly how much money Husband had received, Wife engaged in discovery processes. Husband repeatedly refused to cooperate, and as a result, the equitable distribution proceedings were unable to progress.

[*P3] In an effort to move the proceedings along, Wife sought to compel Husband into compliance with a Motion for Sanctions. On March 24, 2000, after Husband and Husband's counsel failed to appear at the presentation of the Motion, the trial court entered an order characterizing the contents of certain bank accounts as gifts from Uncle to Husband, determining how much Husband will inherit from Uncle and how much he will receive in life insurance proceeds upon Uncle's death, and assigning values to business interests held by Husband with Uncle. The total of these amount exceeded seven million dollars. The order also provided that Husband pay Wife's attorneys' fees, costs and [***3] expenses related to the discovery process from June 30, 1999, through the date of the Motion for Sanction, March 9, 2000.

[*P4] A master's hearing was eventually held, at which time Husband renewed his refusal to procure the financial documents Wife had requested. The master employed the figures established by trial court in its March 24, 2000, order, and filed a report and recommendations. Both parties filed exceptions. The trial court denied Husband's exceptions and granted Wife's exceptions in part, which resulted in the matter being remanded to the master in order to supplement the report. The master filed her supplemental report, and both parties filed exceptions to that as well. The trial court then entered its ruling, dismissing Husband's exceptions and denying Wife's exceptions. Final orders on the economic claims were then entered, and Husband pursued this appeal. He presents the following questions for our review:

> Was it an abuse of discretion to enter sanctions against [Husband] where said sanctions were not based on actual data and the amounts set forth in the sanctions order grossly overstate Husband's assets and income?
>
> Was it an abuse of discretion [***4] to continue to use the amounts set forth in the sanctions order where the record clearly indicates that the amounts were grossly overstated?
>
> Was it an abuse of discretion for the master to use the internet to gather information regarding assets of the case but not to determine the value of stocks after an almost two year delay from hearings to decision during which time September 11, 2001 occurred?
>
> Should Husband's appeal be quashed?

Brief for Appellant at 7.

[*P5] Wife cross-appealed, raising the following issues:

> The trial court erred in the application of the Supreme Court case of ***Humphreys v. DeRoss****, 567 Pa. 614, 790 A.2d 281 (Pa. 2002)* since the March 24, 2000 Order of Court specifically found that [Husband] received interest from property from his uncle as gifts and such gifts are clearly not inheritance.
>
> The trial court erred in not properly determining [Husband's] income for support purposes in contravention of the statutory definition of income and appellate case law interpretation of income since under existing law, all of the sources of funds received by [Husband] per the March 24, 2000 Order must be included [***5] as income attributable to him [**305] for purposes of determining his support obligation.
>
> The trial court erred in not directing [Husband] to pay all or the majority of the counsel fees, costs and expenses (including paralegal fees, which are a legitimate expense) [Wife] incurred to litigate the matter, especially when she was forced to borrow funds from her parents to fund such expenses.

Brief for Appellee at 4-5.

[*P6] Before addressing the merits of this appeal, we must address Wife's motions to quash. Wife asks this Court to quash Husband's appeal for failure to follow proper procedure in perfecting this appeal in the court below, for improperly raising claims on appeal, and for failure to adhere to the Pennsylvania Rules of Appellate Procedure, which failure she alleges caused her undue hardship and prejudice in preparing her position in this matter. We understand Wife's position, but we decline to grant the relief she seeks.

[*P7] "This Court has held that the rules of appellate procedure are 'mandatory, not directing' and it is within our discretion to dismiss an appeal when the rules of appellate procedure are violated. However, if the failure to comply [***6] with the rules of appellate procedure does not impede review of the issues or prejudice the parties, we will address the merits of the appeal." ***White v. Owens-Corning Fiberglas Corp****. 447 Pa. Super. 5, 668 A.2d 136, 141 (Pa. Super. 1995)* (internal citations omitted). We find this to be the case here. In response to Wife's allegations of prejudice, we commend her skillful work, which has produced a comprehensive brief that allows us to review all of the issues. Thus, although Husband has failed to strictly abide by the rules of appellate procedure, we also deny Wife's other two motions to quash. We note that Husband's failure to properly perfect his appeal by complying with the York County rule which requires that a notice of appeal be filed not only with the Prothonotary but also with the Domestic Relations Office does not merit quashal. An appeal is perfected upon the timely filing in the Prothonotary's office and payment of the applicable fees, *Pa.R.A.P. 905*; the failure of an appealing party to take any other step will not affect the validity of the appeal. *Pa.R.A.P. 902*.

[*P8] That said, we move to [***7] the merits of this appeal and find that Husband's first issue lacks merit. The decision whether to sanction a party for the failure to comply with a discovery order, and the degree of that sanction, are within the discretion of the trial court. ***Philadelphia Contributionship Ins. Co. v. Shapiro****, 2002 PA Super 139, 798 A.2d 781 (Pa. Super. 2002)*. This Court will disturb such a sanction only where the trial court has abused its discretion. ***Id***. The propriety of the sanction is determined by examining: (1) the prejudice caused to the opposing party and whether that prejudice can be cured; (2) the defaulting party's willfulness or bad faith in failing to comply with the order; (3) the number of discovery violations, and; (4) the importance of the precluded evidence in light of the failure. ***Hein v. Hein****, 717 A.2d 1053 (Pa. Super. 1998)*.

[*P9] Here, the record is rife with examples of Husband's willful and deliberate refusal to comply with the discovery orders, including his own admission that he would not comply. It is clear that he adopted this position at the beginning of the litigation and stuck with it through all of the proceedings. [***8] The prejudice this refusal caused Wife is substantial; the assets for which Husband refused to provide information are the very heart of the action. This information was of the utmost importance, and so Husband's repeated refusal to comply was a most defiant move.

[**306] [*P10] When a party fails to permit discovery or to obey an order regarding discovery, a court may, upon motion, refuse to allow the disobedient party to support or oppose claims and/or defenses or prohibit the disobedient party from introducing certain evidence or testimony. ***Hutchison v. Luddy**, 417 Pa. Super. 93, 611 A.2d 1280 (Pa. Super. 1992).* Here, Husband refused to permit discovery and willfully defied discovery orders. The trial court assigned values to the assets based upon the evidence received from Wife, and ordered that these values be used by the master in the proceedings. It did so to prevent Husband from delaying this matter any further. The trial court gave Husband numerous chances to comply, and each opportunity was ignored. Husband was given many opportunities to prove the true value of these assets, but he continually declined to do so. [1] For these reasons, we find that the [***9] trial court did not abuse its discretion in sanctioning Husband in the manner in which it did.

1 At the master's hearings, Husband repeatedly refused to discuss these items, saying only that he was not permitted to discuss assets deriving from Uncle's estate as per the terms of the trusts under which they were founded.

[*P11] Husband next argues that it was error for the trial court to continue to use the values it assigned in the March 24, 2000, order "where the record clearly indicates that the amounts were grossly overstated." Brief for Appellant at 7. Husband's entire discussion of this issue is 11 lines long and is completely lacking authority or argument in support thereof. Accordingly, we find this issue to be waived. ***See Estate of Haiko v. McGinley**, 2002 PA Super 147, 799 A.2d 155 (Pa. Super. 2002).*

[*P12] Husband also argues that the special master erred in relying on information gathered by the master through her own research on the Internet. Husband did not raise [***10] this issue in his Statement of Matters Complained of on Appeal, and so we find it to be waived. ***See Lobaugh v. Lobaugh**, 2000 PA Super 159, 753 A.2d 834 (Pa. Super. 2000).*

[*P13] Having disposed of all of Husband's issues, we address the issues raised by Wife in her cross-appeal. Our review of a support order is narrow, and we may disturb the trial court's determination only upon the finding of an abuse of discretion or insufficient evidence to sustain the award. ***Samii v. Samii**, 2004 PA Super 108, 847 A.2d 691 (Pa. Super. 2004).*

[*P14] Wife's first two issues are, at their essence, a challenge to the trial court's application of ***Humphreys v. DeRoss**, 567 Pa. 614, 790 A.2d 281 (Pa. 2002)*, to the assets involved here. In **Humphreys**, our Supreme Court held that the corpus of an inheritance shall not be attributed to an obligor for purposes of those support obligations. In reaching this conclusion, the Court examined the definition of income as set forth in the Domestic Relations Code. Noting that it was first defined as "compensation for services", the Court concluded that the expansive language that [***11] followed ("... including but not limited to ...") applied only to compensation received in exchange for services. ***Id***. Finding no way to define an inheritance as compensation for services, the Supreme Court found that it is excluded from income for support purposes. ***Id***. In reaching this conclusion, the Supreme Court noted that an intact family would more likely use an inheritance for savings, investment or capital purchases rather than for daily living expenses. ***Id***. This rationale supported the conclusion that an inheritance should not be attributable to a party in a support action as income.

[**307] [*P15] We find the issue here to be analogous. A gift is not given in exchange for services, so it does not fit into the statutory definition of income. Accordingly, the corpus of a gift cannot be considered in the calculation of income for support purposes. In so finding we also conclude that gifts may not be properly considered in the same way as lump-sum awards, which the courts of this Commonwealth have consistently found to be includable as income to a support obligor. In those instances, the awards are used in large part to fund day-to-day living expenses. [***12] A gift, such as those at issue here, would be treated by a family in much of the same way an inheritance would; it would be used for savings, investment, or capital expenditures. For that reason, we find that a gift is to be considered in the same manner as an inheritance, pursuant to **Humphreys**. In the instant matter, the trial court so treated the gifts, and we find no error in that determination.

[*P16] This pronouncement does not end our examination. **Humphreys** further provides that the corpus of an inheritance shall be considered for purposes of deviation from a support award. In light of our holding here, we find that the corpus of a gift shall too be considered in determining whether to deviate from the presumptive support obligation. ***See Humphreys**, 790 A.2d*

at 287-88 (citing *Pa.R.C.P. 1910.16-5*). Reviewing the record, we find that such consideration was given to the gifts; the trial court increased the support award by $ 1,000 per month in consideration thereof. Accordingly, we find that the trial court did not err.

[*P17] Finally, we address Wife's issue concerning counsel fees. Counsel fees [***13] are awarded at the trial court's discretion, and we will disturb such an award only upon the finding of an abuse of that discretion. ***Marra v. Marra**, 2003 PA Super 321, 831 A.2d 1183 (Pa. Super. 2003)*. Factors to consider in such an award are the payor's ability to pay, the requesting party's financial resources, the value of the services rendered, and the distribution of property at equitable distribution. ***Anzalone v. Anzalone**, 2003 PA Super 407, 835 A.2d 773 (Pa. Super. 2003)*.

[*P18] Here, Wife was awarded a total of $ 50,000 in counsel fees. Of this figure, $ 40,000 was awarded in conjunction with the March 24, 2000, order imposing sanctions on Husband. It is Wife's position that the trial court erred in awarding this amount when her total fees were more than triple that amount. In light of the factors outlined above, we find that the trial court did not abuse its discretion in awarding only $ 50,000 in counsel fees. While Husband is able to pay, Wife continues to work and was awarded 60% of the marital estate in equitable distribution. The trial court's determination is supported by the record, and we find no abuse of discretion [***14] therein.

[*P19] Orders affirmed.

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* Pa.C.S. documents are current through 2012 Regular Session Act 211 Enacted November 1, 2012. *
P.S. documents are current through 2012 Regular Session Act 150 and 153 to 169 and 171 to 180, 183 to 187, 189 to 191, 193 to 206 and 208 to 211
* January 9, 2013 Annotation Service *

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 23. DOMESTIC RELATIONS
PART VI. CHILDREN AND MINORS
CHAPTER 53. CHILD CUSTODY

Go to the Pennsylvania Code Archive Directory

23 Pa.C.S. § 5323 (2012)

§ 5323. Award of custody.

(a) *Types of award.* --After considering the factors set forth in section 5328 (relating to factors to consider when awarding custody), the court may award any of the following types of custody if it is in the best interest of the child:

(1) Shared physical custody.

(2) Primary physical custody.

(3) Partial physical custody.

(4) Sole physical custody.

(5) Supervised physical custody.

(6) Shared legal custody.

(7) Sole legal custody.

(b) *Interim award.* --The court may issue an interim award of custody to a party who has standing under section 5324 (relating to standing for any form of physical custody or legal custody) or 5325 (relating to standing for partial physical custody and supervised physical custody), in the manner prescribed by the Pennsylvania Rules of Civil Procedure governing special relief in custody matters.

(c) *Notice.* --Any custody order shall include notice of a party's obligations under section 5337 (relating to relocation).

(d) *Reasons for award.* --The court shall delineate the reasons for its decision on the record in open court or in a written opinion or order.

(e) *Safety conditions.* --After considering the factors under section 5328(a)(2), if the court finds that there is an ongoing risk of harm to the child or an abused party and awards any form of custody to a party who committed the abuse or who has a household member who committed the abuse, the court shall include in the custody order safety conditions designed to protect the child or the abused party.

(f) *Enforcement.* --In awarding custody, the court shall specify the terms and conditions of the award in sufficient detail to enable a party to enforce the court order through law enforcement authorities.

(g) *Contempt for noncompliance with any custody order.*

(1) A party who willfully fails to comply with any custody order may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:

(i) Imprisonment for a period of not more than six months.

(ii) A fine of not more than $ 500.

(iii) Probation for a period of not more than six months.

(iv) An order for nonrenewal, suspension or denial of operating privilege under section 4355 (relating to denial or suspension of licenses).

(v) Counsel fees and costs.

(2) An order committing an individual to jail under this section shall specify the condition which, when fulfilled, will result in the release of that individual.

(h) *Parties in same residence.* --Parties living separate and apart in the same residence may seek relief under this chapter, but any custody order made under such a circumstance shall be effective only upon:

(1) one party physically vacating the residence; or

(2) an order awarding one party exclusive possession of the residence.

HISTORY: Act 2010-112 (H.B. 1639), P.L. 1106, § 2, approved Nov. 23, 2010, eff. in 60 days.

NOTES:
LexisNexis (R) Notes:

NOTES:

JOINT STATE GOVERNMENT COMMISSION COMMENTS.

Report of the Advisory Committee on Domestic Relations Law. Custody -- Recommended Amendments (November 1999).

[Subsection (a).] Under this provision, the court should address both physical and legal custody in any award of custody.

Subsection (b) provides for an interim award of special relief in accordance with the *Pennsylvania Rule of Civil Procedure No. 1915.13*.

[Subsection (e).] Based on former section 4346 (contempt for noncompliance with visitation or partial custody order) and revised to apply to all custody or visitation orders. Paragraph (1)(v) ("counsel fees and costs") is new and was not part of former section 4346. The addition of this explicit sanction is consistent with [*23 Pa.C.S. § 3502(e)(7)*] regarding the sanction for failure to comply with an equitable distribution order and [*23 Pa.C.S. § 3703(7)*] regarding payment of arrearages for alimony and alimony pendente lite. Additionally, in paragraph (2), the term "individual" replaces "person" in the first instance and "obligor" in the second instance.

[Subsection (f).] This subsection removes a long-standing obstacle to a party who otherwise has standing to commence a custody action.

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* January 9, 2013 Annotation Service *

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 23. DOMESTIC RELATIONS
PART VI. CHILDREN AND MINORS
CHAPTER 53. CHILD CUSTODY

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23 Pa.C.S. § 5339 (2012)

§ 5339. Award of counsel fees, costs and expenses.

Under this chapter, a court may award reasonable interim or final counsel fees, costs and expenses to a party if the court finds that the conduct of another party was obdurate, vexatious, repetitive or in bad faith.

HISTORY: Act 2010-112 (H.B. 1639), P.L. 1106, § 2, approved Nov. 23, 2010, eff. in 60 days.

NOTES:
LexisNexis (R) Notes:

NOTES:

JOINT STATE GOVERNMENT COMMISSION COMMENTS.

Report of the Advisory Committee on Domestic Relations Law. Custody -- Recommended Amendments (November 1999).

These factors are not in order of priority.

Purdon's Pennsylvania Statutes and Consolidated Statutes
Pennsylvania Rules of Civil Procedure (Refs & Annos)
Actions for Custody, Partial Custody and Visitation of Minor Children (Refs & Annos)

Pa.R.C.P. No. 1915.12

Rule 1915.12. Civil Contempt for Disobedience of Custody Order. Petition. Form of Petition. Service. Order

Currentness

(a) A petition for civil contempt shall begin with a notice and order to appear in substantially the following form:

NOTICE AND ORDER TO APPEAR

Legal proceedings have been brought against you alleging you have wilfully disobeyed an order of court for (custody) (partial custody) (visitation).

If you wish to defend against the claim set forth in the following pages, you may but are not required to file in writing with the court your defenses or objections.

Whether or not you file in writing with the court your defenses or objections, you must appear in person in court on __________ (Day and Date), at ______ ___.M. (Time), in Courtroom __________, __________ (Address).

IF YOU DO NOT APPEAR IN PERSON, THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST.

If the court finds that you have wilfully failed to comply with its order for (custody) (partial custody) (visitation), you may be found to be in contempt of court and committed to jail, fined or both.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

____

(Name)

____

(Address)

____

(Telephone Number)

BY THE COURT:

____

J.

Date: ____________________

(b) The petition shall allege the facts which constitute wilful failure to comply with the custody, partial custody or visitation order, a copy of which shall be attached to the petition.

(c) The petition shall be substantially in the following form:

(Caption)

PETITION FOR CIVIL CONTEMPT FOR DISOBEDIENCE OF (CUSTODY) (PARTIAL CUSTODY) (VISITATION) ORDER

The Petition of ______________________________, respectfully represents:

1. That on ______________________________, Judge __________ entered an Order awarding (Petitioner) (Respondent) (custody) (partial custody) (visitation) of the minor child(ren) ....

(NAME(S) OF CHILD(REN))

A true and correct copy of the order is attached to this petition.

2. Respondent has willfully failed to abide by the order in that ....

WHEREFORE, Petitioner requests that Respondent be held in contempt of court.

....

(Attorney for Petitioner) (Petitioner)

I verify that the statements made in this complaint are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

....

Date Petitioner

(d) The petition shall be served upon the respondent by personal service or regular mail. No answer to the petition shall be required. If service is by mail, the hearing on the petition shall not be held sooner than seven days after mailing of the petition unless the court for cause shown orders an earlier hearing. If the respondent fails to appear, the court shall continue the hearing and may order personal service by the sheriff or constable, or alternative service as accepted by the court, of the petition and notice of a new hearing date, or the court may issue a bench warrant for production of the respondent in court and not for imprisonment.

(e) After hearing, an order committing a respondent to jail for contempt of a custody, partial custody or visitation order shall specify the condition which must be fulfilled to obtain release of the respondent.

Note: See 23 Pa.C.S.A. § 4346 relating to contempt for noncompliance with visitation or partial custody order.

See the Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa.C.S.A. §§ 5443 and 5445, relating to registration and enforcement of custody decrees of another state, and 23 Pa.C.S.A. § 5471, relating to intrastate application of the Uniform Child Custody Jurisdiction and Enforcement Act.

Credits

Adopted Dec. 10, 1981, effective July 1, 1982. Effective date extended to Jan. 1, 1983 by order of June 25, 1982. Readopted and amended Nov. 8, 1982, effective Jan. 1, 1983. Amended Dec. 2, 1994, effective March 1, 1995; March 18, 2004, effective June 16, 2004; Nov. 19, 2008, imd. effective.

Editors' Notes

EXPLANATORY COMMENT--1981

In Cahalin v. Goodman, 280 Pa.Super. 228, 421 A.2d 696 (1980), the Superior Court imposed upon custody proceedings the five-step contempt procedure mandated by Crislip v. Harshman, 243 Pa.Super. 349, 365 A.2d 1260 (1976), in actions for support.

Rule 1915.12 provides a streamlined contempt procedure. Subdivision (a) prescribes the nature of the petition. It will begin with a notice and order in the nature of an extended notice to defend. The notice includes the time and location of the hearing upon the petition and the consequences of a failure to appear. The petition must contain facts showing a "wilful" failure to obey the custody, partial custody or visitation order.

The prothonotary or another person designated by the court is to serve the petition upon the defendant by regular mail. Safeguards are provided by subdivision (c) for continuance of the hearing when the defendant fails to appear. The court is then given the option of either ordering personal service of the petition with a notice of a new hearing date or issuing a bench warrant as may be appropriate. If personal service is ordered, it shall be by the sheriff. If a bench warrant is issued, the rule directs that the warrant provide for producing the defendant in court and not for imprisonment in the county jail. The object of the warrant is to bring the defendant before the court and not to have the defendant languish in jail overnight or over a weekend.

The defendant is not required to answer the petition and he is given a period of at least seven days in which to defend.

Subdivision (d) continues the present case law requirement that the order state the condition which must be fulfilled so that the defendant will be released from prison.

Notes of Decisions (17)

Rules Civ. Proc., Rule 1915.12, 42 Pa.C.S.A., PA ST RCP Rule 1915.12
Current with amendments received through 1/1/13

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Actions for Custody, Partial Custody and Visitation of Minor Children (Refs & Annos)

Pa.R.C.P. No. 1915.13

Rule 1915.13. Special Relief

Currentness

At any time after commencement of the action, the court may on application or its own motion grant appropriate interim or special relief. The relief may include but is not limited to the award of temporary custody, partial custody or visitation; the issuance of appropriate process directing that a child or a party or person having physical custody of a child be brought before the court; and a direction that a person post security to appear with the child when directed by the court or to comply with any order of the court.

Note: This rule supplies relief formerly available by habeas corpus for production of the child.

Credits
Adopted Dec. 10, 1981, effective July 1, 1982; effective date extended to Jan. 1, 1983 by order of June 25, 1982. Readopted Nov. 8, 1982, effective Jan. 1, 1983.

Editors' Notes

EXPLANATORY COMMENT--1981

Rule 1915.13 contains a broad provision empowering the court to provide special relief where appropriate. In a custody proceeding, such special relief might include relief in the nature of a writ of ne exeat, directing the parties not to leave the jurisdiction and not to remove the child from the jurisdiction.

The rule catalogs several types of relief which might be granted, including the entry of a temporary order of custody, partial custody or visitation. The rule specifically provides that the power of the court to grant special relief shall not be limited to the types of relief cataloged.

Notes of Decisions (7)

Rules Civ. Proc., Rule 1915.13, 42 Pa.C.S.A., PA ST RCP Rule 1915.13
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Pa.R.C.P. No. 1915.14

Rule 1915.14. Disobedience of Order. Arrest. Contempt

Currentness

If a person disobeys an order of court other than a custody, partial custody or visitation order, the court may issue a bench warrant for the arrest of the person and if the disobedience is wilful may, after hearing, adjudge the person to be in contempt.

Note: For disobedience of a custody, partial custody or visitation order, see Rule 1915.12.

Credits

Adopted Dec. 10, 1981, effective July 1, 1982; effective date extended to Jan. 1, 1983 by order of June 25, 1982. Readopted Nov. 8, 1982, effective Jan. 1, 1983.

Editors' Notes

EXPLANATORY COMMENT--1981

Rule 1915.14 governs disobedience of orders of court other than an order of custody, partial custody or visitation. Contempt of a custody, partial custody or visitation order is governed by Rule 1915.12.

Although general in terms, the rule will apply primarily to a party who fails to appear before the judge at the hearing.

The failure to obey a court order includes the failure of a party to bring a child to a hearing as required by order of court as well as the failure to appear in person.

The failure to obey an order of court is itself sufficient to cause the court to issue a warrant. However, the finding of contempt may be made only after a hearing at which it is determined that the failure to obey the order was wilful.

Rules Civ. Proc., Rule 1915.14, 42 Pa.C.S.A., PA ST RCP Rule 1915.14
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P.H.D., Appellee v. R.R.D., Appellant

No. 577 WDA 2012

SUPERIOR COURT OF PENNSYLVANIA

2012 PA Super 246*; *56 A.3d 702*; *2012 Pa. Super. LEXIS 3485

August 22, 2012, Argued
November 13, 2012, Filed

PRIOR HISTORY: [**1]

Appeal from the Order of the Court of Common Pleas, Allegheny County, Civil Division, No. FD-99-02811-005. Before MULLIGAN, J.
P.H.D. v. R.R.D., 46 A.3d 817, 2012 Pa. Super. LEXIS 740 (Pa. Super. Ct., 2012)

COUNSEL: R.R.D. appellant, pro se.

Mark K. Gubinsky, Bridgeville, for J.D. and R.D., participating parties.

JUDGES: BEFORE: MUSMANNO, BOWES, AND WECHT, JJ. OPINION BY WECHT, J.

OPINION BY: WECHT

OPINION

[*703] OPINION BY WECHT, J.:

In this case, we are called upon to decide whether, after hearing and denying a contempt petition, a trial court nevertheless retains authority in the same proceeding to grant relief ancillary to that contempt petition. We conclude that it does not.

R.R.D. ["Father"] appeals *pro se* from a March 5, 2012 order dismissing P.H.D. ["Mother"]'s contempt petition. Notwithstanding its decision to deny Mother's contempt petition, the trial court proceeded *sua sponte* to "clarify" its previous child custody order entered on June 28, 2011. [1] No motion for clarification was pending. No motion for modification was pending. Indeed, as we discuss *infra*, in "clarifying" its custody order *sua sponte*, the trial court modified it. This violated Father's due process rights. Accordingly, we vacate the order as it pertains to custody modification.

1 While the trial court indicates that its most recent custody order was the June 28, 2011 order, our review of the record reveals that the most recent [**2] custody modification order was actually entered on September 20, 2011, pursuant to Mother's September 13, 2011 "Petition for Special Relief." The September 20, 2011 order added a term to the June 28, 2011 order, which was otherwise still intact and controlling. Accordingly, the June 28, 2011 and September 20, 2011 orders collectively governed the parents' custody arrangement, until those orders were "clarified" by the court's March 5, 2012 order.

Father and Mother are the divorced parents of two minor children: J.D., born in March of 1999 and R.D., born in December of 2001 [collectively "Children"]. The parties' custody arrangement has changed several times since their divorce. At the time of the contempt hearing, custody was controlled by the June 28, 2011 and September 20, 2011 orders. In the June 28, 2011 order, the trial court made Father's custody contingent on his completion of therapy. Pending completion, Father was limited to weekly supervised visits. Order, 6/28/11, at 1-2. [2] The trial court's September [*704] 20, 2011 order directed Father "to have no contact with the children other than supervised visits." Order, 9/20/11, at 2.

2 Father appealed the June 28 order. A panel of this [**3] Court affirmed, in an unpublished memorandum. ***P.H.D. v. R.R.D.**, 46 A.3d 817 (Pa. Super. 2011)* (unpublished memorandum), *appeal denied*, *47 A.3d 848 (Pa. 2012)* (per curiam).

On January 19, 2012, Mother filed a contempt petition, in which she claimed that Father had violated the June 28, 2011 order by initiating unsupervised contact with the Children. [3] No petition for modification or clarification was filed or served. On March 1, 2012, the trial

court held a hearing on Mother's contempt petition. Mother testified that Father went to J.D.'s band concert in a school auditorium, sat in the front row, and, during the concert, waved his arms at J.D. while J.D. was performing. Notes of Testimony ["N.T."], 3/1/12, at 18. Mother further testified that, after the performance, Father videotaped Mother and R.D. in the school's hallway. ***Id.*** at 19. Mother also testified that Father frequently drives past Mother's house. ***Id.*** at 46.

> 3 Neither the petition, nor the order that ensued, specified whether the species of contempt invoked was civil or criminal in nature. We remind the parties, counsel, and the trial court that this is a distinction with a difference. ***See, e.g., Commonwealth v. Moody****, 2012 PA Super 103, 46 A.3d 765, 771-72 (Pa. Super. 2012),* [**4] *reargument denied* (July 18, 2012) (differentiating civil and criminal contempt). Because it appears to us that the nature of the relief sought was coercive, rather than punitive, and based upon our review of the record, we conclude that the proceeding was civil rather than criminal.

Father insisted that he had no expectation of seeing Mother or Children at the band concert. ***Id.*** at 69. He stated that he attended the concerts to network for his business, and that he enjoyed the music. ***Id.*** at 59-60. Father testified that he did not attempt to speak to Mother or Children at the concert, and that Mother was mistaken in believing that he videotaped her. ***Id.*** at 28. Father, who owns a landscaping business, stated that he has several clients in Mother's neighborhood and that he uses Mother's street as a turnaround, because it is a cul-de-sac. ***Id.*** at 56-58. Father insisted that he was not attempting to violate the June 28, 2011 custody order. ***Id.*** at 63-65. He testified that he believed the court order directing him to have "no contact" with Children meant that he was to "not talk to the children. That's what I consider contact." ***Id.*** at 64.

At the conclusion of the March 1 hearing, the trial court [**5] stated that it was "dismissing the contempt petition at this time but . . . modifying the [custody] order to clarify it. And what I'm saying in the order from now on is that [Father] is . . . not to appear at places where the children would be reasonably expected to be . . . ." ***Id.*** at 81. The trial court concluded by stating that it would "issue something in the mail." ***Id.*** at 84.

On March 5, 2012, the trial court issued its order, which was consistent with the rulings it made or forecast on March 1. [4] [*705] The March 5 order dismissed Mother's contempt petition. The order also "clarified" the court's previous custody orders so as to mandate that Father may "not appear at activities or places where the children would reasonably be expected to be at a particular time." Order, 3/5/12. The order further stated: "Father is on notice that his failure to comply with the provisions of this order will result in a contempt finding in the future." ***Id.*** Father timely appealed. Mother filed no appeal of the denial of her contempt petition.

> 4 The trial court's order reads in full:
>
> > AND NOW, this 5th day of March, 2012, after hearing, it is hereby ORDERED that the court does not find the defendant to be in contempt [**6] because the order was not clear concerning defendant's contact with the children at school activities, etc.
> >
> > Notwithstanding the dismissal of the contempt action, the court hereby clarifies the order limiting father's contact to supervised visits to provide that father shall not appear at activities or places where the children would reasonably be expected to be at a particular time. Father is on notice that his failure to comply with the provisions of this order will result in a contempt finding in the future.
> >
> > As to the issues raised in father's new matter, all are dismissed with the exception that father is entitled to access to records from the children's religious education subject to the clarification concerning contact set forth in this order.
>
> Trial Court Order, 3/5/12.

The guardian *ad litem* [5] asserts that we should quash Father's appeal because Father failed to file a statement of errors complained of on appeal with the trial court pursuant to *1925(a)(2)(i)* and failed to attach such a statement to his brief pursuant to *Pa.R.A.P. 2111(a)(11)*. Guardian's Brief at 7. We decline to do so. While *Pa.R.A.P. 1925(a)(2)(i)* and *905(a)(2)* require that a statement of errors be filed with the [**7] trial court contemporaneously with a notice of appeal in family fast track appeals, the rules do not prescribe a certain consequence in the event of a failure to comply. "*[R]ule 905(a)(2)* is procedural, not jurisdictional; therefore, we are not divested of our jurisdiction by non-compliance." ***In re K.T.E.L.****, 2009 PA Super 205, 983 A.2d 745, 747 (Pa. Super. 2009).* We dismiss appeals for procedural

defects sparingly, and will not do so when an appellant has substantially complied with the procedural rules and the opposing party has not been prejudiced. ***Id.*** (citing ***Stout v. Universal Underwriters Ins. Co.****, 491 Pa. 601, 421 A.2d 1047, 1049 (Pa. 1980))*. Such is the case in this *pro se* appeal.

5 The trial court had appointed the guardian *ad litem* in 2008. Order Appointing Guardian *Ad Litem*, 11/25/08, at 1-2.

While the guardian *ad litem* alleges that Father did not file a statement of errors with the trial court, our docket contains Father's statement, filed on April 3, 2012, along with a certificate of service indicating that all of the appropriate individuals were served, including the guardian *ad litem.* ***See*** Statement of Matters Complained of Regarding Appeal of Order on Custody Contempt Dated March 5, 2012, 4/3/12. Father [**8] substantially complied with the procedural rules, and the opposing party has not alleged prejudice. Accordingly, we decline to quash or dismiss this *pro se* litigant's appeal.

While Father asserts several issues on this appeal, we need only review Father's claim that he was denied due process. Our resolution of that claim (raised within Father's first issue) is dispositive of this appeal. [6] Specifically, Father argues that the trial court committed an abuse of discretion and/or an error of law by, *inter alia*, modifying the custody order notwithstanding its failure to conduct a modification [*706] hearing. Father's Brief at 1. We are constrained to agree.

6 Father has raised the following issues:

> 1) Did the trial court commit an abuse of discretion and/or error of law by denying father due process when it failed to conduct a modification hearing, imposed time limits, refused father to call the children as witnesses, or consider custody factors while modifying the custody order?
>
> 2) Did the trial court commit an abuse of discretion and/or error of law by denying father's [*sic*] his constitutional rights of free speech and impeding his ability to support his children and himself by imposing limitations [**9] on his employment[?]
>
> 3) Did the trial court commit an abuse of discretion and/or error of law when it failed to dismiss the GAL and/or recuse itself while denying father a fair trial?
>
> 4) Did the trial court commit an abuse of discretion and/or error of law when it failed to hold mother in contempt for violating statutory rights to the children's education information and failing to take the children to counseling?

Appellant's Brief at 1 ("suggested answers" and erroneous spaces omitted).

The trial court had before it Mother's contempt petition alone. The subject of this appeal is the order dismissing that petition. Our scope and standard of review are familiar: "In reviewing a trial court's finding on a contempt petition, we are limited to determining whether the trial court committed a clear abuse of discretion. This Court must place great reliance on the sound discretion of the trial judge when reviewing an order of contempt." ***Flannery v. Iberti****, 2000 PA Super 369, 763 A.2d 927, 929 (Pa. Super. 2000)* (citations omitted). [7]

7 To sustain a finding of civil contempt, the complainant must prove certain distinct elements by a preponderance of the evidence: (1) that the contemnor had notice of the specific order [**10] or decree which he is alleged to have disobeyed; (2) that the act constituting the contemnor's violation was volitional; and (3) that the contemnor acted with wrongful intent. ***Stahl v. Redcay****, 2006 PA Super 55, 897 A.2d 478, 489 (Pa. Super. 2006)*. Had the previous orders included the requirement that Father not be in places where he would reasonably expect his children to be, he would have had notice that going to the band concert might well be a violation of the custody order. Father's attendance would have been volitional. A finding of contempt would have been conditioned on the trial court's finding as to Father's intent. Of course, as we discuss *infra*, such an adjudication would suffer from other infirmities.

In resolving Father's issue, we are required to determine whether the trial court's March 5, 2012 order modified the previous custody arrangement or merely "clarified" it. ***See*** T.C.O. at 2 ("I found that Father was not in contempt of that custody order, but I did clarify the order...."). We have expressly held that a trial court "may not permanently modify a custody order without having a petition for modification before it." ***Langendorfer v. Spearman****, 2002 PA Super 93, 797 A.2d 303, 308 (Pa. Super. 2002)*. Neither [**11] party filed a petition for

modification. The trial court asserts that it "clarified," but did not modify, the custody order. We disagree.

While many of our cases have discussed instances in which a custody modification is necessary, there is a dearth of authority specifying what constitutes a modification. "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." *1 Pa.C.S.A. § 1921(a)*. Further, "when the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:... other statutes upon the same or similar subjects." *1 Pa.C.S.A. § 1921(c)(5)*. In the Uniform Child Custody Jurisdiction and Enforcement Act ["UCCJEA"], *23 Pa.C.S.A. §§ 5401-5482*, our General Assembly has provided a definition of modification. Even though this is not a UCCJEA case, we may, in the absence of other governing authority, afford that definition persuasive value. ***See** 1 Pa.C.S.A. § 1921(c)(5)*. The UCCJEA defines modification as "[a] child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, [**12] whether or not it is made by the court that made the previous determination." *23 Pa.C.S.A. § 5402*.

The June 28, 2011 and September 20, 2011 custody orders collectively provided that Father was permitted supervised visits upon completion of therapy, but was to have no contact with Children outside of those visits. The March 5, 2012 order provided that, on explicit pain of pre-adjudicated contempt, Father "shall not appear at activities or places where the children would reasonably be expected to be at a particular time." Order, 3/5/12 ("failure to comply **will** result in a contempt finding") [*707] (emphasis added). This March 5, 2012 order unquestionably imposed new and severe restrictions on Father, and therefore modified the earlier custody orders. Father is now required proactively to alter his daily life and to constantly monitor his movements so as to avoid ever being wherever the children may happen to be at any and all times in the community at large. Would this include a Pittsburgh Steelers game? A popular shopping mall or store or restaurant? An amusement park?

It cannot be gainsaid that these purported no-go zones were not contained in the previous custody arrangement, which was already [**13] highly restrictive. Under the trial court's new "clarification," Father is no longer permitted to attend school activities, community activities that Children will likely attend, or even restaurants and stores that Children might visit. This is a significant departure from the previous order that limited Father's time spent with Children to supervised visits. Most important, the parties were not on notice that such a breathtaking set of restrictions was sought, nor that it could be ordered, particularly in a scenario where the contempt petition is itself *denied.*

The trial court not only modified the custody order. It did so without any modification petition. It did so without notice and a hearing tailored specifically to custody modification. It denied Father his due process rights. Our decision in ***Langendorfer*** is instructive. In that case, the mother filed a contempt petition alleging that the father willfully violated the custody order. ***Langendorfer**, 797 A.2d at 305-06*. In a subsequent order, the trial court found the father in contempt, granted the mother sole legal and primary physical custody, and restricted the father's visitation with the children to supervised visits. ***Id.** at 306-07*. [**14] We found that the father's due process rights were violated because he had no notice that custody was at issue. ***Id.** at 309*.

Our words in ***Langendorfer*** bear reproducing at length here:

> In the instant case, Mother's petition for contempt in no way implicates custody, i.e., she did not request any change in custody. Furthermore, the order to appear received by the parties from the court that scheduled the contempt hearing did not notify the parties that custody was at issue. Also the record and more particularly the docket do not indicate that Mother's contempt petition and Father's petition for temporary modification were consolidated for any purpose. Moreover, the transcript of the hearing reveals that only the contempt petition was before the court. Finally, the court's order, quoted above and delivered from the bench at the conclusion of the hearing, references only Mother's contempt petition and Father's response thereto. Accordingly, we conclude that only Mother's contempt petition was before the court on March 5, 2001.
>
> In addition to the foregoing, we emphasize that Father's due process rights were violated by the actions taken by the court, because Father had no notice that custody [**15] would be at issue in the proceedings. "Notice, in our adversarial process, ensures that each party is provided adequate opportunity to prepare and thereafter properly advocate its position, ultimately exposing all relevant factors from which the finder of fact may make an informed judgment." [***Choplosky v. Choplosky**, 400 Pa. Super. 590, 584 A.2d 340, 342 (Pa. Super. 1990)*.] Without no-

> tice to the parties that custody was at issue, the trial court could not "assume that the parties ha[d] either sufficiently exposed the relevant facts or properly argued their significance. Consequently neither we nor the trial court can make [*708] an informed, yet quintessentially crucial judgment as to whether it was in the best interests of the [child] involved to give sole legal [and physical] custody to the mother." ***Id.*** *at 343*.
>
> Having concluded that a modification petition was not before the court at the time of the hearing on Mother's contempt petition and that Father did not have notice that custody would be an issue, we conclude that the court committed a clear abuse of discretion in ordering a change in custody.

Id. *at 308-09* (footnotes omitted).

As in ***Langendorfer****,* Father here had no notice that custody was at issue. Neither [**16] the contempt petition nor the notice and order to appear held out the prospect of custody modification. ***See*** Petition for Contempt of Child Custody Order of Court and Request for Other Relief, 1/12/11; Contempt Hearing Notice, 1/19/12. Father was unaware that custody was at issue, and therefore had no opportunity to prepare for a modification hearing.

Indeed, the facts here are more egregious than in ***Langendorfer***, where the trial court did find the father in contempt. [8] Here, by contrast, the trial court expressly dismissed the contempt petition. Under such circumstances, it is of course impossible even to advance the argument (rejected in any event by ***Langendorfer***) that the modifications were ancillary to a contempt adjudication. Had the trial court found Father in contempt of its custody order, it would have had jurisdiction to enforce that order. Even then, it would have lacked authority to modify it. Once the contempt petition was dismissed, and inasmuch as no motion for modification was filed, the trial court had nothing else on its plate. No ancillary relief could be granted.

> 8 Had [**17] the trial court found Father in contempt, it could have ordered ancillary relief in the form of sanctions:
>
> > Sanctions for civil contempt can be imposed for one or both of two purposes: to compel or coerce obedience to a court order and/or to compensate the contemnor's adversary for injuries resulting from the contemnor's noncompliance with a court order.
>
> ***Rhoades v. Pryce****, 2005 PA Super 162, 874 A.2d 148, 151-52 (Pa. Super. 2005)* (citation omitted). Such compensatory sanctions have included attorney's fees, investigation costs, deposition fees, subpoena fees, witness fees, or fines to compensate an aggrieved party. ***Id.***

The trial court abused its discretion in altering the terms of custody when a petition requesting such relief was not before it. Once the trial court dismissed the contempt petition, it had no authority to rule on modification, which was not before it at the time. The custody court does not possess some ongoing, continuous supervisory role over the life of a family, however broken that family may be. Rather, the court's jurisdiction is triggered only when invoked, and then only upon proper petition and notice.

We vacate the trial court's March 5, 2012 order as it purports to relate to custody [**18] modification, albeit under the label of "clarification." Specifically, we vacate the second paragraph of the court's order. If one of the parties seeks to modify the custody arrangement, that party must petition the court accordingly. Thereafter, if the court schedules a hearing on the modification petition, the opposing party is on notice that custody modification will be at issue, in fact and in law.

Order vacated in part, as set forth hereinabove. Jurisdiction relinquished.

2012 PA Super 247

JOHN A. SWARROW, v. ANNA MARIE BRASUHN, Appellee APPEAL OF: DENNIS M. MAKEL, ESQUIRE AND C.E. KUROWSKI, ESQUIRE, Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1046 WDA 2011

Appeal from the Judgment Entered of June 23, 2011
In the Court of Common Pleas of Washington County
Civil Division at No(s): 2008-9591

BEFORE: MUSMANNO, J., BOWES, J., and WECHT, J.

MEMORANDUM BY BOWES, J. Filed: November 13, 2012

Motion to strike denied. Contempt order vacated. Fines remitted. Jurisdiction relinquished.

Judge Wecht files a Concurring Opinion.

2012 PA Super 247

JOHN A. SWARROW, v. ANNA MARIE BRASUHN, Appellee APPEAL OF: DENNIS M. MAKEL, ESQUIRE AND C.E. KUROWSKI, ESQUIRE, Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1046 WDA 2011

Appeal from the Judgment Entered of June 23, 2011
In the Court of Common Pleas of Washington County
Civil Division at No(s): 2008-9591

BEFORE: MUSMANNO, J., BOWES, J., and WECHT, J.

CONCURRING OPINION BY WECHT, J.:

I join the majority's decision, and I concur fully with its reasoning. I write separately to reinforce our admonition to the trial court concerning its handling of this matter.

This case presents an illustration of what can transpire when a trial judge loses sight of what is important and fails to maintain "the impersonal authority of law." ***Mayberry v. Pennsylvania***, 400 U.S. 455, 465 (1971) (citation omitted). In this case, the parties had engaged in a dispute over custody of their child. The parties resolved that dispute. Their attorneys were trying to finalize the settlement agreement, and get that agreement executed by the court. Instead of facilitating that resolution and bringing

the matter to conclusion for the sake of the child involved, the trial court here amplified the conflict, and created additional and unnecessary costs and stresses, while at the same time inconveniencing litigants and counsel and unnecessarily and improperly adjudicating two lawyers in contempt.

As our Supreme Court has stated repeatedly and clearly, an adjudication of contempt is no trivial matter, and should be employed sparingly. "[I]t is clear that the guiding principle should be that 'only the least possible power adequate to the end proposed' should be used in contempt proceedings." ***Commonwealth v. Stevenson***, 393 A.2d 386, 392 (Pa. 1978) (citing ***United States v. Wilson***, 421 U.S. 309, 319 (1975) (quoting ***Anderson v. Dunn***, 19 U.S. 204, 231 (1821))).

Trial courts are instructed to "first consider less severe remedies such as civil contempt before imposing summary criminal contempt. The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate..." ***Commonwealth v. Moody***, 46 A.3d 765, 773 n.7 (Pa. Super. 2012), *reargument denied* (July 18, 2012) (quoting ***Commonwealth v. Garrison***, 386 A.2d 971, 976 (Pa. 1978)). While the trial court here referred to its contempt finding as civil, that ruling was, as the majority correctly holds, criminal in nature. Majority Memorandum at 7-10. The trial court not only created a controversy where

there was none, it also bypassed the less severe form of contempt, civil, in favor of the harsher, criminal contempt.[1]

As the majority correctly observes, the record here bespeaks a marked level of animus, indeed, hostility. It may well be that counsel was responsible for some of this animus. But a trial judge does not have the luxury of wallowing in, or exacerbating, rancor. A trial judge must always maintain "the image of the impersonal authority of law." ***Mayberry***, 400 U.S. at 465 (citation omitted). This is especially true in a child custody case, where emotion levels are high and where the objective is to get the parties' agreement finalized so that the lives of children may proceed outside the vortex of litigation.

Essentially, what the trial court did here is to create out of whole cloth a collateral dispute, that is, to pick a fight.[2] In such a fight, the trial judge

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[1] Further evidence that the contempt was criminal in nature is the fact that the trial court imposed a $500 fine on each Appellant, arbitrarily, and without specific correlation to any out-of-pocket attorney fees actually incurred by Mother. Moreover, it cannot be said that the relief requested was "for the benefit of the complainant," ***See Knaus v. Knaus***, 127 A.2d 669, 673 (Pa. 1956) (listing the five factors indicative of civil contempt), in view of the fact that the unknown "remaining balance" of Appellants' $1,000 combined penalty was awarded to the county law library. Reproduced Record at 63a. Such a fine is suggestive of criminal contempt, in which the interests of the general public are at issue and the ruling is punitive in nature.

[2] In addition, as I have already indicated, the contempt proceedings in this case were fundamentally flawed. First, as the Majority describes thoroughly, the trial court was confused about the distinction between civil and criminal contempt. While concluding that the purpose of its contempt
(Footnote Continued Next Page)

possesses greater leverage by virtue of his judicial office. Indeed, the authority of the state is at his beck and call.[3] For the trial judge to employ that power in a spirit of rancor amounts to bullying. This cannot be countenanced. When a trial judge becomes "so 'personally embroiled' with a lawyer" that "the image of . . . impersonal authority" threatens to give way to something more suggestive of personal payback, the trial judge has a duty to recuse. ***Mayberry v. Pennsylvania***, 400 U.S. at 465 (quoting ***Offutt v. United States***, 348 U.S. 11, 17 (1954)).

It should go without saying that trial judges can, and indeed must, vindicate their authority where necessary. Disruptions in court cannot be

(Footnote Continued)

order was civil, the trial court also stated that its intentions were, at least in part, to vindicate its authority. This latter objective sounds, of course, in criminal contempt. ***Knaus*** at 672 ("The dominant purpose of a contempt proceeding determines whether it is civil or criminal. If the dominant purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public, it is a proceeding for criminal contempt.") Moreover, as the Majority points out, the rule to show cause hearing proceeded without the trial court swearing in any of the lawyers who appeared and testified. Although the Majority appears comfortable with the fact that the lawyers have a duty of candor toward the Court (Majority Memorandum at 5 n.4), I wish to emphasize that this duty of candor, while mandated as a disciplinary matter, does not suffice for testimonial purposes. When a record is taken, all witnesses, whether lawyers or otherwise, must be placed under oath. ***See Dunsmore v. Dunsmore***, 455 A.2d 723, 724 (Pa. Super. 1983) (case remanded because record defective for several reasons, including failure to place father under oath before taking of testimony, status as attorney entitling him to no special consideration).

[3] "[I]n societies like ours the command of the public force is intrusted [*sic*] to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 457 (1897).

tolerated. Here, however, there was no disruption in court whatsoever. The trial judge went out of his way to foment a problem that did not exist, or that did not need to exist. Ultimately, far from vindicating the court's authority, these actions served only to undermine it.

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

I.C-M.,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
M.A.M.,	:	
Appellee	:	No. 1260 WDA 2010

Appeal from the Order entered July 19, 2010, in the Court of Common Pleas of Allegheny County, Family Court, at No. FD 99-9918-003.

BEFORE: BOWES, OLSON and COLVILLE,* JJ.

MEMORANDUM: FILED: February 11, 2011

Appellant, I.C-M ("Mother"), appeals from the trial court's July 19, 2010 order denying her motion for primary custody of her daughter, A.M. ("Daughter"). For the following reasons, we affirm.

The trial court set forth the factual and procedural background of this matter as follows:

> On February 8, 1986, [Mother and Appellee, M.A.M. ("Father"),] married. A divorce decree issued on July 20, 2002. Four children were born during the marriage...
>
> The parties have engaged in extensive and frequent litigation, particularly surrounding support, custody, and issues related to their four children. As early as December 10, 2003, [the trial court] specifically found that the communication between Mother and Father had broken down and that Mother's anger toward Father had caused her to take actions that were not in the children's best interests. [Findings of Fact, Conclusions of Law & Order,

*Retired Senior Judge assigned to the Superior Court.

12/10/03, at 4-5]. On December 10, 2003, [the trial court] ordered co-parenting counseling.

The counseling was, at best, fitful and unavailing. The parties returned to court. A June 28, 2004 Order granted Father six overnights every two weeks and Mother the rest of the time. That Order allowed Father to petition for a change in custody should he move back into the children's school district. Father presented a petition to modify custody when he did move back to the North Allegheny School District. A hearing on his petition was scheduled for October 4, 2004, but the parties reached an agreement for a 2-2-5-5 shared custody arrangement. An October 4, 2004 consent Order provided for shared legal and physical custody.

On October 22, 2007, Mother filed a petition against Father under the Protection from Abuse ["PFA"] Act.[[1]] Mother filed the petition on behalf of the eldest child... A temporary PFA Order was granted for [the eldest child] only. On December 7, 2007, following a final hearing, the PFA petition was dismissed and the temporary PFA Order was vacated.

On June 30, 2008, in view of the continuing acrimony and the incessant requests for judicial intervention, [the trial court] appointed a parenting coordinator.

On May 6, 2010, Mother filed a Motion for Special Relief – Summer Camp. Mother alleged that [the second oldest child, A.M.,] no longer wished to have contact with Father. Mother further averred that she had enrolled [A.M.] in a summer program at a Michigan institution named Calvin College and that Father had enrolled [A.M.] in a summer program at Vanderbilt University. The parenting coordinator had affirmed Father's choice of Vanderbilt. Mother brought a motion seeking an Order that [A.M.] be allowed to participate in the Calvin College program. On May 17, 2010, [the trial court] held an evidentiary

[1] ***See*** 23 Pa.C.S.A. § 6101 *et seq.*

> hearing on the issue. On May 19, 2010, on the record developed, [the trial court] ordered that [A.M.] attend the Vanderbilt University program.
>
> On May 6, 2010, Mother also presented a Motion for Primary Custody and for *In Camera* Interview of Child. Mother averred that [A.M.] was refusing to participate in custodial visits with Father, and Mother requested primary legal and physical custody of [A.M.]. [The trial court] scheduled an evidentiary hearing on the motion for July 19, 2010. On July 19, 2010, following that record hearing, [the trial court] denied Mother's motion, directed all parties and children to continue counseling as previously ordered, and ordered Mother's counsel to pay $1,000 as a sanction for counsel's offensive and bullying conduct in [the trial court] toward Father's minor step children.
>
> On August 11, 2010, Mother filed a Notice of Appeal of the July 19 Order, along with her Concise Statement of Matters Complained of on Appeal.

Trial Court Opinion, 9/8/2010, at 1-3.

Appellant presents four issues on appeal:

> 1. Did the lower court commit an error of law when it denied Appellant/Mother's Motion for Primary Custody?
>
> 2. Did the lower court err and abuse its discretion when it failed to consider the testimony of a 17 ½ year-old child, and her desire to reside solely with her Mother?
>
> 3. Did the lower court err and abuse its discretion when it ignored the testimony and opinion of the expert witness who had a long standing history with the family and specifically the child?
>
> 4. Did the lower court err and abuse its discretion when it ordered extreme and harsh sanctions against

> counsel for Appellant/Mother, where no basis existed for such sanctions?

Appellant's Brief at 4.

Appellant's first three issue on appeal challenge the trial court's denial of her motion for primary custody. Custody determinations are reviewed according to the following principles:

> 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).

Collins v. Collins, 897 A.2d 466, 471 (Pa. Super. 2006).

Additionally,

> [w]e consistently have held that the discretion that a trial court employs in custody matters should be accorded the utmost respect, given the special nature of the proceeding and the lasting impact the result will have on the lives of the parties concerned. Indeed, the knowledge gained by a trial court in observing witnesses in a custody proceeding cannot

> adequately be imparted to an appellate court by a printed record.

Ketterer v. Seifert, 902 A.2d 533, 540 (Pa. Super. 2006), *quoting* ***Jackson v. Beck***, 858 A.2d 1250, 1254 (Pa. Super. 2004).

Finally, as "[w]ith any child custody case, including petitions for modification..., 'the paramount concern is the best interests of the child.'" ***Id.*** at 539, *citing* ***Johns v. Cioci***, 865 A.2d 931, 936 (Pa. Super. 2004) (citations omitted). The best-interests standard, decided on a case-by-case basis, considers all factors that legitimately have an effect upon the child's physical, intellectual, moral, and spiritual well being. ***Saintz v. Rinker***, 902 A.2d 509, 512 (Pa. Super. 2006), *citing* ***Arnold v. Arnold***, 847 A.2d 674, 677 (Pa. Super. 2004.) Furthermore,

> "[a]lthough the express wishes of a child are not controlling in custody decisions, such wishes do constitute an important factor that must be carefully considered in determining the child's best interest." ***Com. ex rel. Pierce v. Pierce***, 426 A.2d 555, 559 (Pa. 1981). The weight to be attributed to a child's testimony can best be determined by the judge before whom the child appears. ***McMillen v. McMillen***, 602 A.2d 845, 847 (Pa. 1992). The child's preference must be based upon good reasons and his or her maturity and intelligence must also be considered. ***Id.***

Ketterer, 902 A.2d at 540 (parallel citations omitted).

In this matter, Appellant argues that the trial court abused its discretion and committed an error of law when it denied Mother's motion for primary custody. According to Appellant, the trial court failed to adequately

consider uncontested evidence (Appellant's Brief at 8-11), failed to adequately consider A.M.'s testimony and wishes (Appellant's Brief at 11-14), and ignored relevant expert testimony (Appellant's Brief at 14-16). Therefore, Appellant argues that the trial court's order should be reversed and that Mother's petition should be granted.

After review of the parties' briefs, consideration of their oral arguments in support thereof, and review of the record, we hold that the trial court thoroughly and accurately disposed of Appellant's first three issues on appeal. Indeed, in this protracted saga of litigation between Mother and Father, the trial court is in a unique and far better position to rule upon such factually specific issues. We accord the trial court's opinion the "utmost respect" and, as we discern no abuse of discretion, we adopt it as our own.

Appellant's fourth issue on appeal challenges the trial court's order of sanctions against counsel for Appellant. Appellant's Brief at 16-20. According to Appellant, sanctions against her counsel were inappropriate because the intimidating remarks made by Appellant's counsel (and upon which the sanctions were based) were not made "in the courtroom" and were not supported by sufficient evidence. ***Id.*** at 19-20. We disagree.

Rather, the trial court is correct that a judge has significant authority to "police" the proceedings in his or her own courtroom. Trial Court Opinion, 9/8/2010, at 10, *citing* ***ACE American Ins. Co. v. Underwriters at Lloyds***

& Co., 939 A.2d 935, 948 (Pa. Super. 2007). Indeed, "[m]isconduct in the courtroom is a serious matter [and the] onus is on the trial judge to avert or cure it." ***ACE American Ins. Co.***, 939 A.2d at 948. "Moreover, the question of whether or not a lawyer's conduct transgresses the bounds of legitimate advocacy is 'primarily for the discretion of the trial judge, and an appellate court will not interfere with the exercise of this discretion, unless the record manifests that it was clearly abused.'" ***Id.***, *citing* ***Abrams v. Phila. Suburban Transp. Co.***, 264 A.2d 702, 704 (Pa. 1970).

In its opinion the trial court thoroughly set forth the evidence upon which it concluded that Appellant's counsel had made offensive and intimidating remarks to two teenage witnesses. Trial Court Opinion, 9/8/10, at 9-11. We find such actions absolutely reprehensible by any adult, and especially disturbing when committed by a licensed attorney. That the remarks were made outside of the trial court's earshot does not lessen the trial court's authority and discretion to impose such sanctions. Indeed, the contempt statutes in this Commonwealth distinguish between sanctions for conduct committed inside and outside of the courtroom, and expressly state that conduct committed outside of the courtroom **is** to be punished by fine. ***See*** 42 Pa.C.S.A. § 4133.[2] Consequently, on this issue we also affirm the trial court's sanction order and adopt its opinion as our own.

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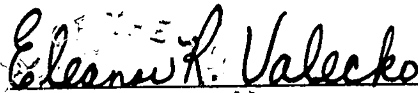
[2] In her brief, Appellant cites to 42 Pa.C.S.A. § 4131. That provision has been renumbered as 42 Pa.C.S.A. § 4132. Section 4133 provides that punishment or commitment for contempt provided in § 4132 extends only to

In any future filings with this or any other court addressing this ruling, the litigants shall attach a copy of the trial court's opinion dated September 8, 2010, to this memorandum.

Order affirmed. Jurisdiction relinquished.

Judgment Entered:



Deputy Prothonotary

DATE: February 11, 2011

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contempt committed in open court and that all other forms of contempt shall be punished by fine only.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

INES CERVONI-MARRERO,

Plaintiff,

v.

MIGUEL A. MARRERO,

Defendant.

No. FD 99-9918-003

Superior Court Docket # 1260 WDA 2010

CHILDREN'S FAST TRACK APPEAL

OPINION OF THE COURT

DAVID N. WECHT, ADMINISTRATIVE JUDGE
Court of Common Pleas

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ALLEGHENY COUNTY PA

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

INES CERVONI- MARRERO, Plaintiff, v. MIGUEL A. MARRERO, Defendant.	No. FD 99-9918-003 Superior Court Docket # 1260 WDA 2010 CHILDREN'S FAST TRACK APPEAL

OPINION OF THE COURT

WECHT, A. J. September 8, 2010

Plaintiff Ines Cervoni-Marrero ["Mother"] appeals from this Court's July 19, 2010 Order. That Order, which followed an evidentiary hearing, denied Mother's Motion for Primary Custody of the parties' daughter, Ana [d.o.b. 3/6/93].

Background and Procedural History

On February 8, 1986, the parties married. A divorce decree issued on July 20, 2002. Four children were born during the marriage: Alexandra [d.o.b. 11/1/90], Ana, Adriana [d.o.b. 3/2/96], and Nicolas [d.o.b. 11/2/97].

The parties have engaged in extensive and frequent litigation, particularly surrounding support, custody, and issues related to their four children. As early as December 10, 2003, this Court specifically found that the communication between

Mother and Father had broken down and that Mother's anger toward Father had caused her to take actions that were not in the children's best interests. [12/10/03 Findings of Fact, Conclusions of Law, & Order, at 4-5]. On December 10, 2003, this Court ordered co-parenting counseling.

The counseling was, at best, fitful and unavailing. The parties returned to court. A June 28, 2004 Order granted Father six overnights every two weeks and Mother the rest of the time. That Order allowed Father to petition for a change in custody should he move back into the children's school district. Father presented a petition to modify custody when he did move back to the North Allegheny School District. A hearing on his petition was scheduled for October 4, 2004, but the parties reached an agreement for a 2-2-5-5 shared custody arrangement. An October 4, 2004 consent Order provided for shared legal and physical custody.

On October 22, 2007, Mother filed a petition against Father under the Protection from Abuse ["PFA"] Act. Mother filed the petition on behalf of the eldest child, Alexandra. A temporary PFA Order was granted for Alexandra only. On December 7, 2007, following a final hearing, the PFA petition was dismissed and the temporary PFA Order was vacated.

On June 30, 2008, in view of the continuing acrimony and the incessant requests for judicial intervention, this Court appointed a parenting coordinator.

On May 6, 2010, Mother filed a Motion for Special Relief – Summer Camp. Mother alleged that Ana no longer wished to have contact with Father. Mother further averred that she had enrolled Ana in a summer program at a Michigan institution named Calvin College and that Father had enrolled Ana in a summer program at Vanderbilt

University. The parenting coordinator had affirmed Father's choice of Vanderbilt. Mother brought a motion seeking an Order that Ana be allowed to participate in the Calvin College program. On May 17, 2010, this Court held an evidentiary hearing on the issue. On May 19, 2010, on the record developed, this Court ordered that Ana attend the Vanderbilt University program.

On May 6, 2010, Mother also presented a Motion for Primary Custody and for *In Camera* Interview of Child. Mother averred that Ana was refusing to participate in custodial visits with Father, and Mother requested primary legal and physical custody of Ana. This Court scheduled an evidentiary hearing on the motion for July 19, 2010. On July 19, 2010, following that record hearing, this Court denied Mother's motion, directed all parties and children to continue counseling as previously ordered, and ordered Mother's counsel to pay $1,000 as a sanction for counsel's offensive and bullying conduct in this Court toward Father's minor stepchildren.

On August 11, 2010, Mother filed a Notice of Appeal of the July 19 Order, along with her Concise Statement of Matters Complained of on Appeal.

<u>Issues Raised on Appeal</u>

In her Pa. R.A.P. 1925 (b) Statement, Mother averred as follows:

1. The trial court's decision to deny Mother/Plaintiff's Motion for primary custody following a hearing was an error of law based upon both the weight and substance of the evidence presented.

2. The trial court abused its discretion in failing to consider the testimony of a 17 ½-year-old child, and her desire to reside solely with her Mother.

3. The trial court also ignored the testimony and opinion of the expert witness who had a long standing history with the family and

specifically the child.

4. The trial court abused its discretion in order [*sic*] extreme and harsh sanctions against counsel for Mother where no basis existed for such sanctions.

Discussion and Analysis

Mother's first allegation of error is that the denial of Mother's motion was against the weight of the evidence. A claim that a verdict is against the weight of the evidence triggers a review of the trial court's exercise of discretion. Alwine v. Sugar Creek Rest, Inc., 883 A.2d 605, 611 (Pa. Super. 2005). Mother's second allegation of error is that this Court abused its discretion in not considering Ana's testimony. Since both claims challenge this Court's discretionary decisionmaking, they will be addressed together.

In all child custody determinations, the paramount concern is the children's best interests. Johns v. Cioci, 865 A.2d 931, 936 (Pa. Super. 2004). In making the best interests decision, the court must consider the preference of the child and any other factor that affects the child's physical, intellectual and emotional well-being. 23 Pa. C.S.A. § 5303 (a)(1). A court must also consider which parent "is more likely to encourage, permit, and allow frequent and continuing contact and physical access between the noncustodial parent and the child." 23 Pa. C.S.A. § 5303 (a)(2).

Ana testified that she wanted to live with Mother. T. at 32. Ana stated that, if she lived with Mother, she would be more connected with her siblings and would do better academically. Id. Ana testified that there was a negative environment at Father's home and that Father was angry and controlling. T. at 32, 34-35. Ana asserted that there is not enough food that she likes at Father's house because Father's stepchildren eat the food that she prefers. T. at 37-38. Ana testified that she feels anxious around Father. T.

at 40. She alleged that Father told her that she could not use the land line phone to call Mother. T. at 38. Ana testified that Adriana (currently fourteen) also wants to make her own decisions about custody time with Father. T. at 61.On cross-examination, Ana admitted that she has a cell phone and that she was never told not to use the cell phone to call Mother. T. at 48-49. Ana also admitted that Mother gave her a new cell phone and that Ana has not given the number to Father. T. at 50. Ana further admitted that she did not list Father as a contact on the forms for the summer program. T. at 51.

Father testified that Ana refused to come to Father's home for her scheduled custody time with him on April 28, 2010. T. at 73. Despite Father's inquiries, Mother refused to tell Father where Ana was. Id. Father testified that he believed Mother was trying to cut Father out of Ana's life. T. at 87. As proof, Father pointed to the Vanderbilt program forms which did not list him either in the parent information section or as an emergency contact and to the fact that he was not given Ana's new cell phone number. T. at 95-96. Father testified that his home was appropriate and that the children have land lines and cell phones so that telephone contact is not an issue. T. at 99-100. Father denied berating, belittling, or lying to Ana. T. at 99, 100.

Father's testimony was corroborated by three sequestered witnesses: his wife, Karen Marrero; and two of her children, Eric Tagliaferre and Kaitlin Tagliaferre. All three testified that there is adequate food in the house, that land line and cell phones are available without restriction, and that they had never witnessed Father berate or belittle Ana. T. at 129, 131-133, 138-140, 152-53. Eric and Kaitlin, 16 year-old twins, admitted that they were not especially close with Ana, but both testified that they consider her a friend. T. at 145-46, 156-57.

Mother's argument at the close of evidence was that Ana was 17 years old and that her preference should effectively control. T. at 164. Father's argument was that Mother was alienating the children from Father. T. at 158. Father pointed to the earlier attempt by Mother to change custody of Alexandra (now nineteen) through the PFA when Alexandra was seventeen. T. at 158-59. Father was also concerned that granting Mother's motion would validate Mother's alienation strategy and set a precedent so that Mother would be encouraged to alienate the younger two children from Father as well. T. at 159.

Ana is seventeen. Her opinions are important to consider. Very important. But not dispositive. Disposition is for the Court. If it was not, there would be no need for the Court. The teenager would simply decide, and that would be that. This Court considered Ana's views. Indeed, it must be acknowledged frankly that, like an elephant, a seventeen year old generally sleeps where she wants to sleep. But not always. Not where there is an alienation pattern as in this case. Not where one parent has already alienated two children and is building precedent to alienate the other two children. This Court has watched the sad picture emerge for this family over a period of years. This Court does not choose to be accessory to the alienation or to ratify Mother's *fait d'accompli.* Ana deserves better. And, importantly, so do her younger brother and sister.

As a matter of law, Ana's opinions are not the only factor this Court must consider. *See*, *e.g.*, Witmayer v. Witmayer, 467 A.2d 371, 376 (Pa. Super. 1983) ("preference is one factor"). At a May 17, 2010 hearing on the issue of which summer program Ana would attend, Ana testified that the Calvin College program would be better for her and that she did not want to attend the Vanderbilt program. At that

hearing, this Court found Ana to be bright but immature, and found that Ana was choosing the Calvin College program to please Mother. This Court ordered Ana to attend the Vanderbilt University program because it was clearly more in line with Ana's best interests. At the July 19, 2010 hearing, Ana testified that she in fact was enjoying the Vanderbilt program and was happy with it. T. at 31. This turn of events illustrates that Ana does not always know what is in her own best interests, and that she attempts to align herself with what she perceives Mother's position to be in the ongoing hostilities.

Ana's testimony also underscores her immaturity. Ana's complaint about the food in Father's house was not that there was inadequate food, but that other children in the home ate the food that she picked out. In any event, the testimony of other witnesses did not support this claim. Ana also complained that she was cut off from Mother because Father would not allow her to use a land line to call Mother. Father denied this, and Ana later admitted that, in any event, she has a cell phone available for her use with no restrictions. Ana also stated that she would be closer to her younger sister and brother if she lived exclusively with Mother. It is doubtful at best that Ana would have a closer bond in that circumstance, given that her younger sister and brother spend half of their time at Father's home.

After considering the evidence of record, this Court agreed with Father that the pattern of alienation with the older children was troubling, and this Court found that Mother is alienating the children from Father. T. at 165-66. This Court also found Father credible in his testimony. Further, this Court found Eric and Kaitlin credible, based upon both their demeanor and the fact that they had no reason to lie about the conditions in their own home.

Given its finding that Ana is immature and that Mother is attempting to alienate the children from Father, this Court concluded that it was in Ana's best interests to continue to have ordered custody time with Father. This Court also ordered that Ana and Father were to engage in counseling pursuant to prior Order and recommendations of the parenting coordinator to allow Ana and Father to attempt to repair their relationship. In addition, this Court deliberated upon the impact on the younger children in the event that this Court allowed Ana to discontinue her custodial time with Father. This Court was concerned that allowing Ana to cut off contact with Father would only validate Mother's alienation strategy and encourage Mother to continue to alienate the younger children and weaken their relationships with Father as well. It is not in Ana's best interest for her to have no contact with her Father.

Mother's third allegation of error is that this Court failed to consider expert testimony. A trial court is not required to accept the conclusion of an expert testifying in a custody case, but the court must consider the testimony, and any independent decision by the trial court must be supported by evidence of record. M.A.T. v. G.S.T., 989 A.2d 11, 20 (Pa. Super. 2010).

Mother's expert was Carolyn Smith, a licensed counselor. Ms. Smith testified that she starting seeing Ana in November 2008, that they had a few appointments in late 2008 and early 2009 and one over the summer of 2009, and that they then started regular sessions in May 2010. T. at 6. There had been no recent appointments because Ana was participating in the Vanderbilt summer program. T. at 21. Ms. Smith testified that she had invited Father to participate in two recent sessions, but that he did not attend. T. at 16. Ms. Smith testified that she believed Ana did not want to live with

Father. T. at 17. On cross-examination, Ms. Smith testified that Father had attended a session in 2009 and that Ms. Smith had asked Father to leave. T. at 20-21. Ms. Smith indicated that she believed Father was not to be on site during sessions, but could not recall who had told her that. Id. Later, Ms. Smith said she recalled that the parenting coordinator had informed her of that. T. at 24.

Father testified that he was uncomfortable going to Ms. Smith for counseling with Ana because, when Ms. Smith asked Father to leave her office, she told him that the parenting coordinator told her Father was "dangerous." T. at 82. Father said Ms. Smith threatened to call the police if Father did not leave her waiting room. T. at 124. Father (who is a licensed physician) also testified that Ms. Smith was not responsive in 2009 when he tried to obtain information about Ana and Adriana's appointments. T. at 83, 123-24.

This Court did consider the testimony of Ms. Smith. However, Ms. Smith's opinion was based solely on Ana's stated wishes. Ms. Smith had little contact with Father, and that contact was not a pleasant interaction. Further, Ms. Smith had only intermittent contact with Ana from late 2008 through summer 2009 and had only seen Ana regularly for two to three months prior to the hearing. This Court found Ms. Smith's opinion to be essentially a confirmation or recapitulation of Ana's stated position.

Mother's fourth allegation of error is that this Court sanctioned Mother's counsel without basis to do so.

After a brief recess requested by Mother's attorney in the July 19 hearing, Father's attorney informed this Court on the reconvened record that Mother's attorney had made offensive and bullying remarks to the two 16-year-old witnesses who were

waiting in the hallway to testify. T. at 128. Both Eric and Kaitlin testified that Mother's attorney said to them, "You have a lot of nerve for being here" or "You have a lot of nerve being here." T. at 141, 149. Eric and Kaitlin were visibly shaken and upset. Mother's attorney admitted that she said they have a lot of nerve to be here. T. at 147. Mother's attorney, who speaks with a booming voice and has an imposing presence, claimed that she was speaking to Mother and that she did not intend the children to overhear. T. at 146-47. This Court questioned Kaitlin closely about whether Mother's attorney used the word "you" or the word "they." T. at 149. Kaitlin testified that it was "you." T. at 150. Kaitlin was so upset by counsel's accusation and counsel's intimidation that she was near tears in the courtroom.

This Court found counsel's conduct to be outrageous, particularly for an attorney who practices regularly in family court and who purports to be protecting the best interests of children. The statements were harmful and hurtful to the children. Given that, this Court ordered counsel to pay $500 to a charity designated by Eric and $500 to a charity designated by Kaitlin. This Court found that to be an appropriate sanction given the outrageousness of counsel's actions and the impact those actions had on two innocent teenagers who had already been subject to the trauma of having to come to Court to give testimony in their stepfather's and stepsister's custody case. This Court considered reporting Mother's counsel to the Disciplinary Board, but refrained from doing so.

A judge has substantial authority to "police" the proceedings in his or her own courtroom. ACE American Ins. Co. v. Underwriters at Lloyds & Co., 939 A.2d 935, 948 (Pa. Super. 2007). In fact, it is the duty of a judge to see that trials are conducted in an

orderly fashion and to stop misconduct immediately on his or her own motion. Id. Whether an attorney's actions cross the bounds of legitimate advocacy is an issue within the discretion of the trial court. Id.

In this case, this Court found the statements by Mother's counsel to two minor children to be patently outrageous. There was no purpose to the statements other than to cause harm and hurt to two children. This Court believed that the statements bordered on an attempt to intimidate the witnesses. This Court did not find Mother's counsel credible in her denial that the statements were intended for the children to hear. Even if Mother's counsel had been credible, it would have been highly inappropriate for the statement to be made within the children's hearing.

BY THE COURT:

A.J.

David N. Wecht
Administrative Judge, Family Division
Court of Common Pleas
Fifth Judicial District of Pennsylvania

Jalal FATEMI, Appellant, v. Linda L. Brodbeck FATEMI now by Change of Name Linda L. Brodbeck

No. 02814 Philadelphia 1986

Superior Court of Pennsylvania

371 Pa. Super. 101*; *537 A.2d 840*; *1988 Pa. Super. LEXIS 284

September 21, 1987, Argued
February 12, 1988, Filed

PRIOR HISTORY: [***1] APPEAL FROM THE ORDER ENTERED SEPTEMBER 19, 1986 IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY, CIVIL NO. 2883-C OF 1980.

DISPOSITION: Affirmed, as modified.

COUNSEL: Thomas S. Cometa, Wilkes-Barre, for appellant.

Anthony J. Martino, Bangor, for appellee.

JUDGES: Cirillo, President Judge, and Tamilia and Beck, JJ. Tamilia, J., concurs with an opinion.

OPINION BY: CIRILLO

OPINION

[*105] [**842] This is an appeal from various orders entered in the Court of Common Pleas, Luzerne County following hearings on an emergency contempt petition. We affirm the court's order, as modified.

Appellant, Dr. Jalal Fatemi, is the natural father of two young boys, who are the subject of the instant custody dispute. Appellee, Linda Brodbeck, formerly Mrs. Fatemi, is the natural mother of the children.

Pursuant to an order dated June 24, 1986, Linda Brodbeck was granted partial custody of the children, consisting of every other weekend, five weeks during the summer, and various holidays. The order contained various other provisions, including the following: "As security to insure compliance with this Order, the deeds presently being held by this Court, and the lis pendens filed against such real estate [appellant's], shall continue in full force and [***2] effect."

On one weekend when the children were to be with their mother, appellee was unable to determine their whereabouts. Appellee subsequently filed a petition to hold appellant in contempt. A rule to show cause was issued on September 5, 1986. The rule ordered appellant to show cause why he should not be held in contempt, and why the children should not be removed from his custody and placed in the custody of their natural mother. Appellant was ordered to appear for the hearing set for September 8, 1986. Service of the petition and rule was made upon counsel of [*106] record. Dr. Fatemi did not appear for the September 8 hearing, but was represented by counsel. At the hearing, Dr. Fatemi's counsel pointed out that it was his understanding that the lis pendens was against Dr. Fatemi's bare tract of land, and not against his house. Counsel also claimed that appellant had not been properly served pursuant to the applicable rules of court. The court subsequently granted appellee's request that the court issue a lis pendens "against the home as security for Dr. Fatemi under the court rules." The court then instructed counsel to take the appropriate steps to record this fact. [***3] The court scheduled another hearing, and ordered Dr. Fatemi to appear. Counsel informed the court that appellant's last known address was in Birmingham, Alabama.

The second hearing was held on September 19, 1986. Dr. Fatemi again did not appear. Counsel informed the court that Dr. Fatemi had fled the jurisdiction for his native country, Iran, and had taken the children with him. Counsel also informed the court that he had verbally advised Dr. Fatemi on two occasions of the proceedings to be held on September 19. Thereafter, appellant's counsel again objected to the notice procedure. Despite these objections, the court proceeded to hear the merits of the case. At the conclusion of the hearing the court

issued several orders, from which appellant takes this appeal.

Appellant raises the following five issues on appeal:

> (1) Did the hearing judge abuse his discretion or commit an error of law when he issued a number of court orders against appellant who had not been served as required by *Pa.R.C.P. 1915.12(a)*, *(b)*, *(c)*, and *(d)*;
>
> (2) Did the hearing judge abuse his discretion or commit an error of law when he held appellant in criminal contempt when appellant, at no time, appeared [***4] personally in or about the court;
>
> (3) Did the hearing judge abuse his discretion or commit an error of law when he fined appellant the sum of $ 25,000, when appellant, at no time, was served in conformity with the applicable rules of procedure;
>
> [*107] (4) Did the hearing judge abuse his discretion or commit an error of law when he ordered that a lis pendens be placed against all of appellant's real estate which included his home which he had listed with a Realtor; and,
>
> (5) Did the hearing judge abuse his discretion or commit an error of law when he changed court ordered legal custody from appellant to appellee, without conducting a hearing with appellant present [**843] to determine whether or not the change in custody of the children would be in their best interests and permanent welfare.

We observe at the outset that this court could properly quash this appeal. We have previously held that where a parent has violated a custody order and the contempt is found to be flagrant, appeal may be denied. In *Commonwealth ex rel. Beemer v. Beemer, 200 Pa.Super. 103, 188 A.2d 475 (1962)*, this court quashed an appeal where the mother violated the custody order, [***5] was adjudged to be in contempt of court, and then appealed. We stated there:

> The question raised by this motion to quash is of great importance. There are a rash of modern instances where court orders are disobeyed with impunity and respect for the law and the courts thereby weakened. It seems, therefore, that it is the duty of the appellate courts to see to it that every assistance is extended to the courts of the Commonwealth so that orders are meticulously carried out as otherwise the dignity of the judiciary, the majesty of the law and its enforcement are clearly undermined.

Id., 200 Pa.Superior Ct. at 106, 188 A.2d at 476; *see also National Union of Marine Cooks v. Arnold, 348 U.S. 37, 75 S.Ct. 92, 99 L.Ed. 46 (1954)* (denial to one who has disobeyed a trial court's order of his statutory right to appeal violates neither the Fourteenth Amendment's guarantee of equal protection of the laws nor its guarantee of due process of law).

We acknowledge the familiar tone of the facts this case. For this reason, and for the edification of the bench and bar, we address the merits of this case.

[*108] [***6] I

With respect to Dr. Fatemi's first argument, we point out that, contrary to his contention, the notice of the order to appear does comply with the form set forth in *Pa.R.C.P. 1915.12(a)*. In addition, appellee's petition does allege facts, pursuant to *Pa.R.C.P. 1915.12(b)*, which constitute willful failure to comply with the custody order. Appellant argues that since the custody order mentions nothing about obtaining the court's permission to change his (and the children's) residence, he is not in contempt, and therefore appellee has not complied with *Rule 1915.12(b)*. This argument, however, ignores the language and purpose of the custody order.

The order provides that the mother has partial custody according to a specific schedule. In addition, the order states: "Neither party . . . shall engage in any conduct which would serve to undermine the relationship of the children with either parent." Appellant's decision to retreat to Iran has not only violated the custody schedule, but has blatantly interfered with what the order attempted to preserve -- the children's relationships with *each* parent. Appellant's actions have flagrantly undermined the mother/children relationship.

[***7] Dr. Fatemi also claims appellee failed to comply with *Pa.R.C.P. 1915.12(c)*. *Rule 1915.12(c)* provides:

> The petition shall be served upon the respondent by personal service or regular mail. . . . If the respondent fails to appear [at the hearing], the court shall continue the hearing and may order personal ser-

> vice of the petition and notice of a new hearing date by the sheriff or may issue a bench warrant for production of the respondent in court and not for imprisonment.

Appellant's counsel objected several times to the court's decision to proceed with the hearing despite the language in *Rule 1915.12(c)* which provides that the hearing be continued if respondent fails to appear. At the conclusion of the hearing, the court ordered:

> [*109] There will be an additional hearing on the motion and the rule, and *Dr. Fatemi is ordered to appear in Courtroom No. 4, Luzerne County Courthouse, at Friday, September 19, 1986, at 10:00 a.m.*, . . . to receive further evidence on the emergency petition of Linda L. Brodbeck Fatemi, . . . and the Rule to Show Cause issued on said petition [which states] as follows: Why he, Dr. Fatemi, should not be held in contempt of the Court Order [***8] [**844] of June 24th, 1986; further Rule to Show Cause why an additional weekend of partial custody should not be granted to the Petitioner; and, further a Rule to Show Cause why the children should not be removed from the custody of the father and placed in the custody of their natural mother. [Emphasis added]

When questioned by appellant's counsel as to how service was to be made, the court stated:

> Counsel for Dr. Fatemi shall notify him verbally and in writing of the hearing. Counsel for the mother shall notify the Defendant by regular mail and also by certified and/or registered mail, return receipt requested, and also shall deliver to the Sheriff of Luzerne County, who shall deliver to the appropriate sheriff or other proper authority for serving legal documents in Birmingham, Alabama, a notice of the hearing including purposes set forth herein[.]

The court further instructed appellee's counsel to prepare the notice pursuant to *Rule 1915.12* so as to avoid further technical problems.

It appears that the technical requirements of *Rule 1915.12* were in fact not met inasmuch as the rule and petition were originally served upon *appellant's attorneys* by regular mail, and not served [***9] upon appellant himself. Obviously, this was done because appellant's whereabouts were unknown. In addition, we note that Dr. Fatemi received actual notice of the September 8 hearing on September 5 by way of a telephone conversation with his attorney. During that conversation, Dr. Fatemi told counsel that he would let him know whether he would be at the hearing.

[*110] Based on the unusual circumstances of the case, the court allowed the proceeding to continue in an effort to ascertain Dr. Fatemi's whereabouts and to formulate a proper method of service for the continued hearing, scheduled for September 19. In particular, the court noted its concern with the welfare of the children.

We remind appellant that our rules of procedure are to be liberally construed so as to secure a "just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." *Pa.R.C.P. 126*. Under the circumstances presented in this case, we are unable to find that the trial court committed an error of law [***10] or abused its discretion in proceeding with the hearing. Moreover, in light of appellant's actual notice of the hearing, and the court's scheduling of a second hearing, we are unable to conclude that Dr. Fatemi's "substantial rights" were affected in any way.

Dr. Fatemi also claims the trial court's order failed to comply with *Pa.R.C.P. 1915.12(d)*. *Rule 1915.12(d)* provides: "After hearing, an order committing a respondent to jail for contempt of a custody, partial custody or visitation order shall specify the condition which must be fulfilled to obtain release of the respondent." This claim is meritless. The court's order clearly stated: "The condition of release from imprisonment, is that he shall deliver the children to the mother."

II

As noted above, Dr. Fatemi failed to appear at the September 19 hearing, contrary to the court's order of September 8, 1986. The court found Dr. Fatemi had "willfully, deliberately, flagrantly, and by conduct which the Court under the circumstances considers outrageous, failed to appear at [the] hearing, despite numerous notices to him of the time, place, and date and purpose of the hearing." On appellee's motion, a bench warrant for the

arrest [***11] of Dr. [*111] Fatemi was issued pursuant to *Pa.R.C.P. 1910.13*. The court further ordered that appellant be committed to the Luzerne County Prison upon his apprehension, and "when he is committed, the Court to be notified, and another hearing will be set. The condition of release from imprisonment, is that he shall deliver the children to the mother."

The transcript of the proceeding reveals that the court was, to some degree, uncertain [**845] as to the characterization of the contempt order, noting finally that it was criminal contempt. Appellant argues on appeal that since he did not personally appear before the court at any time, it was error for the court to find him in criminal contempt.

The Pennsylvania Supreme Court has comprehensively explained the difference between civil and criminal contempt in the case of *In re Martorano, 464 Pa. 66, 346 A.2d 22 (1975)*. The distinction between civil and criminal contempt is not determined by any particular act; rather, it is determined by the dominant purpose of the judicial response to contumacious behavior. *Id., 464 Pa. at 77-78, 346 A.2d at 27-28*. If the dominant purpose [***12] of the court is to prospectively coerce the contemnor to comply with an order of the court, the contempt is civil. If, however, "the dominant purpose of the court is to punish the contemnor for disobedience of the court's order . . . the adjudication of contempt is criminal." *Id., 464 Pa. at 78, 346 A.2d at 28*.

When the court's dominant purpose is to coerce, the appropriate civil contempt penalty is "a conditional or indeterminate sentence of which the contemnor may relieve himself by obeying the court's order, while a criminal adjudication of contempt punishes with a certain term of imprisonment or a fine which the contemnor is powerless to escape by compliance." *Id., 464 Pa. at 79, 346 A.2d at 28* (citing *Shillitani v. United States, 384 U.S. 364, 368-70, 86 S.Ct. 1531, 1534-35, 16 L.Ed.2d 622 (1966))*. The distinction exists solely to determine what procedural rights the contemnor has and what penalties are available for the court to impose. Moreover, "a contemnor who will be sentenced to a determinate term of imprisonment or a fixed fine, which [*112] he is powerless [***13] to escape by purging himself of his contempt, is entitled to the essential procedural safeguards that attend criminal proceedings generally." *Martorano, 464 Pa. at 80, 346 A.2d at 29*; *see also Barrett v. Barrett, 470 Pa. 253, 262, 368 A.2d 616, 620 (1977)* (crucial question to determine civil contempt is whether one has present ability to comply with conditions set by court to purge himself of contempt). In addition, our supreme court has set forth five factors whose presence often indicates civil contempt: (1) where the complainant is a private person as opposed to the government; (2) where the proceeding is a continuation of an original injunction as opposed to a separate and independent action; (3) where holding the defendant in contempt provides relief to a private party; (4) where the complainant primarily benefits from the relief requested; and (5) "where the acts of contempt complained of are primarily civil in character and do not of themselves constitute crimes or conduct by the defendant so contumelious that the court is impelled to act on its own motion." *Knaus v. Knaus, 387 Pa. 370, 378, 127 A.2d 669, 673 (1956).* [***14] The existence of these factors, however, is not dispositive. "Even where the same facts might give rise to criminal as well as civil contempt, each has its own distinct procedural rights; the two may not be casually commingled." *Barrett, 470 Pa. at 253, 368 A.2d at 619*.

Plainly, it may be argued that the facts of the case before us might have given rise to either criminal or civil contempt. The distinguishing factor here is that Dr. Fatemi holds "the key to the jailhouse door." *Bruzzi v. Bruzzi, 332 Pa.Super. 346, 481 A.2d 648 (1984)*; *see also Brocker v. Brocker, 429 Pa. 513, 241 A.2d 336*, (1968), *cert. denied*, *393 U.S. 1081, 89 S.Ct. 857, 21 L.Ed.2d 773 (1969)* (where the act of contempt complained of is a refusal to do some act ordered primarily for the benefit of a private party, proceedings to enforce compliance with a decree of court are civil in nature). Our review of the proceedings reveals that the purpose of the order to some extent was to vindicate the authority and dignity of the court. However, the dominant purpose was to coerce [***15] appellant into abiding by the order [*113] and releasing the children to their mother. We thus conclude the court's label of criminal contempt was inappropriate where the court was conditioning punitive measures (commitment to county prison) on appellant's failure to comply with the court's orders (release of children to appellee). *See Neshaminy Water Resources Auth. v. DelAware Unlimited,* [**846] *Inc., 332 Pa.Super. 461, 481 A.2d 879 (1984)* (confinement for civil contempt must impose a condition that the contemnor is capable of performing which has the effect of purging the contemnor of contempt). We therefore modify the trial court's order to correct this error. *See 42 Pa.C.S. § 706* (appellate court may modify any order brought before it for review).

III

Appellant also claims on appeal that the court erred or abused its discretion in fining him $ 25,000 when he was not served in conformity with the applicable rules of court. The order states:

> The Court further imposes a fine of $ 25,000.00 on Jalal Fatemi and that fund to be used for the purpose of locating the children and Jalal Fatemi and returning all of them to the jurisdiction of this Court.

> [***16] Any unused portion of that sum shall go equally to each of the children and placed in an appropriate account, for their general welfare, including, but not limited to food, clothing, shelter, education, medical attention or other necessities of life.

Each court is the exclusive judge of contempts against its process, and on appeal its action will be reversed only when a plain abuse of discretion occurs. *Id., 332 Pa.Superior Ct. at 469, 481 A.2d at 883*. The trial judge entered this order at the conclusion of the second hearing on September 19. Our discussion in Part I above reveals that Dr. Fatemi was in fact properly served with notice of this second hearing according to the applicable rules of court. In addition, we point out that a court may impose an unconditional fine upon the contemnor in order to encourage [*114] future compliance for the benefit of the injured party. *Schnabel Assoc. v. Building & Constr. Trades Council, 338 Pa.Super. 376, 487 A.2d 1327 (1985)*; *see also Brocker v. Brocker, 429 Pa. 513, 241 A.2d 336 (1968)*, *cert. denied*, *393 U.S. 1081, 89 S.Ct. 857, 21 L.Ed.2d 773 (1968)* [***17] (a court may, in a proceeding for civil contempt, impose the remedial punishment of a fine payable to an aggrieved litigant as compensation for the special damage he or she may have sustained by reason of the contumacious conduct of the offender). Accordingly, we find no abuse of discretion.

IV

Appellant next claims that the court erred or abused its discretion in ordering a lis pendens be placed against his home. A lis pendens does not establish an actual lien on the property. What it does is give notice to third persons that any interest they may acquire in the property pending the litigation will be subject to the result of the action. *See* Goodrich-Amram 2d § 1504(a). Dr. Fatemi claims the court had no authority to proceed without him and without giving him an opportunity to be heard. This argument is meritless. Appellant was given an opportunity to be heard but made himself unavailable to the court and disregarded the court's order to appear. We find the court's order of special relief was appropriate under the circumstances. *See Pa.R.C.P. 1915.13*.

V

Finally, Dr. Fatemi claims the hearing court erred or abused its discretion in transferring legal custody of the [***18] children to appellee without conducting a hearing with appellant present to determine whether change in custody was in the best interests of the children. Although seemingly lost in this tangle of contempt and procedural discussion, the paramount consideration in this case, as in all child custody disputes, is the best interests and welfare of the children. *Albright v. Commonwealth ex rel. Fetters, 491 Pa. 320,* [*115] *421 A.2d 157 (1980)*; *Burke v. Pope, 366 Pa.Super. 488, 531 A.2d 782 (1987)*.

The scope of review in a child custody case is broad and, though it requires this court to accept the trial court's findings of fact unless they are unsupported by the evidence, it allows the reviewing court to draw its own inferences and deductions from the facts as the trial court has found them. *Commonwealth ex rel. Spriggs v. Carson, 470 Pa. 290, 295, 368 A.2d 635, 637 (1977)*; *see also In re Donna W., 325 Pa.Super. 39,* [**847] *472 A.2d 635 (1984)* (en banc) (broad scope of review in custody case, as distinguished from abuse of discretion standard, is essential if the [***19] appellate court is to fulfill its responsibility to children).

In *Commonwealth ex rel. Robinson v. Robinson, 505 Pa. 226, 478 A.2d 800 (1984)*, our supreme court directed that appellate review in custody cases be confined to the following principles:

> [O]ur law has long recognized that the scope of review of an appellate court reviewing a custody matter is of the broadest type . . . Thus, an appellate court is not bound by deductions or inferences made by a trial court from the facts found; . . . nor must a reviewing court accept a finding which has no competent evidence to support it . . . However . . . this broader power of review was never intended to mean that an appelate court is free to nullify the factfinding function of the hearing judge . . . [but, instead, is to remain] within the proper bounds of its review and [base a decision] upon its own independent deductions and inferences from the facts as found by the hearing judge.

Robinson, 505 Pa. at 236, 478 A.2d at 805-06 (citations omitted).

The *Robinson* court concluded that appellate review does require this court to determine whether the trial judge's [***20] conclusions are supported by the factual findings, but warned that this court may not interfere

with those conclusions "*unless they are unreasonable in light of the trial court's factual findings. Bohachevsky v. Sembrot, 368 Pa. 228,* [*116] *81 A.2d 554 (1951)*; and, thus, represent a gross abuse of discretion, *Carson*." *Id., 505 Pa. at 237, 478 A.2d at 806*.

We are somewhat hindered at the outset without the benefit of a trial court opinion. However, under the circumstances of this case, remand for the filing of an opinion would be both inappropriate and meaningless. We find the record otherwise sufficient to enable us to render effective appellate review. *See Commonwealth ex rel. Husack v. Husack, 273 Pa.Super. 192, 417 A.2d 233 (1979)*; *see also Pa.R.A.P. 1925(a)* ("if the reasons for the order do not already appear of record," the trial judge is required to "file of record at least a brief statement, in the form of an opinion, of the reasons for the order . . . or shall specify in writing the place in the record where such reasons may be found.").

As we have noted above, this [***21] court is bound to accept the trial court's findings of fact, providing, of course, that these findings are supported by the evidence. *Robinson, 505 Pa. at 236-37, 478 A.2d at 806*; *see also In re Donna W., 325 Pa. Super. at 39-41, 472 A.2d at 635*. The court found that taking the children to Iran, "with such turmoil, unrest, civil disorder, military acts of warfare, and such, . . . evidenced a total disregard for the welfare of the children" and placed their lives in danger. The court took judicial notice of the fact that Iran and Iraq have been in open conflict for many years. Generally, matters of history, if sufficiently notorious to be the subject of general knowledge, will be judicially noticed. *See In re Estate of Belemecich, 411 Pa. 506, 192 A.2d 740 (1963)*, *reversed on other grounds, Consul General of Yugoslavia at Pittsburgh v. Pennsylvania, 375 U.S. 395, 84 S.Ct. 452, 11 L.Ed.2d 411 (1964)*.

The court also found Dr. Fatemi's actions indicated a "personal and selfish motive to satisfy his own desires contrary to the welfare of the children," [***22] and that his conduct clearly displayed a desire to have the children deprived of the care, comfort, love and affection of their [*117] mother. Moreover, the court found that Dr. Fatemi's claim that he moved with the children to Alabama for the purpose of locating himself at an appropriate hospital "was obviously a fictitious excuse" resulting not from his effort to improve his surgical skills, but from his effort to destroy the mother/children relationship.

Based on our review, we conclude the trial court's findings are fully supported by the evidence in the record. The fact that these children are the focus of adult conflict is extremely troublesome, and this situation is regrettable and not easily resolved. However, our concern here today [**848] is not with conflict between parents or countries, but with the safety and welfare of these children. Their need for continuity of relationships, surroundings and environmental influence is essential to their normal growth and development. *See* J. Goldstein, A. Freud, & A. Solnit, *Beyond the Best Interests of the Child* (1973). It is important in a child's life that he or she have a "stable relationship with an established parental [***23] figure and a known physical environment." *Gerber v. Gerber, 337 Pa.Super. 580, 586, 487 A.2d 413, 416 (1985)*.

Based on our review, we conclude that the children's safety and stability justifies an order transferring custody to the mother, with the father's visitation schedule to be determined when he appears before the court. An arrangement that maintains as full a relationship as possible between the children and *both* parents, or at least allows for such, is in the children's best interests. Dr. Fatemi cannot effectively eliminate the mother from the children's lives.

We recognize the possibility that our decision today may further frustrate Dr. Fatemi and dissuade him from returning to the United States. We remind him, however, and appellee, that the children are the victims here, and will continue to be for as long as this conflict endures.

Affirmed, as modified.

CONCUR BY: TAMILIA

CONCUR

[*118] TAMILIA, Judge, concurring:

I concur in the result. While I agree with the majority's disposition, I take issue with its reliance on *In re Donna W., 325 Pa.Super. 37, 472 A.2d 635 (1984)* (broad scope of review in custody case as distinguished [***24] from abuse of discretion standard is essential if the appellate court is to fill its responsibility to children.) I believe the scope of review applied in *Donna W.* and its genre have been repudiated by the Pennsylvania Supreme Court in *Robinson v. Robinson, 505 Pa. 226, 478 A.2d 800 (1984)* and *Lombardo v. Lombardo, 515 Pa. 139, 527 A.2d 525 (1987). See Fatemi v. Fatemi, 339 Pa.Super. 590, 489 A.2d 798 (1985)* (Concurring and Dissenting Opinion by Tamilia, J.).

I would also hold that snatching of his child, in derogation of a custody Order, is prohibited under the Uniform Child Custody Jurisdiction Act, *42 Pa.C.S.A. § 5341 et seq.*, and the Parental Kidnapping Prevention Act, *28 U.S.C. § 1738A*, and appellant is technically a fugitive. This is particularly so in view of the fact that by violating the conditions of the custody Order, appellant is subject to prosecution for violating *18 Pa.C.S. § 2904*, Interfer-

ence with Custody of Children. As such, he should have no right to appeal, as would be our finding in a criminal case.

To permit him to appeal and for the Court to consider the [***25] case on the merits is to give him a windfall. Under these circumstances, he need not abide by the law and face the court in an open and fair adversary proceeding while maintaining the benefit of a full appellate review, which might resolve some procedural defect in his favor relieving him of the sanctions imposed and ignoring his flouting of the law.

This is particularly of great concern to this Court as the issues relating to custody and partial custody were fully litigated in the trial court and in this Court on appeal. *See Fatemi, supra.* In the earlier proceeding, the mother had appealed a custody Order in favor of the father and for less restrictive partial custody. While the majority of the panel directed a lessening of the partial custody restrictions, the Order in favor of appellant prevailed. This was in spite of [*119] the fact that while the mother had custody, the father had taken the children to Iran from April 1980 to December 1980, without informing the mother. The children were returned only after the mother met with appellant in Switzerland and agreed to give him full custody with daily visitation rights to the mother in the [***26] father's home. The appellant appears determined to be a law unto himself in regard to the custody of his children and should be dealt with accordingly.

I have no quarrel with the result achieved by the majority but believe the [**849] message would be stronger to appellant and his ilk that by child snatching and becoming a fugitive, they forfeit the benefits of the appellate procedure and have waived any right to appeal. A party, who absconds to a foreign country with children who are totally beyond the reach of American justice and who are impervious to diplomatic pressures, should not also have the succor of appellate review. Denying appeal fixes the judgment of the lower court and provides the only remedy available to the wronged person, that is a climate for negotiation whereby to gain relief from heavy sanctions and to regain the benefits of our society, he must repudiate his vicious and destructive self-help approach and accede to reasonable and acceptable standards of conduct.

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 23 Pa.C.S.A. Domestic Relations (Refs & Annos)
Part V. Support, Property and Contracts
Chapter 43. Support Matters Generally
Subchapter C. Proceedings Generally

23 Pa.C.S.A. § 4344

§ 4344. Contempt for failure of obligor to appear

Currentness

A person who willfully fails or refuses to appear in response to a duly served order or other process under this chapter may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:

(1) Imprisonment for a period not to exceed six months.

(2) A fine not to exceed $500.

(3) Probation for a period not to exceed six months.

Credits
1985, Oct. 30, P.L. 264, No. 66, § 1, effective in 90 days.

Notes of Decisions (5)

23 Pa.C.S.A. § 4344, PA ST 23 Pa.C.S.A. § 4344
Current through 2012 Regular Session Act 150 and 153 to 169, 171 to 180, 183 to 187, 189 to 191, 193 to 206 and 208 to 211

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Title 23 Pa.C.S.A. Domestic Relations (Refs & Annos)
Part V. Support, Property and Contracts
Chapter 43. Support Matters Generally
Subchapter C. Proceedings Generally

23 Pa.C.S.A. § 4345

§ 4345. Contempt for noncompliance with support order

Currentness

(a) General rule.--A person who willfully fails to comply with any order under this chapter, except an order subject to section 4344 (relating to contempt for failure of obligor to appear), may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:

(1) Imprisonment for a period not to exceed six months.

(2) A fine not to exceed $1,000.

(3) Probation for a period not to exceed one year.

(b) Condition for release.--An order committing a defendant to jail under this section shall specify the condition the fulfillment of which will result in the release of the obligor.

Credits
1985, Oct. 30, P.L. 264, No. 66, § 1, effective in 90 days. Amended 1996, Oct. 16, P.L. 706, No. 124, § 6, effective in 60 days.

Notes of Decisions (55)

23 Pa.C.S.A. § 4345, PA ST 23 Pa.C.S.A. § 4345
Current through 2012 Regular Session Act 150 and 153 to 169, 171 to 180, 183 to 187, 189 to 191, 193 to 206 and 208 to 211

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* January 9, 2013 Annotation Service *

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 23. DOMESTIC RELATIONS
PART V. SUPPORT, PROPERTY AND CONTRACTS
CHAPTER 43. SUPPORT MATTERS GENERALLY
SUBCHAPTER C. PROCEEDINGS GENERALLY

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23 Pa.C.S. § 4355 (2012)

§ 4355. Denial or suspension of licenses.

(a) *General rule.* --Except as provided in subsection (d.1), where the domestic relations section or the department has been unable to attach the income of an obligor and the obligor owes support in an amount equal to or greater than three months of the monthly support obligation or where an individual has failed to comply with a visitation or partial custody order pursuant to section 4346 (relating to contempt for noncompliance with visitation or partial custody order) or an individual has failed, after appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings, the court, the domestic relations section or the department shall issue an order directing any licensing authority to:

(1) prohibit the issuance or renewal of a license of the obligor or other individual; or

(2) require the suspension of the license of the obligor or other individual.

(b) *Notice to obligor or other individual.*

(1) Prior to the issuance of an order to suspend, nonrenew or deny a license, the obligor or other individual shall be given advance notice. The notice shall specify:

(i) The amount of arrears owed, if applicable.

(ii) How, when and where the notice can be contested.

(iii) That the grounds for contesting the notice shall be limited to mistakes of fact. Mistakes of fact shall be limited to errors in the amount of arrears owed or mistaken identity of the obligor.

(iv) That an order to the licensing authority to automatically suspend, nonrenew or deny the license will occur in all cases 30 days after issuance of the notice unless the arrearage is paid, a periodic payment schedule is approved by the court or the individual is excused from the failure to comply with the warrant or subpoena.

(2) The Supreme Court shall by general rule provide a procedure for the court or disciplinary board to deny, suspend or not renew the license of an attorney who owes past due support in a manner comparable to the procedures set forth in this section.

(c) *Order.*

(1) Thirty days after the issuance of the notice, if the obligor has not paid the arrearage, entered into a court-approved periodic payment schedule or, if applicable, the obligor or other individual has not been excused from complying with the warrant or subpoena, the court, the domestic relations section or department shall direct or cause an order to be issued to the licensing authority to suspend or deny the issuance or renewal of a license. Upon receipt, the licensing authority shall immediately comply with the order or directive. The licensing authority shall have no authority to stay implementation of the order or to hold a hearing except in cases of mistaken identity.

(2) An order providing for a periodic payment schedule shall also provide that failure to comply with the schedule shall result in the immediate suspension, nonrenewal or denial of the obligor's license.

(3) Subject to section 4377(c) (relating to appeals), to contest the order, the obligor or other individual must appear before the domestic relations section not later than ten days after issuance of the order. The grounds for contesting shall be limited to mistakes of fact. If, as determined by the domestic relations section, a mistake of fact has occurred, the action shall be modified accordingly within ten days.

(d) *Reinstatement or issuance of license.* --Where an order or directive has been issued pursuant to subsection (c) and the obligor has satisfied the arrearage or entered into a court- approved payment plan or, if applicable, the obligor or other individual has been excused from the failure to comply with the subpoena or warrant, the court, the domestic relations section or the department shall order or direct the licensing authority to reinstate or issue the license to the obligor or other individual. Upon receipt of the order, the licensing authority shall reinstate or issue the license immediately, provided that the obligor or other individual meets any and all other requirements for issuance or reinstatement.

(d.1) *Special procedures for operating privilege.*

(1) Where the domestic relations section or the department has been unable to attach the income of an obligor and the obligor owes support in an amount equal to or greater than three months of the monthly support obligation or where an individual has failed, after appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings, the court, the domestic relations section or the department may issue an order directing the Department of Transportation to:

(i) prohibit the issuance or renewal of a license of the obligor or other individual; or

(ii) require the suspension of the license of the obligor or other individual.

(2) Prior to the issuance of an order to suspend, nonrenew or deny a license, the obligor or other individual shall be given advance notice. The notice shall specify:

(i) The amount of arrears owed, if applicable.

(ii) How, when and where the notice can be contested.

(iii) That the grounds for contesting the notice shall be limited to mistakes of fact. Mistakes of fact shall be limited to errors in the amount of arrears owed or mistaken identity of the obligor.

(iv) That an order to the Department of Transportation to automatically suspend, nonrenew or deny the license will occur in all cases 30 days after issuance of the notice unless the arrearage is paid, a periodic payment schedule is approved by the court or the individual is excused from the failure to comply with the warrant or subpoena.

(3) Any order issued to the Department of Transportation pursuant to this section shall be issued as agreed upon by the department and the Department of Transportation. The order may be transmitted electronically or by other methods.

(4) Upon receipt of an order or directive from a court, the domestic relations section or the department authorizing the Department of Transportation to suspend the operating privilege of an obligor or other individual, the Department of Transportation shall immediately suspend the operating privilege of that obligor or other individual. Upon receipt of an order from the court or the domestic relations section or a directive from the department authorizing the Department of Transportation to restore the operating privilege of an obligor or other individual, the Department of Transportation shall immediately restore the operating privilege of that obligor or other individual if the person complies with the provisions of *75 Pa.C.S. § 1960* (relating to reinstatement of operating privilege or vehicle registration).

(5) An insurer may not increase premiums, impose a surcharge or rate penalty, make a driver record point assignment for automobile insurance or cancel or refuse to renew an automobile insurance policy on account of a suspension under this section.

(6) There shall be no right to appeal from a suspension under this section pursuant to *75 Pa.C.S. § 1550* (relating to judicial review). Subject to section 4377(c) (relating to power to expedite support cases), the sole remedy shall be to petition the court which entered the underlying support order resulting in the suspension, revocation or refusal to issue or renew the license.

(d.2) *Special procedures for recreational licenses issued by Pennsylvania Game Commission.*

(1) Where the domestic relations section or the department has been unable to attach the income of an obligor and the obligor owes support in an amount equal to or greater than three months of the monthly support obligation or where an individual has failed, after appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings, the court may issue an order directing the Pennsylvania Game Commission to prohibit the issuance or renewal of a recreational license of the obligor or other individual or to require the suspension of the recreational license of the obligor or other individual.

(2) Procedures for notice of suspension, nonrenewal or denial, issuance of the appropriate order and reinstatement of a recreational license shall be in accordance with subsections (b), (c) and (d).

(3) Upon receipt of an order from a court requiring the Pennsylvania Game Commission to refuse to issue or renew or to revoke or suspend the recreational license of the obligor or other individual, the Pennsylvania Game Commission shall immediately comply with the order. Upon receipt of an order from the court authorizing the Pennsylvania Game Commission to restore the recreational license of an obligor or other individual, the Pennsylvania Game Commission shall immediately restore the recreational license of the obligor or other individual if the obligor or other individual complies with the provisions of 34 Pa.C.S. Ch. 27 (relating to hunting and furtaking licenses).

(4) There shall be no right to appeal from a refusal to issue or renew or from a revocation or suspension under this section. The sole remedy shall be to petition the court which entered the underlying support order which resulted in the revocation, suspension or refusal to issue or renew the recreational license.

(d.3) *Special procedures for licenses issued by Pennsylvania Fish and Boat Commission.*

(1) Where the domestic relations section or the department has been unable to attach the income of an obligor and the obligor owes support in an amount equal to or greater than three months of the monthly support obligation or where an individual has failed, after appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings, the court may issue an order directing the Pennsylvania Fish and Boat Commission to prohibit the issuance or renewal of a recreational license of the obligor or other individual or to require the suspension of the recreational license of the obligor or other individual.

(2) Procedures for notice of suspension, nonrenewal or denial, issuance of the appropriate order and reinstatement of a recreational license shall be in accordance with subsections (b), (c) and (d).

(3) Upon receipt of an order from a court requiring the Pennsylvania Fish and Boat Commission to refuse to issue or renew or to revoke or suspend the recreational license of the obligor or other individual, the Pennsylvania Fish and Boat Commission shall immediately comply with the order. Upon receipt of an order from the court authorizing the Pennsylvania Fish and Boat Commission to restore the recreational license of an obligor or other individual, the Pennsylvania Fish and Boat Commission shall immediately restore the recreational license of the obligor or other individual if the obligor or other individual complies with the provisions of 30 Pa.C.S. Ch. 27 (relating to fishing licenses).

(4) There shall be no right to appeal from a refusal to issue or renew or from a revocation or suspension under this section. The sole remedy shall be to petition the court which entered the underlying support order which resulted in the revocation, suspension or refusal to issue or renew the license.

(d.4) *Implementation.* --The department may promulgate regulations and issue directives to coordinate and carry out the provisions of this section.

(d.5) *Construction.* --This section shall supersede any conflicting provision in any other State law unless the provision specifically references this section and provides to the contrary.

(d.6) *Immunity.* --The court, the domestic relations section, the Department of Public Welfare, the Department of Transportation, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission or any employee of any of these entities or any person appointed by the Pennsylvania Game Commission or the Pennsylvania Fish and Boat Commission to issue licenses and permits pursuant to the applicable provisions of 30 Pa.C.S. (relating to fish) and 34 Pa.C.S. (relating to game) shall not be subject to civil or criminal liability for carrying out their duties under this section.

(e) *Definitions.* --As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"License." --A license, certificate, permit or other authorization to:

(1) engage in a profession, trade or business in this Commonwealth or a political subdivision or agency thereof; or

(2) operate a motor vehicle for personal or commercial purposes.

"Licensing authority." --Any entity of the Commonwealth, political subdivision or agency thereof which issues a license.

"Operating privilege." --The privilege to apply for and obtain a license to use as well as the privilege to use a vehicle on a highway as authorized under Title 75 (relating to vehicles).

"Recreational license." --A hunting or fishing license.

HISTORY: Act 1993-62 (H.B. 1340), P.L. 431, § 5, approved July 2, 1993, eff. in 60 days; Act 1997-58 (H.B. 1412), P.L. 549, § 9, approved Dec. 16, 1997, eff. Jan. 1, 1998; Act 1998-127 (H.B. 1992), P.L. 963, § 5, approved Dec. 15, 1998, eff. immediately.

LexisNexis (R) Notes:

Purdon's Pennsylvania Statutes and Consolidated Statutes
Pennsylvania Rules of Civil Procedure (Refs & Annos)
Actions for Support (Refs & Annos)

Pa.R.C.P. No. 1910.20

Rule 1910.20. Support Order. Enforcement. General

Currentness

(a) A support order shall be enforced by income withholding as required by law in the manner provided by Rule 1910.21.

(b) Upon the obligor's failure to comply with a support order, the order may also be enforced by any one or all of the following remedies:

(1) pursuant to Rule 1910.21, and without further hearing or prior notice to the obligor, increasing the amount of monthly support payments for payment of the overdue support at a rate to be determined by the court; withholding or seizing periodic or lump sum payments of income from a government agency, including unemployment compensation, social security, retirement or disability benefits and any other benefits; withholding or seizing periodic or lump sum payments of income from insurance carriers or privately-insured employers, including workers' compensation benefits; withholding or seizing judgments or settlements; and withholding or seizing public and private retirement funds in pay status;

(2) pursuant to Rule 1910.22, imposing liens on real property;

(3) pursuant to Rule 1910.23, attaching and seizing assets of the obligor held in financial institutions;

(4) pursuant to Rule 1910.24, reducing and executing a judgment against the obligor;

(5) pursuant to Rules 1910.25 through 1910.25-6, initiating contempt proceedings;

(6) reporting the amount of overdue support to consumer reporting agencies in the manner prescribed by 23 Pa.C.S. § 4303;

(7) when the obligor owes overdue support in an amount of three months or more, suspending occupational, commercial/driver's and recreational licenses in the manner prescribed by 23 Pa.C.S. § 4355.

These remedies are cumulative and not alternative.

(c) For purposes of this Rule, overdue support remains subject to the remedies set forth in subdivision (b) of this Rule until paid in full. Except as provided in 23 Pa.C.S. § 4355 for suspension of licenses, neither a repayment schedule subsequently agreed to by the parties nor an order of court establishing such a schedule precludes the use of these remedies for collecting overdue support more quickly, whenever feasible.

Credits

Adopted April 23, 1981, effective July 22, 1981. Amended Nov. 7, 1988, effective Jan. 1, 1989; March 30, 1994, effective July 1, 1994; May 31, 2000, effective July 1, 2000.

Editors' Notes

EXPLANATORY COMMENT--2000

Subdivision (a) continues to reflect the use of mandatory income withholding as the primary tool for enforcement of a support obligation. Withholding is applicable to all forms of income, not merely wages, as the term "income" is broadly defined in 23 Pa.C.S. § 4302. Rule 1910.21 prescribes the procedures for withholding income.

Subdivision (b) is new and reflects the availability of the new enforcement remedies set forth in Act 58-1997, 23 Pa.C.S. § 4305(b)(10). Consistent with the definitions of past due and overdue support, these remedies are restricted to cases involving overdue support, *i.e.*, the delinquent support arrearages which accumulate as the result of nonpayment of a support order. They may not be used to collect past due support more quickly so long as the obligor remains current on all provisions of the support order, including repayment of past due support. If, however, the obligor subsequently defaults on the support order, subdivision (c) of this rule and the definitions in Rule 1910.1 make it clear that any past due support still owing under the order immediately converts to overdue support and remains overdue support subject to these remedies until collected in full.

Under the new enforcement rules, an obligor essentially has one opportunity to remain current on his or her support obligation so that Act 58 remedies will not apply to permit collection of the past due support arrearages more quickly than the rate at which he or she is repaying those arrearages under the support order. If, however, the obligor defaults in his or her payment of the order, Rule 1910.20 converts the past due support to overdue support and causes Act 58 remedies to become available to collect all of the overdue support until it is paid in full. It remains subject to these remedies until paid in full despite the existence of any later agreement by the parties or court order providing otherwise.

For example, assume a support order is entered requiring the obligor to pay $100 per month in current support and an additional $25 per month on past due support of $400. So long as obligor remains current on the total monthly payment of $125 per month, the past due support of $400 does not operate as a lien on the obligor's real property. Nor will it be collected more quickly through the court's automatic increase of income withholding, seizure of lump-sum forms of income, attachment of the obligor's bank accounts, or reduction of the past due support to a judgment of record for levy and execution on obligor's property in accordance with these Rules. However, subsequent identification of additional income sources or assets provides a basis for increasing the support order under Rule 1910.19 and freezing such income or assets under Rule 1910.26(b).

If, however, the obligor defaults on the support order in any respect (including his or her failure to pay the $25 per month on the past due support), the $400 of past due support immediately becomes overdue support under the definitions set forth in 23 Pa.C.S. § 4302 and Rule 1910.1. It becomes a lien on real property and is also subject to increased withholding, attachment of assets and all of the other remedies available for collecting overdue support as quickly as possible. In addition, it remains overdue support subject to these remedies until paid in full. Even if, therefore, the obligor subsequently agreed to repayment of this amount in larger monthly installments, or an order were entered pursuant to a contempt proceeding for larger installments, Act 58 remedies remain available to collect the $400 whenever additional income or assets are subsequently located and can be used to satisfy the obligation more quickly. This is the case even though at the time of identification the obligor may still be current on the agreement or contempt order.

Subdivision (b) of this rule restricts consumer agency reporting and suspension of licenses to cases involving overdue support. The actual procedures for reporting and license suspension, however, continue to be governed by statute rather than rule. *See* 23 Pa.C.S. §§ 4303 and 4355.

Rule 1910.20 does not address the collection of support through IRS intercept, Pennsylvania state tax intercept, lottery winnings or any other remedies which may be authorized by federal or state law but are not specifically listed in this rule.

Notes of Decisions (2)

Rules Civ. Proc., Rule 1910.20, 42 Pa.C.S.A., PA ST RCP Rule 1910.20
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Purdon's Pennsylvania Statutes and Consolidated Statutes
Pennsylvania Rules of Civil Procedure (Refs & Annos)
Actions for Support (Refs & Annos)

Pa.R.C.P. No. 1910.25

Rule 1910.25. Enforcement. Support Order. Civil Contempt. Petition. Service. No Answer Required

Currentness

(a) Upon failure to comply with an order of support, a petition for civil contempt

(1) may be filed by the obligee at any time, or

(2) shall be filed by the domestic relations section

(i) immediately upon the accrual of arrearages in any amount for fifteen days where it is known at the outset that income cannot be attached; or

(ii) immediately upon learning that an order for income withholding pursuant to Rule 1910.21 has been ineffective, or within twenty days of failure to comply with the order of support, whichever is earlier.

Note: Except as provided in 23 Pa.C.S. § 4355 relating to suspension of licenses, an order entered pursuant to a contempt proceeding which establishes a rate of repayment on overdue support does not preclude the use of other remedies under Title 23 or these Rules for collecting overdue support more quickly, whenever feasible.

(b) The petition shall begin with an order of court in substantially the following form:

[CAPTION]
ORDER OF COURT
Legal proceedings have been brought against you alleging that you have disobeyed an order of court for support.
(1) A critical issue in the contempt proceeding is your ability to pay and comply with the terms of the support order. If you wish to defend against the claim set forth in the following pages, you may, but are not required to, file in writing with the court your defenses or objections.

(2) You, __________, Respondent, must appear in person in court on __________ (day and date) at ___ (a.m./p.m.) in (court)room ___, __________ (address).

IF YOU DO NOT APPEAR IN PERSON, THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST AND YOU MAY BE COMMITTED TO JAIL.

(3) If the court finds that you have willfully failed to comply with its order for support, you may be found to be in contempt of court and committed to jail, fined or both.

You will have the opportunity to disclose income, other financial information and any relevant personal information at the conference/hearing so that the court can determine if you have the ability to pay. You may also tell the court about any unusual expenses that may affect your ability to pay. You may fill out the enclosed Income Statement and Expense Statement forms and submit them to the court.

At the conference/hearing, the contempt petition may be dismissed, new and/or modified purge conditions may be imposed, or the judge may order you to jail. If the obligee fails to appear, the court will proceed with the case and enter an appropriate order.

YOU ARE REQUIRED TO BRING:

Your most recent pay stub for any and all employers

Payroll address, phone number, fax number and contact person

Proof of medical coverage

Any other documentation relevant to your case and the issue of contempt as stated in the petition, including the completed Income Statement and Expense Statement forms. For example, other documentation that may be relevant includes documents related to claims for unemployment compensation, workers' compensation and Social Security benefits.

BY THE COURT

....

DATE OF ORDER: ....

....

Judge

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

....

(Name)

....

(Address)

....

(Telephone Number)

Note: Neither Rule 1018.1 (Notice to Defend) nor Rule 1361 (Notice to Plead) apply to a petition for enforcement of support.

(c) The petition shall aver the facts alleged to constitute the failure to comply with the support order. The petition shall set forth the amount of support arrearages, if any, as provided by the domestic relations section. Unless specially ordered by the court, no answer to the petition is required.

(d) The petition shall be served upon the respondent

(1) by ordinary mail with the return address of the domestic relations section appearing thereon; or

(2) by any form of mail which requires the respondent to sign a receipt; or

(3) by a competent adult; or

Note: See Rule 76 for the definition of "competent adult".

(4) pursuant to special order of court.

A respondent who attends the conference and/or hearing in person shall be deemed to have been served.

(e) The court may issue a bench warrant as provided by Rule 1910.13-1 for failure of the respondent to appear.

(f) The respondent shall be advised in the Order/Notice to Appear that his or her present ability to pay is a critical issue in the contempt proceeding. The respondent shall be provided with Income and Expense Statements to demonstrate financial ability to pay. At the hearing, the respondent shall be provided the opportunity to respond to any questions about his or her financial status. The trier of fact shall issue an express finding that the respondent does or does not have the present ability to pay.

Credits

Adopted March 30, 1994, effective July 1, 1994. Amended May 14, 1999, effective July 1, 1999. Renumbered from Rule 1910.21-1 and amended May 31, 2000, effective July 1, 2000. Amended March 18, 2004, effective June 16, 2004. Amended Nov. 30, 2012, effective Dec. 30, 2012.

Editors' Notes

EXPLANATORY COMMENT--2012

The amendments to the form in subdivision (b) and new subdivision (f) are intended to assure compliance with the U.S. Supreme Court's decision in *Turner v. Rogers*, 131 S. Ct. 2507 (2011). In that case, the Court held that counsel need not automatically be appointed for indigent support obligors facing incarceration in civil contempt proceedings. The Court held that the due process clause of the Fourteenth Amendment to the U.S. Constitution does not require that counsel be provided where the obligee is not represented by counsel and the state provides alternative procedural safeguards including adequate notice of the importance of the ability to pay, a fair opportunity to present, and to dispute, relevant information, and express court findings as to the obligor's ability to pay.

Notes of Decisions (8)

Rules Civ. Proc., Rule 1910.25, 42 Pa.C.S.A., PA ST RCP Rule 1910.25
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Pa.R.C.P. No. 1910.25-1

Rule 1910.25-1. Civil Contempt. Hearing By Court. Conference by Officer

Currentness

(a) After service of the petition and order of court upon the respondent, there shall be (1) an office conference conducted by a conference officer, as provided by Rule 1910.25-2, or (2) an immediate hearing by the court, if permitted by the court.

(b) If, at any time during a contempt proceeding, including proceedings under Rules 1910.25-2, 1910.25-3 and 1910.25-4, the hearing officer or conference officer determines that the failure to comply with the support order is willful and there is present ability to comply, the petition for contempt shall be heard by the court for consideration of incarceration and other appropriate sanctions.

Note: The determination required by subdivision (b) shall be made by a conference officer in counties adopting the procedure of Rule 1910.25-3 (conference and hearing de novo) or by a hearing officer in counties adopting the alternative procedure of Rule 1910.25-4 (record hearing and exceptions).

Courts should strive to hear these cases promptly, on the same day if possible.

Credits
Adopted March 30, 1994, effective July 1, 1994. Renumbered from 1910.21-2 and amended May 31, 2000, effective July 1, 2000.

Rules Civ. Proc., Rule 1910.25-1, 42 Pa.C.S.A., PA ST RCP Rule 1910.25-1
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Pa.R.C.P. No. 1910.25-2

Rule 1910.25-2. Civil Contempt. Office Conference. Agreement. Alternative Procedures Upon Failure to Agree

Currentness

(a) The office conference shall be conducted by a conference officer.

(b) The conference officer may make a recommendation to the parties as to the disposition of the proceedings.

(c) If an agreement is reached at the conference, the conference officer shall prepare a written order in conformity with the agreement for signature by the parties and submission to the court. The court may enter the order in accordance with the agreement without hearing the parties.

(d) If an agreement is not reached, the procedure shall be as prescribed by Rule 1910.25-3 unless the court by local rule adopts the alternative procedure of Rule 1910.25-4.

Credits
Adopted March 30, 1994, effective July 1, 1994. Renumbered from 1910.21-3 and amended May 31, 2000, effective July 1, 2000.

Rules Civ. Proc., Rule 1910.25-2, 42 Pa.C.S.A., PA ST RCP Rule 1910.25-2
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Pa.R.C.P. No. 1910.25-3

Rule 1910.25-3. Civil Contempt. Conference Summary. Order. Hearing De Novo

Currentness

(a) If an agreement is not reached, the conference officer shall, at the conclusion of the conference or shortly thereafter, prepare a conference summary and furnish copies to the court and to all parties. The conference summary shall state:

(1) the facts upon which the parties agree,

(2) the contentions of the parties with respect to facts upon which they disagree, and

(3) the conference officer's recommendation whether

(i) the respondent has willfully failed to comply with the order for support,

(ii) the respondent should be held in contempt, and

(iii) sanctions or purge conditions should be imposed against the respondent.

Note: The sanction of imprisonment may be imposed only following an evidentiary hearing before a judge. *See* Rule 1910.25-5(a).

(b) The court, without hearing the parties, may enter an appropriate order after consideration of the conference summary. Each party shall be provided with a copy of the order and written notice that any party may, within twenty days after the date of receipt or the date of the mailing of the order, whichever occurs first, file a written demand with the domestic relations section for a hearing before the court.

(c) A demand for a hearing before the court shall stay the contempt order.

(d) If the court does not enter an order under Rule 1910.25-2(c) or subdivision (b) of this rule within five days of the conference, or if an order is entered and a demand for a hearing before the court is filed, there shall be a hearing de novo before the court. The domestic relations section shall schedule the hearing and give notice to the parties. The hearing de novo shall be held no later than seventy-five days after the date the petition for contempt was filed.

(c) The court shall not be precluded from conducting a hearing on the petition for contempt on the same day as the office conference.

Note: Every effort should be made to ensure that these cases are heard promptly, on the same day if possible.

Credits

Adopted March 30, 1994, effective July 1, 1994. Renumbered from 1910.21-4 and amended May 31, 2000, effective July 1, 2000. Amended June 11, 2007, imd. effective.

Rules Civ. Proc., Rule 1910.25-3, 42 Pa.C.S.A., PA ST RCP Rule 1910.25-3
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Pa.R.C.P. No. 1910.25-4

Rule 1910.25-4. Civil Contempt. Alternative Procedure. Record Hearing. Report. Exceptions. Order

Currentness

(a) At the conclusion of the conference if an agreement has not been reached, the parties shall be given notice of the date, time, and place of a hearing if the conference and hearing have not been scheduled for the same date. The hearing on the record shall be conducted by a hearing officer who must be a lawyer.

Note: Every effort should be made to ensure that cases are heard promptly, on the same day if possible.

(b) The hearing officer shall receive evidence, hear argument and file with the court a report containing a proposed order. A copy of the report shall be furnished to all parties at the conclusion of the hearing. The report may be in narrative form and shall include the officer's recommendation with respect to the following matters, together with the reasons therefor:

(1) whether the respondent has willfully failed to comply with the order for support,

(2) whether the respondent should be held in contempt, and

(3) whether sanctions or purge conditions should be imposed against the respondent.

Note: The sanction of imprisonment may be imposed only following an evidentiary hearing before a judge. *See* Rule 1910.25-5(a).

(c) Within twenty days after the conclusion of the hearing, any party may file exceptions to the report or any part thereof, to rulings on objections, to statements or findings of fact, to conclusions of law, or to any other matters occurring during the hearing. Each exception shall set forth a separate objection precisely and without discussion. Matters not covered by exceptions are deemed waived unless, prior to the entry of the order, leave is granted to file exceptions raising those matters.

(d) If no exceptions are filed within the twenty-day period, the court shall review the report and, if approved, enter an order.

(e) If exceptions are filed, the court shall, no later than seventy-five days after the date the petition for contempt was filed, hear argument on the exceptions or hold a hearing de novo. The court shall enter an appropriate order.

Credits
Adopted March 30, 1994, effective July 1, 1994. Renumbered from 1910.21-5 and amended May 31, 2000, effective July 1, 2000. Amended June 11, 2007, imd. effective.

Rules Civ. Proc., Rule 1910.25-4, 42 Pa.C.S.A., PA ST RCP Rule 1910.25-4
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Pa.R.C.P. No. 1910.25-5

Rule 1910.25-5. Civil Contempt. Contempt Order. Incarceration

Currentness

(a) No respondent may be incarcerated as a sanction for contempt without an evidentiary hearing before a judge.

(b) The court shall make a finding, on the record, as to whether the respondent, based upon the evidence presented at the hearing, does or does not have the present ability to pay the court-ordered amount of support.

(c) An order committing a respondent to jail for civil contempt of a support order shall specify the conditions the fulfillment of which will result in the release of the respondent.

Note: The time periods set forth in Rules 1910.25 through 1910.25-6 are for the benefit of the plaintiff, and not for the defendant. The goal is the prompt initiation of contempt proceedings because of the importance of ongoing support payments. The time periods in no way limit the right of either the domestic relations section or the plaintiff to proceed with a contempt action.

Credits

Adopted March 30, 1994, effective July 1, 1994. Renumbered from 1910.21-6 and amended May 31, 2000, effective July 1, 2000. Amended June 11, 2007, imd. effective. Amended Nov. 30, 2012, effective Dec. 30, 2012.

Rules Civ. Proc., Rule 1910.25-5, 42 Pa.C.S.A., PA ST RCP Rule 1910.25-5
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Pa.R.C.P. No. 1910.25-7

Rule 1910.25-7. Indirect Criminal Contempt. Incarceration

Currentness

In addition to any other remedy available to the court, the court may order the respondent to obtain employment with income that can be verified and is subject to income attachment. If the respondent willfully fails to comply with an order to obtain such employment, the court may commit the respondent to jail upon adjudication for indirect criminal contempt, provided the respondent is afforded all of the procedural safeguards available to criminal defendants.

Credits

Adopted June 11, 2007, imd. effective.

Editors' Notes

EXPLANATORY COMMENT--2007

Parental support of children is a fundamental requirement of law and public policy. Absent an inability to maintain employment or acquire other income or assets, sanction in the form of incarceration may be imposed by the court to compel compliance and provide an incentive to obey the law. The contempt process, which should be used as a last resort, is necessary to impose coercive sanctions upon those obligors whose circumstances provide no recourse to the court to compel payment or a good faith effort to comply. Appellate opinions have made it clear that an obligor who is in civil contempt cannot be incarcerated without the present ability to fulfill the conditions the court imposes for release. However, the courts also have noted that recalcitrant obligors may be imprisoned for indirect criminal contempt if afforded the proper procedural safeguards. *See Godfrey v. Godfrey*, 894 A.2d 776 (Pa. Super. 2006); *Hyle v. Hyle*, 868 A.2d 601 (Pa. Super. 2005).

Notes of Decisions (1)

Rules Civ. Proc., Rule 1910.25-7, 42 Pa.C.S.A., PA ST RCP Rule 1910.25-7
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LYDIA A. YERKES, Appellee v. KEITH A. YERKES, Appellant

No. 151 MAP 2001

SUPREME COURT OF PENNSYLVANIA

573 Pa. 294*; *824 A.2d 1169*; *2003 Pa. LEXIS 919

February 26, 2002, Submitted
May 30, 2003, Decided

PRIOR HISTORY: [***1] Appeal from the Order of the Superior Court entered on July 3, 2001 affirming the Order of the Court of Common Pleas of Lancaster County, Domestic Relations Division, entered May 17, 1999 at No. 2972 of 1992.
Yerkes v. Yerkes, 782 A.2d 1068, 2001 Pa. Super. LEXIS 1971 (Pa. Super. Ct., 2001)Trial Court Judges: Gorbey, Leslie, Judge. Intermediate Court Judges: Johnson, Justin M., Judge, Orie Melvin, Joan, Judge, Kelly, John T., Judge.

DISPOSITION: Affirmed.

COUNSEL: For Keith A. Yerkes, ProSe, APPELLANT: Keith A. Yerkes.

For Lydia A. Yerkes, APPELLEE: Albert J. Meier, Esq.,

JUDGES: Before: Cappy, C.J., Castille, Nigro, Newman, Saylor, Eakin and Lamb, JJ. Saylor, J. files a concurring opinion. Lamb, J. files a concurring opinion.

OPINION BY: NIGRO

OPINION

[**1169] [*295] ***OPINION OF THE COURT***

MR. JUSTICE NIGRO

The question presented in this case is whether incarceration, standing alone, is a [**1170] "material and substantial change in circumstances" that provides sufficient grounds for modification or termination of a child support order. We hold that it is not.

[*296] Appellant Keith A. Yerkes ("Father") and Appellee Lydia A. Yerkes ("Mother") were married in November 1978 and separated in August 1992. During their marriage, the parties had two children: Amy, born in January 1983, and Richard, born in August 1988. Immediately following the parties' separation, Mother sought child support from Father. The parties eventually reached an agreement for support in November 1992, whereby Father was to pay one hundred dollars per week for [***2] the support of Amy and Richard. Later the same month, the Court of Common Pleas of Lancaster County ordered compliance with the agreement and further directed that it be accomplished by payroll deductions from Father's regular paychecks.

In 1994, Father was arrested for sexually assaulting Amy, who was eleven years old at the time. He was ultimately convicted of aggravated indecent assault and has been incarcerated for that crime since August 1994. Father is currently imprisoned at the State Correctional Institute at Huntingdon, Pennsylvania ("SCI-Huntingdon"), and will be released by August 2004.

In May 1997, Father petitioned the trial court for modification or termination of the November 1992 support order. The parties were directed to meet at a support conference to take place in August 1997, although Father did not appear because of his incarceration. Following the conference, the conference officer recommended that the petition be dismissed on account of Father's conviction for assaulting Amy, who was a beneficiary of the support order. The trial court agreed and dismissed Father's petition later in August 1997.

In September 1997, Father filed exceptions and requested a hearing [***3] *de novo* before the trial court, which was held in May 1999. [1] Mother appeared at the hearing in person and Father [*297] appeared, *pro se*, by telephone from SCI-Huntingdon. Father's sole argument at the hearing was that he was financially unable to pay his child support obligation because of his incarceration. Specifically, he maintained that his wage of for-

ty-one cents per hour at SCI-Huntingdon only yielded a monthly salary of approximately fifty dollars. [2] He claimed that such a salary made it impossible for him to satisfy his child support obligation, which he alleged was based on his former salary of $ 241.58 per week. Moreover, Father claimed to have no other assets.

1 In December 1997, while Father's hearing request was pending, the Domestic Relations Section of the Court of Common Pleas of Lancaster County petitioned for a contempt adjudication against Father for his failure to pay child support, claiming that Father was $ 17,085.00 in arrears as of that time. The record reveals that a contempt hearing was scheduled for January 1998, but reveals no further details regarding the contempt proceedings. By June 2000, Father's arrears had reached $ 28,798.29.

[***4]

2 According to the trial court, Father's gross prison wages were $ 68.88 in May 1997 and $ 52.28 in June 1997.

Following the hearing, the trial court dismissed Father's exceptions and ratified the August 1997 order. Father appealed, and the Superior Court affirmed in a memorandum decision. *782 A.2d 1068 (Pa. Super. 2001)* (table). We granted Father's petition for allowance of appeal, *790 A.2d 1018 (Pa. 2001)*, and now affirm.

The thrust of Father's argument is that his support obligation should be modified or terminated because he is unable to pay due to his imprisonment and the inadequate wage he earns at SCI-Huntingdon. In making this argument, he alleges that [**1171] there is a conflict among Superior Court decisions regarding the effect of imprisonment on child support obligations. He also contends that the trial court erred in essentially adopting a *per se* rule barring modification or termination where the victim of the parent's criminal acts is also the beneficiary of the support order. Accordingly, he claims that the trial court should have modified or terminated [***5] his support obligation. We disagree.

The principal goal in child support matters is to serve the best interests of the child through provision of reasonable expenses. *Oeler by Gross v. Oeler, 527 Pa. 532, 594 A.2d 649, 651 (Pa. 1991)*; *Sutliff v. Sutliff, 515 Pa. 393, 528 A.2d 1318, 1322 (Pa. 1987)* (plurality). The duty of child support, "as every other duty encompassed in the role of parenthood, is [*298] the equal responsibility of both mother and father." *Conway v. Dana, 456 Pa. 536, 318 A.2d 324, 326 (Pa. 1974)*. As this duty is "absolute," *Larson v. Diveglia, 549 Pa. 118, 700 A.2d 931, 932 (Pa. 1997)*, it must be discharged by the parents "even if it causes them some hardship." *Sutliff, 528 A.2d at 1322*; *see also 23 Pa.C.S. § 4321(2)* ("Parents *are liable* for the support of their children who are unemancipated and 18 years of age or younger." (emphasis added)). That said, reality dictates that the parental obligation of support be guided by the parents' respective capacities and abilities, which depend on the parents' property, income, and earning capacity. *Costello v. LeNoir, 462 Pa. 36, 337 A.2d 866, 868 (Pa. 1975)*; [***6] *Conway, 318 A.2d at 326*. These capacities and abilities are to be assessed at the time that child support payments are sought. *Costello, 337 A.2d at 868*; *see also Labar v. Labar, 557 Pa. 54, 731 A.2d 1252, 1253 n.1 (Pa. 1999)* (citing *Costello* rule).

To give effect to the requirement of reasonable financial support, the Pennsylvania Rules of Civil Procedure provide a comprehensive set of guidelines for the appropriate amount of child support to be contributed by each parent. *See generally Pa.R.C.P. No. 1910.16-1 to 1910.16-7*. In each child support matter, the support contribution indicated by the guidelines is entitled to a strong presumption of correctness. *See 23 Pa.C.S. § 4322(b)*; *Pa.R.C.P. No. 1910.16-1(d)*; *Ball v. Minnick, 538 Pa. 441, 648 A.2d 1192, 1196 (Pa. 1994)*; *see also Mascaro v. Mascaro, 569 Pa. 255, 803 A.2d 1186, 1189-91 (Pa. 2002)* (reciting rules containing presumption). Once a support order is in effect, "[a] petition for modification . . . may be filed at any time and shall be granted if the requesting party demonstrates a substantial change [***7] in circumstances." *23 Pa.C.S. § 4352(a)*; *see also Pa.R.C.P. No. 1910.19* (stating standard for modification). Accordingly, it is the petitioning parent's burden to "specifically aver the material and substantial change in circumstances upon which the petition is based." *Pa.R.C.P. No. 1910.19(a)*; *see also Colonna v. Colonna, 2001 PA Super 368, 788 A.2d 430, 438 (Pa. Super. 2001)* (*en banc*) (stating that burden is on moving party), *appeal granted*, *569 Pa. 678, 800 A.2d 930 (Pa. 2002)*. A finding of either a "material and substantial change [*299] in circumstances" or no such change is reviewed on appeal for an abuse of discretion. *Bowser v. Blom, 569 Pa. 609, 807 A.2d 830, 834 (Pa. 2002)*; *Larson, 700 A.2d at 932*. "An abuse of discretion occurs where there is an error in judgment, a manifestly unreasonable decision, or a misapplication of law." *Larson, 700 A.2d at 932*; *see also Bowser, 807 A.2d at 834* (defining "abuse of discretion" standard).

This Court has never directly addressed whether incarceration, standing alone, is a "material and substantial change in circumstances" [***8] that provides sufficient grounds for modification or termination of a child support order. A review of cases from other jurisdictions, however, reveals a wealth of case law that can be loosely [**1172] categorized into three groups, each of which represents a different approach to assessing the effect of incarceration on support obligations. *See In re Marriage*

of Thurmond, 265 Kan. 715, 962 P.2d 1064, 1068-72 (Kan. 1998) (identifying approaches and collecting cases); *Halliwell v. Halliwell, 326 N.J. Super. 442, 741 A.2d 638, 644-45 (N.J. Super. Ct. App. Div. 1999)* (same); *see also* Frank J. Wozniak, Annotation, *Loss of Income Due to Incarceration as Affecting Child Support Obligation, 27 A.L.R. 5th 540 (1995)* (collecting and discussing cases). The first approach, dubbed the "no justification" rule, generally deems criminal incarceration as insufficient to justify elimination or reduction of an open obligation to pay child support. [3] *See Thurmond, 962 P.2d at 1068-70*; *Halliwell, 741* [*300] *A.2d at 644*. The second approach, known as the "complete justification" rule, generally deems incarceration for criminal conduct [***9] as sufficient to justify elimination or reduction of an existing child support obligation. [4] *See Thurmond, 962 P.2d at 1070-71*; *Halliwell, 741 A.2d at 644-45*. Finally, the third approach is the "one factor" rule, which generally requires the trial court to simply consider the fact of criminal incarceration along with other factors in determining whether to eliminate or reduce an open obligation to pay child support. [5] *See* [**1173] *Thurmond, 962 P.2d at 1071-72*; *Halliwell, 741 A.2d at 645*.

3 At least fifteen jurisdictions appear to adhere to this approach, including: Arizona, *see State ex rel. Dep't of Econ. Sec. v. Ayala, 185 Ariz. 314, 916 P.2d 504, 508 (Ariz. Ct. App. 1996)*; Arkansas, *see Reid v. Reid, 57 Ark. App. 289, 944 S.W.2d 559, 562 (Ark. Ct. App. 1997)*; Connecticut, *see Shipman v. Roberts*, No. FA000630559, 2001 Conn. Super. LEXIS 1653, at *27 (Conn. Super. Ct. June 7, 2001); Delaware, *see Division of Child Support Enf. ex rel. Harper v. Barrows, 570 A.2d 1180, 1183 (Del. 1990)*; Indiana, *see Davis v. Vance, 574 N.E.2d 330, 331 (Ind. Ct. App. 1991)*; Kansas, *see In re Marriage of Thurmond, 265 Kan. 715, 962 P.2d 1064, 1073 (Kan. 1998)*; Kentucky, *see Commonwealth ex rel. Marshall v. Marshall, 15 S.W.3d 396, 401 (Ky. Ct. App. 2000)*; Louisiana, *see State v. Nelson, 587 So. 2d 176, 178 (La. Ct. App. 1991)*; Montana, *see Mooney v. Brennan, 257 Mont. 197, 848 P.2d 1020, 1023-24 (Mont. 1993)*; New Hampshire, *see Noddin v. Noddin, 123 N.H. 73, 455 A.2d 1051, 1053-54 (N.H. 1983)*; New York, *see Matter of Knights, 71 N.Y.2d 865, 522 N.E.2d 1045, 1046, 527 N.Y.S.2d 748 (N.Y. 1988)*; North Dakota, *see Koch v. Williams, 456 N.W.2d 299, 302 (N.D. 1990)*; Ohio, *see Richardson v. Ballard, 113 Ohio App. 3d 552, 681 N.E.2d 507, 508 (Ohio Ct. App. 1996)*; Oklahoma, *see State ex rel. Jones v. Baggett, 1999 OK 68, 990 P.2d 235, 245-46 (Okla. 1999)*; and Utah, *see Proctor v. Proctor, 773 P.2d 1389, 1391 (Utah 1989)*.

[***10]

4 At least seven jurisdictions appear to adhere to this approach, including: California, *see In re Marriage of Smith, 90 Cal. App. 4th 74, 108 Cal.Rptr.2d 537, 543-45 (Cal. Ct. App. 2001)*; Idaho, *see Nab v. Nab, 114 Idaho 512, 757 P.2d 1231, 1238 (Idaho 1988)*; Maryland, *see Wills v. Jones, 340 Md. 480, 667 A.2d 331, 339 (Md. 1995)*; Michigan, *see Pierce v. Pierce, 162 Mich. App. 367, 412 N.W.2d 291, 292-93 (Mich. Ct. App. 1987)*; Minnesota, *see Franzen v. Borders, 521 N.W.2d 626, 629-30 (Minn. Ct. App. 1994)*; Oregon, *see In re Marriage of Willis & Willis, 314 Ore. 566, 840 P.2d 697, 699 (Or. 1992)*; and Washington, *see In re the Marriage of Blickenstaff & Blickenstaff, 71 Wn. App. 489, 859 P.2d 646, 650-51 (Wash. Ct. App. 1993)*.

5 At least nine jurisdictions appear to adhere to this approach, including: Alabama, *see Alred v. Alred, 678 So. 2d 144, 678 So. 2d 1144, 1146 (Ala. Civ. App. 1996)*; Alaska, *see Bendixen v. Bendixen, 962 P.2d 170, 173 (Alaska 1998)*; Colorado, *see In re Marriage of Hamilton, 857 P.2d 542, 544 (Colo. Ct. App. 1993)*; Illinois, *see In re Burbridge, 317 Ill. App. 3d 190, 738 N.E.2d 979, 982, 250 Ill. Dec. 510 (Ill. App. Ct. 2000)*; Iowa, *see In re Marriage of Walters, 575 N.W.2d 739, 743 (Iowa 1998)*; Missouri, *see Oberg v. Oberg, 869 S.W.2d 235, 238 (Mo. Ct. App. 1993)*; New Mexico, *see Thomasson v. Johnson, 120 N.M. 512, 903 P.2d 254, 256-57 (N.M. Ct. App. 1995)*; Texas, *see Hollifield v. Hollifield, 925 S.W.2d 153, 156 (Tex. App. 1996)*; and Wisconsin, *see Parker v. Parker, 152 Wis. 2d 1, 447 N.W.2d 64, 65-66 (Wis. Ct. App. 1989)*. The factors taken into account include the reason the obligated parent entered prison, the length of incarceration, the financial circumstances, the potential for work release, the amount of the existing child support award, and the total amount of child support that will have accumulated upon the incarcerated parent's discharge. *See Burbridge, 738 N.E.2d at 982*; *Hamilton, 857 P.2d at 544*; *Oberg, 869 S.W.2d at 238*.

[***11] The fundamental disagreement between those courts applying a "no justification" rule and those adopting one of the other two rules hinges on whether relief should ever be granted to incarcerated parents. It appears that each court's [*301] ultimate conclusion on this issue is driven by three underlying considerations: (1) whether allowing relief to an incarcerated parent serves the best interests of the child, (2) whether relief is in accord with fairness principles, and (3) whether it is appropriate to treat incarceration in the same manner as voluntary unemployment.

With regard to the first consideration, *i.e.*, whether relief serves the best interests of the child, courts invoking the "no justification" rule often maintain that it is in the best interests of the child for the support order to remain intact because of the possibility of future reimbursement. *E.g.*, *Reid, 944 S.W.2d at 562*; *see also Nelson, 587 So. 2d at 178* (reasoning that obligor's support obligation can be satisfied after release from prison). Moreover, some courts that have adopted this rule emphasize that a downward modification does not benefit the child whose best interests [***12] are at stake, but instead benefits only the obligor. *E.g.*, *Richardson, 681 N.E.2d at 508*; *Baggett, 990 P.2d at 245-46*. On the other hand, those jurisdictions that reject the "no justification" rule often counter that such an approach to the best interests principle is unrealistic:

> [Under the "no justification" rule,] the child support judgment will not be paid during the time that the parent is incarcerated, and therefore the judgment will simply accrue with interest. Such a situation provides little or no benefit to anyone. The children do not receive the benefit of the proceeds during the time they require the funds, and the parent is simply confronted with a large, nondischargeable judgment upon release from prison, at a time when the prospect of paying a large judgment with interest is extremely unlikely. At current interest rates the judgment will double every 6 or 7 years. How this can be in the children's best interest is difficult . . . to imagine.

Pierce, 412 N.W.2d at 293 (quoting *Ohler v. Ohler, 220 Neb. 272, 369 N.W.2d 615, 618-19 (Neb. 1985)* (Krivosha, C.J., dissenting)); *see also* [***13] *Nab, 757 P.2d at 1238* (reasoning that continuation of support obligation of incarcerated parent provides no present benefit to child).

[*302] Having considered the arguments on both sides of this issue, we conclude that the best interests of the child are better served by the "no justification" rule than by a rule that would allow suspension of the support obligation during an obligor's incarceration. As the Appellate Division of the Superior Court of New Jersey has cogently explained:

> We perceive two possible scenarios. In the first, the obligor is incarcerated and the support obligation is not suspended. Payments go into arrears. Upon release, the obligor cannot pay both current support and arrears, so only the current support is paid. In the second scenario, the obligor is incarcerated and the obligation is suspended during incarceration. Upon release, the obligor resumes paying the pre-incarceration support obligation. . . .
>
> In both situations, the child receives no support during the obligor's incarceration, and in both, the child begins to receive support upon the obligor's re [**1174] lease. The children in these situations are essentially in the same circumstances. The [***14] only difference is that the obligor in scenario two has no arrearage debt. Thus, the scenario-one child suffers during the obligor's incarceration, but there is a possibility of compensation at some point in the future. The scenario-two child also suffers during the obligor's incarceration, but there is no realistic chance that the substantial arrearage will ever be fully paid.
>
> The scenario-one child potentially receives a benefit because (s)he may see some of the arrearage payments; the scenario-one obligor receives no benefit. The scenario-two child receives no benefit, potential or otherwise. Rather, it is the scenario-two obligor who receives the benefit because the arrearage debt has been eliminated. Thus, scenario two works to the benefit of the obligor, while scenario one works to the benefit of the child, at least theoretically. The scenario-two child essentially takes on a burden because the obligor has been relieved temporarily of the parental duty of support.
>
> Thus, the argument that it is not in the best interest of the child to continue the obligation is without merit. The question is not which situation is better for the child; [*303] neither situation is beneficial while the [***15] obligor is incarcerated. The question is which scenario is worse. Clearly, it is scenario two, in which the child has no real hope of ever seeing the missed support payments to which (s)he is entitled. . . .

Halliwell, 741 A.2d at 645-46 (footnote omitted). [6] We agree with the New Jersey court that, although none of the three rules will provide short-term relief to the child,

the "no justification" rule at least provides for the possibility that the obligor will repay the support owed to the child. Consequently, as stated above, the "no justification" rule is the approach that is in the best interests of the child. *See Oeler, 594 A.2d at 651* (purpose of child support is to promote best interests of child); *Sutliff, 528 A.2d at 1322* (same).

> 6 The following commentary further supports the analysis of the New Jersey court, though in more practical terms:
>
> > A prison sentence is often referred to as payment for a debt to society. However, a prisoner's debt is hardly being paid if the prisoner is simultaneously incurring another debt to society by failing to pay child support obligations. Therefore, if the parent is unable to pay child support during incarceration, this "second" debt can and should be repaid upon release. This is not an additional punishment or fine, but is a simple reimbursement to the state for what the parent was obligated to pay in the first place. Likewise, public policy considerations require that other family members or private individuals who paid the child support owed by the obligor during the obligor's incarceration, should be reimbursed for their expenditures. Private individuals should not be forced to assume the responsibility and obligations of the incarcerated parent any more than the state should.
>
> *Karen Rothschild Cavanaugh & Daniel Pollack, Child Support Obligations of Incarcerated Parents, 7 Cornell J.L. & Pub. Pol'y 531, 551 (1998)* (footnote omitted).

[***16] With regard to the second consideration, *i.e.*, which approach is most "fair," proponents of the "no justification" rule often reason that fairness principles dictate that an obligor should not benefit from criminal conduct or be allowed to use it as a means to escape child support obligations. [7] *E.g.*, *Mooney, 848 P.2d at 1023*; *Nelson, 587 So. 2d at 178*. These [*304] courts often opine that because the needs of the children have not changed, their needs must prevail [**1175] over the difficulties of the incarcerated parent. *E.g.*, *Reid, 944 S.W.2d at 562*. On the other hand, those rejecting the "no justification" rule argue that fairness weighs in favor of the obligor because, without relief, the obligor parent would be saddled with an onerous burden upon release from prison. *E.g.*, *Ohler, 369 N.W.2d at 618-19* (Krivosha, C.J., dissenting); *Mooney, 848 P.2d at 1024* (Trieweiler, J., dissenting); *Nab, 757 P.2d at 1238*; *Pierce, 412 N.W.2d at 292-93*.

> 7 Alternatively, some courts invoking a fairness rationale have reasoned that the equitable doctrine of "unclean hands" operates to foreclose relief to incarcerated parents. *E.g.*, *Reid, 944 S.W.2d at 562*; *Barrows, 570 A.2d at 1184*.

[***17] On balance, we believe that fairness principles also weigh in favor of the "no justification" rule, primarily because affording relief to the incarcerated parent would effectively subordinate child support payments to the parent's other financial obligations. *See Thurmond, 962 P.2d at 1073* ("Why should an inmate's child support obligation be subject to modification or suspension by virtue of the parent's incarceration when . . . restitution order[s are] unaffected by incarceration?"); *Cavanaugh & Pollack, supra note 6, at 550* ("When people are incarcerated, they are not relieved of their other financial responsibilities, such as making car payments. A child should be afforded at least the same legal status." (footnote omitted)). In Pennsylvania, child support obligations are considered to be of such importance that parties must give them priority over other expenses. *See, e.g.*, *Pa.R.C.P. No. 1910.16-1(a)* ("The support of a spouse or child is a priority obligation so that a party is expected to meet this obligation by adjusting his or her other expenses."); *Pa.R.C.P. No. 1910.16-1* (Explanatory Comment--1998) ("The guidelines make financial support of a child [***18] a primary obligation."); *Pa.R.C.P. No. 1910.21(g)* ("If there are multiple support obligations . . . the court shall allocate among the obligees the amount of income available for withholding, giving priority to current child support . . . ."). [8] As such, we simply cannot justify relieving incarcerated parents of their child support obligations when they are not [*305] relieved of their other financial obligations. [9] Accordingly, we are compelled to agree with those courts adopting the "no justification" rule that fairness counsels in favor of the continuation of support.

> 8 The requirement of priority reflected in these rules accords with Pennsylvania's strong policy favoring payment of child support. *See Larson, 700 A.2d at 932*; *Sutliff, 528 A.2d at 1322*; *23 Pa.C.S. § 4321(2)*; *accord Koch, 456 N.W.2d at 302*; *Mooney, 848 P.2d at 1023*.
>
> 9 In addition, the argument that the "no justification rule" unfairly burdens incarcerated par-

ents upon their release from prison is undermined by the fact that, in Pennsylvania, the General Assembly has enacted a statute under which incarcerated obligors are prevented from being placed in an impossible position upon release on account of significant arrearages. *See 23 Pa.C.S. § 4348(g)* (limiting attachment of child support obligations and arrears to percentage set forth in federal *Consumer Credit Protection Act*). Moreover, we note that significant arrearages will not ordinarily result in a contempt adjudication, as any failure to pay support upon the parent's release will likely be justifiable given his or her inability to comply with the support order at that time. *See 23 Pa.C.S. § 4345* (requiring willful failure to comply with support order for contempt adjudication); *Pa.R.C.P. No. 1910.25-1(b)* (requiring finding of willfulness and a present ability to comply prior to contempt adjudication for failure to pay child support). We also note that the continuation of the support obligation required by the "no justification rule" does not burden the parent during incarceration, as the Commonwealth provides the basic needs of any obligor who is incarcerated. *See Koch, 456 N.W.2d at 301-02*.

[***19] Finally, with regard to the third consideration, *i.e.*, whether it is appropriate to analogize incarceration to voluntary unemployment, courts following the "no justification" rule often liken obligors who are sent to prison for criminal conduct to those [**1176] who voluntarily assume lower paying jobs or leave their jobs. [10] *E.g.*, *Mooney, 848 P.2d at 1023*; *Marshall, 15 S.W.3d at 401*. As the Supreme Court of Montana stated:

> Criminal conduct of any nature cannot excuse the obligation to pay support. We see no reason to offer criminals a [*306] reprieve from their child support obligations when we would not do the same for an obligor who voluntarily walks away from his job. Unlike the obligor who is unemployed or faced with a reduction in pay through no fault of his own, the incarcerated person has control over his actions and should be held to the consequences. . . . [An obligor] should not be able to escape his financial obligation to his children simply because his misdeeds have placed him behind bars. The meter should continue to run.

Mooney, 848 P.2d at 1023 (citation omitted); *see also Richardson, 681 N.E.2d at 508* [***20] (reasoning that imprisonment is a foreseeable result of criminal activity). On the other hand, the Supreme Court of Alaska has rejected the analogy to voluntary unemployment:

> Although incarceration is often a foreseeable consequence of criminal misconduct and all criminal acts are in some sense voluntary, non-custodial parents who engage in criminal misconduct seldom desire the enforced unemployment that accompanies incarceration; nor can they alter their situation; and, in stark contrast to parents who consciously choose to remain unemployed, jailed parents rarely have any actual job prospects or potential income. Equating incarceration to voluntary unemployment would require us to ignore these significant, real-life distinctions.

Bendixen, 962 P.2d at 173; *see also Franzen, 521 N.W.2d at 629* (reasoning that incarceration is usually an involuntary condition).

10 In Pennsylvania, "[w]here a party voluntarily assumes a lower paying job, there generally will be no effect on the support obligation," and "[a] party will ordinarily not be relieved of a support obligation by voluntarily quitting work or by being fired for cause." *Pa.R.C.P. No. 1910.16-2(d)(1)*. In construing this rule, the Superior Court has required that a party seeking modification after a voluntary reduction in income show (1) that the change was not made for the purpose of avoiding child support, and (2) that reduction is warranted based on the party's efforts to mitigate the lost income. *See Grimes v. Grimes, 408 Pa. Super. 158, 596 A.2d 240, 242 (Pa. Super. 1991)*; *see also Kersey v. Jefferson, 2002 PA Super 22, 791 A.2d 419, 423 (Pa. Super. 2002)*. "Otherwise, for calculation of a support obligation, the petitioner will be considered to have an income equal to his or her earning capacity as defined in the support guidelines." *Grimes, 596 A.2d at 242*.

Upon consideration of these competing arguments, we agree with the courts favoring the "no justification" rule that it is appropriate to analogize incarceration to voluntary unemployment. As the Supreme Court of Kansas explained:

> The specific language utilized in some of the [***21] cases supporting [the "no justification"] rule to the effect that incarceration is similar to quitting a job to

> avoid paying child support and that in both situations, the inability to pay is "voluntary" stretches reality a bit. Most inmates would have difficulty accepting the concept that their incarceration is to be considered "voluntary." It is more accurate to say that a [*307] reduction of income from a cause beyond the obligor's control (such as illness, injury, lay-off, etc.) should be considered differently from those which arise from causes within his or her control. Criminal activity foreseeably can lead to incarceration and such activity is obviously within an individual's control. Public policy considerations heavily favor the no-justification rule.

[**1177] *Thurmond, 962 P.2d at 1073*. We agree with the Supreme Court of Kansas that, as it is foreseeable that criminal conduct can lead to incarceration, a reduction in income occasioned by criminal incarceration is clearly within the control of the obligor. Thus, we conclude that an incarcerated obligor, though in somewhat different circumstances from a voluntarily unemployed obligor, has control over his or her [***22] circumstances similar to that of a voluntarily unemployed obligor. Accordingly, it is appropriate to treat these two types of obligors alike. *Accord Halliwell, 741 A.2d at 647*; *Baggett, 990 P.2d at 245*; *see also 23 Pa.C.S. § 4322(a)* ("Child and spousal support shall be awarded pursuant to a statewide guideline . . . so that persons similarly situated shall be treated similarly.").

In sum, we conclude that the "no justification" rule best serves the interests of the child and is in harmony with fairness principles and the child support laws of Pennsylvania. [11] Under the "no justification" rule, it is clear that incarceration, standing alone, is not a "material and substantial change in circumstances" providing sufficient grounds for modification or termination of a child support order. [12] In this case, Father was incarcerated for sexually assaulting his [*308] daughter. [13] His sole argument in support of his petition for modification or termination of his child support obligation was that his incarceration made him unable to pay. Thus, Father cannot obtain relief from his child support obligations. Accordingly, the Superior [***23] Court did not err in affirming the trial court's dismissal of Appellant Keith A. Yerkes' petition for modification or termination of his child support obligation.

11 In addition to being in accord with Pennsylvania law, the "bright-line" nature of the "no justification" rule is also advantageous because it prevents the burdensome case-by-case determinations that occur under the "one factor" rule. *See Thurmond, 962 P.2d at 1072-73*. The "no justification" rule will also result in the filing of fewer modification petitions than necessarily occurs under the "complete justification" rule. *See id.*

12 In *Leasure v. Leasure, 378 Pa. Super. 613, 549 A.2d 225 (Pa. Super. 1988)*, the Superior Court held that a child support obligation should be suspended where the obligor is incarcerated. To the extent that *Leasure* conflicts with the approach we adopt today, we disapprove of it.

13 We note that the result dictated by the rule we adopt today is particularly appropriate given these circumstances. *See Reid, 944 S.W.2d at 562* (holding that relief is prohibited where "the misconduct which resulted in appellant's imprisonment was perpetrated against a child for whom appellant owed a duty of support . . . ."); *see also* Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, *29 Conn. L. Rev. 647, 718-19 (1997)* ("consideration of the nature of the crime seems appropriate where the crime involves a personal assault on the party adversely affected by a voluntary reduction of income").

[***24] The order of the Superior Court is affirmed.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Eakin files a concurring opinion.

CONCUR BY: SAYLOR; EAKIN

CONCUR

CONCURRING OPINION

MR. JUSTICE SAYLOR

Although I see merit in the majority's approach, I would endorse the Superior Court's, which reposed substantial discretion in the trial court to assess the fact of incarceration as one factor in determining whether to grant a petition for modification or termination of child support, particularly in the absence of a specific legislative directive otherwise. *See Leasure v. Leasure, 378 Pa. Super. 613, 616-17, 549 A.2d 225, 226-27 (1988)* (stating that the trial court should consider, *inter alia*, the length of incarceration and the assets of the incarcerated parent in reviewing a petition for modification or suspension of [**1178] child support payments); [1] *see also Kelley v. Kelley, 444 Pa. Super. 286,* [*309] *288, 663 A.2d 785, 786 (1995)* (holding that the fact of incarceration is "but one of several factors" that the trial court must consider in deciding whether to suspend support payments). In any event, given the particular circumstances [***25]

of this case, I find no abuse of discretion in the trial court's denial of Appellant's petition for termination.

1 Although some jurisdictions have viewed *Leasure* as embracing the complete justification rule, *see*, *e.g.*, *Halliwell v. Halliwell, 326 N.J. Super. 442, 741 A.2d 638, 645 (N.J. Super. Ct. 1999)*; *In re Marriage of Thurmond, 265 Kan. 715, 962 P.2d 1064, 1070-71 (Kan. 1998)*, others have more appropriately categorized it as adopting the one factor rule. *See In re Marriage of Burbridge, 317 Ill. App. 3d 190, 738 N.E.2d 979, 982, 250 Ill. Dec. 510 (Ill. App. 2000)*; *In re Marriage of Hamilton, 857 P.2d 542, 544 (Colo. Ct. App. 1993).*

CONCURRING OPINION

MR. JUSTICE EAKIN

I join the majority opinion, which properly holds that, "incarceration, standing alone, is not a 'material and substantial change in circumstances' providing sufficient grounds for modification or termination of a child support order. [***26] " *Yerkes v. Yerkes*, 151 MAP 2001, at 13 (footnote omitted). Although I completely agree with this statement, I cannot agree that incarceration is not a substantial change of circumstance; it clearly is, and we should not, and need not, avoid saying so.

We need not because the heart of the matter is the second half of the phrase, not the first. The proper question is whether this is a change that allows an existing support obligation to be modified or terminated. While incarceration should be acknowledged to be a significant change of circumstance, it may not be grounds for modification or termination of a child support order, as a matter of public policy. [1]

1 Courts have the independent authority to discern public policy in the absence of legislation. *Shick v. Shirey, 552 Pa. 590, 716 A.2d 1231, 1237 (Pa. 1998).* "It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring." *Lurie v. Republican Alliance, 412 Pa. 61, 192 A.2d 367, 370 (Pa. 1963)* (quoting *Mamlin v. Genoe, 340 Pa. 320, 17 A.2d 407, 409 (Pa. 1941)*; *Commonwealth ex rel. Fox v. Swing, 409 Pa. 241, 186 A.2d 24, 27, 54 Mun. L Rep. 174 (Pa. 1962)* (Bell, J., concurring)).

[***27]

CATHERINE KIMOCK, Appellee v. THOMAS JONES, Appellant

No. 1577 EDA 2011

SUPERIOR COURT OF PENNSYLVANIA

2012 PA Super 128*; *47 A.3d 850*; *2012 Pa. Super. LEXIS 1054

March 13, 2012, Argued
June 19, 2012, Filed

PRIOR HISTORY: [**1]
Appeal from the Order of the Court of Common Pleas, Northampton County, Domestic Relations Division, No(s): DR-150004 & CID 226106695. Before ROSCIOLI, J.

COUNSEL: Stanley J. Margle, III, Bethlehem, for appellant.

Linda S. Gardner, Bethlehem, for appellee.

JUDGES: BEFORE: GANTMAN, J., SHOGAN, J., and WECHT, J. OPINION BY GANTMAN, J.

OPINION BY: GANTMAN

OPINION

[*851] OPINION BY GANTMAN, J.:

Appellant, Thomas Jones ("Father"), appeals from the order entered in the Northampton County Court of Common Pleas, which denied Father's petition to terminate child support for his daughter, C.T.J. ("Child"). Father asks us to determine whether the court's most recent custody order (granting Appellee, Catherine Kimock ("Mother"), sole physical and legal custody of Child and limiting Father's contact with Child as permitted and under conditions deemed appropriate by Mother) was tantamount to termination of Father's parental rights such that he should no longer have to pay child support. On this record, we hold that the court's restrictive custody order did not "effectively terminate" Father's parental rights, as alleged; [*852] and Father failed to demonstrate a "material and substantial change" in circumstances to permit complete relief from his child support obligation. Accordingly, we affirm.

The relevant facts and procedural history of this [**2] case are as follows. Mother and Father were married on February 20, 1993, and Child was born the following year. [1] Throughout the marriage, Father verbally and physically abused both Mother and Child. Mother and Father separated in 2004, and on April 15, 2004, Mother filed a divorce complaint. Child lived with Mother after the parties separated, and Father had no contact with Child for the next year. On April 8, 2005, Father filed a custody complaint. Pursuant to stipulation, the court entered an order on August 12, 2005, awarding primary physical custody to Mother and shared legal custody to both parties. The court's order also required Father and Child to participate in reunification counseling therapy, with the goal of establishing regular visitation and partial physical custody for Father. During the counseling sessions, Child ignored Father and on at least one occasion, she attended the session with a blanket over her head to avoid contact with Father. Father admitted during therapy that he had "anger issues." The reunification counseling proved unsuccessful and ceased in 2005, after only five sessions.

1 During all of these proceedings, Child was a minor; she has since reached [**3] the age of majority. Nevertheless, Child has some mental health issues, which could extend Father's child support obligation beyond Child's eighteenth birthday.

On July 13, 2006, Father filed a *praecipe* to have the case scheduled for a conference before a custody master. Following the conference, the parties entered into an agreement, adopted as a court order on August 11, 2006, requiring Father to undergo a diagnostic evaluation with a psychologist. Dr. Ronald J. Esteve evaluated Father and concluded he suffered from bipolar disorder. Dr. Esteve recommended that Father complete extensive

psychotherapy before attempting further reunification with Child. Despite Dr. Esteve's recommendation, Father insisted he did not have bipolar disorder and refused to undergo additional psychotherapy. [2]

2 The parties were divorced on February 12, 2007.

Father had no contact with Child between the last reunification attempt in 2005 until September 2009. On September 24, 2009, Father filed a petition to modify custody and to compel reunification therapy. The court subsequently ordered Father to participate in individual reunification therapy with Terrence P. Brennan, M.A.; Child would continue individual [**4] therapy with Theresa Applegarth, L.P.C. Pursuant to court order, Mr. Brennan and Ms. Applegarth would confer after six weeks of conducting individual therapy with Father and Child, respectively, to determine whether continued reunification therapy was in Child's best interests. If not, Mr. Brennan was directed to issue a report to the court indicating reasons why reunification therapy was not in Child's best interests. On October 16, 2010, Mr. Brennan issued a report stating Child strongly opposed reunification therapy and threatened to harm herself if required to participate. Nevertheless, Mr. Brennan declined to say whether continued reunification therapy was in Child's best interests because Mr. Brennan was unable to confer with Ms. Applegarth.

On January 24-25, 2011, the court held a hearing on Father's petition to modify custody. At the hearing, Mother testified that the ongoing litigation has caused [*853] Child to hurt herself. Child testified she saw Father only one time since ending reunification therapy in 2005; on that occasion, Child threw up after seeing Father and became extremely irate later that evening. Child testified she would "run" or harm herself if ordered to participate [**5] in reunification therapy. Ms. Applegarth testified that Child has been diagnosed with and treated for attention deficit disorder, obsessive compulsive disorder, post-traumatic stress disorder, and an eating disorder, since 1999. Ms. Applegarth opined that the risks of reunifying Father and Child outweighed any potential benefits. In fact, Ms. Applegarth was unable to identify **any** benefit to Child in pursuing reunification therapy at that time and suggested Child should work individually through her issues about Father. Ms. Applegarth expressed concerns that Child would run away or harm herself if the court ordered reunification. Father explained he wanted to attempt reunification therapy, despite his non-compliance with Dr. Esteve's recommendation to undergo extensive individual psychotherapy beforehand. Father indicated he had tried to correspond with Child *via* e- mail, cards, and letters; but Child consistently refused to acknowledge Father's efforts.

On February 8, 2011, the court denied Father's petition to modify custody. Additionally, the court determined shared legal custody was no longer in Child's best interests. Consequently, the court entered the following order:

> AND NOW, [**6] this 8th day of February, 2011, [Father's] Petition for Modification of Custody is hereby **DENIED.** [Mother] is hereby granted sole physical and legal custody of [Child]. [Father] may only have contact with Child as permitted by [Mother] and under such conditions deemed appropriate by [Mother].
>
> Pursuant to *23 Pa.C.S.A. § 5309(b)* [now *23 Pa.C.S.A. § 5336(c)*], [Father] shall not have direct access to Child's medical, dental, religious, or school records. Rather, [Mother] shall provide to [Father] copies of Child's school records, including, but not limited to, grade reports and scholastic achievements. [Mother] shall notify [Father] of any extraordinary medical or dental treatment as soon as practical.
>
> [Mother] shall not make, or permit anyone else to make, derogatory or negative comments about [Father] or his family members in the presence of Child.

(Order, 2/8/11, at 1-2).

On February 16, 2011, Father filed a petition to terminate child support, [3] alleging the court's February 8, 2011 order effectively terminated his parental rights to Child such that he should no longer have to pay child support. Following a hearing, the court denied Father's petition on May 17, 2011. On June 13, 2011, [**7] Father timely filed a notice of appeal. The next day, the court ordered Father to file a concise statement of errors complained of on appeal pursuant to *Pa.R.A.P. 1925(b)*, which Father timely filed on June 20, 2011.

3 At that time, Father's child support obligation was six hundred and twenty-eight dollars ($628.00) per month, plus one hundred and twenty-six dollars ($126.00) per month on arrears.

Father raises one issue for our review:

> DID THE TRIAL COURT COMMIT AN ERROR OF LAW OR ABUSE OF

DISCRETION IN DENYING FATHER'S PETITION FOR TERMINATION OF CHILD SUPPORT?

(Father's Brief at 4).

Our standard of review over child support orders is:

> [*854] When evaluating a support order, this Court may only reverse the trial court's determination where the order cannot be sustained on any valid ground. We will not interfere with the broad discretion afforded the trial court absent an abuse of the discretion or insufficient evidence to sustain the support order. An abuse of discretion is not merely an error of judgment; if, in reaching a conclusion, the court overrides or misapplies the law, or the judgment exercised is shown by the record to be either manifestly unreasonable or the product of partiality, prejudice, [**8] bias or ill will, discretion has been abused. In addition, we note that the duty to support one's child is absolute, and the purpose of child support is to promote the child's best interests.

***Brickus v. Dent**, 2010 PA Super 183, 5 A.3d 1281, 1284 (Pa.Super. 2010)* (quoting ***Silver v. Pinskey**, 2009 PA Super 183, 981 A.2d 284, 291 (Pa.Super. 2009)* (*en banc*)). ***See also Ricco v. Novitski**, 2005 PA Super 121, 874 A.2d 75, 79 (Pa.Super. 2005).*

Father argues the court's February 8, 2011 custody order so severely restricted his contact with Child that it was analogous to an involuntary termination of his parental rights under the Adoption Act. Father asserts an involuntary termination of parental rights order extinguishes an obligor's duty to pay child support; the custody order at issue should similarly absolve Father's support obligation. Father concedes the involuntary termination of parental rights procedures under the Adoption Act involve a higher burden of proof. Nevertheless, Father claims this distinction is irrelevant where the practical effect of the court's custody order is the same as an order terminating parental rights. Father maintains the court's order prevents him from assisting in Child's development and ensures that his only role in [**9] Child's life is one of financial support. Father acknowledges Child was seventeen at the time of the pertinent proceedings, but he emphasizes Child has some mental health issues which might preclude her from graduating high school on time and ultimately extend Father's support obligation after Child reaches the age of majority. Father concludes the court's custody order essentially operated to terminate his parental rights such that it should also extinguish his obligation to pay child support, and this Court must reverse the order denying his petition for relief from child support. We disagree.

Initially, we observe that custody cases and involuntary termination of parental rights cases, under the Adoption Act, are markedly different in both purpose and procedure. ***In re B.L.L.**, 2001 PA Super 341, 787 A.2d 1007 (Pa.Super. 2001).*

> The most significant difference between custody cases and termination cases lies with the quality of the determination which directly impacts on the standard of review. As between parents and others who have standing in a custody case, the standard of review is preponderance of the evidence. ... In making an Order for partial custody or primary custody, the court must consider [**10] the preference of the child as well as other factors which legitimately impact the child's physical, intellectual and emotional well-being. It is important for the court to at least attempt to determine, as best it can, the child's preference, which must comport with the child's best interest.
>
> * * *
>
> **The proceeding for involuntary termination of parental rights stands upon a different foundation, a different standard of review, and requires judicial determinations in keeping with these statutory requirements.**
>
> There is no provision for termination of parental rights at common law and, like [*855] adoption, it is purely a creature of legislation. Initially, **termination of parental rights for all practical purposes ends the parent/child relationship as unequivocally as the death of the child**, ...and for that reason...the standard of proof [is] clear and convincing evidence.
>
> Secondly, the best interest of the child is not the first and only consideration. The court must initially find that the statutory requirements for termination of parental rights have been met. The balancing test between two parents involved in a custody proceeding is not applicable

> because parental rights are not being divested [**11] as they would be following involuntary termination. Thus, the best interest standard applicable in custody cases requires the court to weigh which parent will be best able to serve the needs of the child. In a termination case, only after the court in a bifurcated process has determined within the same proceeding that the parent has or has not forfeited his right to parent the child, must the court turn to review of the needs and welfare of the child.

Id. *at 1012-14* (emphasis added) (internal citations omitted). ***See also*** *23 Pa.C.S.A. § 2511* (delineating statutory grounds for involuntary termination of parental rights). Additionally, "[a] decree terminating all rights of a parent or a decree terminating all rights and duties of a parent entered by a court of competent jurisdiction shall extinguish the power or the right of the parent to object to or receive notice of adoption proceedings." *23 Pa.C.S.A. § 2521(a)*. Because an order terminating parental rights forever severs that relationship, an order terminating parental rights also terminates a parent's obligation to pay child support. ***Kauffman v. Truett****, 2001 PA Super 91, 771 A.2d 36, 38 (Pa.Super. 2001)*.

With respect to child support, our Supreme Court [**12] has stated:

> The principal goal in child support matters is to serve the best interests of the child through provision of reasonable expenses. The duty of child support, as every other duty encompassed in the role of parenthood, is the equal responsibility of both mother and father. As this duty is absolute, it must be discharged by the parents even if it causes them some hardship.

Yerkes v. Yerkes*, 573 Pa. 294, 297-98, 824 A.2d 1169, 1171 (2003)* (internal citations and quotation marks omitted).

Pennsylvania Rule of Civil Procedure 1910.19 sets forth the relevant guidelines to terminate a support order:

> ***Rule 1910.19*. Support. Modification. Termination. Guidelines as Substantial Change in Circumstances. Overpayments** (a) A petition for modification or termination of an existing support order shall specifically aver the material and substantial change in circumstances upon which the petition is based. A new guideline amount resulting from new or revised support guidelines may constitute a material and substantial change in circumstances. The existence of additional income, income sources or assets identified through automated methods or otherwise may also constitute a material and substantial [**13] change in circumstances.

Pa.R.C.P. 1910.19(a). "The burden of demonstrating a material and substantial change rests with the moving party, and the determination of whether such change has occurred in the circumstances of the moving party rests within the trial court's discretion." ***Summers v. Summers****, 2012 PA Super 3, 35 A.3d 786, 789 (Pa.Super. 2012)*. ***See also Yerkes, supra*** (explaining parent's incarceration, by itself, does not constitute material [*856] and substantial change to warrant modification or termination of child support; denial of father's petition to terminate support was particularly appropriate where father's incarceration was based on his sexual assault of daughter; relief is prohibited where misconduct which resulted in appellant's imprisonment was perpetrated against child for whom appellant owed duty of support). [4]

> 4 Following the Supreme Court's decision in ***Yerkes***, *Rule 1910.19* was amended to include a provision allowing the court to modify or terminate child support when it appears to the court that the order is no longer able to be enforced under state law; or the obligor is unable to pay, has no known income or assets and there is no reasonable prospect that the obligor will be able to [**14] pay in the foreseeable future. ***See*** *Pa.R.C.P. 1910.19(f)*.

The obligation to support one's child does not depend on a parent's custodial rights. ***Kauffman, supra. See also Luzerne County Children and Youth Services v. Cottam****, 412 Pa. Super. 268, 603 A.2d 212 (Pa.Super. 1992)*, *appeal denied*, *530 Pa. 666, 610 A.2d 45 (1992)*, *cert. denied*, *506 U.S. 960, 113 S. Ct. 425, 121 L. Ed. 2d 347 (1992)* (holding father owed duty to support child even though child was placed in care of CYS). Additionally, the amount of time a parent spends with his child has no bearing on the parent's obligation to provide child support. ***DeWalt v. DeWalt****, 365 Pa. Super. 280, 529 A.2d 508 (Pa.Super. 1987)*. "Though the parent-child relationship is the basis of this duty, a parent may not be released from this obligation by the actions of the child. A minor child cannot waive [her] right to support. This is

so even if [she] renounces the parent and refuses to see him." ***Id.*** *at 511*. ***See also Hanson v. Hanson****, 425 Pa. Super. 508, 625 A.2d 1212 (Pa.Super. 1993)* (explaining obligation of support is not diminished even if child refuses to maintain relationship with parent). Likewise, a parent cannot use the amount of time he spends with his child as a method of reducing his support obligation [**15] at the expense of the child. ***Anzalone v. Anzalone****, 449 Pa. Super. 201, 673 A.2d 377 (Pa.Super. 1996)*.

Instantly, in denying Father's petition to cease his child support obligation, the trial court reasoned:

> This [c]ourt is not aware of any authority where a duty of support ends because of the terms of a custody order. ...
>
> Father's position ignores the legal standards applicable to an involuntary termination of parental rights proceeding and a custody proceeding. In a proceeding to involuntarily terminate parental rights, the burden of proof is upon the party seeking termination to establish by "clear and convincing" evidence the existence of grounds for doing so. The standard of "clear and convincing" evidence is defined as testimony that is so clear, direct, weighty and convincing as to enable the trier of fact to come to a clear conviction, without hesitance, of the truth of the precise facts in issue. ***In re R.M.G.****, 2010 PA Super 103, 997 A.2d 339 (Pa.Super. 2010)*[, *appeal denied*, *608 Pa. 648, 12 A.3d 372 (2010)*].
>
> When a [c]ourt is faced with a petition for modification of custody, the standard for the [c]ourt to follow is "the best interest of the child." It is well settled, that in any instance in which child custody is [**16] determined, the overriding concern of the court must be the best interest and welfare of the child, including the child's physical, intellectual, emotional, and spiritual wellbeing. ***Shandra v. Williams****, 2003 PA Super 85, 819 A.2d 87 (Pa.Super. 2003)*.
>
> [The court's February 8, 2011] decision was a decision reached after determining what custody arrangement was in the best interest of the child. At no time was [the court] asked to determine [*857] whether there was clear and convincing evidence that Father's parental rights should be terminated.
>
> The [c]ourt was unwilling to allow Father to escape his obligation to support his child simply because a [c]ourt determined that it was in the best interest of [C]hild that Father have no contact with her. Granting Father's petition could have the effect of having parents avoid their support obligations simply by terminating any contact they have with their child. Allowing a parent to end his obligation of support by having no contact through a custody order would allow a parent to choose an option that would allow him to terminate [his] support obligations. To allow the support obligation to end would be contrary to a parent's obligation to support his child and would [**17] be contrary to the best interest of a child. For these reasons, this [c]ourt denied Father's request for relief and ordered him to pay child support.

(Trial Court Opinion, filed August 8, 2011, at 3-4). We see no reason to disturb the court's decision to deny Father's petition to terminate child support under the facts of this case. ***See Brickus, supra.***

The court evaluated the evidence presented at the hearing on Father's petition for custody under a preponderance of the evidence standard to determine the best interests of Child. At no time during that proceeding, was the court asked to evaluate the evidence under the statutory requirements of the Adoption Act, using a clear and convincing evidence standard. ***See In re B.L.L., supra.*** Here, the court decided by the preponderance of the evidence, *inter alia*: (1) reunification therapy would not benefit Child; (2) Father is incapable of making reasonable child-rearing decisions for Child; (3) Child does not recognize Father as a source of security and love; (4) Father and Mother cannot cooperate concerning Child's development and wellbeing; and (5) shared legal custody was no longer in Child's best interests. (***See*** Trial Court Opinion, filed [**18] February 8, 2011, at 20-21.) Consequently, the court limited Father's contact with Child as permitted, and under such conditions deemed appropriate, by Mother; and allowed Father access to Child's medical, dental, religious, and/or school records indirectly through Mother. Importantly, the court's order left open the possibility for reunification between Father and Child at some time in the future; and allowed Father to have contact with Child and access to Child's records, albeit under restricted means. Additionally, the court did not extinguish **all** of Father's rights concerning Child, *e.g.*, Father retains the right to receive notice of and object to adoption proceedings. ***Compare*** *23 Pa.C.S.A. §*

2521. Thus, the restrictive custody order did not "effectively" terminate Father's parental rights. ***See In re B.L.L., supra.***

Moreover, Father failed to prove that the custody order alone constituted a "material and substantial change" in circumstances for purposes of *Rule 1910.19*. ***See Summers, supra.*** Father provided the trial court with no variation in either his finances or Child's needs, which would affect his ability to pay support. ***See*** *Pa.R.C.P. 1910.19*. Instead, Father relied solely on [**19] his notion that the court's order limiting custody was the "material and substantial change" warranting relief from his support obligation. Absent more, we conclude the restrictive custody order was not a "material and substantial change" in circumstances as contemplated under the applicable rules. ***See*** *Pa.R.C.P. 1910.19*; ***Kauffman, supra***; ***Anzalone, supra***; ***Luzerne County Children and Youth Services, supra.***

[*858] Significantly, Father was the primary cause of the estrangement. During and after the parties' marriage, Father verbally and physically abused both Mother and Child. Father's conduct made Child so angry, she threatened self-destructive behavior to avoid contact with him. Father also declined to follow Dr. Esteve's recommendation to complete extensive psychotherapy for his anger and bipolar disorder. Essentially, Father used his own egregious behavior and Child's reactive condition to try to end his support obligation. To grant Father's request would offend the goals of child support law and reward Father for destroying his relationship with Child. ***See Brickus, supra.*** Father cannot use his own misconduct and its ramifications to escape his absolute duty to support Child. ***See Yerkes, supra.*** [**20] Likewise, Child's refusal to maintain contact with Father does not relieve Father of his support obligation, under these facts. ***See Hanson, supra***; ***DeWalt, supra.***

Based upon the foregoing, we hold that the court's restrictive custody order did not "effectively terminate" Father's parental rights, as alleged; and Father failed to demonstrate a "material and substantial change" in circumstances to permit complete relief from his child support obligation. Accordingly, we affirm.

Order affirmed.

KELLY WARMKESSEL, Appellee vs. ERIC HEFFNER, Appellant

No. 879 MDA 2010

SUPERIOR COURT OF PENNSYLVANIA

2011 PA Super 46*; *17 A.3d 408*; *2011 Pa. Super. LEXIS 58

November 29, 2010, Submitted
March 10, 2011, Filed

SUBSEQUENT HISTORY: Appeal denied by *Warmkessel v. Heffner, 2011 Pa. LEXIS 2845 (Pa., Nov. 29, 2011)*

PRIOR HISTORY: [**1]
Appeal from the Order February 26, 2010. In the Court of Common Pleas of Berks County. Domestic Relations, No. 01-1265-00. PACSES # 595103445. Before CAMPBELL, J.

COUNSEL: Roarke T. Aston, Reading, for appellant.

John T. Adams, Reading, for appellee.

JUDGES: BEFORE: STEVENS, GANTMAN, AND FITZGERALD *, JJ. OPINION BY GANTMAN, J.

* Former Justice specially assigned to the Superior Court.

OPINION BY: GANTMAN

OPINION

[*410] **OPINION BY GANTMAN, J.:**

Appellant, Eric Heffner, appeals from the order entered in the Berks County Court of Common Pleas, finding him in civil contempt for non-payment of court-ordered child support and imposing sanctions in the form of a maximum of three (3) months of imprisonment with a purge amount of one hundred dollars ($100.00). Appellant's sole complaint on appeal is that the court erred when it refused to give him credit against his incarceration sanction for the time he served from February 5, 2010, when police took him into custody, until the support enforcement hearing on February 26, 2010. We hold Appellant was not entitled to "credit" against his civil contempt sanction for the time he spent in jail awaiting the support enforcement hearing, and the court properly denied his requested relief. Accordingly, we affirm.

The relevant facts and procedural history of this case are as follows. On May 9, 2001, [**2] Appellee, Kelly Warmkessel, filed a complaint for child support. By order entered on January 8, 2002, the court directed Appellant to pay child support for his two children in the total amount of two hundred and sixty dollars ($260.00) per month. Despite this order, Appellant failed to make regular payments. Over the years that followed, the Domestic Relations Section had to file numerous petitions to enforce the support order, and with little success. Appellant also tried to modify the support order on several occasions but then failed to appear/prosecute his petitions. As a result, Appellant managed to accumulate substantial arrearages.

The year 2009 began with a contempt compliance conference listed for January 20, 2009. That conference was continued because Appellant had a workers' compensation [*411] medical examination scheduled for January 29, 2009, that could lead to benefits. On the day of the rescheduled conference, Appellant signed an authorization to attach any retroactive lump sum he might receive in workers' compensation benefits. What followed was a series of contempt petitions, scheduled conferences, postponements and finally a support enforcement hearing listed for November [**3] 6, 2009. Although properly served, Appellant failed to appear at the November 6, 2009 support enforcement hearing. Consequently, the court issued a bench warrant for Appellant's arrest.

On February 5, 2010, police took Appellant into custody on the outstanding bench warrant. The court set unsecured bail at $5,000.00 ROR and immediate release if Appellant paid court costs of $525.08. The court

re-scheduled the support enforcement hearing for February 26, 2010. Notwithstanding the nominal release conditions, Appellant stayed in jail until the hearing.

On February 26, 2010, the court held the re-scheduled support enforcement hearing. At that time, Appellant was six thousand and thirty-seven dollars ($6,037.00) delinquent in his child support payments. Following the hearing, the court held Appellant in civil contempt and sanctioned Appellant with a maximum of three (3) months' imprisonment with a minimal purge amount of one hundred dollars ($100.00). Appellant's counsel asked the court to give Appellant credit against the three-month sanction for the twenty-one (21) days he had already spent in custody on the bench warrant before the re-scheduled support hearing. The court declined but invited [**4] counsel to submit legal authority on the issue for the court's review.

On March 4, 2010, Appellant filed a motion for reconsideration, arguing he was entitled to what he called "credit for time served," based on equal protection grounds. By order dated March 19, 2010, the court expressly granted reconsideration. On April 22, 2010, the court denied the requested relief. Appellant timely filed his notice of appeal on May 20, 2010. That same day, the court ordered Appellant to file a concise statement of matters complained of on appeal pursuant to *Pa.R.A.P. 1925(b)*, which Appellant timely filed on June 8, 2010.

Appellant raises the following issues for our review:

> IS THE ISSUE RAISED BY APPELLANT, WHICH IS CAPABLE OF REPETITION, BUT LIKELY TO EVADE REVIEW, MOOT AS HE IS NO LONGER INCARCERATED IN CONNECTION WITH THE [TRIAL] COURT'S FINDING OF CIVIL CONTEMPT?
>
> DID THE [TRIAL] COURT ABUSE ITS DISCRETION BY FAILING TO CREDIT TOWARDS APPELLANT'S CIVIL CONTEMPT [SANCTION] TIME SPENT INCARCERATED ON A DOMESTIC RELATIONS BENCH WARRANT AND HIS SUBSEQUENT INABILITY TO MEET CONDITIONS OF BAIL?
>
> DID THE [TRIAL] COURT VIOLATE APPELLANT'S EQUAL PROTECTION RIGHTS UNDER THE CONSTITUTIONS OF BOTH THE UNITED [**5] STATES AND THE COMMONWEALTH OF PENNSYLVANIA BY FAILING TO CREDIT TOWARDS HIS CIVIL CONTEMPT [SANCTION] TIME SPENT INCARCERATED ON A DOMESTIC RELATIONS BENCH WARRANT AND HIS SUBSEQUENT INABILITY TO MEET CONDITIONS OF BAIL?
>
> DID THE [TRIAL] COURT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS [*412] UNDER THE CONSTITUTIONS OF BOTH THE UNITED STATES AND THE COMMONWEALTH OF PENNSYLVANIA BY FAILING TO CREDIT TOWARDS HIS CIVIL CONTEMPT [SANCTION] TIME SPENT INCARCERATED ON A DOMESTIC RELATIONS BENCH WARRANT AND HIS SUBSEQUENT INABILITY TO MEET CONDITIONS OF BAIL?

(Appellant's Brief at 4).

For purposes of disposition, we consider Appellant's issues together. Appellant concedes he was released from prison upon completion of his civil contempt commitment on May 26, 2010. Nevertheless, Appellant argues his claim meets an exception to the mootness doctrine because he is subject to a continuing support order and might be subject to contempt proceedings in the future where the issue of credit for time served in that context could arise again. Appellant asserts his claim also meets an exception to the mootness doctrine because the issue of credit for time served in the civil contempt context is capable of repetition [**6] by other similarly situated defendants.

Appellant further concedes the dominant purpose of the court's sanction of incarceration was to coerce Appellant to comply with his child support obligations. Appellant suggests, however, that the time he spent in jail prior to the support enforcement hearing should qualify as coercive, such that the court's decision to deny him credit for the pre-hearing time served was manifestly unreasonable. Appellant submits it was manifestly unreasonable for the court to conclude that the pre-hearing time spent in detention was not "coercive" time because it had a different purpose. Appellant emphasizes he was financially unable to meet his bail conditions to pay the required $525.08 in court costs, so he had to spend the twenty-one (21) days incarcerated in addition to his three-month sanction. Essentially, Appellant complains the court denied him his fundamental right to be free from confinement based on his status as an indigent person. Appellant also reasons criminal defendants receive credit for all the time they spend in custody in connec-

tion with a criminal charge, so the court's failure to credit him for the pre-hearing time served, due to his status [**7] as a civil contemnor, also unfairly deprived him of his fundamental right to be free from confinement. Appellant maintains the policy reasons behind the statute granting credit for time served in the criminal context are equally applicable to his civil circumstances. Appellant concludes the court's refusal to credit him for his pre-hearing time denied Appellant his equal protection rights under both the United States and Pennsylvania Constitutions. [1] For the following reasons, Appellant's claims merit no relief.

> 1 Appellant makes a similar argument on due process grounds. Appellant failed to raise his due process argument in his motion for reconsideration or *Rule 1925(b)* statement. Consequently, he waived that claim on appeal. ***See** Pa.R.A.P. 302(a)* (stating issues not raised in trial court are waived and cannot be raised for first time on appeal).

Preliminarily, we observe:

> As a general rule, an actual case or controversy must exist at all stages of the judicial process, or a case will be dismissed as moot. An issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to an intervening change in the applicable law. In that case, an [**8] opinion of this Court is rendered advisory in nature. An issue before a court is moot if in ruling upon [*413] the issue the court cannot enter an order that has any legal force or effect.
>
> * * *
>
> [T]his Court will decide questions that otherwise have been rendered moot when one or more of the following exceptions to the mootness doctrine apply: 1) the case involves a question of great public importance, 2) the question presented is capable of repetition and apt to elude appellate review, or 3) a party to the controversy will suffer some detriment due to the decision of the trial court.

***In re D.A.**, 2002 PA Super 184, 801 A.2d 614, 616 (Pa.Super. 2002)* (*en banc*) (internal citations and quotation marks omitted). "The concept of mootness focuses on a change that has occurred during the length of the legal proceedings." ***In re Cain**, 527 Pa. 260, 263, 590 A.2d 291, 292 (1991)*. "If an event occurs that renders impossible the grant of the requested relief, the issue is moot and the appeal is subject to dismissal." ***Delaware River Preservation Co., Inc. v. Miskin**, 2007 PA Super 113, 923 A.2d 1177, 1183 n.3 (Pa.Super. 2007).*

Instantly, Appellant was released from prison upon the completion of his civil contempt commitment on May 26, 2010. Nevertheless, [**9] Appellant's release from prison does not render the issue moot because Appellant is subject to a continuing support order where Appellant might once again face civil contempt proceedings raising the issue of credit for time served, and other similarly situated defendants might raise the same claim. Therefore, this matter qualifies as an exception to the mootness doctrine. ***See In re D.A., supra. See, e.g., Barrett v. Barrett**, 470 Pa. 253, 368 A.2d 616 (1977)* (holding completion of imprisonment sanction imposed for civil contempt did not render claims on appeal moot where appellant remained subject to orders of support and failure to comply with those orders might again subject him to contempt proceedings); ***Griffin v. Griffin**, 384 Pa. Super. 210, 558 A.2d 86 (Pa.Super. 1989)* (holding husband's release from prison upon satisfying his support arrearages did not render issue on appeal moot where husband remained subject to continuing support order under which he could again be subject to contempt proceedings giving rise to same issue).

The relevant standard and scope of review is as follows:

> Our Supreme Court has held that an appellate court has the authority to determine whether the findings of the trial court [**10] support its legal conclusions, but may only interfere with those conclusions if they are unreasonable in light of the trial court's factual findings. This Court will not reverse or modify a final decree unless there has been an error of law or an abuse of discretion, or if the findings are not supported by the record, or there has been a capricious disbelief of the credible evidence. Furthermore [e]ach court is the exclusive judge of contempt against its process, and on appeal its actions will be reversed only when a plain abuse of discretion occurs.

***Mrozek v. James**, 2001 PA Super 199, 780 A.2d 670, 673 (Pa.Super. 2001)* (internal citations and quotation marks omitted).

> Judicial discretion requires action in conformity with law on facts and circum-

stances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason. Similarly, the trial court abuses its discretion if it does not follow legal procedure.

Where the discretion exercised by the trial court is challenged on appeal, the [*414] party bringing the challenge bears a heavy burden.

> [I]t is not sufficient [**11] to persuade the appellate court that it might have reached a different conclusion if...charged with the duty imposed on the court below; it is necessary to go further and show an abuse of the discretionary power. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused.

***Chenot v. A.P. Green Services, Inc.**, 2006 PA Super 52, 895 A.2d 55, 61-62 (Pa.Super. 2006).*

"Contempt is a generic concept distinguished by two types, criminal and civil contempt. The difference is not of the essence, but of the purpose sought by their use. The gravamen of both is the obstruction of orderly process, and each serves a different purpose for regulating obstruction." ***Crozer-Chester Medical Center v. Moran**, 522 Pa. 124, 130, 560 A.2d 133, 136 (1989).*

> The distinction between criminal and civil contempt is...a distinction between two permissible judicial responses to contumacious behavior. These judicial responses are classified according to the dominant purpose of the court. If the dominant [**12] purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public, it is a proceeding for criminal contempt. But where the act of contempt complained of is the refusal to do or refrain from doing some act ordered or prohibited primarily for the benefit of some private party, proceedings to enforce compliance with the decree of the court are civil in nature.
>
> The purpose of a civil contempt proceeding is remedial. Judicial sanctions are employed to coerce the defendant into compliance with the court's order, and in some instances, to compensate the complainant for losses sustained.
>
> > The factors generally said to point to a civil contempt are these: (1) [w]here the complainant is a private person as opposed to the government or a governmental agency; (2) where the proceeding is entitled in the original...action and filed as a continuation thereof as opposed to a separate and independent action; (3) where holding the [respondent] in contempt affords relief to a private party; (4) where the relief requested is primarily for the benefit of the complainant; and (5) where the acts of contempt complained of are primarily civil in character and do [**13] not of themselves constitute crimes or conduct by the [respondent] so contumelious that the court is impelled to act on its own motion.

***Stahl v. Redcay**, 2006 PA Super 55, 897 A.2d 478, 486 (Pa.Super. 2006), appeal denied, 591 Pa. 704, 918 A.2d 747 (2007)* (quoting ***Commonwealth v. Ashton**, 2003 PA*

Super 194, 824 A.2d 1198, 1202 (Pa.Super. 2003)) (internal citations omitted). Whether a particular order contemplates civil or criminal contempt is imperative because each classification confers different and distinct procedural rights on the contemnor. ***Lachat v. Hinchliffe***, *2001 PA Super 50, 769 A.2d 481, 487 (Pa.Super. 2001).*

Section 4345 of the Domestic Relations Code ("DRC") governs punishment for contempt in support actions as follows:

> **§ 4345. Contempt for noncompliance with support order**
>
> **(a) General rule.--**A person who willfully fails to comply with any order under this chapter, except an order subject to section 4344 (relating to contempt for [*415] failure of obligor to appear), may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:
>
> > (1) Imprisonment for a period not to exceed six months.
> >
> > (2) A fine not to exceed $1,000.
> >
> > (3) Probation for a period not to exceed one year.
>
> **(b) Condition** [**14] **for release.**--An order committing a defendant to jail under this section shall specify the condition the fulfillment of which will result in the release of the obligor.

23 Pa.C.S.A. § 4345.

> To be found in civil contempt, a party must have violated a court order. Accordingly, the complaining party must show, by a preponderance of the evidence, that a party violated a court order. The alleged contemnor may then present evidence that he has the present inability to comply and make up the arrears. When the alleged contemnor presents evidence that he is presently unable to comply
>
> > the court, in imposing coercive imprisonment for civil contempt, should set conditions for purging the contempt and effecting release from imprisonment with which it is convinced beyond a reasonable doubt, from the totality of the evidence before it, the contemnor has the present ability to comply.

Childress v. Bogosian, *12 A.3d 448, 2011 PA Super 5, *14-15 (filed January 10, 2011)* (internal citations omitted).

Pennsylvania law provides for pre-sentence confinement credit in the criminal context as follows:

> **§ 9760. Credit for time served**
>
> After reviewing the information submitted under section 9737 (relating to report [**15] of outstanding charges and sentences) the court shall give credit as follows:
>
> (1) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.
>
> (2) Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody under a prior sentence if he is later reprosecuted and resentenced for the same offense or for another offense based on the same act or acts. This shall include credit in accordance with paragraph (1) of this section for all time spent in custody as a result of both the original charge and any subsequent charge for the same offense or for another offense based on the same act or acts.
>
> (3) If the defendant is serving multiple sentences, and if one of the sentences is set aside as the result of direct or collateral attack, credit against the maximum and any minimum term of the remaining

> sentences shall [**16] be given for all time served in relation to the sentence set aside since the commission of the offenses on which the sentences were based.
>
> (4) If the defendant is arrested on one charge and later prosecuted on another charge growing out of an act or acts that occurred prior to his arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former [*416] charge that has not been credited against another sentence.

42 Pa.C.S.A. § 9760. The DRC does not provide an analogous pre-sanction confinement credit in the civil context. ***See*** 23 Pa.C.S.A. § 4345.

In the instant case, Appellant failed to pay court-ordered child support. Following the February 26, 2010 support enforcement hearing, the court held Appellant in civil contempt and imposed sanctions of a maximum of three (3) months' imprisonment with a minimal purge amount of one hundred dollars ($100.00). Appellant's counsel asked the court to give Appellant credit against the three-month sanction for the twenty-one (21) days he had already spent in custody on the bench warrant before the rescheduled support hearing. The court declined. In support [**17] of its decision, the court reasoned:

> Pursuant to...civil contempt case law and the facts of this case, this [c]ourt set the [sanction] such that Appellant would, hopefully, be coerced into paying, and, consequently, immediately purge his contempt. It is impossible to predict how much time any one civil contempt defendant will choose to spend incarcerated. The relevant factors are whether a [c]ourt sets the appropriate purge, and whether the [c]ourt sets an appropriate [sanction] to "coerce" a defendant into paying the purge. As...Appellant in this case did not appeal the purge amount, it is an established fact that the $100 was the legally correct purge amount. Therefore, how long Appellant spent committed to prison was entirely his decision. Appellant's equal protection argument makes no sense in this civil contempt context.
>
> This [c]ourt found that a three-month potential maximum imprisonment was the coercion required to force...Appellant, who had a long track record of making zero child support payments, into making the purge payment. For the sake of argument, if Pennsylvania or constitutional law had required that Appellant receive credit time toward his civil sentence, then this [c]ourt [**18] would have given Appellant a longer [sanction] to offset the credit and achieve the required level of coercion. This [c]ourt set a $100 purge and a maximum commitment period of three months. The maximum allowable incarceration [sanction] for civil contempt for failure to comply with a child support order is six months. 23 Pa.C.S.A. § 4345(a)(1). Therefore, there was ample room to extend the maximum potential [sanction] to three months and twenty-one days to achieve the necessary amount of coercion.
>
> As to Appellant's discretion challenge, this [c]ourt did not abuse its discretion because there is no case law nor statute in Pennsylvania establishing that credit time shall be given in a civil contempt context. Furthermore, ...Appellant's constitutional argument was groundless in light of the facts of this case and in the context of the coercive purpose of civil contempt. This [c]ourt followed the child support law in setting a purge amount that Appellant was immediately capable of paying. Appellant did not appeal this purge amount. Thus, Appellant could have immediately purged his contempt and ended his incarceration. This [c]ourt set a maximum incarceration time period designed, per law, [**19] to coerce...Appellant into paying his purge and contribute toward his children's support. Applying credit time to the three month maximum incarceration [sanction] would have undercut the coercion and undermined the purpose of the civil contempt order. Appellant had no legal entitlement for time served to be credited toward a civil contempt commitment. His purge amount was set very [*417] low. His [sanction] was half of the allowable maximum civil contempt [sanction]. Thus, this [c]ourt acted pursuant to the applicable support law and did not abuse its discretion.

(Trial Court Opinion, filed June 25, 2010, at 4-6). We agree. Here, Appellant had the opportunity for immediate release ROR from his pre-hearing confinement, upon payment of modest court costs. After finding Appellant in civil contempt for failure to meet his child support obligations, the court imposed coercive confinement under 23 Pa.C.S.A. 4345, with a *de minimis* purge amount of $100.00. The court was convinced beyond a reasonable doubt, under the circumstances presented, that Appellant had the present ability to pay the purge amount. ***See Childress, supra.*** On appeal, there is no dispute that the purge amount was reasonable.

With [**20] respect to Appellant's time-served arguments, he provides no **relevant** statute or case law that requires a court to give credit toward a civil contempt commitment for pre-hearing time served. Instead, Appellant couches his complaints in bold, general, and sweeping terms of deprivation of constitutional rights, which must necessarily fail. ***See Lerner v. Lerner****, 2008 PA Super 183, 954 A.2d 1229, 1240 (Pa.Super. 2008)* (citing ***Jones v. Jones****, 2005 PA Super 213, 878 A.2d 86, 91 (Pa.Super. 2005)* (reiterating general rule: "It is the appellant who has the burden of establishing [his] entitlement to relief by showing that the ruling of the trial court is erroneous under the evidence or the law. Where the appellant has failed to cite any authority in support of a contention, the claim is waived")). ***See also Commonwealth v. Johnson****, 2009 PA Super 36, 967 A.2d 1001 (Pa.Super. 2009)* (stating right to credit for time served prior to trial or sentence is statutory; there is no constitutional right to credit for pre-trial/pre-sentence detention). As a result, we see no reason to disturb the court's decision to deny Appellant's request for credit for time served on the grounds alleged.

Based upon the foregoing, we hold Appellant was not entitled to "credit" [**21] against his civil contempt sanction for the time he spent in jail awaiting the support enforcement hearing, and the court properly denied his requested relief. Accordingly, we affirm.

Order affirmed.

MELISSA L. PLUNKARD, Appellant v. JOHN L. McCONNELL, Appellee

No. 538 WDA 2008

SUPERIOR COURT OF PENNSYLVANIA

2008 PA Super 282*; *962 A.2d 1227*; *2008 Pa. Super. LEXIS 4305

September 23, 2008, Argued
December 12, 2008, Filed

SUBSEQUENT HISTORY: Appeal denied by *Plunkard v. McConnell, 2009 Pa. LEXIS 1221 (Pa., July 1, 2009)*

PRIOR HISTORY: [***1]
Appeal from the Order of the Court of Common Pleas of Butler County, Domestic Relations Division, No. 25086. Before DOERR, J.

COUNSEL: Joseph E. Kubit, Butler, for appellant.

Christy P. Foreman, Pittsburgh, for appellee.

JUDGES: BEFORE: KLEIN, POPOVICH and FITZGERALD *, JJ. OPINION BY POPOVICH, J.

* Former Justice specially assigned to Superior Court.

OPINION BY: POPOVICH

OPINION

[**1228] OPINION BY POPOVICH, J.:

[*P1] Melissa L. Plunkard (Mother) appeals the order entered on February 19, 2008, in the Court of Common Pleas of Butler County, that granted the petition of John L. McConnell (Father) to terminate his support obligation for their minor child (Child), pursuant to *Pa.R.C.P. 1910.19(f)*. Upon review, we reverse in part and remand.

[*P2] The relevant facts and procedural history of this case are as follows. Mother gave birth to Child on August 25, 2000. Father and Mother were not married at the time of Child's birth, and they are not presently married to each other. Father's current support obligation to Child is $ 275.00 per month, and he is in significant arrears. Father was convicted of numerous criminal offenses and has been incarcerated since 2003. He is currently serving a 6-12 year sentence at the State Correctional Institution at Mercer (SCI-Mercer) for charges of aggravated assault, endangering the welfare of [***2] children, and simple assault. Father will be eligible for parole on December 6, 2008.

[*P3] On February 22, 2007, Father filed *pro se* a petition for modification and termination of his support obligation. Within the petition, Father claimed that he was [**1229] entitled to the termination of the support obligation and remittitur of the pending arrears because he was incarcerated, lacked income or assets, and was unable to pay the obligation for the foreseeable future. The domestic relations officer recommended that Father's petition should be granted, and the trial court adopted the domestic relations officer's recommendation by order entered November 5, 2007. Mother filed a petition for trial *de novo,* which occurred on January 30, 2008. Thereafter, on February 19, 2008, the trial court entered an order terminating Father's support obligation pursuant to *Pa.R.C.P. 1910.19(f)*. [1] Mother, in turn, filed a timely notice of appeal to this Court, and, pursuant to the trial court's order, a timely concise statement of errors complained of on appeal. Thereafter, the trial court authored an opinion that adopted its February 19, 2008 memorandum as its response to the issues presented in Mother's concise statement.

1 The [***3] trial court authored a memorandum in support of its order.

[*P4] Mother presents the following issue for our review:

> Whether the [trial court] erred in granting [Father's] motion for modification of an existing support order terminating the charging order for support and remitting all arrears[?]

Mother's brief, at 4.

[*P5] Initially, we note that our standard of review over the modification of a child support award is well settled. A trial court's decision regarding the modification of a child support award will not be overturned absent an abuse of discretion, namely, an unreasonable exercise of judgment or a misapplication of the law. ***See Schoenfeld v. Marsh,*** *418 Pa. Super. 469, 614 A.2d 733, 736 (Pa. Super. 1992).* An award of support, once in effect, may be modified *via* petition at any time, provided that the petitioning party demonstrates a material and substantial change in their circumstances warranting a modification. ***See*** *23 Pa.C.S.A. § 4352(a)*; ***see also*** *Pa.R.C.P. 1910.19.* The burden of demonstrating a "material and substantial change" rests with the moving party, and the determination of whether such change has occurred in the circumstances of the moving party rests within the trial court's discretion. ***See Bowser v. Blom,*** *569 Pa. 609, 807 A.2d 830 (2002).*

[*P6] [***4] In a typical case, arrears can be modified retroactively only during the period in which a petition for modification is pending. ***See*** *23 Pa.C.S.A. § 4352(e).* Title *23 Pa.C.S.A. § 4352(e)* states the following:

> (e) **Retroactive modification of arrears.**--No court shall modify or remit any support obligation, on or after the date it is due, except with respect to any period during which there is pending a petition for modification. If a petition for modification was filed, modification may be applied to the period beginning on the date that notice of such petition was given, either directly or through the appropriate agent, to the obligee or, where the obligee was the petitioner, to the obligor. However, modification may be applied to an earlier period if the petitioner was precluded from filing a petition for modification by reason of a significant physical or mental disability, misrepresentation of another party or other compelling reason and if the petitioner, when no longer precluded, promptly filed a petition. In the case of an emancipated child, arrears shall not accrue from and after the date of the emancipation of the child for whose support the payment is made.

[**1230] [*P7] In the present case, [***5] Father sought modification of his support obligation and retroactive modification of his support arrears *for the entire effective period of the award* based upon evidence that he was incarcerated and that he was without sufficient income or assets to meet his child support obligation until released from prison. Until recently, the mere fact of a parent's incarceration was not considered by the Courts of this Commonwealth to be a "material and substantial change in circumstances" that would provide sufficient grounds for modification or termination of a child support order. ***See, e.g., Yerkes v. Yerkes,*** *573 Pa. 294, 307, 824 A.2d 1169, 1177 (2003).* The basis for this principle was that incarceration, as opposed to institutionalization, results from intentional criminal conduct that results in a conviction and, therefore, was analogous to an obligor who voluntarily diminishes their income in an attempt to avoid a support obligation. ***Id.,*** *at 307, 824 A.2d at 1177.* However, on May 19, 2006, *Pa.R.C.P. 1910.19* was amended to include the following subdivision:

> (f) Upon notice to the obligee, with a copy to the obligor, explaining the basis for the proposed modification or termination, the court [***6] may modify or terminate a charging order for support and remit any arrears, ***all without prejudice,*** when it appears to the court that:
>
> > (1) the order is no longer able to be enforced under state law; or
> >
> > (2) the obligor is unable to pay, has no known income or assets and there is no reasonable prospect that the obligor will be able to pay in the foreseeable future.
>
> The notice shall advise the obligee to contact the domestic relations section within 60 days of the date of the mailing of the notice if the obligee wishes to contest the proposed action. If the obligee objects, the domestic relations section shall schedule a conference to provide the obligee the opportunity to contest the

> proposed modification or termination. If the obligee does not respond to the notice or object to the proposed action, the court shall have the authority to modify or terminate the order and remit any arrears, without prejudice.

(emphasis added).

[*P8] The explanatory comment accompanying *Rule 1910.19(f)* states the following:

> New *subdivision (f)* addresses an increasing multiplicity of circumstances in which the continued existence of a court-ordered obligation of support is inconsistent with the rules or law. An obligor [***7] with no known assets whose sole source of income is Supplemental Security Income or cash assistance cannot be ordered to pay support under *Rule 1910.16-2*. Likewise, an obligor with no verifiable income or assets whose institutionalization, incarceration, or long-term disability precludes the payment of support renders the support order unenforceable and uncollectible, diminishing the perception of the court as a source of redress and relief. Often, the obligor unable or unaware of the need to file for a modification or termination, or the parties abandon the action. In those circumstances, the courts are charged with managing dockets with no viable outcomes. Both the rules and the federal guidelines for child support under Title IV-D of the Social Security Act provide for circumstances under which a child support case may be closed.

[*P9] Therefore, the law of this Commonwealth now affords an incarcerated parent the ability to petition to modify or terminate their support obligation where they are able to prove that the order is no longer able to be enforced under state law or that the incarcerated obligor parent is [**1231] without the ability to pay their child support obligation and there is no [***8] reasonable prospect that they will be able do so for the foreseeable future. ***See Nash v. Herbster,*** *2007 PA Super 262, 932 A.2d 183, 188 (Pa. Super. 2007).*

[*P10] Although Father's parole eligibility date is December 8, 2008, the trial court concluded that, in its experience, it would be highly unlikely that Father would be released from prison and would remain incarcerated for a period in excess of ten years with no ability to pay his support obligation to Child. Trial court memorandum, 2/19/2008, at 4. Accordingly, the trial court granted Father's petition to terminate his support obligation and remitted all pending arrears.

[*P11] Mother asserts first that the trial court abused its discretion in granting Father's request, due to his age (32 years) and his upcoming parole eligibility. We disagree with Mother's argument. First, the trial court is in the best position to determine the relative length of time that an individual will be incarcerated for their convictions, and we will not disturb its exercise of discretion on this point. If, in fact, Father is released at an earlier date, Mother will have the ability to petition the trial court for a reinstatement of Father's support obligation because the trial court's [***9] termination order was entered without prejudice to Mother to reinstate the support obligation. ***See, e.g.,*** *Pa.R.C.P. 1910.19(f)* (trial court may terminate charging order for support without prejudice to obligee party). Further, the record is clear that Father is without resources, has no present ability to pay his support obligation, and will be unable to do so for the foreseeable future. Therefore, the trial court did not abuse its discretion in terminating the support obligation for the duration of Father's imprisonment. ***Id.*** Accordingly, Mother's argument fails. However, our inquiry does not end here.

[*P12] Mother also asserts that the trial court abused its discretion by remitting **all** of the arrears that have accumulated in this case. We agree with Mother's assertion.

[*P13] *Rule 1910.19(f)* states that the trial court *may* remit *any* arrears arising under a charging order of support when the obligor is unable to pay and there is no prospect that the obligor will be able to pay for the foreseeable future. However, the Rule does not automatically entitle an obligor to this broad relief. ***See Nash v. Herbster,*** *2007 PA Super 262, 932 A.2d 183, 188 (Pa. Super. 2007)* (Orie Melvin, J., concurring). The record is clear that [***10] Father was in arrears of his support obligation *prior* to his incarceration. ***See*** Certified record no. 24, November 26, 2002 Order. We find that it would be inequitable for Father to "benefit" financially from his incarceration for support debts arising prior to his incarceration. Therefore, we depart from the trial court's conclusion that Father's incarceration in 2003 should serve as a basis for remitting his pre-incarceration support arrears debt.

[*P14] Instead, we find that Father's petition for termination of his support obligation and the arrears arising from that obligation should apply only to the period of his incarceration itself. We base our conclusion

upon *23 Pa.C.S.A. § 4352(e)*. *Section 4352(e)* indicates that a trial court may modify arrears retroactively to a period of time prior to a pending modification petition for reasons of mental or physical disability, fraudulent conduct, or another "compelling reason."

[*P15] Presently, Father was not precluded from filing his modification (termination) petition by virtue of fraud committed against him or his own disability. Rather, he was precluded from filing his termination petition due to the state of the law of this Commonwealth as it had [***11] existed [**1232] prior to May 19, 2006, *i.e.,* the effective date of *Pa.R.C.P. 1910.19(f)*. It is more than likely that Father would have filed his petition shortly after he was incarcerated, had the law permitted him to do so. Thus, it would also be inequitable to limit the termination of Father's arrears to the period of the pendency of his petition (as in the typical case) due to the state of the law at the time of his initial incarceration. ***Cf.*** *23 Pa.C.S.A. § 4352(e)* (typically, retroactive modification of arrears permitted only during pendency of modification petition). Consequently, the sea change in the law presented a compelling reason to permit Father to seek termination of his arrears retroactively to the date that he was incarcerated. Therefore, we agree with the trial court's exercise of its discretion to remit those child support arrears that accrued to Father during the period of his incarceration.

[*P16] Nevertheless, we cannot find that the change in the law constitutes a "compelling reason" such that it would justify a retroactive modification of Father's pre-incarceration support arrearages. It has long been a precept of statutory construction that general words and phrases must be [***12] construed to take their meanings by preceding particular words. ***See*** *1 Pa.C.S.A. § 1903(b)*. The particular words and phrases preceding "other compelling reason" within *Section 4352(e)* are "precluded," "misrepresentation of another party" and "physical or mental disability." Therefore, it follows that the "compelling reason" that would justify a retroactive modification of Father's pre-incarceration support arrears would have resulted from a *pre-incarceration event* similar to the aforementioned that precluded him from "having his day in court" and that was beyond his capacity to control. Neither situation is present here, as Father, while incarcerated, merely attempted to reap the benefit of a fortuitous change in the law regarding his pre-incarceration child support debt. Consequently, we are constrained to conclude that there was no "compelling reason" for the trial court's retroactive modification of Father's pre-incarceration support arrears. ***See*** *23 Pa.C.S.A. § 4352(e)*; ***see also Nash,*** *932 A.2d at 188* (Orie Melvin, J., concurring). Therefore, we reverse the trial court's order in part and remand with the directive that it reinstate Father's pre-incarceration support arrears.

[*P17] Order [***13] reversed in part. Case remanded with instructions. Jurisdiction relinquished.