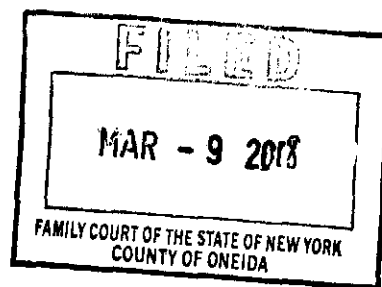


Matter of Dillenbeck v Trzcinski
2018 NY Slip Op 33647(U)
March 9, 2018
Family Court, Oneida County
Docket Number: V-04932-16 & 17A
Judge: Julia M. Brouillette
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**FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF ONEIDA**

**Present: Hon. Julia M. Brouillette
Family Court Judge**



**In the Matter of a Proceeding under
Article 6 of the Family Court Act,**

EDWARD D. DILLENBECK,
Petitioner,

-against-

KELLY C. TRZCINSKI,
Respondent.

DECISION AND ORDER

File No. 22411

**Dockets Nos.: V-04932-16 & 17A,
17B, 17C, 17D, 17F, 17G,
17H, 17I, 17J, 17K, 17L, 17M,
17N, 17O, 17P
V-04933-16 & 17A, 17B, 17C, 17D,
17F, 17G, 17H, 17I, 17J,
17K, 17L, 17M, 17N, 17O, 17P
V-04934-16 & 17A, 17B, 17C, 17D,
17F, 17G, 17H, 17I, 17J,
17K, 17L, 17M, 17N, 17O, 17P**

**In the Matter of a Proceeding under
Article 6 of the Family Court Act,**

KELLY C. TRZCINSKI,
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-against-

EDWARD D. DILLENBECK,
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DECISION AND ORDER

File No. 22411

**Dockets Nos.: V- 04932-16/17E
V- 04933-16/17E
V- 04934-16/17E**

APPEARANCES: John Raspante, Esq., Attorney for Petitioner
Jennifer Hurley, Esq., of counsel Oneida County Public Defender's Office
- Civil Division, Attorney for Respondent
Julie Giruzzi-Mosca, Esq., Attorney for the Child

Before this Court is a *de novo* Petition for Custody under Article 6 of the Family Court Act filed by Edward Dillenbeck regarding the three subject children: Child 1 (age 13), Child 2 (age 8) and Child 3 (age 4). This petition was filed November 18, 2016. In Mr. Dillenbeck's initial petition, he requested an award of joint legal custody with a shared parenting schedule, week-on, week-off.

The matter was initially heard before Hon. Joan E. Shkane on December 12, 2016; a 1034 report was ordered and the Court issued a Temporary Order granting, *inter alia*, primary physical custody to the Respondent mother, and visitation to the Petitioner every other weekend. The parties returned to Court January 25, 2017, whereupon a new Temporary Order was issued directing, *inter alia*, Mr. Dillenbeck to have supervised visitation at the Family Nurturing Center for two hours per week. The Court took judicial notice of the prior orders issued by this Court. The Court is also taking judicial notice of the proceedings before Hon. Joan E. Shkane, in so far as any of those proceedings were on the record.

Mr. Dillenbeck subsequently filed petitions 17A, 17B, 17C, 17D, 17F, 17G, 17H, 17I, 17J, 17K, 17L, 17M, 17N, 17O and 17P, all alleging violations of the prior Temporary Orders. The petitions were filed April 3, 2017, April 10, 2017, May 31, 2017, June 7, 2017, July 19, 2017, August 2, 2017, August 17, 2017, September 21, 2017, October 26, 2017 and December 6, 2017. Each violation petition espouses different dates that Ms. Trzcinski allegedly failed to bring the children for Mr. Dillenbeck's Court ordered parenting time. Ms. Trzcinski filed violation petition, 17E, on June 15, 2017, which alleged, *inter alia*, that Mr. Dillenbeck violated the supervised parenting time provision of the Temporary Order by attending his daughter's school graduation ceremony.

The parties were present at Court on the following dates: December 12, 2016, January 25, 2017, April 5, 2017, May 18, 2017, August 22, 2017, September 25, 2017, October 31, 2017, November 28, 2017 and December 8, 2017. The Court notes that after the conclusion of the trial Mr. Dillenbeck filed two subsequent Violation Petitions, which were marked with Docket Number extensions 18Q and 18R; said petitions were not arraigned and are not part of this Decision and Order.

The parties were properly served with the respective petitions, denials were entered and the matters were scheduled for trial. The trial was commenced and completed December 8, 2017. Mr. Dillenbeck testified on his own behalf as his only witness. Ms. Trzcinski testified on her behalf as her only witness. The Attorney for the Child did not call any independent witnesses, there was no rebuttal and the proof was closed.

The Court determines that there was insufficient testimony regarding behaviors that could be determined to comprise domestic violence as between the parties. As a result, the Court does not find the provisions of Domestic Relations Law § 240 require additional action by the Court at this time.

The Court conducted a search of the statewide registry of orders of protection, Family Court warrants, the sex offender registry and the Family Court's child protective records. The Court re-ran the statewide registry checks on February 28, 2018, and there were no other results found.

Edward Dillenbeck testified on his own behalf regarding his household composition, work experience, his relationship with the Respondent, each of the dates he alleged he showed

up to exercise his parenting time and Ms. Trzcinski failed to bring the children, the excuses regarding her failures to attend that he obtained second or third hand, and his opinions that Ms. Trzcinski wilfully failed to follow the Orders and directives of the Court. Mr. Dillenbeck maintained he would wait each time he was supposed to have visitation anywhere from as little as fifteen minutes up to and including one full hour at the designated location to see if Ms. Trzcinski would show up. Mr. Dillenbeck expressed a desire to see his children and his frustrations in being continually thwarted from doing so. Mr. Dillenbeck denied receiving any text messages in advance from Ms. Trzcinski letting him know she would not be attending the Court ordered visits; although he acknowledged sometimes receiving advance communications from a Kid's Oneida (hereinafter "KO") representative letting him know a visit had been cancelled.

Mr. Dillenbeck stated when the parties lived together, Ms. Trzcinski was responsible for making doctor's appointments, but he took the children to all their appointments and ensured the children received appropriate medical care; thus, he was concerned that the children have not received appropriate care since he left the home. Mr. Dillenbeck maintained he has not been able to obtain access to medical records or providers and that Ms. Trzcinski failed to provide him with any information.

Mr. Dillenbeck testified he received notification from Child Protective Services that there was an open investigation with his child regarding educational neglect. Mr. Dillenbeck maintained the information he was able to obtain suggested one child had missed approximately two months of school during the 2016-2017 school year. Mr. Dillenbeck expressed frustration in his inability to consistently obtain information directly from the schools. He stated he was forbidden from attending his daughters sixth grade graduation by the school. Mr. Dillenbeck stated that although the school declined to allow him to attend, it was his understanding that their position was based on information provided to the school by Ms. Trzcinski.

Mr. Dillenbeck denied having any mental health, anger or substance use disorders or issues. Mr. Dillenbeck stated that although he was not ordered to engage in anger management classes he nonetheless did complete a ten-week program to alleviate any concerns in an effort to move forward and have more time with his children. Mr. Dillenbeck denied his visitation should ever have been supervised, denied he ever exercised inappropriate corporal punishment and was unable to explain why a random urine screen was positive for amphetamines.

Mr. Dillenbeck stated he currently resides in the same school district as Ms. Trzcinski; however, if his request for primary physical custody is granted he would like to try to enroll the children in a private school. Mr. Dillenbeck maintained he would be able to provide appropriate financial support for the children if awarded physical custody and that he recently moved into a larger six bedroom apartment. Mr. Dillenbeck prayed for an award of primary physical custody with set parenting time for Ms. Trzcinski.

Mr. Dillenbeck's testimony regarding Ms. Trzcinski's failure to show up for his scheduled parenting time and his frustrations in regard to the same were credible. His assertions

regarding his finances and denial regarding the positive urine screen were not. It is clear some of Mr. Dillenbeck's expectations regarding the situation are unrealistic.

Ms. Kelly Trzcinski testified that the children had always resided with her and that Mr. Dillenbeck left the family in September of 2016. Ms. Trzcinski acknowledged Child 2 had some health issues during the 2016-2017 school year and missed some school. Ms. Trzcinski downplayed the significance, maintained the school was always provided with appropriate excuses, but acknowledged various people had spoken to her about the absences – both from the school and from Child Protective Services. Ms. Trzcinski admitted she had not wanted Mr. Dillenbeck at Child 2's sixth grade graduation, so she had told the school that Mr. Dillenbeck should not be allowed to attend. While acknowledging the youngest child, Child 3, had fallen behind on his immunizations, Ms. Trzcinski maintained it was for reasons that were no fault of hers. Ms. Trzcinski acknowledged she currently has an open preventative case with Child Protective Services and is working with a parent aide.

Ms. Trzcinski denied Mr. Dillenbeck ever contacted her about any concerns he might have regarding the children's medical care or education. Ms. Trzcinski maintained she would periodically attempt to contact Mr. Dillenbeck about concerns she had regarding the children, with the last time that she tried to contact Mr. Dillenbeck being about two weeks ago. When asked, Ms. Trzcinski was unable to recall her own phone number, was certain that she had previously provided it to Mr. Dillenbeck (who indicated that she had not) and was unable or unwilling to provide the number in the courtroom when expressly requested to do so.

Ms. Trzcinski acknowledged she and Mr. Dillenbeck do not get along. Ms. Trzcinski stated there were plenty of reasons; primarily that there was an imaginary power struggle going on, he becomes angry and they are unable to find any common ground. In the past she has tried to call and either he does not answer or hangs up on her.

Ms. Trzcinski admitted some of Mr. Dillenbeck's scheduled visitations were missed and acknowledged that number is probably higher than five, but denied she missed as many as Mr. Dillenbeck has alleged. Ms. Trzcinski maintained she has sent text messages directly to Mr. Dillenbeck to let him know when she would not be attending. Ms. Trzcinski also maintained that she would attempt to contact Kid's Oneida to alert them when she was unable to attend visits. Ms. Trzcinski acknowledged that Ms. Katie Clark from KO had spoken with her about the need to contact them in advance if she was going to be late or miss a visit, and implied KO had threatened to cancel the visits in their entirety if she did not start calling in advance to alert them.

Ms. Trzcinski provided multiple excuses as to why she had been unable to follow the order of the Court and various explanations – such as for the first visit, KO provided her with the incorrect information regarding the location of the visit; or how the judge entered an order directing she could not leave the children with another adult, so every time one of the children was ill or sick she had no other option but to cancel the visit, as she could not be reasonably expected to bring a sick child to the visit. At no point did Ms. Trzcinski express or imply any

responsibility for any of the missed visits; rather the tenor was that she was the victim of the unavoidable situation. Ms. Trzcinski indicated she would be willing to make up the missed visitation; however, upon further questioning it became apparent that Ms. Trzcinski was simply stating something she thought she ought to say rather than something she was actually willing to follow through with. Ms. Trzcinski alleged on at least one occasion, Mr. Dillenbeck had sent her an inappropriate text during his scheduled visitation and appeared to be in the bathroom alone with one of the children. Ms. Trzcinski had offered this information by way of explaining why Mr. Dillenbeck was appropriately foreclosed from attending the child's graduation ceremony.

Ms. Trzcinski stated she does not currently work, she has a disability but hopes to be able to work in the future. Ms. Trzcinski supports herself and family in part through social security disability benefits.

Ms. Trzcinski grudgingly admitted she may have yelled at the Hon. Joan E. Shkane at a Court appearance, but maintained she did not unequivocally state she had no intentions of following the Judge's orders or that she was simply not going to allow Mr. Dillenbeck any parenting time.

The Court notes there were no text messages or telephone records admitted into evidence by either party. The Court also noted Ms. Trzcinski made comments which indicated she has been discussing same aspects of this case with the eldest child; for example, when she stated the eldest agreed with her that the weekday visitation was not a good idea and that schedule simply did not work.

To say that there was a paucity of evidence in this case is an understatement. At the close of the trial this Court said it would consider, yet to be received, certified KO records. It was the frustration of this Court which led to the assertion that the Court would consider these KO records. The Court's aspiration for additional proof cannot discharge the Court's obligation to follow and abide by the rules of evidence and thus, the records belatedly submitted from KO were neither reviewed nor considered in any manner in rendering this decision.

Ultimately, the Court is bound by the evidence that was properly submitted and must make its determinations based on the evidence it has, not on evidence it wishes it had. With that in mind, the Court has placed particular emphasis on the demeanor of the parties – with each other as well as their demeanor with the Court and their respective counsel – during the trial as well as from the prior appearances before this Judge.

This Judge is mindful of the directives that were made from the bench and the fact that said directives were, for whatever reason, simply not followed. To say the least, the current situation is extremely problematic. From the Court's perspective, it is unfair, unhelpful and cowardly of the Court to issue any order which does not take into account a history, when such exists, that suggests one party will simply thumb their nose at the Court's orders and instead continue to do whatever it is that they choose. Part of the function of the Court is to dissuade actions amounting to self-help; but rather to encourage everyone to comply with societal rules -

including following directives and orders of the Court when the parties are before a tribunal. The Court must take action to encourage everyone to have confidence in “the system”. People must have confidence in the system before they will consistently avail themselves of the Court’s processes, the assistance of police and other services/agencies society has to offer when the parties simply cannot work it out amongst themselves. To do otherwise, encourages lawlessness and chaos.

There was insufficient evidence presented which would support a finding that Mr. Dillenbeck’s parenting time should have been or must continue to be supervised. The Court is concerned about the positive urine screen and the failure to provide any explanation therefore; however, that in and of itself does not necessitate supervised parenting time.

It is lamentable that Ms. Trzcinski has demonstrated a flawed understanding regarding her proper role as a parent. Ms. Trzcinski appears to have taken an active role in ensuring the children have as little contact with their father as possible, has engaged in inappropriate discourse with the children regarding the parenting situation and as such has proven herself to be unfit.

“In this initial custody determination, the overriding priority is the best interests of the child[ren].” Matter of Saperston v Holdaway, 93 AD3d 1271, 1275-1276, 940 NYS2d 728 (4th Dept 2012), internal citations omitted. “It is well settled that, in determining the child[ren]’s best interests, a court should consider (1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the parents and the length of time the present custodial arrangement has continued; (2) the quality of the child[ren]’s home environment and that of the parent seeking custody; (3) the ability of each parent to provide for the child[ren]’s emotion and intellectual development; (4) the financial status and ability of each parent to provide for the child[ren]; (5) the individual needs and expressed desires of the child[ren]; and (6) the need of the child[ren] to live with siblings.” Matter of Braga v Bell, 151 AD3d 1924, 1925, 58 NYS3d 807 (4th Dept 2017), internal citations omitted. “In addition to this nonexhaustive list, all other relevant factors must be considered” Matter of Lynch v Gillogly, 82 AD3d 1529, 1530, 920 NYS2d 437 (3rd Dept 2011). Further, “[w]illful interference with a noncustodial parent’s right to visitation is so inconsistent with the best interests of the children as to, per se, raise a strong probability that the offending party is unfit to act as a custodial parent.” Matter of Bullard v Clark, 154 AD3d 846, 847, 62 NYS3d 189 (2nd Dept 2017).

Ms. Trzcinski’s unwillingness to foster the children’s relationship with their father, deliberate interference with Mr. Dillenbeck’s parenting time and inability to follow the directives of the Court are all antithetical to the best interests of the children. Ms. Trzcinski impaired Mr. Dillenbeck’s rights to communicate and visit with the children and halted the father’s ability to participate in the children’s upbringing and schooling - effectively keeping Mr. Dillenbeck in the dark in regard to the children’s lives. This is unacceptable. There were also lapses in the children’s medical care and schooling while in the mother’s exclusive care.

An “award of joint custody is reserved for relatively stable, amicable parents behaving in mature civilized fashion” Matter of Fiorelli v Fiorelli, 34 AD3d 1216, 824 NYS2d 695 (4th Dept 2006), internal citations omitted. A joint custodial relationship cannot be imposed upon “embattled and embittered” parents. See e.g. Matter of Schlafer v Schlafer, 6 AD3d 1202, 1203, 775 NYS2d 711 (4th Dept 2004).

The hostility between the parties was palpable in the Courtroom; in particular Ms. Trzcinski’s disdain for Mr. Dillenbeck was readily apparent. Unfortunately, there is no communication or collaboration between the parents for the betterment of their children. The proof was that Ms. Trzcinski persisted in her efforts to thwart contact between the children and their father. The mother created a stressful and hostile environment that negatively impacts the children. The Court has reservations in regard to Mr. Dillenbeck, but as between the two parties and based on the totality of the evidence presented, Mr. Dillenbeck is the more fit parent. Consequently, Mr. Dillenbeck is awarded sole custody of the minor children with parenting time to Ms. Trzcinski.

In regard to Mr. Dillenbeck’s 15 violation petitions and Ms. Trzcinski’s violation petition, to establish a wilful violation for civil contempt, a party had to prove by clear and convincing evidence that the other “violated a lawful and unequivocal mandate of the court that was in effect at the time of the filing of a petition,” which actions prejudiced their rights, and that such violations were wilful. Matter of Moreno v Elliott, 155 AD3d 1561, 63 NYS3d 778 (4th Dept 2017). Based on the above, the father has met his burden and Ms. Trzcinski is found to have wilfully violated the prior orders of the Court, which she basically admitted to doing repeatedly. The Court gives no credence to Ms. Trzcinski’s excuses. Said violations prejudiced Mr. Dillenbeck’s rights as the children’s father.

Ms. Trzcinski did not establish her alleged violation by clear and convincing evidence. Consequently, the Violation Petition bearing Docket Numbers V- 04932-16/17E, V- 04933-16/17E and V- 04934-16/ 17E is denied and dismissed with prejudice.

Based on the wilful violations, Ms. Trzcinski is sentenced to serve 30 days in the Oneida County Jail, with said sentence suspended for a period of one year from the date this Decision and Order is filed, upon the condition that Ms. Trzcinski complies with Family Court Orders, including this Decision and Order. See Matter of Munster v Munster, 17 AD3d 600, 794 NYS2d 394 (2nd Dept 2005); Judiciary Law § 753(A)(3); FCA § 156.

Accordingly, it is hereby

ORDERED, that Mr. Edward D. Dillenbeck shall have sole custody of the three minor children; and it is further

ORDERED, that during the school year Ms. Kelly C. Trzcinski shall have parenting time with the children every other weekend commencing March 16, 2018, from Friday after school, or 4:00 p.m. if school is not in session, until Monday morning when the children shall be

returned to school, or 4:00 p.m. if school is not in session; and it is further

ORDERED, that during the summer recess Ms. Kelly C. Trzcinski's every other weekend parenting time shall be extended to Wednesday at 4:00 p.m.; and it is further

ORDERED, that for all exchanges which do not occur at the school, the party who is to start their parenting time shall arrange for the children to be picked up from the other parent's residence unless otherwise agreed; and it is further

ORDERED, that each party shall have one week of uninterrupted parenting time during the summer, either in July or August, with the week being defined as Monday through Friday tacked onto their regularly scheduled weekend (each parent retains their respective weekend parenting time); with the parties exchanging which week they intend to exercise no later than June 1st of each year, and if there is a conflict as to which weeks the parties want, Ms. Trzcinski's choice shall control in odd years and Mr. Dillenbeck's choice shall control in even years; and it is further

ORDERED, the parties shall alternate the following holidays: Fourth of July, Thanksgiving and Christmas, commencing with the father, Mr. Dillenbeck, having the children the Fourth of July in 2018, the mother then having Thanksgiving 2018, and the father having the first portion of Christmas in 2018 and the mother having Fourth of July in 2019, etc.; and it is further

ORDERED, that for the Fourth of July the parenting time shall be from noon on the Fourth overnight until noon on the fifth of July; and it is further

ORDERED, that for Thanksgiving the parenting time shall be from Thanksgiving Day at noon, overnight until the following day at noon; and it is further

ORDERED, that in regard to Christmas, for the parent having the holiday, the parenting time shall be from Christmas Eve at noon overnight to Christmas Day at noon; and for the parent not having the holiday, the parenting time shall be from Christmas Day at noon overnight to December 26th at noon; and it is further

ORDERED, that the child shall be with Mr. Dillenbeck on Father's Day and with Ms. Trzcinski on Mother's Day from 10:00 a.m. to 6:00 p.m.; and it is further

ORDERED, that the parents shall alternate the winter and spring recesses with the mother being entitled to parenting time during the winter recess (usually in February) of each even calendar year and the father being entitled to parenting time during the winter recess in odd calendar years. The mother being entitled to parenting time during the spring recess (usually in April) in each odd calendar year and the father being entitled to parenting time during the spring recess in each even calendar year. The recess is defined as Monday through Friday of the school recess; and it is further

ORDERED, that school vacation and holiday parenting time takes precedence over regularly scheduled parenting time; and it is further

ORDERED, that neither parent shall consume or be under the influence of any synthetic

drugs, illegal drugs or prescription medication not specifically prescribed for them and shall take all prescribed medication and over the counter medication in a manner that is consistent with their labeling while the children are in their presence; and it is further

ORDERED, that neither parent shall be under the influence of alcohol to the point of intoxication as defined by the NYS Vehicle and Traffic Law while the children are in their presence; and it is further

ORDERED that the parents shall NOT use any form of physical discipline (corporal punishment) when disciplining the children, nor allow any third party to do so; and it is further

ORDERED, that each parent, regardless of custodial status, is authorized to access all the children's educational, medical or psychological records or any other record or notice that is available to the custodial parent. This includes the right to speak with and obtain information from teachers, counselors and medical providers; and it is further

ORDERED, that each parent shall promptly and fully disclose to the other parent any event significantly affecting the children's health, education, behavior or general welfare; and it is further

ORDERED, that each parent shall give the other timely notice of the children's medical appointments, school events not otherwise contained within the school's published calendars, counseling sessions or the like; and it is further

ORDERED, that all conversations, interactions and dealings of any sort between the parents shall be conducted in a civil and courteous manner; and it is further

ORDERED, that neither parent shall discuss the legal aspects of this case, where the children should reside, any disagreements between the parents, who the children would like to spend more time with, what parenting time is "fair" or "unfair", which parent was responsible for an event/disagreement/problem/failure, any disagreements/arguments between the parents, any negative past acts the other parent did/should have done/failed to do, who did/should have/failed to paid for something or other similar adult issues with or in front of the children or permit third persons to do so; and it is further

ORDERED, that neither parent shall disparage the other parent or other members of that parent's family or household to or in front of the children or permit third persons to do so; and it is further

ORDERED, that the parties shall keep one another advised of a current address and phone number at all times and will immediately notify the other if they change their address and/or phone number; and it is further

ADJUDGED, that Ms. Kelly C. Trzcinski failed to obey the orders of this Court and that such failures were wilful; and it is further

ORDERED, that Ms. Kelly C. Trzcinski is sentenced to serve 30 days in the Oneida

County Jail, with said sentence being suspended for a period of 1 year from the date this Decision and Order is filed, upon the condition that Ms. Trzcinski complies with Family Court Orders, including this Decision and Order; and it is further

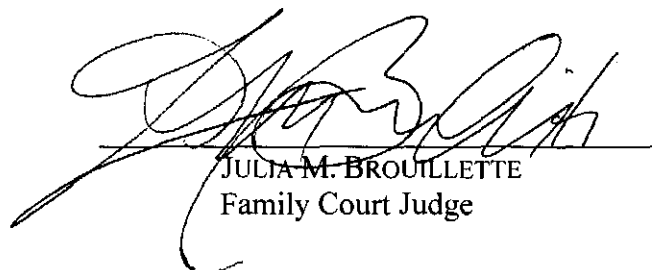
ORDERED, that Ms. Kelly Trzcinski's Violation Petition bearing Docket Numbers V-04932-16/17E, V- 04933-16/17E and V- 04934-16/ 17E is denied and dismissed with prejudice; and it is further

ORDERED, that service of a copy of this Order by regular mail upon the parties, their respective attorney's and the Attorney for the Child shall be deemed good and sufficient service.

THIS SHALL CONSTITUTE THE DECISION AND ORDER OF THIS COURT

Dated at Utica, New York
on March 9, 2018

ENTER:



JULIA M. BROUILLETTE
Family Court Judge

NOTICE: Pursuant to §1113 of the Family Court Act, an appeal must be taken within 30 days of receipt of the Order by appellant in Court, 35 days from the mailing of the Order to the appellant by the Clerk of the Court, or 30 days after service by a party or law guardian upon the appellant, whichever is earliest.