

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

M.B.,

Appellee

v.

L.G.,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1064 EDA 2012

Appeal from the Order Entered March 7, 2012  
In the Court of Common Pleas of Montgomery County  
Civil Division at No(s): 2010-31483

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.\*

MEMORANDUM BY BENDER, J.

Filed: January 29, 2013

L.G. (Mother) appeals from the order dated March 6, 2012, and entered March 7, 2012, wherein the trial court found Mother in contempt of two prior custody orders, dated October 19, 2011 and December 2, 2011. The March 7<sup>th</sup> order directed Mother to reimburse M.B. (Father) \$500 for expenses and to pay \$1500 in attorney's fees to Father's counsel.<sup>1</sup> We affirm.

Mother and Father are the parents of K.G.B. (Child), born in October of 2002. Mother lives in Cheltenham, Pennsylvania, and Father resides in

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> Father has not filed a brief with this Court in response to the issues raised by Mother in this appeal.

Ridgewood, New Jersey. The initial custody order, dated October 21, 2011, provided for a comprehensive custody arrangement with Father having custody on alternating weekends. Mother was required to transport Child on the pertinent Friday to the Ridgewood Police Department in New Jersey and Father was to transport the Child to the Cheltenham Police Department in Pennsylvania on Sunday evening. The order also directed the use of the Our Family Wizard program to input Child's schedule and activities. Child was required to telephone the out-of-custody parent on a daily basis. After the October 21, 2011 order was issued, Mother complained about her inability to provide the Friday transport, suggesting that the parties meet halfway on both Friday and Sunday evenings. The court incorporated some of Mother's requests and issued a supplemental order, dated December 2, 2011, which amended the transportation provisions. The new arrangement required Father to pick up Child at school on Friday and Mother to pick up Child at 6:00 p.m. on Sunday at the Ridgewood Police Department. The court refused to implement a halfway meeting on Friday and/or Sunday to avoid the conflicts posed for Child.<sup>2</sup>

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<sup>2</sup> Mother filed an appeal from the December 2, 2011 custody order. Because Mother failed to file a statement of errors complained of on appeal as directed by the trial court, her appeal was dismissed by order of this Court on March 2, 2012. **See** Superior Court Order, No. 101 EDA 2012, 3/2/12.

On January 6, 2012, Father filed a petition for contempt. A hearing was held on February 22, 2012. The trial court summarized Father's allegations as to Mother's violations of the two custody orders and also set forth a recitation of Mother's testimony as follows:

a On November 20, 2011, Mother failed to pick the child up on Sunday night and did not arrive until Monday afternoon causing the child to miss school[.]

b On November 23, 2011, Mother was three hours late dropping the minor child off at the meeting place[.]

c On December 26, 2011, Mother did not drop the child off for his Christmas custody schedule but told Father he could have visitation if he was willing to pick the minor child up in New Haven, Connecticut and drop the child off[.]

d On Sunday, January 16, 2012, Mother failed to pick up the minor child on Sunday evening and alternative arrangements had to be made to get the minor child home so he would not miss school[.]

e On Friday, January 27, 2012, Father learned that Mother had called and sent a note to school authorizing maternal Grandfather to pick up the child from school because she claimed that she could not pick up on the Sunday of the visit[.] Father did get the child that day but on January 29, 2012, Mother did not pick up the child as threatened[.]

f On February 10, 2012, Mother purposely picked up the child from school early to prevent the weekend visitation[.]

g Since Christmas, Father's communication with the minor child has been nonexistent[.]

h Mother has failed to update the Our Family Wizard calendar and/or does not provide notice of extracurricular events, which resulted in Father['s] missing the child's concert[.]

i Mother's failure to comply with the Order caused Father to incur expenses including, but not limited to, tickets for a basketball game, other missed activities, transportation and gas[.]

At the hearing, Mother admitted that she violated the Orders with regard to visitation alleging she cannot pick up the child on Sunday evenings due to a variety of excuses including, traveling for her job, a baby who cannot travel that long in the

car, she is currently breastfeeding her baby, her partner cannot help her with transportation and, for one missed weekend, the child had a book report due[.]

Mother consistently stated that she was willing to meet "halfway" at or near the Trenton train station, however, evidence was provided to demonstrate that Mother's travel time to Trenton was approximately 33 miles and Father's would be 70 miles[.]

Mother testified that she feels that because she sends email or text messages refusing to cooperate with the terms of the Order, i[.] e[.], picking the child up on Sunday evenings, she should be "excused" from its terms[.] Additionally, she testified that she did not comply with the Christmas visitation because she was in Connecticut but she was willing to let Father come to pick up the child and return the child, which was not what the Court Order provided[.]

Mother admitted that she has not complied with the Order regarding telephone calls because that is "between Father and child[.]" She stated that Father has no basis or claim for expenses because there is no proof that the expenses were made for the child or, in the case of gas or transportation costs, since she put Father on notice that she was not complying with the Order, he should mitigate those expenses by not traveling to the transfer location[.]

Mother testified that she will not notify Father about the child's events through Our Family Wizard or any other form of communication because he gets emails from the school and should get that information directly from the school even though Father has no knowledge of the activities the child is currently enrolled in[.]

Mother admitted that she and Father have an acrimonious relationship and that both parents are harming the child[.] Mother further stated that the less Father is around the better for the child, and that the child does not want to go to Father's home[.]

Mother has informed Father that she has gone above this Court's authority to the Superior Court and the inference is that she does not have to comply with this Court's Orders[.]

However, Mother's appeal was dismissed through an Order from the Superior Court filed March 2, 2012[.] On February 27, 2012, this Court received correspondence from Father's counsel informing the Court that Mother refused to pick the child up on Sunday evening even though she gave no prior notice of her inability to make the drive and further informed Father at 6 00 p[.]m[.] on Sunday that he already knew her "stance" from past texts[.]

Trial Court Opinion, 3/6/12, at 2-4 (unnumbered). Based upon the above, the court held Mother in contempt and ordered her to pay Father \$500 for expenses and \$1500 to Father's attorney. The court also warned Mother that further violations could subject Mother to further sanctions. *Id.* at 5 (unnumbered).

Mother appealed from the order holding her in contempt of the custody orders.<sup>3</sup> In her brief, she raises three issues for our review:

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<sup>3</sup> In an opinion filed pursuant to Pa.R.A.P. 1925(a), the trial court suggests that this Court quash Mother's appeal because it was untimely filed. Trial Court Opinion, 4/17/12. However, our review reveals that Mother's appeal comports with Pa.R.A.P. 903, which provides a thirty-day window in which an appeal must be filed. The order appealed from was entered on the common pleas docket on March 7, 2012, and Mother's appeal was filed on April 9, 2012. Although April 6, 2012, was the thirtieth day, it was Good Friday, a day on which the Superior Court was closed. Therefore, Mother's appeal, filed on Monday, April 9, 2012, was timely filed. In that same opinion, the court indicated that Mother failed to submit a concise statement pursuant to Pa.R.A.P. 1925(a)(2)(i), which addresses the filing of concise statements in Children's Fast Track cases. However, this Court recognized that this appeal does not meet the definition of a Children's Fast Track case under Pa.R.A.P. 102. **See** Superior Court Order, 4/17/12. Additionally, in an amended opinion, the trial court acknowledges that Mother did file a Rule 1925 statement, but concludes that this Court should find a waiver of the issues because the statement is too vague. Since we are able to discern Mother's claims of error, we will not consider her issues waived.

[1.] Whether the trial court committed an error of law and/or abused his discretion in refusing to grant [Mother's] continuance where [Mother] had retained counsel who could not attend hearing because of conflict and schedule?

[2.] Whether the trial court committed an error of law and/or abused his discretion by making a finding at the conclusion of the hearing that was contrary [to the] sufficiency of the evidence presented?

[3.] Whether [the] trial court committed error of law and/or abused its discretion in failing to consider and give proper weight to all things that affect "best interests" of the child in this case?

Mother's brief at 3.

Mother first argues that the trial court erred in refusing to grant a continuance that she requested at the hearing at which she was forced to proceed *pro se* because her newly retained counsel had a scheduling conflict. Although at the February 22, 2012 hearing Mother explained that there was some confusion due to the scheduling change orders issued by the court prior to the February 22, 2012 hearing, she blamed that lack of clarity on delays in the receipt of the orders due to a mailbox mix up at her apartment complex. N.T., 2/22/12, at 47. Mother further informed the court that she had obtained an attorney, who could not attend that day's proceeding. Then, Mother stated "[a]nd then we're proceeding without him." *Id.* at 48. She never requested a continuance due to her attorney's inability to attend the hearing. Rather, prior to her statements about her new attorney, she cross-examined Father, testified on her own behalf, and submitted to cross-examination by Father's attorney. At no time did she request that the contempt hearing be continued. She only indicated that her attorney would

be “representing [her] going forward in all of this.” *Id.* at 49. Since Mother failed to request a continuance before or during the hearing, this issue is waived. **See** Pa.R.A.P. 302(a) (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”).<sup>4</sup>

Mother’s second and third questions for review appear to pose weight and sufficiency claims as those claims relate to the court’s finding of contempt.<sup>5</sup> Therefore, we begin by noting that the purpose of civil contempt is remedial, and sanctions are used to coerce the respondent into compliance with a valid court order, and in some instances, to compensate the petitioner for losses sustained by noncompliance. ***In re Contempt of Cullen***, 849 A.2d 1207, 1210 (Pa. Super. 2004).

When considering an appeal from an Order holding a party in contempt for failure to comply with a court Order, our scope of review is narrow: we will reverse only upon a showing the court abused its discretion. ***Hyle v. Hyle***, 868 A.2d 601 (Pa.

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<sup>4</sup> Although Mother’s brief cites cases relating to notice, her brief does not contain any argument about any error concerning a lack of notice. As stated in her first question, she only takes issue with a failure by the court to grant a continuance.

<sup>5</sup> Mother has failed to comply with Pa.R.A.P. 2119(a), which provides that “[t]he argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.” Although Mother’s brief essentially contains a single argument section, we have not been impeded in our review. ***See Coleman v. Wyeth Pharmaceuticals, Inc.***, 6 A.3d 502, 508 n.6 (Pa. Super. 2010) (stating, “counsel are strongly cautioned to adhere to the Rules of Appellate [P]rocedure, or risk waiver of their clients’ claims”).

Super. 2005), *appeal denied*, 586 Pa. 727, 890 A.2d 1059 (2005). The court abuses its discretion if it misapplies the law or exercises its discretion in a manner lacking reason. *Id.* 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. *Id.*

***Hopkins v. Byes***, 954 A.2d 654, 655-56 (Pa. Super. 2008).

In general, Mother argues that Father failed to prove that she willfully failed to comply with the custody orders. Specifically, she claims that because she notified Father in advance of any schedule changes as allowed by the custody order, she should not have been held in contempt. She also argues that when Father failed to respond to her notices of a change in schedule as the custody order directs, Father may have waived his right to assert contempt of the custody order by Mother.

Mother first relies on 23 Pa.C.S. § 5323(g), which provides that “[a] party who willfully fails to comply with any custody order may ... be adjudged in contempt.” Based upon this language, she contends that Father failed to prove willfulness. Mother also relies on the following language from the October 19, 2012 custody order:

e. Schedule Deviations: With the exception of medical emergencies, any requests for deviation from the schedule or issues involving the child shall be communicated to the other immediately. In the event the parties cannot or refuse to communicate by text message, the parties shall communicate by e-mail or certified overnight mail, with the party receiving the communication to respond within 48 hours, unless the request requires immediate attention. Texts and e-mails shall be civil. The receiving party’s failure to respond to the communication

may be deemed a waiver of his or her right to raise child related issues in the event of a claim for contempt.

Custody Order, 10/19/12, at ¶ 2 e.

Our review of the transcript reveals that at certain times Mother did in fact contact Father regarding changes to the custody schedule. Moreover, Father did admit that he did not respond to some of these messages as to changes. However, Father also testified about some incidents that occurred when he attempted to pick up Child at school, once when, at Mother's direction, the maternal grandfather was also attempting to pick up Child, and once when Mother had picked up Child at an earlier time, thus, thwarting Father's scheduled pick up. As to another occurrence related to the Christmas exchange that never took place because Mother was in Connecticut, Mother had suggested that Father pick up and return Child to her there. Also, Mother's myriad statements about "meeting halfway" were debunked by the trial court because the halfway points suggested by Mother produced a grossly unequal distance for each parent to drive.

Additionally, we note that numerous times during the hearing Mother readily admitted that she did not comply with the custody orders regarding transportation issues; however, she also stated that she refused to post information about Child's activities on the Our Family Wizard website because Father could receive the same information from direct emails from the school. As noted by the trial court, the general information from the school did not provide specifics as to Child's activities, thus, Father's reliance on the school's general emails was insufficient to notify Father of events in

which Child participated. Furthermore, with regard to the phone contact issue, Mother again admitted that she had not complied with the custody order.

It is evident Mother's argument rests solely on the transportation issues; she overlooks entirely the allegations and testimony presented by Father as to the Our Family Wizard website and the phone call problems. Simply stated, the court found Father's testimony more credible and, since Mother admitted her lack of compliance, the court found her to be somewhat credible. "[T]his Court defers to the credibility determinations of the trial court with regard to the witnesses who appeared before it, as that court had the opportunity to observe their demeanor." *Harcar v. Harcar*, 982 A.2d 1230, 1236 (Pa. Super. 2009). Under the circumstances here, we cannot conclude that the trial court abused its discretion. The record contained more than sufficient evidence to support the trial court's ruling. Accordingly, we hold that the court properly found Mother in contempt of its custody orders. Therefore, we affirm the order from which Mother appealed.

Order affirmed.