NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

M.B. Appellant v. M.K. Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1884 WDA 2012

Appeal from the Order October 30, 2012
In the Court of Common Pleas of Butler County
Domestic Relations at No(s):FC No 07-90812-C

BEFORE: BENDER, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.: FILED: May 29, 2013

Appellant, M.B. ("Mother"), appeals from the order entered in the Butler County Court of Common Pleas, denying her consolidated petitions for contempt against Appellee, M.K. ("Father"). We affirm.

The relevant facts and procedural history of this appeal are as follows. The parties married on July 10, 1993. On November 21, 2007, Father filed a divorce complaint. The parties are the parents of two minor children, A.K. ("Daughter") and S.K. ("Son"). On August 18, 2011, the court entered a consent order whereby the parties agreed to shared legal and physical custody of both children. Significantly, the order included the following provisions regarding the children's activities:

5. Activities.

> A. Enrollment. Neither of the children shall be enrolled in any activity without the express written consent of both parents, and the parent having custody shall endeavor to have the children participate in the activity; however, the [c]ourt finds it to be an appropriate method of discipline to reasonably withhold such activities from the minor children. Also, counseling schedules, vacations, and special family events shall have priority over organized activities. Each parent shall keep a log of the children's activities so that if he/she ever withholds attendance for counseling, vacation, or disciplinary reasons, he/she will be in a position to provide an explanation of the child's absence to the parenting coordinator or the [c]ourt.
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> B. Parental Attendance. Unless expressly authorized by the parenting coordinator, and the other party, neither parent shall attend sporting events, practices, award banquets, concerts, school plays or other children's events when the children are in the physical custody of the other parent. Both parents may be present at functions involving the children, such as parent teacher conferences when the children will not be present at the function.

(Order, entered 8/18/11, at 4-5).

On March 6, 2012, Mother filed a petition for modification of custody. In it, Mother set forth numerous allegations of Father's non-compliance with the custody order. Following oral argument, the court appointed a guardian *ad litem* for the parties' children. The court ordered the guardian *ad litem* to interview the children and prepare a report regarding the allegations in Mother's modification petition. The court also scheduled a status conference for September 2012.

On August 15, 2012, Mother filed three separate petitions for contempt. In the petitions, Mother contended Father had committed direct violations of the custody order on the following grounds: 1) Father

repeatedly failed to take the children to activities without proper excuses; 2) Father attended a Valentine's Day party at Son's school, which occurred during Mother's custodial time; and 3) Father did not provide the children with opportunities to make telephone calls to Mother during Father's custodial time. Mother concluded the court should sanction Father for his conduct. The court consolidated and conducted contempt hearings on October 4, 2012 and October 25, 2012. On October 30, 2012, the court denied Mother's contempt petitions.

Mother timely filed a notice of appeal on November 28, 2012.[1] The notice of appeal included a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i).

Mother raises four issues for our review:

> WAS IT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO RULE THAT, WHEN THE CHILDREN MISSED ACTIVITIES FOR REASONS NOT PERMITTED UNDER THE ORDER OF COURT, [FATHER] HAD NOT VIOLATED THE ORDER OF COURT?
>
> WAS IT AN ABUSE OF DISCRETION FOR THE TRIAL COURT NOT TO FIND [FATHER] IN VIOLATION OF THE ORDER FOR FAILING TO KEEP A JOURNAL OF THE INSTANCES THE CHILDREN MISSED THEIR ACTIVITIES?
>
> WAS IT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO REINTERPRET THE CUSTODY ORDER TO EXCUSE…FATHER ATTENDING AN ACTIVITY

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[1] An order refusing to adjudicate a party in contempt of a prior court order is immediately appealable. ***Langendorfer v. Spearman***, 797 A.2d 303 (Pa.Super. 2002).

> ON…MOTHER'S TIME IN CLEAR VIOLATION OF THE ORDER?
>
> WHETHER THE DECISION OF THE TRIAL COURT WAS A RESULT OF PREJUDICE, BIAS OR ILL WILL?

(Mother's Brief at 4).

Our standard of review from an order denying a petition for civil contempt is as follows:

> This Court will reverse a trial court's order denying a civil contempt petition only upon a showing that the trial court misapplied the law or exercised its discretion in a manner lacking reason. In proceedings for civil contempt of court, the general rule is that the burden of proof rests with the complaining party to demonstrate that the defendant is in noncompliance with a court order. To sustain a finding of civil contempt, the complainant must prove, by a preponderance of the evidence, that: (1) the contemnor had notice of the specific order or decree which he is alleged to have disobeyed; (2) the act constituting the contemnor's violation was volitional; and (3) the contemnor acted with wrongful intent.

MacDougall v. MacDougall, 49 A.3d 890, 892 (Pa.Super. 2012) (internal citations omitted).

In her first issue, Mother acknowledges that the August 2011 custody order permits a parent to withhold a child from activities as a punishment, to attend counseling, or to participate in some other family event. Mother argues, however, that Father withheld the children from activities on seven occasions without any excuse for the absences. Mother further argues that Father provided unacceptable excuses for three absences, and Father simply claimed Mother was lying about twelve additional absences. On this record,

Mother asserts the court should have found Father in contempt for failing to take the children to activities without proper excuses for the absences.

In her second issue, Mother maintains the custody order required the parties to keep a journal of the children's activities, including a list of reasons for any absences from the activities. Mother admits that Father submitted his journal into evidence at the contempt hearing. Nevertheless, Mother complains the journal contained "curious" entries, and Father's testimony at the hearing cast doubt upon the accuracy of the entire document. In light of certain conflicts between Father's testimony and the journal entries, Mother reasons the court should not have found Father was credible. Further, Mother submits the preponderance of the evidence demonstrated that Father did not keep the journal as ordered, which constituted another direct violation of the custody order.

In her third issue, Mother contends the custody order prohibited one party from attending the children's activities when the children were in the physical custody of the other party. Mother avows the court enforced this provision against her on a prior occasion, finding her in contempt for attending an activity occurring during Father's custodial time. Mother insists Father committed an identical violation, because he attended a Valentine's Day party at Son's school that occurred during Mother's custodial time. Mother urges that Father's attendance at the Valentine's Day party constituted a third direct violation of the custody order. Mother concludes

this Court must reverse the order denying the contempt petitions and remand the matter for the imposition of sanctions. We disagree.

"[T]he normal means of enforcing a partial custody or visitation order is by contempt proceedings." ***Rosenberg v. Rosenberg***, 504 A.2d 350, 353 (Pa.Super. 1986). "A court may hold a party in civil contempt for the willful disobedience of a custody order." ***Flannery v. Iberti***, 763 A.2d 927, 929 (Pa.Super. 2000). Additionally, "[T]his Court defers to the credibility determinations of the trial court with regard to the witnesses who appeared before it, as that court has had the opportunity to observe their demeanor." ***Garr v. Peters***, 773 A.2d 183, 189 (Pa.Super. 2001).

Instantly, Mother testified at the hearings and submitted a list of sixty-seven occasions where she believed Father had failed to take the children to their activities. (***See*** Mother's Exhibit B-2, submitted 10/4/12, at 1-4.) In response, Father provided reasons for the children's absences from the scheduled activities. Regarding Daughter's weekend swim practices, Father stated that he never agreed to take her to Sunday morning practice sessions with a second swim club. Father testified he informed Mother of this decision in a letter to her attorney. Likewise, Father did not support Mother's decision to enroll Son in a wrestling program, and Father sent an email to Mother notifying her that he would "not be pushing [Son] to go" to wrestling practice. (***See*** N.T. Hearing, 10/4/12, at 70.) Father believed he could withhold the children from activities where he had not consented to

their enrollment, because the custody order required both parents to agree on enrollment in new activities. (***Id.*** at 64).

Regarding the children's remaining missed activities, Father indicated that both Daughter and Son missed certain events due to homework, illness, Father's own work schedule, scheduling conflicts between the children's activities, Daughter's desire to ice skate with friends, or Daughter's desire to take a break from her practice schedule. When asked about the list of missed activities Mother had submitted, Father maintained that most of the absences alleged were inaccurate.

Father confirmed that he maintained a journal pursuant to Paragraph 5(A) of the custody order. The journal listed the activities that the children attended during Father's custodial time. The journal also tracked the children's absences from their activities, and it provided reasons for the absences. Father explained the journal recorded activities from January 2012 until the time of the hearing. During that period, Father admitted he had failed to log approximately "four or five" of Daughter's activities in the journal. (***Id.*** at 45). Father also submitted a copy of the journal into evidence.[2]

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[2] Father's journal is included in the certified record, and our review of the document reveals that it substantially complied with the minimum requirements set forth in the custody order.

The parties' parenting coordinator addressed the issue of the children's activities, observing that Father did not have an obligation to take the children to every activity scheduled during his custodial time:

> Well, what I told both parties was that—I admonished [M]other for signing the children up for so many activities that basically completely scheduled [Father's] custody time and forcing him to drive them around to various…practices. So I told [Mother] while, you know, I thought it was great that they were in some sports or activities, that too many were not good and that I was not going to hold another parent accountable for having his entire custody time, basically, schedule by [Mother]. And I told [Father] that. I said, get them to as many practices as you can. But I was not going to force him to have them at every practice. That was my position and has always remained my position. Her complaint is that they are not going to all practices.

(***Id.*** at 49).

Significantly, the court found Father's testimony credible:

> Upon consideration of the testimony provided by the parties at the hearing, the [c]ourt finds Father credible that he never agreed to take [Daughter] to swimming practice on Sunday mornings, or to have [Son] enrolled in wrestling. The [c]ourt further finds that there was substantial compliance by Father regarding the other times the children have missed activities in that Father's explanations were plausible and credible. For example, Father cited instances where he was attending the other child's event, or the children were engaging in alternate activities that were appropriate such as ice skating.

(***See*** Order, entered 10/30/12, at 1-2.) We defer to the court's credibility determinations, which the record supports. ***See Garr, supra***. In light of the applicable standard of review, relevant case law, and the evidence adduced at the contempt hearings, we see no abuse of discretion in the

court's finding that Father did not violate the custody order on the these grounds. ***See MacDougall, supra***; ***Flannery, supra***.

Regarding Father's attendance at the Valentine's Day party at Son's school, Mother testified the event fell during her custodial time. Mother conceded that she could not attend the party; but she maintained Father should not have attended an event that occurred during her custodial time.

The parenting coordinator testified that Mother did not complain about Father's attendance at the party prior to filing the contempt petitions. Moreover, the parenting coordinator opined Father's presence created no problem under the custody order:

> It's not about whose custody time it is when the kids are at activities. It's about the parents both being present at these activities at the same time because they can't control their behavior. So if one parent isn't able to go for whatever reason…and the other parent can, I don't see it as a violation of the order and I see nothing wrong with it. I think it's better for the children to have some sort of parental representation there…. So maybe according to the wording, maybe it was misinterpreted. But as far as a violation, no, I don't. I mean, I know that [Mother] referenced in her motion when she was held in contempt. My difference in that is that in that particular setting, [Mother] and [Father] both attended during [Father's] custody time and that was the problem, that both parents were there. It wasn't about whose custody time it was. It was about the fact of both parents being there and not being able to control their behavior when they are together at an activity. So I don't see anything wrong with [Father] going to a Valentine's Day [activity] if [Mother] wasn't going to be there.

(***See*** N.T. Hearing, 10/4/12, at 52-53.)

Based upon the foregoing, the court determined Father had complied with the custody order:

> [T]he court finds the intent of the Consent Order was to prohibit both parents from being at the same place at the same time. Thus, Father was not in contempt because Mother was not present. Had Mother physically been present, the [c]ourt would have found Father in contempt.

(***See*** Order, entered 10/30/12, at 2.) Here, the record supports the court's conclusion regarding Father's attendance at Son's school Valentine's Day party. ***See MacDougall, supra***; ***Flannery, supra***. Consequently, Mother is not entitled to relief on her first three claims.

In her fourth issue, Mother asserts the evidentiary record did not support the court's ruling on the contempt petitions. Absent more, Mother concludes the court's decision was the result of partiality, prejudice, bias, or ill will. Mother acknowledges this Court cannot *sua sponte* direct the recusal of a trial judge. Mother asks this Court, however, to suggest that the trial court "review whether it believes it can treat [Mother] impartially in this matter and, if not, to recuse itself." (Mother's Brief at 19). We refuse to address this claim.

"As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged." ***Chadwick v. Caulfield***, 834 A.2d 562, 571 (Pa.Super. 2003), *cert. denied*, 543 U.S. 875, 125 S.Ct. 102, 160 L.Ed.2d 126 (2004) (quoting ***Commonwealth v. Abu-***

Jamal, 553 Pa. 485, 507, 720 A.2d 79, 89 (1998), *cert. denied*, 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 38 (1999)).

> In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overruled on appeal but for an abuse of discretion. In reviewing a denial of a disqualification motion, we recognize that our judges are honorable, fair and competent.

Chadwick, supra at 571 (quoting ***Abu-Jamal, supra*** at 507, 720 A.2d at 89).

Instantly, we have already determined that the record supports the court's denial of Mother's contempt petitions. To the extent Mother urges us to tell the trial judge to consider recusal, Mother must raise this claim in the trial court in the first instance. ***See Chadwick, supra***. ***See also*** Pa.R.A.P. 302(a) (stating issues not raised in trial court are waived and cannot be raised for first time on appeal). Consequently, we decline to address the argument. Accordingly, we affirm the order denying Mother's petitions for contempt.

Order affirmed.

Judgment Entered.

Nicholas V. Cosetti

Deputy Prothonotary

Date: May 29, 2013