

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

B.N.D.

Appellant

v.

J.A.S.

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 844 MDA 2015

Appeal from the Order Entered April 17, 2015
In the Court of Common Pleas of York County
Civil Division at No(s): 2013-FC-000769-03

BEFORE: GANTMAN, P.J., OLSON, J., and PLATT, J.*

MEMORANDUM BY GANTMAN, P.J.:

FILED OCTOBER 06, 2015

Appellant, B.N.D. ("Mother"), appeals from the order entered in the York County Court of Common Pleas, finding Mother in contempt of the court's May 12, 2014 custody order and imposing sanctions in the form of attorney fees. We affirm.

The relevant facts and procedural history of this case are as follows. Mother and J.A.S. ("Father") are the biological parents of M.S. and J.S. Mother and Father separated in the spring of 2013. Following separation, Mother stayed permanently in Ohio with the children, while Father returned to Pennsylvania. On May 3, 2013, the York County Court of Common Pleas entered an order granting Mother and Father joint legal custody of the children and awarding Mother primary physical custody of the children in Ohio. Father filed a petition for modification of the custody order on

*Retired Senior Judge assigned to the Superior Court.

September 10, 2013. After a two-day custody trial, the York County court entered a new custody order on May 12, 2014, which, *inter alia*, granted Father physical custody of the children for the February 13, 2015 weekend.

In January of 2015, M.S. made allegations of abuse against Father to her therapist in Ohio. The therapist reported M.S.'s abuse allegations to Fairfield County Child Protective Services ("Fairfield County CPS") in Ohio, who then informed York County Children, Youth and Families ("York County CYF") of the allegations on January 28, 2015. York County CYF conducted an investigation into the abuse allegations in Pennsylvania, which included an interview with Father. On February 11, 2015, Mother informed Father that J.S.' doctor had advised that J.S. not travel that weekend due to an ear infection. Father requested to exercise his custody rights as to M.S. for the February 13, 2015 weekend; however, Mother refused Father's request despite Mother learning on 2/12/15, from a York County CYF caseworker that M.S.' abuse allegations were unfounded.

On March 13, 2015, Mother filed a motion for an emergency *ex parte* order in Ohio, asking the Ohio court to suspend Father's custody rights and grant Mother sole custody of the children based on M.S.' abuse allegations. On March 18, 2015, Father filed a petition in York County, asking the court to hold Mother in contempt of the May 12, 2014 custody order, for not allowing him to have custody of M.S. during the February 13, 2015 weekend. On March 24, 2015, following a hearing, the Ohio court entered an emergency *ex parte* order, temporarily suspending Father's custody

rights until April 23, 2015. With respect to the contempt action in York County, Mother filed a motion for change of venue based on *forum non conveniens* on April 6, 2015. On April 16, 2015, the York County court denied Mother's motion for change of venue, after a hearing. On April 17, 2015, the York County court held a hearing on Father's contempt petition, found Mother in contempt of the court's May 12, 2014 custody order, and ordered Mother to pay Father \$850.00 for attorney fees incurred. Mother filed a timely notice of appeal and Rule 1925(b) statement of errors complained of on appeal on May 13, 2015.¹

Mother raises the following issues for our review:

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW AND/OR ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR *FORUM NON CONVENIENS* AND CHANGE OF VENUE WITH RESPECT TO APPELLEE'S MOTION FOR CONTEMPT CONTRARY TO 23 PA.C.S.A. § 5427?

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW AND/OR ABUSED ITS DISCRETION IN FINDING APPELLANT

¹ Civil contempt orders imposing sanctions for non-compliance with a prior court order generally constitute final, appealable orders. ***Stahl v. Redcay***, 897 A.2d 478, 487 (Pa.Super. 2006), *appeal denied*, 591 Pa. 704, 918 A.2d 747 (2007) (citing ***Lachat v. Hinchliffe***, 769 A.2d 481, 488 (Pa.Super. 2001) (stating civil contempt paired with sanctions constitutes final, appealable order). "Ordinarily, an adjudication of contempt, with a directive to specifically perform, without sanctions, is interlocutory and not appealable." ***Richardson v. Richardson***, 774 A.2d 1267, 1268 n.2 (Pa.Super. 2001). The imposition of attorney fees related to contempt proceedings constitutes a sanction for purposes of this rule of appealability. ***Rhoades v. Pryce***, 874 A.2d 148, 153 (Pa.Super. 2005) (*en banc*), *appeal denied*, 587 Pa. 724, 899 A.2d 1124 (2006).

IN CONTEMPT OF THE CUSTODY ORDER AFTER TRIAL
DATED MAY 12, 2014?

(Mother's Brief at 4).

Our standard of review for a civil contempt order is as follows:

When considering an appeal from an [o]rder holding a party in contempt for failure to comply with a court [o]rder, our scope of review is narrow: we will reverse only upon a showing the [trial] court abused its discretion. The [trial] 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 [o]rder, and the complaining party must satisfy that burden by a preponderance of the evidence.

Harcar v. Harcar, 982 A.2d 1230, 1234 (Pa.Super. 2009) (internal citations omitted); ***Mrozek v. James***, 780 A.2d 670, 673 (Pa.Super. 2001) (stating same). Additionally, 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 [appellate] court must place great reliance upon the discretion of the trial judge.

Langendorfer v. Spearman, 797 A.2d 303, 307 (Pa.Super. 2002).

Section 5323 of the Pennsylvania Code governs punishment for contempt in custody actions as follows:

§ 5323. Award of custody

* * *

(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.

23 Pa.C.S.A. § 5323(g). To sustain a finding of civil contempt involving a custody order, this Court has stated:

[T]he 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, supra at 1235. An alleged contemnor must have the opportunity to explain her non-compliance with the court order, as intent is an essential element of contempt. **Nemeth v. Nemeth**, 451 A.2d 1384, 1387 (Pa.Super. 1982).

Our standard of review of the denial of a motion for change of venue

based on *forum non conveniens* is as follows:

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

M.E.V. v. R.D.V., 57 A.3d 126, 129 (Pa.Super. 2012). Section 5427 of the Pennsylvania Code sets for the law applicable to an inconvenient forum finding as follows:

§ 5427. Inconvenient forum

(a) General rule.—A court of this Commonwealth which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion or request of another court.

(b) Factors.—Before determining whether it is an inconvenient forum, a court of this Commonwealth shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (2) the length of time the child has resided outside this Commonwealth;

- (3) the distance between the court in this Commonwealth and the court in the state that would assume jurisdiction;
- (4) the relative financial circumstances of the parties;
- (5) any agreement of the parties as to which state should assume jurisdiction;
- (6) the nature and location of the evidence to resolve the pending litigation, including testimony of the child;
- (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (8) the familiarity of the court of each state with the facts and issues in the pending litigation.

23 Pa.C.S.A. § 5427(a)-(b).

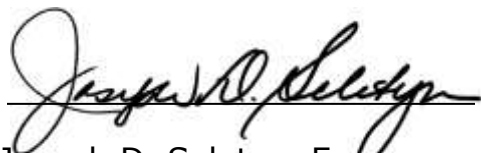
After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Gregory M. Snyder, we conclude Appellant's issues on appeal merit no relief. The trial court opinion comprehensively discusses and properly disposes of those questions. (**See** Trial Court Opinion, filed June 12, 2015, at 2-6) (finding: **(1)** court considered all eight factors contained in Section 5427 of Pennsylvania Code to determine whether York County was inconvenient forum, noting: with respect to first factor, alleged abuse of M.S. occurred in York County and, after investigation, York County CYF determined allegations were unfounded; with respect to second factor, fact that children live with Mother in Ohio weighs slightly in favor of Mother's request that

Ohio court hear contempt matter; with respect to third factor, distance between York County court and Ohio court, is between six and seven hours by car, which is not inordinately long and does not have much impact on where contempt matter should be decided; with respect to fourth factor, while Father's financial circumstances are better than Mother's, this has not inhibited Mother's ability to participate in contempt matter as demonstrated by private counsel representing Mother in proceedings; with respect to fifth factor, Mother and Father had no agreement regarding jurisdiction or venue; with respect to sixth factor, Mother failed to convince court it would be impossible or difficult to present evidence in York County as Father agreed to Mother presenting evidence via telephone; with respect to seventh factor, contempt matters are given high priority in Pennsylvania and Mother presented no evidence on Ohio court's ability to decide contempt matter expeditiously; and with respect to eighth factor, York County court is more familiar with underlying custody matter because it issued original custody order, and proceeding in Ohio court focused on abuse allegations, not custodial relationship between Mother and Father; therefore, upon consideration of factors contained in Section 5427 of Pennsylvania Code, York County was proper venue for contempt matter; **(2)** Father was entitled to partial custody of children for three-day weekend beginning on February 13, 2015; Mother admitted she refused to allow Father to exercise his custody rights on those dates; Mother conceded she knew abuse allegations

were unfounded because of phone call from CYF caseworker on February 12, 2015, yet she told Father he could not have custody of children; Mother presented no evidence to support her claim that Father and his girlfriend violated the May 12, 2014 custody order by blowing smoke in children's faces; Father expressed to Mother that he still wanted to exercise his custody rights as to M.S. despite J.S.' ear infection, but Mother refused to let Father do so; therefore, Mother willfully violated custody order with respect to M.S. during February 13, 2015 weekend). Accordingly, we affirm on the basis of the trial court's opinion.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/6/2015

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

B.N.D.

Plaintiff

v.

J.A.S.

Defendant

NO. 2013-FC-0769-03

CIVIL ACTION

CUSTODY

APPEARANCES:

SHERI D. COOVER, Esquire
Counsel for Plaintiff

HEATHER A. REYNOSA, Esquire
Counsel for Defendant

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TRIAL COURT'S 1925(a) STATEMENT

Plaintiff has appealed to the Superior Court from the Trial Court's order of April 16, 2015 denying the change of venue request, and the order of April 17, 2015 finding Plaintiff in Contempt.

The Trial Court did not issue a directive to Plaintiff to file a Statement of Errors Complained of on Appeal (hereinafter "Statement"), as this appeal is a Children's Fast Track appeal, and therefore Plaintiff's Statement was filed on May 13, 2015, the same day as the Notice of Appeal.

This 1925(a) Statement is submitted in response to Plaintiff's 1925(b) Statement, and as a supplement to the record and the Trial Court's orders of April 16, 2015 and April 17, 2015.

APRIL 16, 2015 ORDER – VENUE

In Plaintiff's first complaint, she contends that the Trial Court erred "in denying [Plaintiff's] motion for forum non conveniens and change of venue with respect to

3

[Defendant's] Motion for Contempt contrary to 23 Pa.C.S.A. §5427." "Before determining whether it is an inconvenient forum, a court of this Commonwealth shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors. The Trial Court considered all the factors set forth in section 5427 as follows:

1. At the time of the hearing on April 16, 2015, it was uncertain whether domestic violence had occurred, as allegations of abuse against Defendant were the basis of the Ohio ex-parte order. (N.T., 4/16/15, page 94). However, the Trial Court was unaware at the time of this hearing that these same allegations were previously alleged and investigated by York County Children and Youth (with the help from Ohio Children and Youth) and determined to be unfounded. Furthermore, the alleged abuser was Defendant, who lives in York County, PA, the abuse was alleged to have occurred in York County, PA, and the allegations were reported to the York County PA Children, Youth and Families, who investigated those allegations.
2. The children have resided outside Pennsylvania since March 2013, which is a little more than two years. (N.T., 4/16/15, page 28). Because the children are young, a significant portion of their lives has been spent in Ohio (N.T., 4/16/15, page 95). This provides a very slight advantage to Plaintiff (N.T., 4/16/15, pages 94-95).
3. The distance between the Court in this Commonwealth and the Court in Carroll,

Ohio, is a six or seven hour day trip by automobile. (N.T., 4/16/15, page 63). This is not an inordinately long trip that would have much impact on whether this case should be decided in Ohio or Pennsylvania (N.T., 4/16/15, pages 96, 98).

4. Defendant's financial circumstances are better than Plaintiff's (N.T., 4/16/15, pages 39-49, 58-65, 96). However that has not prevented Plaintiff from participating through private counsel in this proceeding. (N.T., 4/16/15, page 96). Plaintiff has not been hampered by her financial circumstances from aggressively defending and asserting her position in this case (N.T., 4/16/15, page 97). Plaintiff's financial circumstances do not inhibit her ability to participate as a party in this custody matter regarding contempt. (N.T., 4/16/15, page 97).
5. There was no agreement by the parties regarding jurisdiction or venue (N.T., 4/16/15, pages 66, 95).
6. It doesn't look like there would be a lot of evidence beyond the testimony of the parties and perhaps some stipulations regarding what else has occurred in the case (N.T., 4/16/15, pages 9, 12, 14, 15, 18, 99). Plaintiff's Counsel did not convince the Trial Court that it would be [necessarilly] impossible or all that difficult to present the evidence she wishes to present here in York County, or via speakerphone, which Defendant has indicated he would be okay with (N.T., 4/16/15, pages 22, 99). Also, see the Trial Court's discussion regarding the first factor that appears above.

7. There was no evidence presented regarding the Ohio Court's ability to decide the issue expeditiously or about their procedures necessary to present the evidence. (N.T., 4/16/15, page 95). The Trial Court is well aware that in Pennsylvania, these matters are given as much priority as possible (N.T., 4/16/15, page 95). The Trial Court has the ability and the inclination to decide the issue expeditiously (N.T., 4/16/15, page 99).
8. Regarding the familiarity of the court of each state with the facts and issues in the pending litigation, Pennsylvania is more familiar with the case than is Ohio. While there was an ex parte proceeding in Ohio, that proceeding was focused on allegations of child abuse allegedly committed by Defendant in his home in York County, Pennsylvania, and not really on the custodial relationship between Plaintiff and Defendant. (N.T., 4/16/15, page 99). The existing custody order was issued by this Court, although not the undersigned judge. (N.T., 4/16/15, pages 95-96).

Given the foregoing, the Trial Court properly determined that the proper venue for this case is in York County, Pennsylvania.

APRIL 17, 2015 ORDER – CONTEMPT

Plaintiff contends that the Trial Court erred "in finding [Plaintiff] in willful contempt of the *Custody Order After Trial* dated May 12, 2014[.]" The finding of contempt pertains to a three-day weekend in February which, pursuant to the custody order, Defendant was entitled to have partial custody of the children. Plaintiff admits that Defendant was to have custody of the children that weekend pursuant to the order (N.T., 4/17/15, page 80),

and she also admits that she refused to allow Defendant to exercise those custody rights (N.T., 4/17/15, pages 80-81, 105-106).

Plaintiff contends that it was out of concern for the welfare of the children that she refused to allow father to exercise his custody rights that weekend. Specifically, Plaintiff contends that she was aware of allegations of abuse against Defendant. (N.T., 4/17/15, pages 83-84). While it is true that a Child line report was made against Defendant (N.T., 4/17/15, pages 12-13), CYS (with the help of CYS in Ohio) investigated those allegations and determined that they were unfounded (N.T., 4/17/15, pages 18-20). Moreover, Plaintiff admits that at the time she told Defendant he could not have custody of the children for that weekend, she knew that the allegations were unfounded, as she had received a phone call the day before from Amanda White of CYS letting her know that. (N.T., 4/17/15, pages 94, 105-106).

Plaintiff also claims that she denied Defendant his weekend for custody because he and his girlfriend smoke in the presence of the children and blow smoke in their faces. (N.T., 4/17/15, page 110). However, there was no evidence presented (other than Plaintiff's bald assertions) that Defendant and his girlfriend were, in fact, doing that. Moreover, Plaintiff never sought to have the custody order modified due to her alleged concerns.

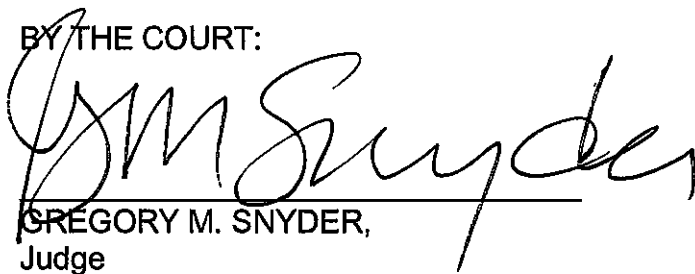
Finally, Plaintiff claims that she did not allow Defendant to have custody that weekend because *J.S.* had an ear infection. (N.T., 4/17/15, page 81). Plaintiff submitted a letter from *J.S.'s* physician advising that the child should "limit any traveling this weekend, so that he may have time to rest and finish his antibiotic."

Plaintiff's Exhibit # 3(b). Defendant told Plaintiff that even if he can't have visitation with J.S., he would still like to exercise his rights in regard to M.S. (N.T., 4/17/15, page 39). Plaintiff refused to allow Defendant to exercise his custody rights pertaining to M.S., also, claiming that the custody order requires that either both go or neither one goes. (N.T., 4/17/15, pages 39-40). At the hearing, however, Plaintiff's Counsel admitted that the order contains no such provision. (N.T., 4/17/15, page 40).

Given the foregoing, it was clear that Plaintiff willfully violated the May 12, 2014 custody order regarding Defendant's rights to custody during a 3-day weekend in February, at least as it pertains to M.S. (See N.T., 4/17/15, pages 115-117).

The Clerk of Courts is directed to provide a copy of this order to Attorney Heather Reynosa and to Attorney Sheri Coover.

BY THE COURT:


GREGORY M. SNYDER,
Judge

Date: June 12, 2015

Sheri Coover, ESQUIRE
44 S. Hanover St.
CANTON, PA. 17013

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CASE NUMBER: 2013-PC-769.03

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