NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

N.L.C., Appellee v. W.J.B., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 705 WDA 2012

Appeal from the Order of March 26, 2012,
in the Court of Common Pleas of Erie County,
Domestic Relations at No. NS 200002722/Pacses Case No. 854102781

BEFORE: BOWES, LAZARUS and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: FILED: May 3, 2013

Father appeals, *pro se*, from the order finding him in contempt for failing to pay child support and imposing sanctions. Father claims the trial court erred in: (1) entering a contempt order when jurisdiction had passed to this Court when Father appealed the support order; (2) ordering Father to be incarcerated in a facility which is non-compliant with the Americans with Disabilities Act;[1] (3) finding Father in willful contempt where no evidence was presented that he is employable; (4) failing to consider Father's present ability to pay when setting the purge amount; (5) failing to consider Father's outstanding medical bills and ongoing medical expenses; (6) arbitrarily cutting short Father's testimony; (7) preventing Father's wife from

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[1] 42 U.S.C. § 12101, *et seq*.

*Retired Senior Judge assigned to the Superior Court.

testifying; and (8) failing to credit or properly consider Father's evidence as to his medical expenses and disability. We affirm.

Mother and Father are the parents of one minor child who is the subject of the instant support action. Pursuant to a September 26, 2002, order, Father's monthly child support obligation was initially set at $300.00. Mother petitioned for modification of the support order in May 2006. Pursuant to a June 20, 2006, interim order, Father was assessed an earning capacity of $1960.00 net per month based upon his prior employment and his support obligation was increased to $433.33 per month. This order became a final order. In September 2006, Father filed a petition for modification requesting a decrease in support, due, in relevant part, to his claim that he does not earn the income that has been assessed for calculation of support. Following a hearing, the court entered an interim order denying Father's petition for modification as a final order. Father did not appeal this order. Thereafter, on August 31, 2007, Father petitioned the court for modification requesting a decrease in support due to a material and substantial change in the custody and visitation schedule. On February 27, 2008, following a hearing, the court entered its interim order dismissing Father's petition as a final order. This order was subsequently affirmed by this Court. [***N.L.C. v. W.J.B.***], 964 A.2d 449 (Pa. Super. 2008) (unpublished memorandum).

The trial court summarized the additional relevant facts as follows:

> . . . Father, on April 12, 2010 filed a Petition for Modification of an Existing Support Order alleging that an accident rendered him unable to work. Following a support conference, the Court issued a May 26, 2010 recommended Order in the amount of

> $433.33 per month.[2] The Order reflected a downward deviation in Father's support obligation in consideration of his care of another minor child, but denied suspension of the support obligation as Father's alleged disability was not preventing him from earning income. On June 16, 2010, Father filed a Demand for Court Hearing. Following a *de novo* hearing, this Court issued an August 25, 2010 Order making the May 26, 2010 Order a final order. Father appealed the August 25, 2010 Order, however, he discontinued the appeal.
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> On March 4, 2011, Father filed a Petition for Modification of an Existing Support Order alleging that he was disabled and requesting a decrease in his support obligation. Upon recommendation of the conference officer, the Court, by an April 14, 2011 Order, dismissed Father's Petition and continued his support obligation at $433.33/month. Father filed a Demand for Court Hearing. Following a *de novo* hearing at which Father's counsel presented documentation indicating that Father was hospitalized, this Court issued a June 16, 2011 Order dismissing Father's Petition without prejudice and making the April 14, 2011 Order a final order.
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> Meanwhile, on May 17, 2011, the Domestic Relations Section filed a Petition for Contempt against Father alleging that he failed to pay support in accordance with the April 14, 2011 Order and had, therefore, accumulated $6,921.27 in arrearages. By a June 13, 2011 Order of Court, this Court did not find Father in contempt; instead, it continued the matter.
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> Father, on August 22, 2011, filed a Motion for Modification and Leave to Bypass Support Conference alleging, in relevant part, that his medical condition and ability to work required the Court's consideration. A *de novo* hearing was scheduled.[fn1]
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> FN1 Initially, the de novo hearing was scheduled for October 13, 2011. It was, however, continued at Father's request to December 8, 2011. Due to the death of an immediate family member of Mother's counsel, the December 8, 2011 hearing was rescheduled for February 1, 2012.

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[2] Father was assessed a net monthly income of $1,978.52 based on an earning capacity previously established by the court.

On November 1, 2011, the Domestic Relations Section filed a Petition for Contempt against Father alleging that he failed to pay support in accordance with the April 14, 2011 Order and had accumulated arrearages of $9,087.92. A hearing on the Petition was scheduled to be heard at the same time as the *de novo* hearing on Father's August 22, 2011 Motion for Modification. Father, on the afternoon immediately preceding the hearing, presented a Motion to Allow Testimony by Electronic Means requesting, for health reasons, to participate in the next day's hearing by telephone. This Court denied the same and proceeded with the *de novo* hearing. Father was not present, however, he was represented by counsel. Following the February 1, 2012 *de novo* hearing, this Court issued a February 14, 2012 Order as follows:

> Defendant to pay $433.33/month for the support of one child through 02/29/12. The Court is prorating the defendant's settlement of $65,614.71 over 38 months (03/01/12-04/30/15) giving the defendant additional income of $1726.70/month net. Defendant's income/earning capability $3705.22/month net ($1978.52 plus $1726.70). Plaintiff's income/earning capability of $1216.28/month net. Effective 03/01/12 through 04/30/15 (38 months) defendant to pay $633.56 per month for the support of one child. This order allows a 10% downward deviation in consideration of the defendant's other child. Effective 05/01/15 this order is to be automatically decreased to $433.33/m for the support of one child and continue until the child is emancipated (18 and graduated from high school). All other terms of the prior order are to stand.

Father, on March 13, 2012, filed a Notice of Appeal from the February 14, 2012 Order.[3]

As Father did not appear for the February 1st contempt hearing, a bench warrant was issued for his arrest.[fn2] The warrant was served and a hearing on the warrant was held on March 26, 2012. By a March 26, 2012 Order, this Court found Father in contempt of court for willfully failing to pay child support and

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[3] Father's appeal of this order is docketed at 443 WDA 2012 in this Court.

> ordered his incarceration for a six month period or a purge in the amount of $3,000.00. Father, on March 27, 2012, paid the purge and was released from incarceration.
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> FN2 Father asserts that he is unable to travel and therefore he was unable to appear for the support contempt hearing. In support of his inability to appear for the February 1, 2012 contempt hearing, Father offered a February 10, 2012 letter of Dr. Hausknecht. *See* Exhibit B; *see also*, N.T. 3. Meanwhile, since his May 24, 2011 surgery, Father has, on at least two occasions, travelled the 450 mile distance to exercise custody of the Child. N.T. at 4 and 15-16. Father is simply not credible.

Trial Court Opinion, 06/06/12, 1-3. Father's timely appeal followed.

> In reviewing Father's claims, we are mindful that:
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> Our scope of review when considering an appeal from an order holding a party in contempt of court is narrow: We will reverse only upon a showing of an abuse of discretion. ***See Diamond v. Diamond***, 2002 PA Super 34, 792 A.2d 597, 600 (Pa. Super. 2002). The court abuses its discretion if it misapplies the law or exercises its discretion in a manner lacking reason.

Hyle v. Hyle, 868 A.2d 601, 604 (Pa. Super. 2005).

> In addition, as this Court has stated:
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> The purpose of a civil contempt order is to coerce the contemnor to comply with a court order. ***See Gunther v. Bolus***, 2004 PA Super 8, 853 A.2d 1014, 1016 (Pa. Super. 2004), appeal denied, 578 Pa. 709, 853 A.2d 362 (2004). Punishment for contempt in support actions is governed by 23 Pa.C.S. § 4345. Section 4345 provides that
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> > (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.
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> (2) A fine not to exceed $1,000.
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> (3) Probation for a period not to exceed one year.
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> (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.
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> 23 Pa.C.S. § 4345.

> To be found in civil contempt, a party must have violated a court order. ***See Garr v. Peters***, 2001 PA Super 110, 773 A.2d 183, 189 (Pa. Super. 2001). Accordingly, the complaining party must show, by a preponderance of the evidence, that a party violated a court order. ***See Sinaiko v. Sinaiko***, 445 Pa. Super. 56, 664 A.2d 1005, 1009 ([Pa. Super.] 1995). The alleged contemnor may then present evidence that he has the present inability to comply and make up the arrears. ***See Barrett v. Barrett***, 470 Pa. 253, 264, 368 A.2d 616, 621 (1977); ***see also, Sinaiko***, 664 A.2d at 1009. 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.

Orfield v. Weindel, 52 A.3d 275, 278-79 (Pa. Super. 2012).

In his first claim, Father argues the court lacked jurisdiction to issue the contempt order in this case because jurisdiction of this matter had passed to this Court when Father appealed the February 14, 2012, support order. Father argues that the total amount of his support arrears was in dispute and any amount of support owed by Father could not be known or calculated until this Court ruled on his appeal.

Appellant cites no legal authority to support his proposition that the court lacked jurisdiction to enter the contempt order in this case; accordingly, he has failed to demonstrate that he is entitled to relief on this issue. Nonetheless, in addressing the effect of Father's appeal on the court's jurisdiction to enter the contempt order, the trial court relied on Pa.R.A.P. 1701, which provides:

> Effect of Appeal Generally
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> (a) General rule. Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter.
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> (b) Authority of a trial court or agency after appeal. After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may:
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> . . .
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> (2) Enforce any order entered in the matter, unless the effect of the order has been superseded as prescribed in this chapter.

Pa.R.C.P. 1701(a) and (b)(2). The trial court correctly found that because Father never sought supersedeas or a stay of the court's February 14, 2012, order, the court retained authority to enforce the support order. ***See Travitzky v. Travitzky***, 534 A.2d 1081, 1084 n.3 (Pa. Super. 1987) (holding that, absent a supersedeas, the trial court has inherent power to enforce its orders even after an appeal has been taken) (citing Pa.R.A.P. 1701(b)). Thus, Father is entitled to no relief on this claim.

In his second claim, Father argues the trial court erred in ordering him to be incarcerated in a facility which is non-complaint with the Americans

with Disabilities Act. We agree with the trial court that this issue is waived as Father did not raise it to the trial court. ***See*** Pa.R.A.P. 302(a) (stating "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Father's additional arguments that the trial court violated the Eighth Amendment of the United States Constitution and the Universal Declaration of Human Rights for incarcerating him despite his physical condition are similarly waived due to Father's failure to raise them to the trial court. Father is entitled to no relief on this claim.

In his third claim, Father argues the trial court erred in finding that he willfully failed to comply with the support order where there was no evidence that he is employable.

The trial court addressed this claim as follows:

> The parties do not dispute that [Father] failed to comply with the order for support.[fn3] Father, however, presented evidence to indicate that he is unable to comply with the support order. Specifically, Father asserted that, as the result of a January 17, 2010 automobile accident and complications from a May 24, 2011, surgery, he is unable to work. *See* N.T., March 26, 2012, at 4-8 and 12-13; *see also* Exhibit A, N.T. *Telephone Deposition of Kaushik Das*, M.D., January 19, 2012. Father testified that he is fully paralyzed from the neck down, that every area of his body is affected and that he has only limited improvement in his movement compared to what he had when he first got out of surgery. *See* N.T., March 26, 2012 at 9. His testimony is not, however, consistent with this Court's observations of his physical abilities. Father was present before the Court and capable of moving on his own and walking. Father's testimony is further inconsistent with the testimony of his own physician. *See* Exhibit A, N.T. *Telephone Deposition of Kaushik Das*, M.D., January 19, 2012. Specifically, Dr. Das indicated that Father has made "quite a bit of progress" since the surgery, that he is able to walk, and that "he's definitely better." *See id.* at 17. Father is unable to move like a normal person, however, he can walk

> with a cane and take a few steps without any assistance; he is just slower. *See id.* at 22. Moreover, Dr. Das testified that Father's condition is only "slightly worse" than it was prior to surgery. *See id.* at 18. Meanwhile, this Court determined, just nine months prior to surgery, that Father's condition was not preventing him from earning income in his profession. *See* August 25, 2010 Order[fn4]; *see also* October 21, 2010 Opinion. Furthermore, although Dr. Das testified that Father is *currently* unemployable, it became clear from his testimony that his assessment was not made in relation to Father's actual training and work history. *See* April 30, 2012 Opinion, [*N.L.C. v. W.J.B.*], Docket No. NS200002722.
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> FN3 By the time of the March 26, 2012 hearing, Father had arrears totaling $11,454,80. *See* N.T., *Contempt Hearing*, March 26, 2012 at 2. The last payment that Father made toward his support obligation was $12.01 on May 24, 2010.
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> FN4 Father filed an appeal from the August 25, 2010 Order, which he discontinued. *See* Superior Court of Pennsylvania Appeal Docket 1524 WDA 2010.
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> It is further noteworthy that Father has been denied Social Security disability. *See* N.T., March 26, 2012, at 15.
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> The Court has consistently found inconsistencies in Father's arguments and concluded on multiple occasions that Father has formulated excuses not to support his child. See, for example, April 22, 2008 Opinion, [*N.L.C. v. W.J.B.*], Docket No. NS200002722 aff'd by Memorandum Opinion, 522 WDA 2008 (Pa. Super. 2008); *see also* October 21, 2010 Opinion; *see also* April 30, 2012 Opinion. Father's evidence is once again inconsistent with his argument, indicating that he has merely found another excuse not to support his child.
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> Accordingly, the Court found that Father willfully failed to comply with the support order.

Trial Court Opinion, 06/06/12, at 5-6.

Father's argument is essentially that the trial court erred in not accepting his evidence that he is unable to comply with the support order

because he is unemployable. As this Court has stated, "[w]hen the trial court sits as fact finder, the weight to be assigned the testimony of the witnesses is within its exclusive province, as are credibility determinations, [and] the court is free to choose to believe all, part, or none of the evidence presented." ***Mackay v. Mackay***, 984 A.2d 529, 533 (Pa. Super. 2009). The trial court explained its rationale for the weight it gave to the testimony of Father and his physician and for its determination that Father's evidence failed to establish that he is unemployable. Evidence exists in the record to support the court's determination that Father has the ability to pay his child support obligation and acted willfully in failing to comply with the support order. The trial court's findings in this regard are supported by the record and its conclusions are not unreasonable. We find no error in this regard.

In his fourth, fifth, and eighth claims, Father argues the trial court erred in failing to consider whether Father had the ability to pay the purge amount. Father argues the court ignored evidence of his significant medical expenses and his lack of income in determining his ability to pay.

The trial court explained its decision as follows:

> Relative to his automobile accident, Father, in August of 2011, received a $65,614.71 settlement. *See* N.T. at 11; *see also* Petitioner's Exhibit 2 from February 1, 2012 *De Novo* Hearing. Nevertheless, he has not made any child support payments. Father asserts that he has medical bills and, therefore, he has not paid his child support. Meanwhile, there is not any indication that he has made any payments from the $65,614.71 settlement award toward his medical bills. Instead, he asserts that his medical bills, totaling approximately $152,000.00 for the period of February of 2011 through September of 2011, remain unpaid. *See* N.T. at 9-12; *see also* Exhibit 3 from February 1, 2012 *De*

> *Novo* Hearing. Accordingly, there is no evidence of record to indicate that Father does not have available to him $65,614.71.

Trial Court Opinion, 06/06/12, at 7.

The trial court considered Father's evidence and determined that Father had the present ability to pay $3,000.00 to purge the contempt. Father testified that he received the $65,614.71 settlement award in August 2011; he provided no testimony that he was no longer in possession of this amount. Thus, the record supports the trial court's findings that, at the time of the hearing, Father had the present ability to pay the purge amount.

In his sixth claim, Father argues the court erred in cutting short Father's testimony and, thus, limiting the defense. In his seventh claim, Father argues the court erred in removing Father's wife and child from the courtroom, thus, preventing Father's wife from testifying. We find both issues to be waived as Father, who was represented by counsel at the hearing, did not raise an objection on either basis to the trial court. ***See*** Pa.R.A.P. 302(a).

Order affirmed.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: 5/3/2013