J-A08014-14
J-A08015-14

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

S.J.K., n/k/a S.J.B.,		:	IN THE SUPERIOR COURT OF
		:	PENNSYLVANIA
	Appellant	:	
		:	
v.		:	
		:	
D.T.K.,		:	
		:	
	Appellee	:	No. 590 WDA 2013

Appeal from the Order Entered March 7, 2013,
In the Court of Common Pleas of Washington County,
Civil Division, at No. G.D. 2006-5998.

S.J.K., n/k/a S.J.B.,		:	IN THE SUPERIOR COURT OF
		:	PENNSYLVANIA
	Appellant	:	
		:	
v.		:	
		:	
D.T.K.,		:	
		:	
	Appellee	:	No. 1659 WDA 2013

Appeal from the Order Entered September 16, 2013,
In the Court of Common Pleas of Washington County,
Civil Division, at No. G.D. 2006-5998.

BEFORE: SHOGAN, OLSON and WECHT, JJ.

MEMORANDUM BY SHOGAN, J.: FILED: April 14, 2014

Appellant, S.J.B. ("Mother"), appeals from the contempt orders[1] of March 7, 2013, and September 16, 2013. We affirm.

[1] These cases were listed consecutively at oral argument and relate to the same parties. We have chosen to address both appeals in a single memorandum.

Mother and Appellee, D.T.K. ("Father"), are the parents of four children; only the youngest two are minors: a daughter, A.K., age fifteen, and a son, Z.K., age thirteen. The custody order in effect was entered on April 11, 2008; Mother has primary physical custody, and Father has partial physical custody every other weekend, one week in June, two weeks in July, one week in August, and portions of major holidays. Mother's Day and Father's Day are designated to the appropriate parent.

Relating to the appeal at 590 WDA 2013,[2] Father previously had filed a contempt petition on April 5, 2012, which the trial court granted on June 12, 2012, and directed Mother to pay Father's attorney $500.00. No appeal from that order was filed. The same pattern of violations of Father's custody time apparently continued, and Father filed a second contempt petition on December 6, 2012. The trial court held a hearing on March 6, 2013, at which both parties testified. The trial court again found Mother in contempt on March 7, 2013, and ordered her to pay Father's attorney $500.00. Mother filed a notice of appeal on April 3, 2013, and a Pa.R.A.P. 1925(b) statement on April 22, 2013. The March 7, 2013 order is on appeal at 590 WDA 2013.

[2] We grant Mother's motion to strike the May 15, 2013 contempt petition from Father's designation of reproduced record, as that petition post-dated the April 3, 2013 notice of appeal. As that petition is *dehors* the certified record in this appeal, we do not consider it in Mother's appeal of the March 7, 2013 contempt order.

Relating to the appeal at 1659 WDA 2013, Father filed a third contempt petition on May 15, 2013. The trial court held a hearing on September 13, 2013, at which the parties and their oldest son, B.K., testified. On September 16, 2013, the trial court found Mother in contempt and directed her to pay Father's attorney $1,000.00. The September 16, 2013 order is on appeal at 1659 WDA 2013.

Mother raises the identical two issues in both appeals, as follows:

> 1. Whether the Trial Court abused its discretion and/or erred as a matter of law by finding [Mother] in contempt where the order in question is not definite, clear, or specific and in failing to resolve any omissions or ambiguities in Mother's favor.
>
> 2. Whether the Trial Court abused its discretion and/or erred as a matter of law in determining that [Father] met his burden of proof in establishing violations of the custody order by a preponderance of the evidence and by making factual findings based totally on conjecture rather than the evidence of record.

Mother's Briefs at 4.

Our scope and standard of review are well-settled:

> In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. ***Johns v. Cioci***, 865 A.2d 931, 936 (Pa. Super. 2004). We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. ***Id***. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first-hand. ***Id***. However, we are not bound by the trial court's deductions or inferences from its factual findings. ***Id***. Ultimately, the test is "whether the trial court's conclusions are unreasonable as shown by the evidence of record." ***Landis v. Landis***, 869 A.2d 1003, 1011 (Pa. Super. 2005) (citations

> omitted). We may reject the conclusions of the trial court "only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court." ***Hanson v. Hanson***, 878 A.2d 127, 129 (Pa. Super. 2005).
>
> With any child custody case, the paramount concern is the best interests of the child. ***Landis, supra***, 869 A.2d at 1011. This standard requires a case-by-case assessment of all the factors that may legitimately affect the "physical, intellectual, moral and spiritual well-being" of the child. ***Id***. (citations omitted).

G.A. v. D.L., 72 A.3d 264, 268–269 (Pa. Super. 2013) (quoting ***Collins v. Collins***, 897 A.2d 466, 471 (Pa. Super. 2006)).

When we review a trial court's finding of contempt, "we are limited to determining whether the trial court committed a clear abuse of discretion. **This Court must place great reliance on the sound discretion of the trial judge** when reviewing an order of contempt." ***P.H.D. v. R.R.D.***, 56 A.3d 702 (Pa. Super. 2012) (citation omitted) (emphasis added). Moreover, "each court is the exclusive judge of contempts against its process." ***G.A. v. D.L.*** at 269 (citing ***Royal Bank of Pennsylvania v. Selig***, 644 A.2d 741, 747 (Pa. Super. 1994)). "The contempt power is essential to the preservation of the court's authority and prevents the administration of justice from falling into disrepute." ***Habjan v. Habjan***, 73 A.3d 630, 637 (Pa. Super. 2013) (quoting ***Garr v. Peters***, 773 A.2d 183, 189 (Pa. Super. 2001)).

Appeal at 590 WDA 2013

Mother first contends the custody order of April 11, 2008, is not clear, definite, and specific in that it requires the parties merely to encourage the children to participate in partial custody periods but does not require either parent to force or compel visitation. This issue is waived for failure to assert that claim in the Pa.R.A.P. 1925(b) statement. Pa.R.A.P. 1925 (b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived"); ***see also Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998) ("Any issues not raised in a 1925(b) statement will be deemed waived."); ***Ramer v. Ramer***, 914 A.2d 894 (Pa. Super. 2006) (same). Where the issue is omitted completely from the concise statement, as here, the issue is waived.[3]

In her second issue, Mother proffers that the trial court erred in holding that Father met his burden of proof. She avers that the court relied on presumptions and inferences and maintains that Father did not prove that she had notice of the June 12, 2012 contempt order, which was the first contempt order.

Father responds that Mother was well aware of her obligation to comply with the custody order, citing ***Hopkins v. Byes***, 954 A.2d 654 (Pa.

[3] Since no such issue was raised, the trial court did not address any issue relating to the clarity of the custody order in its Rule 1925(a) opinion.

Super. 2008), in support. In ***Hopkins*** we affirmed a finding of contempt for the mother's failure to ensure the child's compliance with the visitation order. Father also maintains that when Mother received notice of the first contempt order, filed June 14, 2012, is "of no importance." Father's Brief at 12. Mother knew Father had custody on Father's Day, and she knew the partial custody schedule set forth in the April 11, 2008 custody order. Father asserts that Mother has continually violated the custody order by interfering with his custody periods, and the trial court had competent evidence before it when making its ruling.

We are perplexed by Mother's argument related to the timing of her receipt of the June 14, 2012 contempt order. Mother did not appeal the June 14, 2012 contempt order, and its receipt is irrelevant to the basis for the instant contempt order. This appeal involves the March 7, 2013 order of contempt, which documents Mother's non-compliance with the April 11, 2008 custody order. While the **existence** of the June 14, 2012 order may have some relevance in the scheme of things, the timing of its receipt is immaterial to the trial court's finding of contempt on March 7, 2013, for noncompliance with the April 11, 2008 custody order.

We have described the requisites in proceedings for civil contempt of court as follows:

> [T]he 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) (citations omitted). While Mother acknowledges that "credibility determinations are within the province of the Trial Court," her argument on this issue is mere repetition of the evidence the trial court had before it. Mother's Brief at 21–22. We rely on the trial court's explanation for its order, as follows:[4]

> The trial court found [M]other in contempt for not requiring the children to be in [F]ather's care on his designated weekends of partial custody even though they had some activity scheduled. It concluded that [M]other would excuse the children from visiting with [F]ather for an entire weekend if an unusual or special activity fell on the weekend despite the fact that the activity would not span the entire weekend. For example, [F]ather testified with credibility about the following issues:
>
> > 1. [A.K.] attended the . . . High School homecoming dance during [F]ather's weekend. The dance event, however, did not last an entire weekend but [M]other excused [A.K.] from visiting with [F]ather for the entire weekend. R.R. # 29 at 27–28.
> >
> > 2. Mother had a black belt karate event on a weekend [F]ather was to have custody. The children

[4] The trial court made clear that its finding of contempt was not based on conflicts on Wednesday evenings, which was the make-up time designated in the June 12, 2012 contempt order, stating, "[T]he trial court's March 7, 2013 order did not find [M]other in contempt regarding the children's sporting or extracurricular activities on Wednesdays." Trial Court Opinion, 4/30/13, at 3.

> attended but [M]other's event was not for the entire weekend; [F]ather was not able to exercise any custody that weekend. R.R. # 29 at 28.
>
> 3. [Z.K.] had a "Snowball Dance" at his middle school on a weekend [F]ather was to have custody. The dance was not the entire weekend, yet [F]ather was not able to exercise any custodial time. R.R. # 29 at 33.
>
> 4. [A.K.] informed [F]ather that she was going to attend a bonfire on a Friday night but would then spend the remainder of the weekend with a friend at that friend's home. This was [F]ather's custodial weekend, as well as [F]ather's [D]ay weekend. R.R. # 29 at 11.

Mother's response to such claims was that she would encourage or urge the children to go with their father for the weekend. She did not require the children to be with their father, a person who only enjoys custody six days per month, before the unique/unusual event started or ended. As [M]other testified, I "urged them (the children) to discuss these plans" with [F]ather; "I have urged [A.K.] to talk with you. Please discuss with her. She is home and I am encouraging her to go with you; I have always encouraged them to go every single time it's his weekend." R.R. # 29 at 75, 77, 113. Such apathy is not acceptable, for it permits the children to control or determine whether the terms of the custody order will be followed. Mother knew the terms and conditions of the custody order but willfully failed to comply. . . .

The children may have activities on the Fridays, Saturdays and Sundays when [F]ather is to exercise partial custody, but that does not excuse [M]other from assuring that [F]ather is able to exercise custody. None of the activities aforementioned commenced at 5:30 p.m. on Friday and ended at 8:00 p.m. on Sunday. The trial court emphasized in the March 7, 2013 order that it "understands children of the twenty-first century have busy activity schedules . . . ." R.R. # 21. **If the custody order cannot be followed for some reason, it is incumbent upon [M]other to file a modification petition.**

Trial Court Opinion, 4/30/13, at 4–5 (emphasis added). The trial court's finding of contempt was clearly based upon the evidence of record, and we affirm the trial court's determination.

Appeal at 1659 WDA 2013

Mother's first issue once again alleges that the custody order of April 11, 2008, is not clear, definite, and specific. As we concluded in the appeal at 590 WDA 2013, this issue is waived for Mother's failure to assert that claim in the Pa.R.A.P. 1925(b) statement. Pa.R.A.P. 1925 (b)(4)(vii). While Mother's concise statement herein asserts very tangentially that the evidence at the contempt hearing does not support a finding of contempt, "i.e. [that the] clarity of the order [was] allegedly violated," Pa.R.A.P. 1925 (b) statement, 11/13/13, at ¶ 8, such statement is insufficient to put the trial court on notice that she is challenging the clarity, definiteness, and specificity of the underlying custody order. Rather, it presents a mere hint that the evidence at the contempt hearing does not support the conclusion that the custody order was violated. Thus, we conclude that any issue regarding the clarity of the April 11, 2008 custody order is waived.[5]

[5] Even if not waived, Mother's assertion that the custody order and contempt orders are unclear and "do not address either party's duty to communicate," Mother's Brief at 18, is beside the point, and her contention that the orders are vague is misdirected. The orders are clear: Father has two court-ordered weekend partial custody periods per month; Mother

Mother's second argument is a rehash of her claims in the appeal at 590 WDA 2013. Indeed, she represents once again that her "position consistently has been that the April 11, 2008 order applies equally to both parents." Mother's Brief at 15. There is nothing incorrect about that statement, but it has nothing to do with the fact that the court has found **her** in contempt three times because she continues to refuse to abide by the relevant custody order when the children's activities occur on Father's custodial weekends.[6]

The main focus at the September 13, 2013 contempt hearing was Mother's noncompliance with the custody order on the weekend of B.K.'s college graduation. Mother avers that Father was content to remain silent concerning B.K.'s graduation plans. The record does not support that claim. Mother admits that she did not communicate with Father regarding his intentions to attend graduation ceremonies. Mother's Brief at 16. Instead, she maintains that Father also is guilty of not communicating, which may be the case, but our analysis here concerns whether there is support for the court's finding of Mother's contempt.

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continually fails to comply with the order. Mother imposes her own theories of when she must comply and when she need not abide by the order.

[6] No reasonable person would contend that arrangements had to be made to accommodate another sibling's college graduation; the problem is that Mother, the custodial parent, decides what and when she will alter the activities without any attempt to involve Father.

Father presented an e-mail[7] from Mother dated Friday, May 3, 2013, sent at 3:51 p.m., that stated as follows:

> [A]s you are aware, we will be at B.K.'s graduation ceremony . . . today and tomorrow and will not be home at 5:30 today. [J.K., A.K. AND Z.K.] want to stay home and attend B.K.'s graduation ceremony celebrations and all the boys Pirate game on Sunday. You can pick [A.K.] up Saturday evening and [Z.K.] after the game on Sunday afternoon.

N.T., 9/13/13, at 9.[8] The Pirate game referenced in the e-mail was an outing attended by the karate studio owned by Mother's current husband. ***Id***. at 11, 38.

In support of its finding of contempt, the trial court explained:

> Mother sent a text to father at 3:51 p.m. on Friday, May 3rd to remind him not to come to her house to pick up the children ([Z.K.] and [A.K.]) because they all were going to [B.K.'s] graduation on Friday and Saturday, as well as a Pirate game on Sunday. Exhibit D. Mother, however, never spoke or communicated in any fashion with [F]ather about him not exercising his custody that weekend. Further, [M]other never communicated with [F]ather about whether he was attending the graduation ceremonies. Mother testified she "understood" he was going; this was based upon her conversations with [B.K.].
>
> [B.K.] testified that he spoke with his father about the graduation ceremonies and invited him to the Friday and Saturday events. He also testified that his father never told

[7] Mother testified she sent Father an e-mail; the trial court characterized the communication as a text message. Trial Court Opinion, 11/26/13, at 2.

[8] The April 11, 2008 custody order awarded Father alternating weekend partial custody from 5:30 p.m. on Friday until 8:00 p.m. on Sunday. Order, 4/11/08, at ¶ 2(A). Testimony established that May 3–5, 2013, was Father's weekend for custody. N.T., 9/13/13, at 9.

> whether he would be attending. This is very different from [M]other's testimony.
>
> The Court finds [B.K.'s] testimony to be more credible than [M]other's testimony. If [B.K.] did not know whether his father was attending, it should be incumbent upon [M]other to inquire with [F]ather if he was going to the graduation. Then, once [M]other learned from [F]ather that he was not planning to attend, she should ask him to take the children to the event since it was his custodial weekend. If he declined, then [M]other should inquire if she could take the children because it was important to observe their eldest brother's graduation.
>
> It was quiet [sic] disingenuous and presumptuous for [M]other to simply notify [F]ather that she was going to the ceremonies with the children after she had left her home at 3:51 p.m. on May 3rd without any direct prior discussion.

Trial Court Opinion, 11/26/13, at 2–3.

As noted previously, this 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. ***Harcar v. Harcar***, 982 A.2d 1230, 1236 (Pa. Super. 2009). As we conclude that the record supports the trial court's credibility assessment, we will not disturb its decision that Mother has impeded Father's ability to assert his partial custody rights and is in contempt of the April 11, 2008 order.

As an additional matter, Father included in his brief a one-sentence request for counsel fees pursuant to Pa.R.A.P. 2744, a claim he reasserted at oral argument. ***See*** Father's Brief in 590 WDA 2013 at 14; in 1659 WDA 2013 at 12. We conclude that we cannot unequivocally characterize

Mother's behavior as "dilatory, obdurate or vexatious" within the meaning of Rule 2744. Moreover, we cannot characterize the instant appeal as clearly frivolous as that term is defined in the Rule. An appeal is frivolous for purposes of Rule 2744 "where it lacks any basis in law or fact; simply because an appeal lacks merit does not make it frivolous." ***Geiger v. Rouse***, 715 A.2d 454, 458–459 (Pa. Super. 1998) (citing ***Commonwealth v. Walczak***, 655 A.2d 592 (1995)).

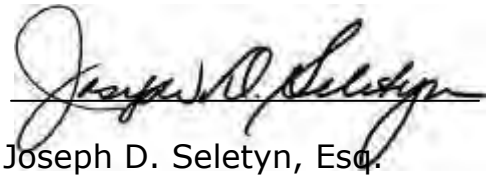
Mother did not appeal the first contempt order dated June 14, 2012. The second and third orders are concurrently before us. Thus, Mother has never had the trial court's ruling tested by this Court until now. Father has not shown that Mother's claims run counter to well-settled law. While a continuation of similar factual scenarios resulting in contemptuous behavior may compel a contrary result in the future, we simply cannot warrant Rule 2744 sanctions on this record at this time. ***See Murphey v. Murphey***, 599 A.2d 647 (Pa. Super. 1991) (Pa.R.A.P. 2744 counsel fee award not granted where appeal was not clearly frivolous and the appellant's behavior was not dilatory, obdurate, or vexatious). While we find Mother's appeals unpersuasive, we cannot conclude that they lacked any basis in law or fact and amounted to an unreasonable exercise under these circumstances. ***Geiger***, 715 A.2d at 459. Thus, we decline to exercise our discretion under

Pa.R.A.P. 2744. ***Rohm and Haas Co. v. Lin***, 992 A.2d 132 (Pa. Super. 2010).

Having determined that Mother's arguments are devoid of merit, we affirm the orders of March 7, 2013, and September 16, 2013, finding Mother in contempt for violating the terms of the parties' custody and visitation order and assessing against her a sanction of attorney fees.

Orders affirmed; Mother's Motion to Strike granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/14/2014