

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

J.H.,

Appellee

v.

Y.H.,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 67 MDA 2014

Appeal from the Order entered December 20, 2013,  
in the Court of Common Pleas of Dauphin County,  
Civil Division, at No(s): 2012-CV 8725 CU

BEFORE: FORD ELLIOTT, P.J.E., OLSON, and STRASSBURGER\*, JJ.

MEMORANDUM BY OLSON, J.:

**FILED JULY 29, 2014**

Y.H. ("Mother") appeals, *pro se*, the order of the trial court dated and entered December 20, 2013, that held her in contempt of the trial court's custody orders dated March 15, 2013, June 5, 2013, and October 30, 2013, with regard to her daughter, C.H. ("Child") (born in April of 2006) with J.H. ("Father"). We affirm, and deny Father's request for counsel fees.

The parties, who were previously married, have a history of custody litigation dating back to October 3, 2012, when Father filed a complaint for custody of Child against Mother.<sup>1</sup> On December 6, 2012, the trial court

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\* Retired Senior Judge specially assigned to the Superior Court.

<sup>1</sup> Mother has an older daughter, H.M., who is not a subject of the instant custody litigation.

scheduled a hearing on Father's custody complaint to occur on December 21, 2012.

On December 14, 2012, Father filed a petition for emergency custody relief. The trial court convened a custody hearing on December 21, 2012, and entered a custody order on that same date awarding Father sole legal and primary physical custody, awarding Mother partial physical custody, and providing that no party could relocate, without approval, if the relocation would significantly impair the non-relocating party's ability to exercise his or her custodial rights. The order reflected notice to Mother and was sent to her at addresses in San Francisco and Stockton, California.

On January 9, 2013, Father filed an emergency petition for contempt of custody. The trial court commenced a hearing on the contempt petition on January 22, 2013, at which Mother participated via telephone from Stockton, California. Notes of testimony were prepared. On that same date, the trial court continued the hearing until March 14, 2013.

On January 22, 2013, Mother filed a letter with the trial court in which she stated that she did not have notice of the hearing held on December 21, 2012, and, thus, had not participated.

On January 29, 2013, Father filed an emergency petition for special relief under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), 23 Pa.C.S.A. § 5401 to 5482. On February 4, 2013, the trial court granted, in part, Father's motion for special relief under the UCCJEA,

insofar as the trial court informed the court in California, where Mother allegedly was residing, of the status of the custody case in Pennsylvania, pursuant to 23 Pa.C.S.A. § 5424(d) (addressing mandatory communication between courts). The trial court denied the motion in part, refusing to expedite the contempt hearing scheduled to occur on March 14, 2013. In addition, the trial court, on February 4, 2013, scheduled a custody hearing to occur on March 12, 2013, in light of Mother's allegation that she did not have notice of the December 21, 2012 hearing.

On March 1, 2013, counsel, Timothy L. Czekaj, Esq. entered his appearance on behalf of Mother. The parties appeared for a custody conference on March 4, 2013, but did not reach any resolution. In an order dated March 4, 2013 and entered on March 11, 2013, the trial court, through Bruce F. Bratton, Custody Judge, directed the parties to separately attend the Dauphin County Seminar for Families in Conflict presented by InterWorks, with Father directed to attend on March 22, 2013, and Mother on April 13, 2013. The order further provided that failure to attend could result in the imposition of fines or other sanctions for contempt.

On March 15, 2013, the trial court entered a custody order upon agreement of the parties, providing for shared legal custody, and primary physical custody to Father during the school year, with partial physical custody to Mother during the summer vacation and on spring break, and in Pennsylvania if she provided Father with at least fourteen days' notice. The

order also provided that the parties agreed to register the custody order in California prior to Child returning to California. In a separate order entered on March 15, 2013, the trial court ruled that, as the parties had entered an agreement that was embodied in the March 15, 2013 custody order, the issue of whether Mother had received notice of the December 21, 2012 hearing was moot. Further, in the order, the trial court denied Father's emergency petition for contempt of custody filed on January 9, 2013.

On March 27, 2013, the trial court entered an order providing that, upon its receipt of a custody conference summary report filed on March 12, 2013 concerning the conciliation conference on Father's petition for contempt, all issues addressed in the conciliation conference were disposed of in the March 15, 2013 custody order, and no hearing would be scheduled on the contempt petition.

On April 17, 2013, Father filed a petition for special relief with regard to Mother's alleged failure to comply with the March 15, 2013 custody order. Father's petition sought counsel fees from Mother in the amount of \$1,500.00. On April 18, 2013, the trial court issued a rule to show cause against Mother why Father's petition for special relief should not be granted. On April 23, 2013, Mother's counsel filed a motion for leave to withdraw his appearance. On April 24, 2013, Father filed a motion to make the rule absolute. On April 25, 2013, the trial court scheduled a hearing for May 24, 2013 on Father's petition for special relief and motion to make rule absolute.

The trial court also issued a rule to show cause why Mother's counsel's petition to withdraw should not be granted. On May 1, 2013, upon motion by Father filed on April 30, 2013, the trial court continued the hearing until June 4, 2013.

In an order entered on June 4, 2013, the trial court noted that Mother did not respond to Father's motion to make rule absolute; thus, the court's order made the rule absolute regarding Father's petition for special relief, and entered a new custody order. The trial court directed Mother to pay Father's counsel fees in the amount of \$1,500.00 within 120 days from the signing of the order. On June 5, 2013, the trial court entered an amended order, adding additional language that Mother failed to appear at the hearing held on June 4, 2013. With respect to the custody issue, the trial court directed that, during the weekdays, while Child was in the custody of Father, Mother would have the right to one daily phone call with Child at 8:15 a.m. (Eastern Time), and 9:00 a.m. (Eastern Time) on weekends. When Child was in the custody of Mother, Father would have the right to one daily phone call to occur at 1:00 p.m. (Eastern Time), and that both parents would have the right to reasonable email contact with Child. Additionally, on June 5, 2013, the trial court entered an order permitting Mother's counsel to withdraw his appearance.

On September 4, 2013, Mother filed an entry of appearance as a self-represented party, and the trial court granted her leave to proceed *in forma*

*pauperis*. Mother provided her address as Wichita, Kansas. Mother also filed a petition for modification of custody on September 4, 2013. On September 6, 2013, Mother advised the trial court of a telephone number at which she could be reached while in Harrisburg, Pennsylvania.<sup>2</sup>

The trial court explained the factual background and subsequent procedural history of this appeal as follows.

On September 4, 2013, Mother filed an Emergency Petition for Special Relief regarding custody of [] [Child]. In her Emergency Petition, [Mother] raised claims that [Child] was being physically disciplined by [Father] and his wife, [A.H. ("Stepmother")].

On September 9, 2013, [Father] filed an Answer to the Emergency Petition denying Mother's allegations and asserting a Counterclaim for Contempt and Modification of Custody Order. In [Father's] Counterclaim for Contempt, he alleged that [Mother] violated the parties' March 15, 2013 and June 5, 2013 Custody Orders by (1) failing to communicate civilly and respectfully about co-parenting [and] legal custody issues, (2) placing [Child] in the middle of disputes with [Father], (3) using disparaging remarks about [Father] and his family in the presence of [Child], (4) failing to provide a valid address and contact information, (5) failing to follow the proper relocation procedures set forth in Title 23, Section 5337 prior to her relocation, (6) using or allowing household members to use tobacco and illegal substances in the presence of [Child], (7) refusing to allow [Child] to speak to anyone other than [Father] during [Mother's] custodial time, (8) failing to enroll [Child] in [a] counseling session during the summer, (9) interfering with or prohibiting [Father's] daily phone calls to [Child] during [Mother's] custodial time, (10) calling [Child] sporadically, rather than at the time designated by Order, and (11) sending [Father] an excessive number of emails a day, most of which are harassing and unrelated to co-parenting issues. Additionally, [Father] asked the [trial court] to modify custody to prevent [Mother] from exercising unsupervised visits with [Child] outside

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<sup>2</sup> On October 1, 2013, Mother filed an updated telephone number with the trial court.

of Pennsylvania due to (1)[Mother's] instability during her periods of custody, (2) [Mother's] failure to inform [Father] of where she and [Child] were located during the summer, (3) [Mother's] instability in housing, and (4) [Mother's] income being generated from prostitution.

[The trial court] held a hearing on September 16, 2013, and, after hearing the testimony provided, denied [Mother's] Emergency Petition and ordered that the case be sent to a custody conciliation conference. [Mother] filed a second Emergency Petition for Special Relief in Custody on September 17, 2013, again asserting that [Father] and [Stepmother] were physically abusing [Child]. By Order dated September 17, 2013, [the trial court] denied [Mother's] September 17, 2013 Emergency Petition.

Following an October 29, 2013 custody conciliation conference, the parties reached an agreement resulting in the entrance of a Custody Order dated October 30, 2013.<sup>[3]</sup> The only outstanding issue that remained following the October 30, 2013 Order was [Father's] Counterclaim. [Father] filed an Amended Counterclaim for Contempt on November 12, 2013, which additionally asserted that [Mother] violated the June 5, 2013 Order by failing to pay attorney's fees in the amount of \$1500[.00] within 120 days of the Order. A hearing on [Father's] Counterclaim for Contempt was scheduled for December 5, 2013.

On November 12, 2013, Shana M. Walter, Esquire[, ] filed a Petition for Leave to Withdraw as Counsel for [Mother]. [The trial court] issued a Rule to Show Cause on Attorney Walter's petition, rule returnable at the December 5, 2013 hearing.

At the December 5, 2013 hearing, Attorney Walter's Petition to Withdraw was granted and she was permitted to withdraw as counsel for [Mother] prior to the commencement of the contempt hearing.

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<sup>[3]</sup> The October 30, 2013 custody order provided that the parties would share legal custody, Father would have primary physical custody, and Mother would have partial custody in accordance with a schedule. The order did not indicate whether Mother could exercise custody in Stockton, California, but did include a section concerning relocation.

Trial Court Opinion, 1/23/14, at 3-4 (citations to notes of testimony omitted).<sup>4</sup>

The trial court held the hearing on Father's contempt counterclaim on December 5, 2013. Based on the testimony, the trial court found the following facts:

At the hearing, [Father] testified that [Mother] sent him an average of twelve or thirteen emails a day, which discussed issues outside of co-parenting, criticized Father and his family, and incorporated foul language. [Mother] admitted that she used foul language in her communications with [Father].

[Father] testified that [Mother] attempted to alienate [Child's] affections from [Father] by placing [Child] in the middle of disagreements between the parties and by making [Child] memorize the Custody Orders. [Father] and [Stepmother] testified that [Mother] prevented [Child] from talking on the phone to [Stepmother] during [Mother's] custodial periods.

When the parties were in Court in March of 2013, [Mother] provided to [Father], and to [the trial court], an address indicating that her current address was in Stockton, California. On April 16, 2013, the parties filed [the trial court's] March 15, 2013 Custody Order in Stockton, California. [Father] testified that, in the summer, [Father] assumed that [Mother] was going to take [Child] to California, and stop in Kansas along the way to retrieve [Mother's] other child, [H.M.]; however[, ] on June 15, 2013[, ] he received an email stating that [Mother] and [Child] were visiting Kansas and staying at a hotel. [Father] testified that, after not hearing from [Child] for three or four days, he called the police in California[, ] who informed him that someone other than [Mother] was living at the Stockton address previously provided by [Mother]. [Father] testified that he was worried about [Child] because he received conflicting information

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<sup>4</sup> On October 29, 2013, the trial court entered an order directing that Father was to attend the Interworks seminar on December 14, 2013, and Mother on November 16, 2013. Also, in the separate custody order entered on October 30, 2013, the trial court noted that Attorney Walter appeared on behalf of Mother at the custody conference held on October 29, 2013.



via email regarding where [Mother] was living. [Father] testified that eventually [Mother] informed him that she was visiting her parents in Wichita, Kansas. [Father] testified that in June 2013, he and [Mother] had an email exchange in which [Mother] indicated that she and [Child] were in San Jose, California, planned to visit Kansas, and would be moving to Cleveland, Ohio. [Father] testified that, in July, he and [Mother] had an email exchange in which she indicated that she was not going to inform him of where she was residing, but that he could buy a plane ticket to Cleveland, Ohio in order to retrieve [Child] for the resumption of [Father's] custodial time. [Father] testified that he received an email from [Mother] on August 29, 2013 informing him that her California address was still current. [Father] testified that when he picked [Child] up to resume his custodial time, he picked her up at a McDonald's in Ashland, Ohio, which was the address [Child] gave [Father] for the exchange.

[Mother] testified that, at the time of the hearing, she was renting a room at . . . South Sixteenth Street, Camp Hill, Pennsylvania. [Mother] testified that, over the summer, she did not take [Child] to California, but had left her in Kansas with [Mother's] parents. [Mother] testified that she was uncertain as to whether she wanted to stay in Cleveland, Ohio, which is why she did not provide [Father] with an address for that area. [Mother] testified that [Child] lived . . . [in] Wichita, Kansas from the start of summer until August 24, 2013[,] when [Mother] took [Child] to Ohio.

[Father] testified that when [Child] is in his custody, she attends counseling on a weekly or bi-weekly basis with her school counselor. [Father] testified that, to his knowledge, [Child] was not enrolled in counseling during the summer, but that he was told that [Child] was seeing someone unofficially. [Father] testified that he researched counselors in [Mother's] area that would be covered under his insurance, but [Mother] never followed through with enrolling [Child] in counseling.

[Father] testified that he had trouble reaching [Child] by telephone over the summer when [Child] was in [Mother's] custody. [Father] testified that, although he attempted to coordinate times to talk to [Child] via telephone, there were times when he was unable to speak to her for days, or times when she would be with her friends and unavailable to talk.

[Father] also testified that, at one point, [Child] received a new phone and her minutes were limited, so [Mother] told her she had to earn minutes to talk to [Father], resulting in shortened phone conversations between [Child] and [Father]. [Father] testified that [Mother] had made no payment towards his attorney's fees.

[Mother] testified that she does not intend to reside in Pennsylvania. [Mother] testified that she no longer resided in Stockton, California as of June 1, 2013. [Mother] admitted that she did not provide [Father] with correct information regarding her residence over the summer. [Mother] admitted to having a meager income.

***Id.*** at 4-7 (footnotes omitted).

Child was at the hearing, but the parties agreed that she had nothing to contribute to the contempt matter, and, therefore, Mother did not call her as a witness.<sup>5</sup>

Additionally, the trial court explained the following:

At the conclusion of the hearing, [the trial court] asked the parties if they had filed proposed orders in the matter. When both replied in the negative, the [trial court] informed the parties that they had five days in which to file a proposed order indicating "what [the parties] would like [the trial court] to do in the case." [Father] submitted a proposed order on December 5, 2013. [Mother] filed her proposed order on December 9, 2013. Following the December 5, 2013 hearing, after consideration of the relevant pleadings, and after a review of each party's proposed order, [the trial court] entered its December 20, 2013 Order finding [Mother] in contempt of court and ordering appropriate remedies.

***Id.*** at 8 (citations to notes of testimony omitted).

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<sup>5</sup> Mother had subpoenaed Child to appear at the hearing.

In the December 20, 2013 order finding Mother in contempt of the previous custody orders dated March 15, 2013, June 5, 2013, and October 30, 2013, the trial court directed as follows:

1. [Mother] shall pay [Father's] reasonable attorney's fees in the amount of three hundred dollars (\$300.00), payable directly to [Father's] attorney, Foreman & Caraciolo, P.C. within ninety (90) days of the date of this Order.
2. [Mother] shall be prohibited from exercising any custody outside of Dauphin County, Pennsylvania.
3. [Mother] shall undergo anger management counseling and follow through with any recommendations.
4. [Mother] shall enroll in parenting classes.
5. Pending full compliance with this Court Order, [Mother] shall be limited to exercising custody under the supervision of the YWCA, for a period of four hours weekly, to be determined by the availability of the parties and the YWCA.

Trial Court Order, 12/20/13, at 1.

In the meantime, on December 17, 2013, Mother, acting *pro se*, filed a hand-written request with the trial court seeking permission to leave for the state of Kansas with her older daughter, H.M., to be with Mother's ailing father, and providing the address of Mother's parents in Wichita, Kansas. On December 19, 2013, Mother filed a hand-written request to change her address to her parents' address in Wichita, Kansas, and requesting permission to visit Child before leaving with H.M. for Kansas, scheduled for December 20, 2013.

On December 20, 2013, the trial court entered an order directing Mother to serve a copy of her requests on Father, and a certificate of service with the court. The order also directed the Prothonotary to mark Mother's change of address in the docket, and provided that, as per the court's December 20, 2013 contempt order, Mother was prohibited from exercising any custody over Child outside of Dauphin County.

On December 20, 2013, Mother timely filed a handwritten notice of appeal from the order entered on December 20, 2013, stating the following:

I [Mother] am filing a appel [sic] to the ruling on 20 Dec 2013. I am doing so based on I had filed a proposed order with the court on 9 Dec 2013 and was true to the court about the Plaintiff. There is no just cause for what the Plaintiff is requesting[,] and [I] have not had any reason for this ruling. With this ruling we will not be able to see or spend time with [Child,] and I am asking the court to please read my order that I had turned in. I beg of the court for a new hearing so proof can be shown on why the ruling needs to be changed.

Mother's Notice of Appeal, 12/20/13, at 1.

On December 27, 2013, Mother filed a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).<sup>6</sup>

Mother raised the following issues in her concise statement:

A. [Whether the] Trial Court erred, . . . Defendant was not given a regular custody hearing, [the] reasons is because [she] was

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<sup>6</sup> We accept Mother's late filing of her concise statement pursuant to ***In re K.T.E.L.***, 983 A.2d 745 (Pa. Super. 2009). On that same date, Mother filed a document with this Court captioned, "Application to Appellate Court for Supersedeas of Custody Appeal to the Superior Court." On January 15, 2014, this Court, *per curiam*, entered an order denying the supersedeas petition, without prejudice to Mother to first request such relief in the trial court, citing Pa.R.A.P. 1732(a).

not served for the December 21[,] 2012 hearing[?] The Plaintiff emails me on December 30, 2012 with him having sole custody. I was able to attend the March 15[,] 2013 [hearing] that was the contempt hearing about the first hearing, which I won. Because I lived in California and to save time from coming back[,] a proposed order was decided.

B. [Whether the] Honorable Trial Court erred [sic] I was never given the chance to turn in strong supporting evidence to show cause of why I should have primary custody of [Child], [sic] [?] I was told on the emergency hearing on September 16, 2013 that I could subpoena her [Child] in to testify on my behave [sic] so all evidence was "here say"[,] my case was thrown out.

C. [Whether the] Honorable Trial Court erred, [sic] both Plaintiff and myself was [sic] ordered to attend the Interworks class, [sic] the Plaintiff did not go to his on December 14, 2013.

D. [Whether the] Honorable Trial Court erred, [sic] the June 5, 2013 hearing was only based off [sic] the fact that I had a civil suit against the Plaintiff in California for property in which he had got the family court involved[?] There was never a [sic] order for my property but I had asked the Plaintiff if I can [sic] pick up our things when I come back to Pennsylvania to pick up [Child]. By the laws of California[,] I was required to inform him[,] but he and his attorney went and filed anyway[,] we just wanted our things.

E. [Whether the] Honorable Trial Court erred, [sic] the Plaintiff turned in paperwork back in Oct [sic] 3, 2012 with false information about me to gain sole custody, [sic] [?] [H]e had said that I abandoned/neglected the children when in fact he kicked me out after the divorce just to remarry two months later, [sic] I had to get settled back in California with [a] job, car and home. The Plaintiff requested all must happen if I wanted the children. I advised him I can get it done in 6 months in [sic] which I did in 5 months and came back to get the children.

F. [Whether the] Honorable Trial Court erred, [sic] the Plaintiff had a [sic] attorney but I was never informed by anyone[,] until after the December 21, 2012 hearing[,] until January 2013 with an email from his attorney saying I was in contempt of court about a hearing I knew nothing about and for me to return [Child] back to Pennsylvania.

G. [Whether the] Honorable Trial Court erred, [sic] because I am my own attorney with this ruling on December 20, 2013, [sic] [?] I felt if I was a real attorney I could find out the why's, [sic] I spoke to the chamber secretary just to find out anything, but a nervous secretary? I am only wanting to know why not one thing from my proposed order was considered. And the problems that I had submitted wasn't addressed, [sic] I just want what's best for [Child].

H. [Whether the] Honorable Trial Court erred, [sic] [a] lot of confusion on December 5, 2013[,] my attorney was ordered in the court for which I thought she was my attorney for a custody hearing, [sic] [?] [S]he called me in to her office to discuss the hearing a day before, [sic] [S]he advised me that she does not do contempts, but had to resubmit paper works [sic] that she is no longer my attorney[,] while in court[,] to the Judge. I was asked if I wanted to continue the hearing, [sic] I said yes, but to have her walk out before hand [sic] was insulting.

I. [Whether the] Honorable Trial Court erred, [sic] on paperwork that was filed after the hearing, nothing of the December 9, 2013 [proposed order Defendant submitted] was even mentioned[?] I filed a tester letter to the court on December 17, 2013[,] and it was responded to fast, which was a sign to me[,] and one on December 19, 2013[,] with a quick response back.

Mother's Statement of Error to Superior Court, 12/27/13, at 1-2.

In her brief on appeal, Mother raises the following issue:

[H]ow[,] with all the filings and how the order stands, that [Father] has done with no thought of [Child's] feelings[,] would not be Parental Alienation Syndrome, how is this the best interest of the child[?]

With the order from the Honorable Judge to turn in a proposed order[,] why is there no judgment attached to it, would what [Mother] turned in would [sic] change the outcome to the order if it was read[?]

Mother's Brief, at 4.

We find Mother waived her first issue--i.e., that Father has not acted in Child's best interests by filing his petitions and that his petitions have encouraged parental alienation of Child against Mother--by her failure to raise it in her concise statement. **See Krebs v. United Refining Company of Pennsylvania**, 893 A.2d 776, 797 (Pa. Super. 2006) (stating that any issue not raised in a statement of questions involved in the appellant's brief, or suggested therein, and preserved in the concise statement is deemed waived); Pa.R.A.P. 2116(a). It appears that Mother is attempting to litigate custody issues, in that she is raising an issue of whether Father and Stepmother engage in parental alienation of Child against Mother, and whether their conduct is in Child's best interests.<sup>7</sup> To the extent that Mother complains in her brief that the trial court did not consider the "sixteen" factors set forth in section 5328(a) of the Child Custody Act in these proceedings, we remind Mother that the issue before the trial court in the present matter was her contempt of the trial court's custody orders. **See** Mother's Brief, at Argument for Appellant, p. 11. Mother waived all challenges to the trial court's custody orders by her failure to timely file appeals from those orders. **See** Pa.R.A.P. 903.

In her second issue, Mother asserts that, in its December 5, 2013 order, the trial court directed the parties to file proposed orders within five

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<sup>7</sup> Mother, acting *pro se*, is not relieved from her duty to properly raise and develop her appealable claims. **See Smathers v. Smathers**, 670 A.2d 1159, 1160 (Pa. Super. 1996).

days. Mother claims that she filed her proposed order on December 9, 2013, but the trial court failed to attach her proposed order to its December 20, 2013 ruling. Mother contends that the trial court took away all of her parental rights to Child without merit or explanation. She argues that the trial court would have rendered a different decision had the judge read her proposed order. Mother's Brief, at 7. We will review Mother's issue regarding whether the trial court abused its discretion in finding her in contempt of the prior custody orders, and issuing sanctions against her, including sanctions on her exercise of custody over Child.<sup>8</sup>

This Court has stated our standard of review with regard to civil contempt as follows:

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). This court also has stated that "each court is the exclusive judge of contempts against its process." **Royal Bank of Pennsylvania v, Selig**, 434 Pa. Super. 537, 644 A.2d 741, 747 (Pa. Super. 1994).

**G.A. v. D.L.**, 72 A.3d 264, 269 (Pa. Super. 2013) (quotations in original).

We have instructed:

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<sup>8</sup> We find all of Mother's remaining issues in her concise statement waived for failure of Mother to raise them in the statement of questions presented portion of her brief on appeal. **See Krebs**, 893 A.2d at 797. To the extent that Mother complained in her concise statement that the trial court erred when it permitted Attorney Walter to withdraw her appearance at the December 5, 2013 hearing, we note that, had Mother preserved the issue in her statement of questions presented portion of her brief, she was not entitled to court-appointed counsel in this custody/contempt proceeding.



The contempt power is essential to the preservation of the court's authority and prevents the administration of justice from failing into disrepute. When reviewing an appeal from a contempt order, the appellant [sic] must place great reliance upon the discretion of the trial judge. On appeal from a court's order holding a party in contempt of court, our scope of review is very narrow. We are limited to determining whether the trial court committed a clear abuse of discretion.

***Langendorfer v. Spearman***, 797 A.2d at 303, 307-308.

Additionally, in order to be found in civil contempt, a party must have violated a court order. ***Sinaiko v. Sinaiko***, 664 A.2d 1005, 1009 (Pa. Super. 2005). "The complaining party has the burden of proving by a preponderance of the evidence that a party violated a court order." ***Id.*** "To impose civil contempt[,] the trial court must be convinced beyond a reasonable doubt[,] from the totality of the evidence presented[,] that the contemnor has the present ability to comply with the order." ***Id.*** at 1010. "The alleged contemnor has the burden of proving the affirmative defense that he has the present inability to comply with the court order." ***Id.*** at 1009. "If the alleged contemnor is unable to perform the dictates of the order and has, in good faith, attempted to comply with the order, contempt is not proven. ***Id.***

We recently stated:

[A] mere showing of noncompliance with a court order, or even misconduct, is never sufficient alone to prove civil contempt. ***Id.*** Moreover, we recognize that:

To sustain a finding of civil contempt, the complainant must prove certain distinct elements: (1) that the contemnor had notice of the specific order or decree

which he 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.

***Habjan v. Habjan***, 73 A.3d 630, 636 (Pa. Super. 2013) (citation omitted).

The trial court set forth the following explanation for finding Mother in civil contempt of its prior custody orders.

*I. March 15, 2013 Order*

[Father] met his burden of proving that [Mother] violated the . . . March 15, 2013 Order. Paragraph Five of the March 15, 2013 Order requires each party to provide to the other party a valid address and contact information. [Father] testified that he was provided with a Stockton, California address for [Mother], but the address proved to be invalid, as he was informed by California law enforcement officials that [Mother] was not living at the address provided. [Father] testified that he was provided with conflicting information as to where [Mother] resided, which included locales such as California, Kansas, and Ohio. [Father] testified that when he contacted [Mother] regarding her address, [Mother] refused to inform him of her contact information. [Mother] testified that, even though [Child] lived at . . . Crowley, Wichita, Kansas for most of the summer, [Mother] did not provide [Father] with correct information regarding her address over the summer. With regard to Paragraph Five, [the trial court] found [Mother] was clearly in contempt as she admitted to violating this provision of the Order, despite having the ability to provide [Father] with a correct and stable address for [Child] over the summer.

Paragraph Twelve of the March 15, 2013 Order provides that each party is entitled to one daily phone call with [Child] during the other party's custodial time. [Father] testified that he had difficulty reaching [Child] by telephone over the summer when she was in [Mother's] care. [Father] testified that, in certain instances, he was unable to reach [Child] for days or, when he would call, [Child] would be and [sic] unavailable to talk. [Mother] did not provide any testimony that she was unable to facilitate telephone conversations between [Child] and [Father]. As such, [the trial court] found that [Mother] clearly violated Paragraph Twelve.

Paragraph Thirteen of the March 15, 2013 Order requires both parties to take measures to foster a feeling of affection between [Child] and the other party. Paragraph Thirteen also prohibits one party from taking action or making statements to estrange [Child] from the other party and prohibits the parties from using [Child] as an intermediary to communicate regarding custody. [Father] testified that [Mother] would place [Child] in the middle of the parties' disagreements. [Father] also testified that [Mother] made [Child] memorize the parties' custody orders. [Father] testified that he was informed by [Child] as to where the custodial exchange at the end of the summer was to occur. [Father] also testified that his phone conversations with [Child] were restricted due to [Mother's] requirement that [Child] earn minutes to speak with [Father]. [The trial court] found that [Mother] had violated Paragraph Thirteen, despite having the ability to comply with its mandates.

Paragraph Fifteen of the March 15, 2013 Order provides that the parties shall permit [Child's] access to family relationships. [Father] and [Stepmother] testified that [Mother] prevented [Child] from communicating with [Stepmother] during [Mother's] custodial periods. Based on the testimony, [the trial court] found that [Mother] violated Paragraph Fifteen, despite having the ability to comply with its mandates. Based on the foregoing, [the trial court] found that [Mother] was in civil contempt of the March 15, 2013 Order.

## *II. June 5, 2013 Order*

[Father] met his burden of proving [Mother] violated the . . . June 5, 2013 Order. Paragraph Two of the June 5, 2013 Order required [Child] to attend counseling sessions while in [Mother's] custodial care during Summer 2013. [Father] testified that, despite being informed that [Child] was seeing a counselor unofficially, he was unaware of [Child] being enrolled in counseling during Summer 2013. [Father] testified that he found counselors that were covered under his insurance in the area in which he believe [sic] [Mother] resided, but that [Mother] never enrolled [Child] in counseling. [The trial court] found that, despite [Mother's] ability to enroll [Child] in and compel [Child] to attend counseling, [Child] was not enrolled in counseling during Summer 2013[,] and Paragraph Two was violated.

Paragraph Three of the June 5, 2013 Order provided that, while [Child] was in [Mother's] custody, [Father] had the right to one daily phone call with [Child], which was to occur at 1:00 p.m. Eastern time. [Father's] testimony that he was unable to communicate with [Child] via telephone at various points over the summer established that this provision was violated. [Mother] did not provide testimony that she in good faith attempted to comply with the provision or that she had the inability to comply with the provision. As such, [the trial court] found [Mother] in civil contempt of Paragraph Three.

Paragraph Four of the June 5, 2013 Order provided that [Mother] could contact [Father] once a day through email for issues concerning [Child] only, unless emergency circumstances existed. [Father] testified that he received, on average, between twelve and thirteen emails a day from [Mother]. [Father] testified that most of the emails he received from [Mother] did not discuss [Child], but rather involved criticisms of his family. [Mother] admitted that she used foul language in her communications with [Father]. Based on this testimony, [the trial court] found that [Mother] violated Paragraph Four, despite having the ability to comply with the provision.

Paragraph Six of the June 5, 2013 Order required [Mother] to pay [Father's] counsel fees in the amount of \$1,500[.00] within 120 days. [Father] testified that his counsel fees had not been paid by [Mother]. [Mother] did not testify that she had the inability to comply with this provision of the Order, nor did she testify that she tried, in good faith, to comply with the provision. [The trial court] found that [Mother] had violated Paragraph Six. Based on the foregoing, [the trial court] found that [Mother] was in civil contempt of its June 5, 2013 Order.

### *III. October 30, 2013 Order*

[Father] met his burden of proving [Mother] violated the parties' October 30, 2013 Order. The October 30, 2013 Order indicates that all provisions of the June 5, 2013 and March 15, 2013 Orders not modified by the October 30, 2013 Order remain in full force and effect. Paragraph One of the October 30, 2013 Order indicates that the parties agreed, *inter alia*, not to alienate [Child's] affections from the other parent. [Father] testified that [Mother] restricted the length of [Child's] phone calls with

[Father] by making [Child] earn minutes to talk with [Father]. [Father] also testified that [Mother] placed [Child] in the middle of the parties' disagreements. [Mother] admitted that she did not provide [Father] with an address for where [Child] stayed over the summer, despite [Child] residing at one address for the majority of the summer. As [Mother] did not testify that she, in good faith, attempted to comply with this provision, and did not testify that she was unable to comply with this provision, [the trial court] found that [Mother] violated Paragraph One of the October 30, 2013 Order.

Paragraph Eighteen of the October 30, 2013 Order prohibits a party from engaging in a course of conduct designed to alienate [Child] from the other party's extended family. Paragraph Twenty of the October 30, 2013 Order indicates that the parties shall permit access to [Child's] family relationships. [Father] and [Stepmother] both testified that [Mother] prohibited [Child] from speaking to [Stepmother] while in [Mother's] care. Again, [Mother] provided no testimony that she was unable to comply with this provision or that she, in good faith, tried to comply with this provision. As such, [the trial court] found that [Mother] violated Paragraphs Eighteen and Twenty of the October 30, 2013 Order. Based on the foregoing, [the trial court] found [Mother] in civil contempt of the October 30, 2013 Order.

*B. Remedies Ordered by [the Trial Court's] December 20, 2013 Order*

A court may exercise its civil contempt power not to inflict punishment, but to enforce compliance with its orders for the benefit of the party in whose favor the order runs. **Garr v. Peters**, 773 A.2d 183, 189 (Pa. Super. 2001). After finding [Mother] in contempt for violating [the trial court's] March 15, 2013, June 5, 2013 and October 30, 2013 Orders, [the trial court] entered its December 20, 2013 Order containing several remedying provisions.

First, based on [Mother's] failure to pay [Father's] counsel fees as required by the June 5, 2013 Order, [the trial court] ordered [Mother] to pay [Father's] counsel fees within ninety days of the December 20, 2013 Order. Based on [Mother's] testimony at the hearing that she possessed limited financial means, [the trial court] reduced the amount of fees from \$1,500[.00] to \$300[.00].

Second, based on [Mother's] failure to provide [Father] with a valid address and contact information, and based on [Mother's] deliberate actions to keep [Father] uninformed as to the location of his [d]aughter, [the trial court] prohibited [Mother] from exercising custody of [Child] outside of Dauphin County, Pennsylvania.

Third, based on [Mother's] habits of inundating [Father] with emails that consist of personal attacks couched in foul language, [the trial court] ordered [Mother] to undergo anger management counseling and to follow through with any recommendations.

Fourth, as [Mother] was found to have placed [Child] in the middle of parenting disputes and was found to have interfered with communication between [Child] and both [Father] and [Stepmother], [the trial court] ordered [Mother] to enroll in parenting classes.

Finally, as it is evident to [the trial court] that [Mother] loves [Child], in order to ensure [Mother's] compliance with its December 20, 2013 Order, [the trial court] ordered that [Mother's] custodial time with [Child] was to be limited to four hours a week and to consist of supervised visits through the YWCA until [Mother] had complied with the December 20, 2013 Order in full.

Trial Court Opinion, at 8-14.

This Court finds competent evidence in the record to support the trial court's finding that Mother was in contempt of its March 15, 2013, June 5, 2013, and October 30, 2013 custody orders. The trial court entered the March 15, 2013 custody order upon the agreement of the parties to resolve custody modification petitions. The trial court entered the June 5, 2013 amended custody order to resolve Father's petition for special relief regarding Mother's failure to comply with the March 15, 2013 custody order, after Mother failed to appear at the hearing on June 4, 2013. The trial court

also entered the October 30, 2013 custody order on the agreement of the parties. We find no merit to Mother's contention that the trial court's issuance of its December 20, 2013 order without attaching her proposed order filed on December 9, 2013 indicates that the court failed to consider her submission. The trial court specifically stated that the parties submitted proposed orders, with Mother submitting her proposed order on December 9, 2013. **See** Trial Court Opinion, at 8.

The contempt petition that was before the court at the hearing on December 5, 2013 sought to sanction Mother for failing to comply with the existing custody orders. One of the sanctions that the trial court decided to impose, based on the competent evidence presented at the contempt hearing, was to restrict Mother's exercise of her partial physical custody rights to supervised visitation at the YWCA for four hours, and only in Dauphin County, until she can become compliant with the trial court's orders. The trial court's sanction was not the result of its consideration of a petition for modification of custody but a remedy for Mother's blatant disregard of the trial court's custody orders. Thus, the trial court did not need to consider the best interest factors of section 5328(a) of the Child Custody Act, as Mother asserts. **Cf. P.H.D. v. R.D.**, 56 A.3d 702 (Pa. Super. 2012) (holding that trial court abused its discretion in modifying the terms of an existing custody order at a hearing at which it had dismissed the contempt petition because it had no authority to modify custody after

dismissing the contempt petition and because contemnor lacked notice that custody was at issue); **Langendorfer**, 797 A.2d at 308 (holding that trial court abused its discretion and violated the father's due process rights in modifying custody to change legal and primary physical custody of subject child from father to mother, where the mother's contempt petition did not implicate custody).

Father's answer to Mother's emergency petition for special relief and counterclaim for contempt and modification of custody order, filed on September 9, 2013, specifically sought, as a remedy for Mother's alleged contempt, an order prohibiting Mother from exercising custody outside of Pennsylvania and to limit her unsupervised custody by imposing supervised visitation. Thus, it was clear that the petition for contempt and remedies sought could implicate custody. Hence, Mother had adequate notice that the contempt hearing could result in sanctions that impacted her custody rights. Thus, this case is distinguishable from **P.H.D. v. R.D., supra**, since Mother, unlike the appellant in **P.H.D. v. R.D.**, had notice before the contempt hearing that her custody rights were at issue. This situation is more akin to the situation in **Flannery v. Iberti**, 763 A.2d 927, 929 (Pa. Super. 2000). In **Flannery**, this Court held that the trial court acted within its discretion in refusing to hold a mother in contempt for her repeated violations of a custody order. The trial court reasoned that holding the mother in contempt on prior occasions had not had any impact on her behavior. The court found



that modifying the underlying custody order would have an impact. Notably, in **Flannery**, as in the present case, the petition for contempt implicated custody, and notice with regard to the possibility of an impact on custody at the contempt hearing was not an issue. **See Langendorfer**, 797 A.2d at 308-309.

Father's requested relief for the alleged contempt was an alteration in the terms under which Mother could exercise her custody, so Mother clearly had notice of the possible impact on custody. We, therefore, find no merit to Mother's contention concerning the trial court's failure to properly modify the custody order by addressing the sixteen section 5328(a) factors, and that it improperly deprived her of her custody of Child, to the extent that those issues are preserved in her appeal. The section 5328(a) factors bore no relation to either the contempt issue or Father's request to alter the terms of Mother's custody, as a sanction for her past behavior, that was before the trial court at the contempt hearing.<sup>9</sup>

We also conclude that the trial court carefully structured its sanctions to further the best interests of Child. Among other things, the evidence

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<sup>9</sup> We note that Mother also asserts that Father failed to attend the Interworks class on December 14, 2013, as directed in the trial court's October 29, 2013 order. Mother failed to preserve this issue in her statement of questions involved portion of her brief. **See Krebs**, 893 A.2d at 797. We would find it lacked merit, in any event, as the record consists only of the testimony and evidence admitted at the hearing on December 5, 2013 on Father's contempt petition. **Commonwealth v. Preston**, 904 A.2d 1 (Pa. Super. 2006) (*en banc*) (providing that we are restricted to reviewing the matters in the certified record).

showed that Mother violated the court's custody orders during the summer of 2013 by giving Father invalid addresses as to Child's location, refusing to cooperate with Father's attempts to maintain consistent telephone contact with Child, restricting the duration of Father's telephone calls with Child, preventing communication between Child and Stepmother, and failing to enroll Child in counseling sessions. Taken together, the trial court could reasonably find that these violations tended to: 1) alienate Child's bonds with Father and other extended family members such as Stepmother, and 2) frustrate the court's effort to establish a program of counseling aimed at assisting Child in coping with her parent's contentious divorce. Therefore, based upon Mother's violations, the trial court fashioned a temporary, non-punitive scheme of sanctions that both maintained Mother's relationship with Child and preserved the authority of the court's prior custody orders under circumstances more amenable to judicial supervision. We see no clear abuse of the court's discretion in this situation and, after a careful review of the record, we affirm the contempt order of the trial court.

Next, we address Father's request for counsel fees to be assessed against Mother in relation to this appeal, pursuant to Pa.R.A.P. 2744, because Mother's appeal lacks any basis in law or fact, and is wholly frivolous. **See** Father's Brief, at 13-14.

Pennsylvania Rule of Appellate Procedure 2744 provides that this Court may award reasonable counsel fees "if it determines that an appeal is

frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious.” Pa.R.A.P. 2744. Under such circumstances, we “may remand the case to the trial court to determine the amount of damages authorized by this rule.” Pa.R.A.P. 2744. **See also** 42 Pa.C.S.A. § 2503 (addressing rights of participants to receive counsel fees).

Moreover, this Court has stated the following:

Generally, litigants are responsible for their own counsel fees unless otherwise permitted by statutory authority, agreement of the parties, or some other recognized exception to the general rule. A trial court may award counsel fees to a party when that party’s opponent acts in a dilatory, obdurate or vexatious manner during the pendency of the case. 42 Pa.C.S.A. § 2503.

**Hart v. Arnold**, 884 A.2d 316, 342 (Pa. Super. 2005) (citation omitted).

As a reviewing Court, we are limited to a review the certified record. **Commonwealth v. Preston**, 904 A.2d 1 (Pa. Super. 2006) (*en banc*). On the basis of the certified record, it appears that Mother, acting *pro se*, wished to pursue this appeal to have this Court determine whether she was in contempt of the existing custody order, based on her steadfast position that she should have been awarded primary physical custody. As such, although her issues on appeal are somewhat poorly articulated, we are unable to rule that her appeal was taken in a dilatory, obdurate or vexatious manner. In the future, we leave it to the trial court to make a determination of the appropriateness of counsel fees for Father because of Mother’s alleged

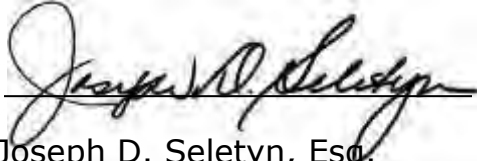
conduct, upon any motion for counsel fees Father might file in that court.

**See** 42 Pa.C.S.A. § 2503.

Order affirmed. Father's Request for Counsel Fees denied.

Judge Strassburger files a Concurring and Dissenting Memorandum.

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: 7/29/2014