NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

D.S., Appellee v. R.S., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1734 WDA 2013

Appeal from the Order Entered October 1, 2013
In the Court of Common Pleas of Westmoreland County
Domestic Relations at No(s): 1837 of 2000-D

BEFORE: BENDER, P.J.E., OLSON, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, P.J.E.: **FILED JULY 24, 2014**

Father, R.S., appeals from the trial court's October 1, 2013 order granting Mother, D.S., sole legal custody over their fifteen-year-old daughter, A.S. (born in May of 1999). We affirm.

The trial court has summarized the facts of this case as follows:

> This case began in 2000, and the custody arrangements have been as follows: [f]rom March 2001 until June 2001, the Mother had sole legal and primary physical custody and the Father had supervised visitation with the child twice a week; from June 2001 until October 2001, the Mother had sole legal and primary physical custody and the Father had partial physical custody every other weekend and one evening visit per week; from October 2001 until February 2002, the parties shared legal custody, the Mother had primary physical custody, and the Father was granted every other weekend and one evening visit per week, as well as shared holidays[.] On February 1, 2002, a

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* Former Justice specially assigned to the Superior Court.

consent order was entered which granted the parties shared legal custody, the Mother primary physical custody, and the Father every other weekend and, once the child turned three (3) years old, every Tuesday overnight. The relationship between the Father and the daughter deteriorated over the years since the order[1], and in 2010, the Father filed a [m]otion to [c]ompel the [c]ustody order, which the [c]ourt interpreted as a petition to modify, and initiated the current litigation. This is the point at which the Father's periods of partial custody ceased due to the child's unwillingness to see him. Parent/child reconciliation with [a therapist] was ordered and reviews before the [c]ourt were set in an attempt to make progress with strengthening the relationship between the Father and the child.

> [1] The reasons for this deterioration[,] according to the child[,] are the multiple incidents which occurred during the Father's periods of partial custody, involving the Father['s] being intoxicated and requiring medical assistance while she was alone with him, the Father['s] leaving her and her cousins unsupervised at a pool while he was at a bar consuming alcohol, and screaming and swearing during fights with his wife at the time and placing her [A.S.] in the middle of the fights.

In March 2011, the Mother brought a motion to the [c]ourt requesting sole legal custody due to the child's need (based on the child's physician's recommendation) for a tonsillectomy. She alleges that the Father was contacting the child's doctors preventing the surgery from occurring. An order granting the Mother interim sole legal custody was entered and the tonsillectomy was performed.[2] The Father's legal custody was reinstated by an order of court dated October 26, 2011 upon consideration of his motion requesting such. [Father also filed a motion for recusal, which the trial court denied in the October 26, 2011 order.] Since that time, there have been multiple motions and arguments regarding the child's medical care (including prescribed medications) and treating physicians, resulting in the Mother['s] taking the child to urgent care centers for any medical issues, rather than having a primary care physician.

> [2] This order was appealed to the Pennsylvania Superior Court and was dismissed as moot [on] July 31, 2012.

> The parent/child reconciliation sessions have not occurred to date due to the Father['s] not following through early on and, currently, due to the child's refusal to participate and her severe reactions/panic attacks upon sight of the Father. At the time of trial, the contact between the Father and child were limited to supervised instant messaging.

Trial Court Opinion (T.C.O.), 10/1/13, at 1-2.[1]

At the conclusion of the non-jury custody trial, the court issued the following order:

> 1. The Mother shall have legal custody of the child;
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> 2. The Mother shall have primary physical custody of the child;
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> 3. The Father shall have partial physical custody as agreed to by the child and the Father, with guidance from the child's treating therapist;
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> 4. The Father and child shall continue participating in supervised instant messaging sessions[.] The goal is to move to unsupervised instant messaging and skype session[s] between the Father and child. Absent an incident with the supervised instant messaging sessions or a recommendation by the therapist to the contrary, the supervised sessions shall move to unsupervised and parent-child reconciliation skype sessions, if not already done, in a year from the date of this order.
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> The Mother is to continue making reasonable efforts to facilitate appropriate therapeutic interventions for the purpose of providing the Father opportunity to establish a relationship with the child. The expense of such therapeutic interventions is to be borne by the Father.

Trial Court Order, 10/1/13.

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[1] We note that the trial court found A.S. "is involved in therapy and [possibly] exhibits signs of … Post Traumatic Stress Disorder and high anxiety seemingly due to incidents which occurred while in the custody of the Father." T.C.O. at 4.

Father filed a timely notice of appeal to this Court on October 28, 2013, and complied with the court's order directing the filing of a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). In his brief, Father presents the following questions for our review:

> 1. The [c]ourt abused its discretion and erred as a matter of law in *sua sponte* quashing subpoenas for witnesses necessary to determine the best interests of the parties' minor daughter by both by providing expert evidence as to symptoms, treatment and prognosis for the minor child and whose testimony was necessary for Father to make a record challenging [Mother's] [] credibility.
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> 2. The [c]ourt abused its discretion and erred as a matter of law in removing Father's shared legal custody and awarding Mother sole legal custody.
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> 3. The [c]ourt abused its discretion and erred as a matter of law in denying Father's [m]otion for [r]ecusal.

Father's brief at 6 (unnecessary capitalization and emphasis omitted).

With respect to Father's first issue, this Court reviews challenges to motions to quash subpoenas as follows:

> Whether a subpoena shall be enforced rests in the judicial discretion of the court. We will not disturb a discretionary ruling of a [trial] court unless the record demonstrates an abuse of the court's discretion. So long as there is evidence which supports the [trial] court's decision, it will be affirmed. We may not substitute our judgment of the evidence for that of the [trial] court.

Slusaw v. Hoffman, 861 A.2d 269, 272 (Pa. Super. 2004) (quoting ***In re Subpoena No. 22***, 709 A.2d 385, 387 (Pa. Super. 1998)). Further, this Court has stated, "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its

discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." ***Branham v. Rohm and Haas Co.***, 19 A.3d 1094, 1103 (Pa. Super. 2011) (quoting ***Commonwealth v. Fleming***, 794 A.2d 385, 387 (Pa. Super. 2002)).

Here, Father argues that the trial court abused its discretion by quashing the subpoenas directed to Jessica VanDeven, a physician's assistant at Pediatric Associates of Westmoreland; Dr. Thaer Almalouf, the owner of Pediatric Associates of Westmoreland and the doctor who recommended that A.S. undergo a tonsillectomy; Dr. Mark Klingensmith, the surgeon who performed the tonsillectomy on A.S. in 2011; and Sherry Shields, the child's mental health therapist.[2] Father claims that he subpoenaed these individuals because he wanted to provide the court with facts regarding A.S.'s treatment directly from her medical providers — rather than Mother — in order to determine A.S.'s best interest. Father's brief at 13. Additionally, he alleges that he sought to have A.S.'s medical providers testify about A.S.'s treatment to challenge Mother's credibility and show that Mother failed to advise Father on A.S.'s medical care. N.T., 4/11/13, at 24, 34-36.

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[2] We acknowledge that Mother is employed by Pediatric Associates of Westmoreland.

Although Father claims that he understands that it is the purview of the trial court to determine credibility, his brief to this Court recites facts and focuses on attacking "troubling inconsistencies[] in Mother's testimony." Father's brief at 16, 18. It is well-established that "[i]n determining whether a court has abused its discretion, we do not usurp the trial court's duty as finder of fact. The trial court's findings, if supported by credible evidence, are binding upon a reviewing court and will be followed." ***Miller v. Miller***, 744 A.2d 778, 787 (Pa. Super. 1999) (internal citations omitted). In his brief, Father essentially asks this Court to reassess the facts and ascertain credibility, which we are not permitted to do. He also does not proffer any legal authority in support of why the trial court should have enforced his subpoenas. We note that, while Father devotes twelve pages of his brief to specifically discussing subpoenas and Mother's credibility, Father cites only one legal authority in that section, a case which does not discernibly relate to the issue at hand.[3] ***See*** Pa.R.A.P. 2119(a) ("The argument shall … have at the head of each part … the particular point treated therein, ***followed by***

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[3] Father provides a citation to ***C.R.F. v. S.E.F.***, 45 A.3d 441, 445 (Pa. Super. 2012). ***See*** Father's brief at 16. The page of the case that Father references sets forth the definition of "proceeding" from *Black's Law Dictionary*, and concludes that the Child Custody Act, 23 Pa.C.S. §§ 5321-5340, applies to evidentiary proceedings that commence on or after the effective date of the Act. Although the ***C.R.F.*** case discusses our Court's standard of review for custody orders, we did not find any reference to subpoenas and, thus, we conclude it is not dispositive of the issue before us.

such discussion and citation of authorities as are deemed pertinent.") (emphasis added); ***In re Estate of Whitley***, 50 A.3d 203, 209-10 (Pa. Super. 2012) ("This Court will not consider the merits of an argument which fails to cite relevant case or statutory authority. Failure to cite relevant legal authority constitutes waiver of the claim on appeal.") (internal citations omitted); ***Korn v. Epstein***, 727 A.2d 1130, 1135 (Pa. Super. 1999) ("Where the appellant has failed to cite any authority in support of a contention, the claim is waived."). Because Father does not provide sufficient legal authority to substantiate his point, we determine that his claim regarding the subpoenas is waived. We therefore affirm the trial court's decision to quash the subpoenas directed to the above-named witnesses.

Nevertheless, even if Father had provided appropriate legal authority in his brief, we would determine that the trial court did not abuse its discretion in quashing Father's subpoenas. At the custody trial, after A.S.'s guardian *ad litem* asked to protect the child's confidentiality, the trial court ultimately granted a protective order preventing disclosure of A.S.'s mental health records by her medical providers. N.T., 4/11/13, at 22-23, 36, 42. The trial court reasoned that disclosure of A.S.'s mental health records to her estranged Father would likely invade her privacy, discourage her openness in therapy, and compromise her emotional well-being. ***Id.*** at 31-35. Thus, after careful contemplation, the trial court found that it would be too harmful to A.S. to have her mental health information involuntarily

disclosed to Father, given her severe alienation from him. ***Id.*** Based on the court's thoughtful considerations, we would not conclude that the trial court abused its discretion in quashing the subpoenas.

Father also sought to subpoena the physicians involved with A.S.'s tonsillectomy, Dr. Thaer Almalouf and Dr. Mark Klingensmith. The trial court determined that their testimony was not relevant to the present custody litigation because: (1) A.S. already had her tonsils removed, (2) the issue of the tonsillectomy was previously litigated, and (3) the doctors' testimony would have no significant bearing on the current custody proceeding. ***Id.*** at 38-42. Again, because the trial court provided reasonable explanations for its determination, we would conclude that it did not abuse its discretion.

Next, Father contends that the court abused its discretion in granting Mother sole legal custody.[4] In addressing this issue, we are guided by the following:

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[4] Upon reading Father's eighteen-page Rule 1925(b) statement, we encourage Father's counsel to review Rule 1925(b)(4) (mandating that Rule 1925(b) statements are concise and do not provide lengthy explanations as to any error). We also acknowledge that the trial court did not address legal custody in its Rule 1925(a) opinion, likely because Father emphasized other issues and was unclear about his specific grievances in his Rule 1925(b) statement. Nevertheless, we are able to address his claim contesting legal custody on appeal. ***Cf. Liles v. Balmer***, 653 A.2d 1237, 1244 (Pa. Super. 1994) ("With respect to the trial court's failure to issue an opinion, we note that Rule 1925 does not require a trial judge to issue an opinion in all cases. Instead, a statement is only necessary where the reasons for the order do not already appear of record.").

> Our standard of review over a custody order is for a gross abuse of discretion. If a trial court, in reaching its conclusion, overrides or misapplies the law or exercises judgment which is manifestly unreasonable … then discretion is abused. Our scope of review over custody disputes is broad; this Court is not bound by the deductions and inferences the trial court derives from its findings of fact, nor must we accept the trial court's findings of fact when these findings are not supported by competent evidence of record. Our paramount concern in child custody matters is the best interests of the children.

Yates v. Yates, 963 A.2d 535, 538-39 (Pa. Super. 2008) (citing ***Ottolini v. Barrett***, 954 A.2d 610, 612 (Pa. Super. 2008)). In determining the best interest of the child, the court must consider all relevant factors under 23 Pa.C.S. § 5328(a).

In this case, the trial court conducted a thorough analysis of the sixteen factors listed under 23 Pa.C.S. § 5328(a) to ascertain A.S.'s best interest. The court addressed the issue of legal custody in its analysis, explaining:

> The parties have been to court multiple times over issues with the child's health and treatment of such. The essence of these issues is that the Father does not consent to the child's doctors and therapists, and is contacting these healthcare providers and preventing them from treating the child. This forced the Mother to take the child to urgent care facilities for treatment of any medical issues.
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> The situation dealing with [A.S.'s] tonsils is an example of this and how the Father is thwarting treatment for [A.S.]. The Father was opposed to removing [A.S.'s] tonsils, even though her primary care physician's and surgeon's opinions were that it was necessary. This [c]ourt granted the Mother sole legal custody to accomplish the surgery, a decision which the Father appealed. But the Mother and [A.S.] testify that she has had significantly less incidents of illness since the surgery.
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> …

> The conflict between the parties appears to stem from decisions regarding the child, specifically medical decisions…. Granting the Mother sole legal custody, given that she has had primary physical custody of the child since the separation and is more attuned to the child's needs, will likely reduce the conflict between the parties, and allow Father to focus closely on the relationship with [A.S.], rather than the decisions and the custody battle with the Mother.

T.C.O. at 6-8. Father argues that the court's conclusions "were unreasonable as shown by the lack of evidence on the record." Father's brief at 13. Further, Father states that he would prefer an appointed medical guardian, instead of Mother, for A.S. ***Id.*** Before reaching the merits of his claim relating to legal custody, we again note that Father cites no legal authority regarding this issue in his brief and, instead, makes bald assertions. ***See id.*** at 27 ("In the short review of evidence herein[,] Mother's façade of super Mother wanting her daughter to have a relationship with her Father cracks."). We reiterate that "[a]rguments lacking citation to pertinent legal authority are deemed waived." ***Hubert v. Greenwald***, 743 A.2d 977, 981 (Pa. Super. 1999). ***See also Eichman v. McKeon***, 824 A.2d 305, 319 (Pa. Super. 2003) ("Appellants cite no pertinent authority to support this bald assertion of error, thus we find this claim to be waived.") (internal citation omitted). Therefore, we determine that Father's claim contesting legal custody is waived.

Even if we could disregard the defects in Father's brief, we would nevertheless affirm the trial court's decision to grant Mother sole legal custody. After reviewing the trial court's rationale, we would not conclude

that the court exercised unreasonable judgment or overlooked the best interests of A.S. There is ample evidence on the record that the parties have been to court in the past to dispute medical decisions for A.S.,[5] and that Mother is most familiar with A.S.'s needs.[6] We would therefore affirm the trial court's decision to grant sole legal custody to Mother.

Last, Father alleges that the trial court abused its discretion in denying Father's motion for recusal. In his brief, Father alleges that the trial court misrepresented facts about his reconciliation therapy with A.S., falsely indicated that Father interfered with A.S.'s tonsillectomy, and caused Father to upset A.S. when he accidentally encountered her at court. We employ the following standard of review for motions of recusal:

> A trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially ... or whenever he believes his impartiality can be reasonably questioned. ***Commonwealth v. Goodman***, 454 Pa. 358, 311 A.2d 652, 654 (1973). It is presumed that the judge has the ability to determine whether he will be able to rule impartially and without prejudice, and his

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[5] ***See, e.g.***, Father's brief at 12 ("Some of Mother's decisions [Father] questioned in view of Father['s] not being able to make reconciliation with his daughter in over four (4) years include Mother choosing a therapist for A.S. without notifying Father. These decisions included having [Mother's] pediatric practice prescribe Zoloft to A.S. ...."). ***See also*** Mother's Emergency Motion for Special Relief, 3/24/11, at 2 ("The minor child cannot be seen by an otolaryngologist because the parties share legal custody and Father will not consent.").

[6] We note that Father resides in North Carolina, has not spent time with A.S. since December 2009, and currently only communicates with A.S. through supervised instant messaging.

> assessment is personal, unreviewable, and final. ***Commonwealth v. Druce***, 577 Pa. 581, 848 A.2d 104, 108 (2004). Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overturned on appeal but for an abuse of discretion. ***Commonwealth v. Abu–Jamal***, 553 Pa. 485, 720 A.2d 79, 89 (1998). The party requesting recusal bears the burden of producing evidence that establishes bias, prejudice, or unfairness. ***Commonwealth v. White***, 589 Pa. 642, 910 A.2d 648, 657 (2006). This evidence must raise a substantial doubt as to the jurist's ability to preside impartially. ***Id.***

In re Bridgeport Fire Litigation, 5 A.3d 1250, 1254 (Pa. Super. 2010).

We begin by noting that Father, again, offers no pertinent legal authority in his brief to support his recusal argument. Father cites only one case addressing recusal in his brief, simply asserting, "Father relies on the same case cited to the trial court on recusal; Adoption of L.J.B. Appeal of C.L.F., Natural Mother, 18 A.3d 1098 (Pa. 2011)[,] for the proposition that the trial judge must recuse himself in this matter." Father's brief at 31. Father makes no effort to analogize or compare this case to his circumstances. ***See, e.g.***, ***Commonwealth v. Miller***, 721 A.2d 1121, 1124 (Pa. Super. 1998) ("We decline to become appellant's counsel. When issues are not properly raised and developed in briefs, when briefs are wholly inadequate to present specific issues for review, a court will not consider the merits thereof."); ***Hercules v. Jones***, 609 A.2d 837, 840 (Pa. Super. 1992) ("However, without any argument linking the definition to the facts of this case, this Court is unable to address appellant's phantom argument and we find the issue to be waived."). Therefore, we consider Father's recusal issue waived.

However, even if we were to reach the merits of Father's recusal claim, we would conclude that Father offers no compelling evidence to show that the trial judge abused his discretion in disposing of this case.[7] First, with regard to the reconciliation therapy, Father claims that the court incorrectly stated that he did not initially follow through with the therapy sessions. Father's brief at 28 ("Where in this record is there anything to support the trial court['s] writing [] in its [m]emorandum[….] 'The parent/child reconciliation sessions have not occurred to date due to the Father['s] not following through early on..' [sic]") (emphasis omitted).[8] We determine that this single statement would not meet the burden of proving that the trial judge acted with bias and abused his discretion in denying Father's motion for recusal. Moreover, according to our review of testimony by the therapist at trial, the trial judge's statement does not seem to be inaccurate since it took Father several weeks to schedule an appointment with the therapist. ***See*** N.T., 4/11/13, at 103 ("[T]he referral was made by [the] [g]uardian *ad*

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[7] We acknowledge that Father raised additional issues, namely regarding *ex parte* communications and Father's role as a "whistleblower" at a local hospital, in his motion for recusal. Yet, Father barely mentions these issues in his brief, and therefore we will not consider them.

[8] We point out that the trial judge also acknowledged A.S.'s unwillingness to participate in reconciliation therapy. ***See*** T.C.O. at 2 ("The parent/child reconciliation sessions have not occurred to date due to the Father['s] not following through early on and, currently, due to the child's refusal to participate and her severe reactions/panic attacks upon sight of the Father.").

[l]item [] on March 12, [20]11, through a telephone call…. [Father] was to call me [the reconciliation therapist, William Sorrels] to set it up, as well as [Mother], I believe. [Mother] left a message on my voicemail on March 28, 2011. My first call from [Father] was April 6, 2011.") (italics added).[9] We therefore would hold that Father did not produce adequate evidence to call into doubt the trial judge's impartiality.

Second, Father claims that the trial judge falsely stated that Father unilaterally instructed the physician not to proceed with the tonsillectomy. Father's brief at 30 ("[T]he [c]ourt wrote in a footnote to its [m]emorandum and [o]rder of court…that '[a]pparently Father had unilaterally instructed the treating physician not to proceed.' There is nothing on the record indicating that Father changed the surgery date.") (emphasis omitted). However, Father did file a motion for special relief on May 4, 2011, requesting that the court "order that the minor child's tonsillectomy … be cancelled and rescheduled to occur during the child's summer vacation from school." Motion for Special Relief, 5/4/11, at 2. Father also testified about speaking with Dr. Klingensmith before surgery and questioning him about the criteria for determining that a tonsillectomy is needed. N.T., 4/11/13, at 347-48. Father further testified, "[M]y hope was if you got it [the surgery] postponed, since the [c]ourt had their own deadline, that at that point we

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[9] Father alleges that the court order for reconciliation therapy was dated March 21, 2011, and he called sixteen days later. Father's brief at 29.

could have presented further evidence why it wasn't even needed and why fraudulent information was presented to Dr. Klingensmith to justify having it done. But, unfortunately, that never happened because the Court said it needed done. [M]y opinion didn't matter." ***Id.*** at 349. Based on Father's own testimony, we would not conclude that the judge acted with prejudice in how he characterized Father's actions because Father did essentially instruct the physician not to proceed with the tonsillectomy.

Last, Father alleges that the court caused Father to distress daughter because Father was ordered by the "[c]ourt/[d]eputy [s]heriff" to leave the courtroom so it could be locked during lunch on October 2, 2012. Father's brief at 31 ("Father was ordered by the [c]ourt/[d]eputy [s]heriff to leave the courtroom so it could be locked. A.S. saw him in the hallway … and began shaking and crying and screaming. Father witnessed his daughter's distress and was sorry he had caused it. But Father had not really caused it. The [c]ourt had caused it.") (citations omitted). This unfortunate encounter does not establish any bias, prejudice, or unfairness on behalf of the judge. In fact, Father does not even allege that the judge had any direct involvement with causing this meeting to occur.[10] Father's arguments fail to

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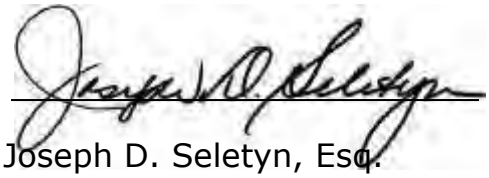
[10] The trial judge also addressed the incident, explaining, "[D]uring one of the days of trial, the Father was instructed to exit the courtroom once the Court recessed for lunch, at which point the child saw the Father at a distance in the hall and broke down, falling to the ground and sobbing. It should be noted that the Father did not do anything at the time to elicit such a response, he simply exited the courtroom. It should be noted that counsel
(Footnote Continued Next Page)

demonstrate an abuse of discretion and would not raise any substantial doubts about the trial judge's impartiality. Based on the foregoing reasons, we would affirm the trial court's decision to deny Father's motion for recusal.

Order affirmed.

Judge Olson concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/24/2014

(Footnote Continued) ——————————

for the Father instructed him to remain in the courtroom so as to not upset the child, however, the [c]ourt, not knowing of these instructions, directed the Father to exit the courtroom." T.C.O. at 5 n.5.