

**COMMONWEALTH OF PENNSYLVANIA
IN THE SUPERIOR COURT OF PENNSYLVANIA**

**No. 912 MDA 2019
CHILDREN'S FAST TRACK APPEAL**

BAW n/k/a BAC,
APPELLEE,

v.

TLW, III,
APPELLANT.

BRIEF FOR APPELLANT, THOMAS L. WILLIAMS, III

**APPEAL FROM ORDER OF THE COURT OF COMMON PLEAS OF
SCHUYLKILL COUNTY, PENNSYLVANIA, DATED MAY 22, 2019
TRIAL COURT DOCKET NO. S-3416-2009**

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STATEMENT OF JURISDICTION

The Superior Court has jurisdiction of this matter pursuant to Pa.R.C.P. 313(a), relating to collateral orders, as that rule is applied to contempt findings for which a sanction has been imposed. *Rhoades v. Pryce*, 874 A.2d 148, 151 (Pa. Super. 2005).

ORDER IN QUESTION

IN THE COURT OF COMMON PLEAS SCHUYLKILL COUNTY
CIVIL DIVISION --- LAW

BETH A. WILLIAMS n/k/a	:	<u>CIVIL ACTION - LAW</u>
BETH A. CHICKILLY,	:	
Plaintiff	:	No. S-4516-09
	:	
v.	:	
	:	
THOMAS L. WILLIAMS,	:	
Defendant	:	-- Custody--

Arlen R. Day, Esq.	-for Plaintiff
Thomas L. Williams	-for Defendant
Mark A. Barket, Esq.	-Custody Hearing Officer

ORDER OF COURT

AND NOW, this 22nd day of May, 2019 the court is informed:

A hearing was held on May 9, 2019 on the Rule to Show Cause dated March 27, 2019 which directs Defendant to show cause why he should not be held in contempt for failure to pay \$1,666.66 toward custody evaluations. Defendant was originally ordered to make the aforesaid payments within twenty days of the first order entered October 11, 2018. Since that time Defendant was granted extensions by orders of October 31, 2018, December 4, 2018 and February 22, 2019 and his last extension was until March 22, 2019. Defendant has been working part time since the beginning of 2019 and has been able to pay for living expenses. At the hearing on May 9, 2019 Defendant also acknowledged that he recently went on a trip to the state of Florida and traveled via commercial airliner. Under these circumstances, and considering that Defendant has had over seven months to

comply, the hearing officer finds the Defendant's failure to pay for his evaluations has been willful.

NOW THEREFORE, it is hereby ORDERED that Defendant is in Contempt of the order of February 22, 2019. He may purge himself of the contempt by paying the sum of \$1,666.66 to Psychological Associates, Pottsville, PA by May 30, 2019. If Defendant fails to make payment by this deadline he shall report to the Schuylkill County prison on May 31, 2019 at 4:00 p.m. to serve 48 hours in prison and shall report each subsequent Friday at 4:00 p.m. until after the end of the weekend of August 2, 2019, or until he pays the amount due, whichever shall first occur.

BY THE COURT,
/s/ John E. Domalakes, Judge

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

When reviewing a finding of contempt, this Court exercises an abuse of discretion standard of review. *Commonwealth v. Baker*, 766 A.2d 328, 331 (Pa. 2001). A trial court abuses its discretion if it committed an error of judgment that “overrides or misapplies the law.” *Id.* The trial court also abuses its discretion if the evidence in the record shows that its judgment “is manifestly unreasonable or lacking in reason.” *Id.*

This Court reviews the trial court’s procedures *de novo*, as those issues are questions of law. *Commonwealth v. Moody*, 125 A.3d 1, 6 (Pa. 2015).

Accordingly, the Court uses a plenary scope of review for those issues. *Id.*

STATEMENT OF THE QUESTIONS PRESENTED

The principal questions presented on appeal are:

1. Did the Trial Court commit an error of law and violate Father's right to due process when it found him in contempt without holding a hearing and delegated its authority to a Hearing Officer?

ANSWER BELOW: No

SUGGESTED ANSWER: Yes

2. Did the Trial Court abuse its discretion when it found Father in contempt without adequately inquiring into Father's present ability to comply with the order to pay costs?

ANSWER BELOW: No

SUGGESTED ANSWER: Yes

3. Did the Trial Court commit an error of law when it failed to appoint counsel for Father once it determined Father faced incarceration for contempt?

ANSWER BELOW: No

SUGGESTED ANSWER: Yes

4. Did the Trial Court abuse its discretion when it imposed a purge condition that Father could not meet?

ANSWER BELOW: No

SUGGESTED ANSWER: Yes

STATEMENT OF THE CASE

This is a direct appeal from the Schuylkill County Court of Common Pleas challenging the finding of contempt and sentence of imprisonment entered against Appellant Thomas Williams on May 22, 2019 by the Honorable John E. Domalakes.

A. Procedural History

Appellant (hereinafter “Father”) was held in contempt for failing to pay his share of court-ordered custody evaluation fees. On August 20, 2018 Father filed a *pro se* Petition for Modification of Custody concerning the minor children, K.W. and B.W. He also filed a request to proceed *in forma pauperis (IFP)*, which was granted August 22, 2019. On October 11, 2018, after a custody conference yielding no agreement, home and custody evaluations were ordered with Father to pay one-third of the cost, or \$1,166.66. He filed a reconsideration request that was denied on October 26, 2018.

The parties appeared before a Hearing Officer on November 29, 2018 in response to a Rule to Show Cause because Father had not paid his share of costs to the evaluator. Father was found not to have willfully violated the order. Appellee (hereinafter “Mother”) filed a Petition for Contempt and for Termination of Father’s *IFP* Status on January 4, 2019. On February 22, 2019, the Court denied

and dismissed Mother's requests, upholding Father's *IFP* status. He was ordered to pay the evaluation cost by March 22, 2019.

On March 27, 2019, the Court entered a Rule Returnable for Father to show cause why he should not be held in contempt because he had not paid the evaluation fee. On May 22, 2019 the Court held Father in contempt of the February 22, 2019 Order. The Court sanctioned Father with incarceration of 48 hours unless he paid \$1,666.66 by May 30, 2019, and for 48 hours every weekend for the succeeding nine weeks or until he paid the amount. Father requested Reconsideration, including asking to be heard by the Court, which the Court denied on May 28, 2019. This appeal followed on June 5, 2019.

B. Factual History

As the docket sheet indicates, Father and Mother have engaged in extensive litigation since their divorce in 2009. The parties stipulated to a custody agreement that became a court order on May 11, 2016. (Custody Order 11/21/18 at 1). The May 11, 2016 agreement ordered shared legal custody, primary physical custody with Mother, and partial physical custody with Father, Sunday through Wednesday for all three children: M.W. born on November 2, 2000; K.W. born on September 20, 2002; and B.W. born on September 13, 2004. The stipulation was reached because Mother separated from her husband, Justin Chickilly (hereinafter "Stepfather") and specified that Mother would pay for court ordered evaluations

for subsequent custody petitions should Mother reconcile with Stepfather. Mother and Stepfather have separated and subsequently reconciled multiple times due to contention and violence in their relationship. Their divorce proceedings, filed in 2015, are still pending due to their pattern of reconciliation. (Custody Order 11/21/18 at 2).

When Mother reconciled with Stepfather in early 2018, K.W. and B.W. moved in with Father, determined not to live in a volatile environment. (Custody Order 11/21/18 at 1). K.W. soon returned to residing with Mother, but B.W. remained with Father. Mother subsequently filed a Contempt Petition against Father for not following the 2016 Custody Order. The Court denied Mother's petition, and permitted B.W. to continue residing with Father, but ordered that he file a Petition for Modification of Custody within thirty days. Father filed the petition on August 20, 2018, proceeding *pro se* and *IFP*. (Petition to Modify Custody Order & Application to Proceed *In Forma Pauperis*). The Trial Court granted Father's *IFP* status on August 22, 2018. (Order Granting *In Forma Pauperis*).

On September 19, 2018, Father filed an Emergency Petition alleging a violent incident between Stepfather and Mother in the presence of the children. On September 28, 2018, the Court denied Father's Petition because Mother testified credibly that the altercation was not in the presence of the children. Additionally,

Mother had since separated from Stepfather. (Order of Court 9/28/18). Mother moved in with her mother. She, M.W. and K.W. shared a bedroom. (Father's 9/19/18 Emergency Petition.)

On October 9, 2018, Hearing Officer Mark Barket, Esq. held a conciliation conference. The parties agreed that the petition does not pertain to M.W., the eldest daughter. The parties were unable to come to agreement regarding custody of K.W. and B.W., as Mother wanted to keep the 2016 Custody Order in effect, and Father wanted primary custody both children. Attorney Barket recommended evaluations based on the complex issues involved in the action. (Custody Hearing Officer's Report 10/10/18).

Attorney Barket did not recommend that Mother pay the entire costs of the custody evaluation, notwithstanding the provision in the 2016 Custody Order that she agreed to do so if a Petition to Modify was filed after she and Stepfather reconciled. The stated reason for failing to enforce that agreement was that Father's *pro se* Petition for Modification "does not state anything about Mr. Chickilly and basically indicates that the youngest two children want to live with him primarily." (Custody Hearing Officer's Report). The parties' net incomes were reported to be \$4,000 monthly for Mother and \$1,300 monthly for Father.

On October 11, 2018, the court adopted Attorney Barket's recommendation and ordered home and custody evaluations. The Trial Court allocated 1/3 of the

costs to Father for \$1,166.66 and allocated the remaining amount to Mother. (Order of Court 10/11/18 at 1). On October 24, 2018, the Trial Court denied Father's Motion for Reconsideration of the order.

Mother and Father subsequently filed additional matters with the Trial Court. On October 12, 2018, Mother filed a Petition for Special Relief requesting compliance with the 2016 Order. On November 9, 2018, Father filed a Petition for Contempt against Mother for denying his custodial time with K.W. Mother answered that K.W. was refusing to spend time with Father after an argument between Father and K.W. on Halloween. Concurrently, Mother counterclaimed for primary custody of K.W. (Order of Court 11/21/18 at 1-2).

In a November 21, 2018 order, the Trial Court denied Father's Contempt Petition and ordered reconciliation counseling between Father and K.W. (Order of Court 11/21/18 at 8). The Trial Court denied Mother's Petition for Special Relief and ordered B.W.'s primary custody remain with Father and ordered partial custody with Mother; Friday through Sunday during the school year, and Sunday through Wednesday in the summer. (Order of Court 11/21/18 at 9).

In November, Mother filed a Petition for Contempt asking the Trial Court to find Father in contempt for not paying his portion of the evaluation costs. (Petition for Contempt filed 11/9/18). On November 29, 2018, the Hearing Officer conducted a hearing on the Rule to Show Cause. In its December 4, 2018 Order,

adopting the recommendations of the Hearing Officer, the Trial Court found that Father had not willfully violated the evaluation order. Father had testified credibly that he had surgery on October 24, 2018 and was laid off and without income until resuming work on November 28, 2018. Father was ordered to comply with the Order by January 10, 2019 and to provide his bank statements to opposing counsel. (Order of Court 12/4/18).

On January 4, 2019, Mother filed a Petition for Contempt and for Termination of Father's *In Forma Pauperis* Status. (Petition for Contempt filed 1/4/19). At a February 14, 2019 rule to show cause hearing before the Hearing Officer, Father testified credibly that he had averaged \$937.50 for income in December and January. (Order of Court 2/22/19 at 1). He further testified that his expenses were about \$850 per month. (Order of Court 2/22/19 at 1). Ultimately, the Trial Court denied and dismissed Mother's Petition for Contempt and request for Termination of *IFP* Status. (Order of Court 2/22/19 at 2). The Court ordered the Father pay his allocated share of evaluations by March 22, 2019. (Order of Court 2/22/19 at 2).

On March 27, 2019, the Trial Court entered a Rule Returnable for Father to show cause why he should not be held in contempt after it received information from the Psychology Associates that Father had not paid his portion of the evaluation costs. Neither party filed a Petition for Contempt prior to the Trial

Court issuing its Rule to Show Cause. Attorney Mark Barket, Hearing Officer, held a hearing on May 9, 2018. (Transcript of Proceedings from Audio Recording 5/9/19 (Transcript)). The hearing lasted only four minutes and Father gave the sole testimony with interjections from Mother's attorney. (Transcript).

On May 22, 2019, the Trial Court, adopting the Hearing Officer's finding that Father's conduct in not paying his portion of the evaluation costs willful, found Father in contempt of the February 22, 2019 order. (Order of Court 5/22/19). The Trial Court stated that Father had the ability to pay his living expenses and was working part time. (Order of Court 5/22/19). The brief May 22 Order also states that Father "acknowledged that he recently went on a trip to the state of Florida and traveled via commercial airliner." No mention is made of Father's testimony at the May 9 hearing that his sister had paid for his airline ticket to Florida for his own Father's 60th birthday or his statement that he could get proof that his sister had paid. (Transcript at 5).

In its contempt order, the Trial Court specified that Father could purge his contempt by paying \$1,666.66 to Psychological Associates, Pottsville, PA by May 30, 2019. However, the Order continued, that if Father failed to pay the purge amount he must report to the Schuylkill County Prison every weekend for ten consecutive (48-hour) weekends beginning May 31, 2019 through the weekend of

August 2, 2019. (Order of Court 5/22/19). The purge amount of \$1,666.66 is greater than Father's one-third share of the \$3,500 evaluation fee (\$1,166.66).

Father sought reconsideration of the Order and requested a de novo hearing before the judge, which the Trial Court denied on May 28, 2019. (Order of Court 5/28/19). Father reported to the Schuylkill County Prison on May 31, 2019 where he remained incarcerated for 48 hours. On June 5, 2019, Father filed Notice of Appeal and two days later an Application for Emergency Stay of the Trial Court's Order. This Honorable Court entered a temporary Stay on June 7, 2019 and then on June 19, 2019 a Stay for the duration of the appeal.

SUMMARY OF THE ARGUMENT

The Trial Court violated Father's due process rights when it found Father in civil contempt and sanctioned him with jail time but failed to hold its own evidentiary hearing and impermissibly delegated its authority to a hearing officer. *C.W. v. K.A.W.*, 774 A.2d 745, 749-50 (Pa. Super. 2001). The Rules provide hearing officers with only limited authority that does not extend to presiding over contempt proceedings. Pa. R.Civ.P. No. 1915.4-1. By denying Father his day in court, the Trial Court violated Father's fundamental right to due process because only a judge may adjudicate a party in contempt and order incarceration. *Schoffstall v. Schoffstall*, 527 A.2d 567, 569 (Pa. Super. 1987).

The Trial Court Abused its discretion when it failed to conduct an inquiry into Father's present financial ability to pay the costs of the court ordered custody evaluations and instead deferred to the Hearing Officer. *S.G. v. J.M.G.*, 186 A.3d 995, 998 n. 3 (Pa. Super. 2018). Furthermore, the record is insufficient to establish that Father had the requisite *mens rea* that he willfully defied the order for the Trial Court to hold him in contempt. *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. 2018).

Under this Court's precedents, individuals have a right to counsel in any civil contempt proceeding in which there is a likelihood of imprisonment. *Commonwealth ex rel. Brown v. Hendrick*, 283 A.2d 722, 723-24 (Pa. Super.

1971); *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. 2018). The Trial Court erred when it failed to appoint counsel for Father once it determined that Father faced incarceration for contempt and that Father was unable to afford counsel.

The Trial Court abused its discretion when it set a purge amount that Father, in his indigent state, could not possibly meet. Prior to setting the condition upon which will purge the contempt, a court must be certain that the contemnor is, in fact, able to comply with that condition. *Hyle v. Hyle*, 868 A.2d 601 (Pa. Super. 601). The only information on the record about Father's financial ability to pay the purge amount stems from a four minute long hearing held before a Hearing Officer in which the Hearing Officer acknowledges that Father would not be able to pay. (Transcript 5/9/19 at 2, lines 13-14).

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND FATHER IN CONTEMPT WITHOUT HOLDING A HEARING.

There is no dispute that the Trial Court held Father in civil contempt, as the apparent remedial goal of the hearing officer and Trial Court was to compel Father to comply with the Trial Court's prior order to pay custody evaluation costs. *See Schnabel Assocs. Inc. v. Building & Constructive Trades Council*, 487 A.2d 1327, 1332 (Pa. Super. 1985) (contempt is generally civil when it is intended to "coerce the contemnor to comply with the court directive"). In addition, the Trial Court imposed a condition by which Father could purge the contempt and escape punishment. ¹*See Bruzzi v. Bruzzi*, 481 A.2d 648, 652 (Pa. Super. 1984) (explaining that "the feature which distinguishes" civil from criminal contempt is "that a civil contempt order, because of its coercive nature, will necessarily have a condition upon which the contemnor may purge himself"). These features distinguish civil contempt from criminal contempt.

However, the manner in which the Trial Court entered its May 22 Order finding Father in contempt and imposing incarceration, with a purge condition of paying \$1,666.66, violated Father's due process rights.

¹ As is discussed below, Father lacks the ability to meet the purge condition.

A. The Trial Court Unlawfully Delegated Its Inherent Judicial Power of Contempt to the Hearing Officer.

Pennsylvania's courts are consistently clear about the source of their contempt authority: "The power to punish for contempt, including the power to inflict summary punishment, is not derived by statute but rather is a right inherent in courts and is incidental to the grant of judicial power under Article 5 of our Constitution." *Commonwealth v. Marcone*, 410 A.2d 759, 763 (Pa. 1980); *Sinaiko v. Sinaiko*, 664 A.2d 1005, 1009 (Pa. Super. 1995) (same). In other words, a court's authority to hold individuals in contempt and punish them for violating a court order is a fundamental and inherent power derived from the "judicial power" set forth in Article 5. As with other aspects of a court's judicial power, it cannot be delegated to another entity such as a hearing officer.

This Court has repeatedly ruled that trial courts simply cannot delegate their judicial power. In *C.W., K.A.W.*, 774 A.2d 745, 749-50 (Pa. Super. 2001), a trial court repeatedly solicited the advice of a guardian *ad litem* and essentially adopted that individual's recommendation as the court's order. This Court explained that in a "non-jury trial such as this, the role of the judge is to interpret the law, determine the facts and apply the facts to the law for an eventual decision of the controversy. The trial court may not delegate its judicial powers." *Id.* at 749. But the trial court violated that prohibition by permitting the guardian *ad litem* to essentially make

factual determinations and interpret the law—a “clear and gross abuse of judicial discretion.” *Id.* at 750.

The ruling in *C.W.* follows this Court’s consistent decisions prohibiting the delegation of judicial power. In criminal cases, trial courts cannot “delegate the sentencing decision to any person or group,” and, indeed, there is thus “no reason for the probation office to make a sentencing recommendation.” *Commonwealth v. Bastone*, 467 A.2d 1339, 1342 (Pa. Super. 1983). *See also Commonwealth v. Ragoli*, 524 A.2d 933, 938 (Pa. Super. 1987) (trial court failed to both announce the reasons for its sentencing “on the record” in open court and improperly delegated its obligation to impose a sentence). Moreover, in domestic relation cases where a hearing officer is used pursuant to the Rules, the trial court “cannot delegate its judicial duty as ultimate finder of fact” and must still “conduct a complete and independent review of the evidence when ruling on exceptions.” *Sirio v. Sirio*, 951 A.2d 1188, 1196 (Pa. Super. 2008) (internal citation omitted). As our Supreme Court plainly put it, a court “has no arm beyond its own judicial anatomy; it cannot delegate judicial power.” *Smith v. Gallagher*, 185 A.2d 135, 153 (Pa. 1962) (explaining that a court’s inherent judicial power related to grand jury investigations does not permit it to appoint a special prosecutor).

Yet in this case the Trial Court quite clearly delegated its judicial power regarding contempt to the hearing officer. The Trial Court’s May 22 Order states

that a “hearing” was held on the rule to show cause, and that hearing of course was before a hearing officer and not the judge. It states that “the *hearing officer* finds that Defendant’s failure to pay for his evaluations has been willful.” Nowhere in the Order does the Trial Court even suggest that it made its own factual findings or legal conclusions; to the contrary, it quite plainly deferred to and adopted the *legal conclusion* of the Hearing Officer. That is unlawful, as it constituted an illegal delegation of the Trial Court’s inherent powers of contempt. The Trial Court then compounded the error by ordering the sanctions that the hearing officer requested, namely, Father’s imprisonment on the weekends unless he paid \$1,666.66. This procedure was unlawful and is akin to the abdication of judicial responsibility, as in *C.W.* As with a bench trial, the Trial Court’s role in a contempt proceeding is to make factual findings, draw legal conclusions, and impose punishment. No law permits it to delegate that authority.²

B. The Trial Court’s Denial of a Hearing Violated the Rules of Civil Procedure.

² It is possible that the Supreme Court could delegate some judicial power, such as through the Rules. See *Yates v. Yates*, 963 A.2d 535, 540-41 (Pa. Super. 2008) (explaining that the Supreme Court on occasion “permits the limited delegation of judicial authority” through the Rules to address ancillary matters). However, it certainly has not done so here. Indeed, it has not even truly delegated any authority to hearing officers in support cases pursuant to Rule 1910.25-4. Pursuant to that Rule, although a hearing officer makes a preliminary recommendation of contempt to the court, the parties may file exceptions and the court “shall” hold a hearing either “on the exceptions or hold a hearing de novo.” *Id.* Thus, the judicial power unquestionably remains with the trial court.

By denying Father a hearing before a judge and relying exclusively on the recommendation of the Hearing Officer to adjudicate contempt, the Trial Court violated the language of the Pa. R.Civ.P. No. 1915.4-1, which narrowly limits hearing officers to preside over partial custody actions when there are no complex questions of law or fact. Nothing in that Rule or the others governing the power of hearing officers permits them to play any role whatsoever in contempt proceedings. Absent explicit authority to delegate that authority, the Rules prohibit it.

Pursuant to the maxim “*expressio unius est exclusion alterius*” where certain things are designated within a statute, all omissions should be understood as exclusions. 1 Pa. C.S. §1903(a); *Commonwealth v. Ostrosky*, 866 A.2d 423, 430 (Pa. Super. 2005). Rule 1915.4-1, *et seq.* only authorizes hearing officers to have limited authority. By contrast, the rules in support actions authorize a hearing officer to conduct a civil contempt hearing. *See* Pa.R.C.P. No. 1910.25-4. Logically, the inclusion of such a rule in one area of family law that is absent from a subsequent section creates a presumption the rule was intentionally excluded and that a hearing officer has no authority to conduct a hearing on civil contempt in cases arising from custody. 1 Pa. C.S. § 1903(a). After all, if the Supreme Court intended otherwise when it promulgated the Rules, it would have specified the relevant delegation in custody cases in the same way it has in support cases.

Therefore, the judges of the court are the only authority to preside over civil contempt hearings in custody.

Indeed, even though hearing officers in support cases do have *some* role in contempt proceedings, they are not the final arbiters of contempt in the way that the Hearing Officer was in this case. Local courts may opt to proceed either pursuant to Rule 1910.25-1 or 1910.25-4. Both place strict limitations on the role of hearing officers. Both procedures permit an individual to file exceptions with and have a hearing with the judge. And critically, the Rules are explicit that “No respondent may be incarcerated as a sanction for contempt **without an evidentiary hearing before a judge.**” Pa.R.Civ.P. 1910.25-5(a)(emphasis added).³ This Court describes this provision as “enumerating the rights and procedure to be followed when imposing incarceration for civil contempt,” without limiting this right to civil contempt arising from support actions. *Thompson v. Thompson*, 187 A.3d 259, 265 (Pa. Super. 2018).

These procedures, of course, apply only to support cases, not the custody case currently before the Court. Nevertheless, the fact that they explicitly allow for *some* role for a hearing officer—while also carefully ensuring that the ultimate disposition lies with the judge following an evidentiary hearing—highlights the

³ This rule is significant enough that it is repeated in notes under Pa.R.C.P. No. 1910.25-3 and No. 1910.25-4(b).

illegality of Trial Court's actions. No provision in the rules governing custody proceedings authorizes the hearing officer to have any role whatsoever in contempt proceedings, and it was unlawful for the Trial Court to proceed in the manner it did.⁴

While Father recognizes the Court's need for administrative measures to ease judicial caseloads, such measures should not come at the expense of procedural due process.⁵ Father was denied a hearing before a judge and was denied other procedural safeguards that should accompany an order for incarceration.⁶ A Hearing Officer conducted the Rule to Show Cause hearings. (Transcript 5/9/19; Order of Court 5/22/19). Neither party received reports on these hearings, nor were they provided an opportunity to file exceptions or to request a hearing de novo. After receiving the Court's May 22, 2019 order holding Father in

⁴ In fact, case law suggests that civil contempt procedures should not vary based on the area of law from which the case emerged. Cases regarding labor law, criminal law, and property law start at the same five-step process required for civil contempt. *See, Schnabel* 487 A.2d at 1332; ; *Lachat v. Hinchcliffe*, 769 A.2d 481 (Pa. Super. 2001). Procedurally, the relevant distinction is between civil and criminal contempt, as described above.

Indeed, the Trial Court should have provided Father with more due process than in the support rules, because the procedures for support weigh the pressing need for quick disposition against the contemnor's rights to due process (as explained in *Schoffstall*, 527 A.2d at 571-72). Unlike in an alimony or support context, the funds in the instant matter were payable to an outside vendor rather than depriving the other party of support.

⁵ *See, Commonwealth v. Mauk*, 185 A.3d 406, 413(Pa. Super. 2018) ("Promptness in the administration of justice is commendable, but haste which disregards fundamental principles may prove disastrous.").

⁶ Including the protections that a judge will determine the contempt sanctions, that the parties have the opportunity to file exceptions to the hearing officer's recommendation, and that the parties may demand a hearing de novo.

contempt and sanctioning him with incarceration, he requested a hearing de novo in his Motion for Reconsideration. The Trial Court summarily denied his motion, stating, “the Court has not been presented with anything in the Motion which would cause it to reconsider the Court’s Order of May 22, 2019.” (Order of Court 5/28/19). By denying Father a hearing before a judge, the Trial Court committed an error of law in violation of the Rules of Civil Procedure.

C. The Trial Court’s Denial of a Hearing Violated Father’s Right to Due Process.

By unlawfully delegating its judicial powers and nevertheless holding Father in contempt and ordering his incarceration, the Trial Court violated his fundamental due process rights. The Due Process Clause of the Fourteenth Amendment requires procedural safeguards when “a person may be deprived in a legal proceeding of a liberty interest, such as physical freedom.” *Everett v. Parker*, 889 A.2d 578, 580 (Pa. Super. 2005) (internal citations omitted). In civil contempt proceedings, procedural due process is ordinarily governed under a five-step process. *Crislip v. Harshman*, 365 A.2d 1260, 1261 (Pa. Super. 1976). In *Crislip*, the Court outlined these five steps: (1) a rule to show cause why attachment should issue; (2) an answer and hearing; (3) a rule absolute; (4) a hearing on the

contempt citation; and (5) an adjudication.⁷ *See also, Harcar v. Harcar*, 982 A.2d 1230, 1234-1235 (Pa. Super. 2009); *Lagendorfer v. Spearman*, 797 A.2d 303 (Pa. Super. 2003). Thereafter, where a violation of a court order has followed a full hearing, the procedural requirements are reduced to only include: (1) notice of the alleged violations and (2) opportunity for explanation and defense. *Diamond v. Diamond*, 792 A.2d 597, 601 (Pa. Super. 2002) (internal citations omitted).

In the present case, where Father never had a full hearing before a judge, Father was entitled to the full five-step process, including two hearings before a judge. Instead, the Trial Court denied him any hearing before a judge. Even if, *arguendo*, he was not entitled to all five steps,⁸ the Trial Court denied him due process when it failed to conduct a hearing itself.

Procedural due process “requires, at its core, adequate notice, opportunity to be heard, and the chance to defend oneself *before a fair and impartial tribunal having jurisdiction over the case.*” *J.M. v. K.W.*, 164 A.3d 1260, 1269 n. 5 (Pa. Super. 2017) (emphasis added, internal citations omitted).⁹ Additionally, “[b]oth

⁷ These procedures essentially operate like a mini criminal proceeding, essentially requiring that there be a preliminary hearing on the rule to show cause—so that the moving party can set forth a prima facie case—before holding a full evidentiary hearing on the merits.

⁸ See, e.g., criticism of *Crislip*'s five steps in *Lowenschuss v. Lowenschuss*, 470 A.2d 970, 973 (Pa. 1973) (stating that the five steps were streamlined into statute); Pa.R.C.P. No. 1910.21; *Schoffstall*, 527 A.2d at 570 (calling the five steps “onerous, unworkable and wasteful of staff and judicial time without increasing protection to contemnor or aiding in resolution of the arrearage problem”).

⁹ See also, *Harcas*, 982 A.2d at 1235; *Diamond*, 792 A.2d at 601; *Schnabel*, 487 A.2d at 1334.

notice and opportunity to be heard must be afforded ‘at a meaningful time in a meaningful manner.’” *Everett*, 889 A.2d at 580 (internal citations omitted). Only a judge may adjudicate a party in contempt. *Schoffstall v. Schoffstall*, 527 A.2d 567,569 (Pa.Super. 1987). Furthermore, a judge may enter an order that commits a party to jail only after an evidentiary hearing. *Id.*

Fundamentally, before finding or sanctioning contempt, a judge has a duty to inquire individually into the reason for a defendant’s noncompliance with a court order, even if the court permits initial contempt hearings before a conference or hearing officer. *Mauk*, 185 A.3d at 411; *Schoffstall*, 527 A.2d at 571, n. 3.

In the present case, the Trial Court failed to provide Father with the process he was due, the least of which was a hearing conducted by a judge. The only notice Father received was the Rule to Show Cause Order entered because “the [Trial] Court has received notification from the Custody Conciliation Officer that [Father] has not paid for custody and home evaluations which [Father] was ordered to do so... (Order of Court 3/27/19). The Rule scheduled a hearing for May 9, 2019. (Order of Court 3/27/19). Attorney Mark Barket, Hearing Officer, conducted the hearing on the Rule Returnable. The hearing lasted a total of four minutes. (Transcript). (The title page notes the hearing commenced at 1:09 p.m. and on the last page notes that the hearing ended at 1:13 p.m.). Father provided the sole testimony, which totaled thirty lines, in response to questions from the custody

Hearing Officer and interjections from Mother's counsel. (Transcript). Father asserts that what process he was provided falls far below that required by Pennsylvania appellate and constitutional jurisprudence requiring that this Court vacate the order below.

In *Schoffstall v. Schoffstall*, this Court, ultimately, found that procedural due process was satisfied where a hearing officer conducted an initial contempt hearing on nonpayment of alimony pendente lite and then referred the matter to a judge for a hearing de novo because of the possibility of incarceration. *Schoffstall*, 527 A.2d at 568. This Court affirmed the lower court's decision because the appellant was given opportunity to testify before a judge in a hearing de novo as to his present ability to comply with the order. *Id.*

While not relevant to the decision in *Schoffstall*, this Court criticized the civil contempt procedure described in the trial court's slip opinion.

[Our] approval does not extend to that part of the practice described by the lower court, in which the court, without presence of the hearing officer and the contemnor, would sign an Order of contempt and impose sanctions, upon the recommendation of the hearing officer, if no exceptions are filed.

Schoffstall, 527 A.2d at 571, n. 3.

The *Schoffstall* Court further criticized the practice used in that lower court. "We are troubled by a procedure which does not require that the defendant appear in court before a judge for a hearing *prior to* a finding of contempt" *Id.* (emphasis

added). This Court raised concern that such a procedure “invites abuse” and “seems to be an inversion of due process of law.” *Id.*

The procedure criticized in *Schoffstall* is exactly the procedure followed in the present case. Father, like the defendant in *Schoffstall*, received a preliminary hearing before a Hearing Officer. (Transcript at 1 line 3; 1925(a) Opinion at 2). Unlike the defendant in *Schoffstall*, a judge never heard Father’s case nor was the case referred to a judge when the possibility of incarceration emerged. (Transcript at 3, lines 18-20, lines 22-24). Instead, the judge’s order found Father in contempt based solely on the recommendation of the Hearing Officer, and in fact the Trial Court denied Father’s request for a de novo hearing. (Order of Court 5/28/19 at 2).

Further troubling in the instant case is that the Hearing Officer’s recommendations adopted by the Trial Court never were made part of the record or served upon the parties. (Order of Court 5/22/19). As a result, neither party had an opportunity to file exceptions to those recommendations.

Although Father had a hearing by a Hearing Officer on the Rule to Show Cause, the Trial Court failed to provide him with the requisite hearing before a judge prior to a finding of contempt. (Order of Court 5/22/19). After the May 22, 2019 order of contempt and incarceration, Father gave the Trial Court the opportunity to cure the procedural defect by requesting a hearing de novo in his Motion for Reconsideration, but the Trial Court denied his request. In this way, the

Trial Court violated Father's right to a hearing before a judge, a right of due process imposed by case law. Thus, his procedural due process rights were clearly violated.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING FATHER IN CONTEMPT BASED ON AN INADEQUATE RECORD.

A. The Trial Court Abused Its Discretion When It Failed to Conduct an Inquiry into Father's Present Financial Ability to Pay the Costs of the Court Ordered Custody Evaluations and Instead Deferred to the Hearing Officer.

A necessary prerequisite for a trial court to exercise its discretion is that the court provide a "hearing and due consideration" of the issue. *See, e.g., In re Deed of Trust of Rose Hill Cemetery Ass'n*, 590 A.2d 1, 3 (Pa. 1991). The Trial Court erred by failing to inquire whether Father had the present financial ability to pay costs of custody evaluations prior to finding him in contempt, as it instead simply deferred to the hearing officer and made only paltry findings about Father's finances in its May 22 Order. This is unconstitutional, as the United States Supreme Court and this Court have repeatedly held.

Last year, in another case involving payments for a custody evaluation, this Court cautioned that "before the court can order incarceration, it must first determine that Mother has the present ability to pay and that her failure to pay was willful" in accordance with *Bearden v. Georgia*, 461 U.S. 660 (1983); *S.G. v. J.M.G.*, 186 A.3d at 998 n. 3. *Bearden* provides constitutional limits, pursuant to

the Fourteenth Amendment, on when an individual can be imprisoned because he is too poor to pay. It requires that the “sentencing court must inquire into the reasons for the failure to pay” and make findings regarding whether that nonpayment has been “willful.” *Bearden*, 461 U.S. at 672-73. This Court, in another opinion decided last year, explicitly extended *Bearden*’s “logic to contempt proceedings” and explained that “a trial court must individually question a defendant about his or her current circumstances, before sending that defendant to jail.” *Mauk*, 185 A.3d at 412.

Thus, by failing to hold its own hearing and make findings regarding the defendant’s willful nonpayment, the Trial Court violated *Bearden*. Indeed, the only findings—which were of course the Hearing Officer’s and not the Trial Court’s—that the Trial Court even noted in its May 22 Order were that the defendant had been “working part time,” had recently traveled to Florida, and had been given extensions to pay. These findings are plainly insufficient. *See, e.g., Diaz* 191 A.3d at 866 (factual record that defendant was unemployed, possibly had a job available, and was willing to sell his blood plasma was insufficient to support finding of contempt for nonpayment); *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. 1984) (no evidence that the defendant is able to pay when the only facts show that he has no “financial assets [or] liabilities” and has been “living from hand to mouth”). Without substantially more detail about Father’s financial

situation—at a minimum his income, rent, utilities, food, transportation costs, costs of dependent care (he cared for one child), and medical care—the Trial Court had no basis on which to imprison Father.

B. Even Assuming that the Proceedings Before the Hearing Officer Could Have Served as the Evidentiary Basis for a Finding of Contempt, that Hearing Was Insufficient.

Assuming, *arguendo*, that the Trial Court's procedure was not fatally flawed from the start because it delegated its authority to the Hearing Officer, the proceeding before the Hearing Officer was nevertheless insufficient to establish that Father willfully failed to pay.

Under this Court's precedents, a court can only hold a person in contempt after determining that that person has "willfully" failed to pay. This Court explained in *Mauk* that "contempt has a mens rea element of specifically intending to defy the underlying court order, and impossibility of performance of the court-ordered act is an absolute defense." *Mauk*, 185 A.3d at 411. The court must make this determination each and every time that a person appears for a contempt hearing due to nonpayment "because the person's financial situations may have changed since the last time she or he was before the court." It is for that reason that a court must "make any findings of fact" prior to finding the person in contempt. *Diaz*, 191 A.3d at 866 (vacating finding of contempt and order of imprisonment). Absent that finding of willful nonpayment, there has been no contemptuous violation of the court's order. *See Mauk*, 185 A.3d at 411; *Commonwealth v. Rosser*, 407 A.2d 857, 859, 860 n.8 (Pa. Super. 1979); *c.f. Commonwealth ex rel.*

Powell v. Rosenberry, 645 A.2d 1328, 1331 (Pa. Super. 1994) (nonpayment is a technical violation of parole only if there is a “willful refusal to pay”).

The May 22 Order paid lip service to the “willful” requirement, noting that the “hearing officer finds that the Defendant’s failure to pay for his evaluation has been willful.”¹⁰ As in *Diaz*, however, the record is simply insufficient to establish willful noncompliance, as it showed only that the defendant explained he did not have the funds, was working as a subcontractor when work was available, and had taken a flight to Florida to visit his father, which his sister paid for.

The Hearing Officer was required to “inquire” into the reasons for nonpayment, per *Bearden*, and make “findings.” It did none of that, instead relying on an apparently previous finding that, “last time, you were found to have sufficient income.”¹¹ That is insufficient under *Mauk*. If the Hearing Officer was frustrated that Father had not saved sufficient money on his \$937.50/month income (while caring for a child), or that he was not sufficiently seeking work, then the Hearing Officer was required to take evidence and make findings regarding Father’s income and expenses. See *Commonwealth ex rel. Wright v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973) (record insufficient to establish that parent was willfully

¹⁰ Notably, the Trial Court did not say that *it* found the conduct willful.

¹¹ The Hearing Officer arguably was mistaken about Father’s “sufficient” income. The February 22, 2019 Order indicates that Father’s average monthly income was \$937.50 and his monthly expenses were \$850. Father could not possibly have saved \$1,166.66 between February and May 9, 2019.

refusing to pay because there was no evidence suggesting he was refusing to work); *Commonwealth ex rel. Brown v. Hendrick*, 283 A.2d 722, 724 (Pa. Super. 1971) (en banc) (“The record is silent as to his earnings and earning power; his skill, his work record, education and ability to work. There was no attempt to find out the reason for his failure to work only the answer: ‘I haven’t been able to get a job. I’ve been trying, but I can’t get one.’ The court seemed to rely entirely on his physical appearance. This is not enough.”). However, the Hearing Officer did not develop such a record, which therefore cannot support a finding that Father willfully failed to pay.

III. THE TRIAL COURT ERRED BY NOT APPOINTING FATHER COUNSEL ONCE IT DETERMINED THAT HE WAS FACING INCARCERATION FOR CONTEMPT

A. Controlling and Persuasive Precedent From This Court Dictates Recognition of the Right to Counsel for Civil Contempt Cases Such As This One.

Under this Court's precedents, individuals have a right to counsel in any civil contempt proceeding in which there is a likelihood of imprisonment. In *Hendrick*, this Court—sitting *en banc*—reversed an order of imprisonment in a civil contempt proceeding¹² following nonpayment of support because the father was not represented by counsel. *See Hendrick*, 283 A.2d at 723-24. As an *en banc* decision, *Hendrick* remains binding precedent upon this Court. *See In the Interest of A.A.*, 195 A.3d 896, 909 (Pa. 2018). But critically, this Court reaffirmed the same constitutional principles as recently as last year in *Diaz*, a case establishing the right to counsel in civil contempt proceedings when there is a "likelihood of imprisonment," *Diaz*, 191 A.3d at 862-63. Furthermore, in *Mauk*, this Court explained that whether a trial court proceeds by "civil or indirect criminal contempt is irrelevant" in light of what fundamental due process protections are due. *Mauk*, 185 A.3d at 413. *Hendrick* and *Diaz* are not outliers, as they support a

¹² The *Hendrick* court specifically stated, "The law of Pennsylvania provides for both civil and criminal remedies for the support of wife and children. In the instant case, the action was civil." *Id* at 723.

long line of Pennsylvania cases that have extended the right to counsel in areas that the federal courts have not yet recognized.¹³

B. *Turner v. Rogers* Does Not Suggest a Different Result With Respect to Civil Contempt Cases Where the Opposing Side is Represented.

While Father maintains that the Pennsylvania Constitution extends the right to counsel to all civil contempt proceedings where incarceration is a possibility, the fact that the opposing party in the instant case was represented by counsel takes this case outside the holding of *Turner v. Rogers*, 564 U.S. 431 (2011), which limited its opinion to situations

where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).

Turner, 564 U.S. at 432 (emphasis added). In fact, the Court strongly suggested it would come to a different conclusion for contempt cases initiated by the State solely for the reason that the State is typically represented by competent counsel:

¹³ Indeed, while the brief of Amici the ACLU of Pennsylvania and the National Coalition for a Civil Right to Counsel explore this topic in more depth, Father contends that his right to counsel is protected by Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution, from which his right to due process emanates. Pennsylvania's case law governing the right to counsel, which goes beyond the federal floor, suggests that it is better grounded in our own Constitution rather than the Fourteenth Amendment.

We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody. See *supra*, at 443, 180 L. Ed. 2d, at 463. Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative. Cf. *Johnson v. Zerbst*, 304 U.S. 458, 462-463, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) (“[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel”).

Turner, 564 U.S. at 432.

It is notable that the proceedings at issue in the instant case not only do not involve the asymmetry that concerned the *Turner* Court, but in fact concern the reverse: they pit an unrepresented and indigent parent against a parent represented by learned counsel. Providing a right to appointed counsel for the unrepresented parent would address the spirit of the concern expressed in *Turner*.

In other civil contexts, Pennsylvania courts have pointed to a similar asymmetry in representation as a reason for recognizing a constitutional right to appointed counsel. For instance, for termination of parental rights, the Supreme Court of Pennsylvania observed that

Since the state is the adversary . . . there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel ... it would be grossly unfair to force appellant to defend against the appellees' case without the assistance of someone, trained in the law, who could test the appellees' case by the rules of evidence and the techniques of cross-examination.

In re Adoption of R.I., 312 A.2d 601, 602-03 (Pa. 1973) (citation omitted).¹⁴ See also *Corra v. Coll*, 451 A.2d 480, 487 (Pa. Super. 1982) (recognizing right to appointed counsel in paternity proceedings in part because “here in Pennsylvania, a complainant in a support action at which paternity is disputed shall, ‘upon the request of the court or a Commonwealth or local public welfare official’ be represented by the district attorney ... A paternity proceeding often becomes an adversary contest between a complainant, backed by the resources of a skilled attorney, and the uncounseled accused father. Under these circumstances, the contest is undeniably tilted in favor of the complainant.”) In these cases, the persuasive factor was not that the State was the plaintiff, but rather that the State was represented by a trained attorney, as is the case here.

The Trial Court issued a Rule to Show Cause and scheduled a Rule Returnable for May 9, 2019. Attorney Mark Barket, the Hearing Officer conducted the Rule hearing. Father and Mother were both present as was Mother’s counsel Arlen Day. (Transcript cover page). The four minute long hearing did not allow for

¹⁴ While *Adoption of R.I.* preceded the U.S. Supreme Court’s decision in *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (no federal categorical right to counsel in termination of parental rights cases), it has been reaffirmed by Pennsylvania courts several times since *Lassiter*, meaning it rests on the state constitution’s due process clause. See e.g. *Adoption of L.J.B.*, 995 A.2d 1182 (Pa. 2010) (per curiam) (remanding to trial court “for a determination of whether Petitioner is eligible for the appointment of counsel. See *In re Adoption of R.I.*... Should the trial court determine that Petitioner is eligible for the appointment of counsel, then counsel shall be appointed by the trial court”); *In the Interest of J.T.*, 983 A.2d 771, 774 (Pa. Super. 2009) (observing that *Adoption of R.I.* held that “an indigent parent in a termination of parental rights case has a constitutional right to counsel.”)

Father to provide any evidence or explanation for his non-payment. He was only in the position to answer questions posed by the Hearing Officer. (Transcript at 1-5)

Had Father been afforded counsel, he would have responded to questioning from that counsel that would have established his inability to comply with the underlying order to pay for home and custody evaluations, thereby establishing that a finding of contempt was not authorized. *See Cunningham v. Cunningham*, 182 A.3d 464,471 (Pa. Super. 2018)(“If the alleged contemnor is unable to perform and has, in good faith, attempted to comply with the court order, then contempt is not proven.”). Mother’s counsel volunteered information that Father had recently traveled to Florida. However, Father was unaware of how to advocate for himself and did not bring documentation or witnesses to support that he did not pay for the trip but his sister did so that he could be at his Father’s 60th Birthday celebration. (Transcript 2-3).¹⁵ The imbalance of knowledge and deference that Mother received because she had counsel cannot be overstated. The Hearing officer asks Mother’s counsel, “So Counsel, what do you want to do with this situation? I mean, even if we put him in jail, it’s not going to get paid. So what do we do here?” (Transcript at 2).

¹⁵ Or, if the proceeding was started by a Contempt Petition filed by Mother, perhaps he would have been on notice that the trip to Florida was at issue. Similarly, if there was a subsequent hearing before the Trial Court he could have presented his proof.

C. Father Did Not Waive His Right to Counsel.

While Father did not request the appointment of counsel at trial, his situation is identical to that in *Diaz*, where this court rejected the argument that because the defendant “never requested a public defender and did not retain private counsel, he knowingly, intelligently, and voluntarily waived his right to counsel.” This court rightfully cited to *Rodriguez v. Rodriguez*, 600 A.2d 589, 551-52 (Pa. Super. 1991) and Pa.R.Crim.P. 121, and the same law applies to the instant case. Furthermore, *Diaz* held that “our courts have long ‘recognized that the failure to preserve an issue for appeal may be excused when a strong public interest outweighs the need to protect the judicial system from improperly preserved issues’ ... One such strong public interest is whether a party is entitled to counsel in a civil contempt proceeding.” *Id.*

Father, in the instant case, could not have waived his right to counsel as he had no idea that he could ask for one. Father, proceeding *IFP* throughout the custody matter, clearly could not afford to hire one. His lack of counsel only compounds the wealth-based inequity here.

IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A PURGE CONDITION THAT FATHER COULD NOT MEET.

Once a court finds that all three elements of civil contempt have been met,¹⁶ it must set a purge condition whereby the contemnor can avoid the sanction imposed by the court. *Cunningham*, 182 A.3d at 472 (citing *Barrett v. Barrett*, 368 A.2d 616, 621 (Pa. 1977)). The requirement of a purge condition is consistent with the purpose of civil contempt: to compel compliance with the court order. Prior to setting the condition upon which will purge the contempt, a court must be certain that the contemnor is in fact, able to comply with that condition. *Hyle*, 868 A.2d 601 (Pa. Super. 601).

By setting a purge condition the contemnor cannot certainly meet, the court essentially “convert[s] a coercive sentence into a penal one without the safeguards of criminal procedure.” *Barrett*, 368 A.2d at 621.¹⁷ Therefore, to impose a lawful purge condition, the court must be “convinced beyond a reasonable doubt, from the totality of the evidence before it, the contemnor has the present ability to comply.” *Cunningham*, 182 A.3d at 472 (citations omitted).

As with the determination of ability to pay, analyzed in Section II, the relevant inquiry is whether Father had the present ability to meet the purge

¹⁶ *Harcar*, 982 A.2d at 1235 sets forth the three elements of civil contempt: 1) that the contemnor had notice of the specific order or decree which she is alleged to have disobeyed; 2) that the act constituting the contemnor’s violation was volitional; and 3) that the contemnor acted with wrongful intent (internal citations omitted).

¹⁷ The Hearing Officer practically admits that jailing Father would not actually have the coercive impact that incarceration is expected to provoke in civil contempt. “I mean, even if we put him in jail, [the evaluation cost is] not going to get paid.” (Transcript 5/9/19 at 2, lines 13-14).

condition based on the totality of the circumstances. The key distinction in analyzing the purge condition is that the burden of proof is heightened to the standard of being beyond reasonable doubt. And, per *Barret*, this inquiry is *separate* and *distinct* from the question of whether the alleged contemnor was actually in contempt, as it is a bifurcated process of first finding contempt and then imposing a lawful purge.

Thus, the analysis in Section II on Father's present ability to pay based on the totality of the circumstances is also relevant here in the analysis of the lawfulness of the purge condition. As averred in Section II, the Trial Court failed to make a factual determination that Father was able to pay the costs of evaluations. The scant inquiry into his finances, Father submits is insufficient even by the preponderance standard and, thus, is certainly insufficient to establish beyond a reasonable doubt that Father had the present ability to meet the purge condition set by the Trial Court.

In the case at bar, the amount set for the purge condition is actually more than Father's total cost for the custody and home evaluations. In its October 11, 2018 Order of Court, the Trial Court ordered the parties to pay \$3500 for the home and custody evaluations. (Order of Court 10/11/18). The Trial Court apportioned the costs two-thirds towards Mother and one-third to Father or \$2,333.34 towards Mother and \$1,166.66 to Father. (Order of Court 10/11/18). However, the Trial

Court in finding Father in contempt set the purge amount at \$1,666.66 (Order of Court 5/22/19).

In addition, it is clear that the Hearing Officer – and thus the Trial Court – violated two basic principles regarding purge conditions. First, the Hearing Officer explicitly stated that he hoped Father would “get tired of being in jail and decide to save the money to pay it.” This is a plain violation of *Hyle*, which explained that a purge that is conditioned on a person making money in the future is an illegal purge. *See Hyle*, 868 A.2d at 606. Any discussion of Father possibly using his tax refund is similarly illegal under *Godfrey v. Godfrey*, 894 A.2d 776, 783 (Pa. Super. 2006) which explicitly prohibits conditioning purges on the use of possible future tax refunds. Second, per *Commonwealth v. Bowden*, 894 A.2d 740, 763-64 (Pa. 2003), a purge condition must be calculated with respect to the “probable effectiveness of any suggested sanction in bringing about the desired result.” The Hearing Officer explicitly said “I mean, even if we put him in jail, it’s not going to get paid.” This notable admission undercuts the entire jail sentence and purge condition – the Hearing Officer essentially threw up his hands and decided to incarcerate Father, apparently recognizing that it was futile due to Father’s inability to pay. In light of all of this, the Trial Court erred as a matter of law by setting a purge condition that Father could not actually pay.

CONCLUSION

For the foregoing reasons, this Honorable Court should hold that the trial court erred as a matter of law and violated Father's right to due process by adopting the recommendation of a hearing officer to find Father in contempt and sanction him with incarceration, failing to appoint counsel and setting a purge condition that Father had no ability to pay. Therefore, this Court should vacate the Trial Court's May 22 and May 28 Orders, clarify the proper standards for finding a party in civil contempt and ordering incarceration, when counsel must be appointed and remand for new proceedings in conformity with those standards.

Respectfully submitted,



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Counsel for Appellant

Robin White, on brief

APPENDIX

6/5/19
Copies mailed
Atty Day & Chwastak

COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY-CIVIL ACTION-LAW

BETH A. WILLIAMS n/k/a
BETH A. CHICKILLY,
Plaintiff

NO.: S-3416-2009

vs.

THOMAS L. WILLIAMS, III,
Defendant

COLLECTORIAL OFFICE
2019 JUN -5 PM 4:21
SCHUYLKILL COUNTY PA

Arlan R. Day, Esq. – for Plaintiff
Marsha Chwastak, Esq. – for Defendant

DOMALAKES, J.

ORDER and OPINION PURSUANT TO Pa.R.C.P. 1925

The instant Appeal involves Father's Appeal of a Court Order dated May 22, 2019, which Order held him in contempt for failure to pay his share of Custody Evaluation fee, as ordered by the Court on October 11, 2018. This long and contentious matters involves three (3) children, namely Mariah, born November 1, 2000, who is now eighteen (18) years of age, who is estranged from Father and wants nothing to do with him, Katrina, born September 11, 2002, age sixteen (16) and Brooke, born September 13, 2004, age fourteen (14). Mother has remarried and the children appear to dislike her new husband. Father also dislikes her new husband. Mother's husband dislikes Father.

There have been a multitude of Petitions, filings and Hearings held over the years. Given the contentiousness displayed by the parties, charges and counter-charges made by everyone involved, the Court felt that Custody Evaluations were

necessary and appropriate and so ORDERED. Father has resisted the evaluations and claims he is unable to pay his share. A Hearing was held on May 19, 2019, before Custody Officer, Mark Barket, Esquire, who recommended to the Court that Father be held in Contempt because he willfully has disobeyed the Court's Order. The Court agrees.

THEREFORE NOW, this 5th day of June, 2019, the Court having been informed that the matter filed to the above Term and Number has been Appealed to the Superior Court of Pennsylvania, the Office of the Schuylkill County Prothonotary is hereby **DIRECTED** to forthwith transmit the record papers in this matter to the Superior Court of Pennsylvania. This Court's Order dated May 28, 2019 and within Opinion will serve as this Court's Rule 1925 Opinion.

It is noted the Court simply encourages the parties to pay their shares for Custody Evaluations so this case may move forward.

BY THE COURT
Donald J. J.

COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY-CIVIL ACTION-LAW

BETH A. WILLIAMS n/k/a
BETH A. CHICKILLY,
Plaintiff

NO.: S-3416-2009

vs.

THOMAS L. WILLIAMS, III,
Defendant

Arlan R. Day, Esq. - for Plaintiff
Thomas L. Williams, III - Defendant ProSe

2019 JUN -6 AM 8:47
SCHUYLKILL COUNTY PA
17501
REGISTRATION OFFICE

ORDER OF COURT

DOMALAKES, J.

AND NOW, this 28th day of May, 2019, upon noting that a Motion for Reconsideration of this Court's Order of May 22, 2019, was filed on May 24, 2019, by Defendant/Petitioner and the Court noting that the Motion was assigned to the Court on May 28, 2019; and the Court further noting that the Court's Order date May 22, 2019 provides as follows:

"AND NOW, this 22nd day of May, 2019, the Court is informed:

A hearing was held on May 9, 2019 on the Rule to Show Cause dated March 27, 2019 which directs Defendant to show cause why he should not be held in contempt for failure to pay \$1,666.66 towards custody evaluations. Defendant was originally ordered to make the aforesaid payment within twenty days of the first order entered October 11, 2108. Since that time Defendant was granted extensions by orders of October 31, 2018, December 4, 2018, and February 22, 2019 and his last extension was until March 22, 2019. Defendant has been working part time since the beginning of 2019 and has been able to pay for living expenses. At the hearing on May 9, 2019 Defendant also acknowledged that he recently went on a trip to the state of Florida and traveled via commercial airliner. Under the circumstances, and considering that

Defendant has had over seven months to comply, the hearing officer finds that Defendant's failure to pay for his evaluations has been willful.

NOW THEREFORE, it is hereby ORDERED that Defendant is in contempt of the order of February 22, 2019. He may purge himself of the contempt by paying the sum of \$1,666.66 to Psychological Associates, Pottsville, PA, by May 30, 2019. If Defendant fails to make payment by this deadline he shall report to the Schuylkill County Prison on May 31, 2019 at 4:00 p.m. to serve 48 hours in prison and shall report each subsequent Friday at 4:00 p.m. to serve 48 hours until after the end of the weekend of August 2, 2019, or until he pays the amount due, whichever shall first occur."

And the Court further noting that it has reviewed the Motion for Reconsideration of Defendant/Petitioner and the Court has not been presented with anything in the Motion which would cause it to reconsider the Court's Order of May 22, 2019. As noted previously in the Court's Order based on the record, the Defendant's failure to pay for his evaluations has been willful.

It is therefore, ORDERED that the Defendant/Petitioner's Motion for Reconsideration is DENIED and he is DIRECTED to comply with all provisions of the May 22, 2019 Order of Court.

BY THE COURT,

 J.

MAIL
DISCOUNT
STAMP
FILE
ARCHIVE

A-5

IN THE COURT OF COMMON PLEAS SCHUYLKILL COUNTY
CIVIL ACTION-LAW

BETH A. WILLIAMS, n/k/a :
BETH A. CHICKILLY :
Plaintiff/Appellee : No. S-3416-2009
 :
vs. : Custody
 :
THOMAS L. WILLIAMS, III :
Defendant/Appellant :

2019 JUN -5 PM 2:16
SCHUYLKILL COUNTY PA
17901
COURT CLERK'S OFFICE

CONCISE STATEMENT OF ERRORS COMPLAINED OF ON APPEAL

THIS IS A CHILDREN'S FAST TRACK APPEAL


Appellant, Thomas L. Williams, III, by and through his attorneys, Marsha Chwastiak, Esquire, and MidPenn Legal Services, files this Concise Statement of Errors Complained of on Appeal in accordance with Pa R.A.P. §905(a)(2) and 1925(a)(2) as follows:

- I. The Trial Court committed an error of law and violated Appellant's right to due process by finding him in contempt without providing a hearing before a judge and by failing to permit Mr. Williams an opportunity to file exceptions to the Master's recommendation.
- II. The Trial Court abused its discretion when it found Appellant in contempt for failing to pay court order custody evaluation costs when

Appellant had no current ability to pay those costs and the Trial Court had granted Appellant *in forma pauperis* status.

- III. The Trial Court committed an error of law by imposing a sanction of imprisonment in a civil contempt proceeding without informing Mr. Williams of his right to counsel; thereby ensuring he did not knowingly, intelligently, or voluntarily waive that right.
- IV. The Trial Court committed an error of law for setting a purge amount without inquiring into Appellant's actual ability to pay the amount set.
- V. The Trial Court abused its discretion when it imposed a purge condition that Appellant could not meet.

Date: 6/5/19


Marsha Chwastiak, Esquire
MidPenn Legal Services
Attorney I.D. No. 56967
315 North Centre Street
Pottsville, PA 17901
(570) 628-3931 x3303
Attorney for Appellant

Civil Case: S-3416-2009

Action	DIVORCE
Received	12/07/2009 @ 10:07AM

Initial Cost	165.50
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Filings	420
Plaintiffs	2
Defendants	1

Paid	
Plaintiff	869.00
Defendant	1079.50
Office	18.00
Total	1966.50

Divorce			
Date Married	Cause	Decree Date	Judge
02/10/2001	NO FAULT	12/15/2011	DOMALAKES,JOHN E

Plaintiffs	Defendants
WILLIAMS,BETH A CHICKILLY,BETH A	WILLIAMS III,THOMAS L

Filings				
Date	Filing	Filed By	Cost	To
07/09/2019	NOTICE PURSUANT TO PA. R.A.P. 1931 (d)	PROTHONOTARY		
06/21/2019	TRANSCRIPT	COURT REPORTER		
06/21/2019	ORDER	SUPERIOR COURT		
06/19/2019	ORDER	SUPERIOR COURT		
06/19/2019	ORDER-GRANTED	SUPERIOR COURT		
06/07/2019	ORDER	SUPERIOR COURT		
06/07/2019	ORDER-GRANTED	SUPERIOR COURT		
06/06/2019	REQUEST FOR TRANSCRIPT	CHWASTIAK,MARSHA ANN		
06/06/2019	REQUEST FOR TRANSCRIPT	CHWASTIAK,MARSHA ANN		
06/05/2019	CONFIDENTIAL FORM	CHWASTIAK,MARSHA ANN		
06/05/2019	NOTICE OF APPEAL	CHWASTIAK,MARSHA ANN		PLAINTIFF
06/05/2019	CONCISE STATEMENT OF MATTERS	CHWASTIAK,MARSHA ANN		
06/05/2019	REQUEST FOR TRANSCRIPT	CHWASTIAK,MARSHA ANN		
06/05/2019	PROOF OF SERVICE	CHWASTIAK,MARSHA ANN		
06/05/2019	OPINION AND ORDER OF COURT-COPIES MAILED	DOMALAKES,JOHN E		
06/05/2019	ORDER-DENIED	DOMALAKES,JOHN E		
05/29/2019	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		

05/29/2019	ORDER FOR PERFORMANCE	DOMALAKES,JOHN E		
05/24/2019	CONFIDENTIAL FORM	WILLIAMS III,THOMAS L		
05/24/2019	PRAECIPE FOR HEARING LIST	WILLIAMS III,THOMAS L		
05/24/2019	MOTION FOR RECONSIDERATION	WILLIAMS III,THOMAS L		
05/24/2019	CERTIFICATE OF SERVICE	WILLIAMS III,THOMAS L		
05/22/2019	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		
05/22/2019	ORDER FOR PERFORMANCE	DOMALAKES,JOHN E		
05/22/2019	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		
05/17/2019	PETITION FOR EXTENSION OF TIME	DAY II,ARLEN R		
05/17/2019	CERTIFICATION	DAY II,ARLEN R		
05/17/2019	CERTIFICATE OF SERVICE	DAY II,ARLEN R		
03/27/2019	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
03/27/2019	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 05/09/2019 02:00PM At CCO				
02/22/2019	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		
02/22/2019	ORDER-DENIED	DOMALAKES,JOHN E		
02/04/2019	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
02/04/2019	RULE RETURNED	BALDWIN,WILLIAM		
Special Process on 02/14/2019 03:00PM At CCO				
01/30/2019	AFFIDAVIT	DAY II,ARLEN R		
01/22/2019	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
01/22/2019	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 02/14/2019 03:00PM At				
01/08/2019	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		
01/08/2019	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
01/08/2019	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 02/06/2019 01:15PM At CCO				
01/04/2019	PETITION FOR CONTEMPT	DAY II,ARLEN R		
01/04/2019	VERIFICATION	DAY II,ARLEN R		
01/04/2019	CERTIFICATE OF SERVICE	DAY II,ARLEN R		
12/04/2018	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		
12/04/2018	ORDER FOR PERFORMANCE	DOMALAKES,JOHN E		
12/03/2018	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
12/03/2018	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 01/03/2019 10:00AM At CCO				
11/21/2018	EXHIBITS	CCO		
11/21/2018	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		
11/21/2018	CUSTODY ORDER	DOMALAKES,JOHN E		
11/14/2018	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
11/14/2018	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 11/29/2018 01:15PM At CCO				

11/14/2018	ANSWER	DAY II,ARLEN R		
11/14/2018	CERTIFICATE OF SERVICE	DAY II,ARLEN R		
11/13/2018	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
11/13/2018	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 11/15/2018 09:00AM At CCO				
11/09/2018	PETITION FOR CONTEMPT	WILLIAMS III,THOMAS L		
11/09/2018	CERTIFICATE OF SERVICE	WILLIAMS III,THOMAS L		
11/08/2018	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
11/08/2018	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 11/15/2018 09:00AM At CCO				
10/26/2018	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		
10/26/2018	ORDER-DENIED	DOMALAKES,JOHN E		
10/22/2018	APPLICATION APPROVED AND CONTINUED	CCO		
Special Process on 11/07/2018 03:15PM At CCO				
10/22/2018	MOTION	WILLIAMS III,THOMAS L		
10/19/2018	APPLICATION FOR CONTINUANCE	WILLIAMS III,THOMAS L		
10/15/2018	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
10/15/2018	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 10/25/2018 09:00AM At				
10/12/2018	PETITION FOR SPECIAL RELIEF	DAY II,ARLEN R	64.00	PLAINTIFF
10/12/2018	CERTIFICATE OF SERVICE	DAY II,ARLEN R		
10/12/2018	VERIFICATION	DAY II,ARLEN R		
10/11/2018	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		
10/11/2018	ORDER-HOME EVALUATION	DOMALAKES,JOHN E		
10/10/2018	CUSTODY HEARING OFFICER'S REPORT	CCO		
09/28/2018	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		
09/28/2018	ORDER-DENIED	DOMALAKES,JOHN E		
09/20/2018	COPIES MAILED	CCO		
09/20/2018	APPLICATION DENIED	CCO		
09/20/2018	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
09/20/2018	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 09/27/2018 10:15AM At CCP				
09/19/2018	AFFIDAVIT OF SERVICE	WILLIAMS III,THOMAS L		
09/19/2018	PETITION FOR SPECIAL RELIEF	WILLIAMS III,THOMAS L		PLAINTIFF
09/19/2018	APPLICATION FOR CONTINUANCE	WILLIAMS III,THOMAS L		
09/11/2018	NOTICE OF CUSTODY CONFERENCE	BALDWIN,WILLIAM		
Special Process on 10/09/2018 03:00PM At CCO				
08/22/2018	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		

08/22/2018	ORDER GRANTING IN FORMA PAUPERIS	DOMALAKES,JOHN E		
08/20/2018	PETITION TO MODIFY CUSTODY ORDER	WILLIAMS III,THOMAS L		PLAINTIFF
08/20/2018	APPLICATION TO PROCEED IN FORMA PAUPERIS	WILLIAMS III,THOMAS L		
08/20/2018	VERIFICATION	WILLIAMS III,THOMAS L		
07/18/2018	ORDER OF COURT/COPIES MAILED	DOMALAKES,JOHN E		
07/18/2018	CUSTODY ORDER	DOMALAKES,JOHN E		
07/03/2018	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
07/03/2018	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 07/16/2018 09:00AM At CCO				
06/04/2018	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
06/04/2018	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 07/02/2018 03:00PM At CCO				
05/16/2018	APPLICATION APPROVED AND CONTINUED	CCO		
Special Process on 06/08/2018 11:00AM At CCO				
05/14/2018	APPLICATION FOR CONTINUANCE	WILLIAMS III,THOMAS L	16.00	
04/25/2018	APPLICATION APPROVED AND CONTINUED	CCO		
Special Process on 05/24/2018 09:00AM At CCO				
04/24/2018	APPLICATION FOR CONTINUANCE	DAY II,ARLEN R	16.00	
04/10/2018	ORDER OF COURT/COPIES MAILED	BALDWIN,WILLIAM		
04/10/2018	ORDER/HEARING SCHEDULE FOR	BALDWIN,WILLIAM		
Special Process on 05/11/2018 11:00AM At CCO				
04/09/2018	PETITION FOR CONTEMPT	DAY II,ARLEN R		

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<u>WITNESS</u>	<u>EXAMINATION BY</u>	<u>PAGE</u>
Thomas Williams, III	Hearing Officer:	3

P R O C E E D I N G S

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3 HEARING OFFICER: This is the time and
4 place scheduled for a hearing in the matter of Beth
5 Williams, Chickilly now, versus Thomas Williams. Both
6 parties are present as well as Attorney Day for
7 Plaintiff. We're here on the rule to show cause dated
8 March 27th.

9 (The parties were placed under oath by the
10 Hearing Officer.)

11 EXAMINATION

12 BY THE HEARING OFFICER:

13 Q. The reason we're here, Mr. Williams, you
14 haven't paid for your evaluations yet, correct?

15 A. Correct.

16 Q. The last order which was entered in
17 February gave you 30 days. So you had till
18 March 22nd. And why haven't you paid?

19 A. I don't have the funds.

20 Q. And are you working yet?

21 A. No, I'm not actually.

22 Q. When is the last time you worked?

23 A. Last week.

24 Q. Where were you working?

25 A. I worked in Huntingdon County, New Jersey.

—Jennifer F. McGrath, Official Court Reporter—

1 Q. Handyman?

2 A. Yeah.

3 Q. And what do you mean last week? Did they
4 call you in? It's not a steady job?

5 A. No. It's work when they have it, you know.
6 Basically a subcontractor.

7 Q. All right. Well, last time, you were found
8 to have sufficient income. And also what's being
9 considered here is how much time has elapsed. This is
10 now -- we're seven months into this. So certainly you
11 had time.

12 So Counsel, what do you want to do with
13 this situation? I mean, even if we put him in jail,
14 it's not going to get paid. So what do we do here?

15 MR. DAY: Well, I mean, that's the
16 question. Nothing we've done so far has forced him to
17 pay. It's my understanding he's been on vacations in
18 Florida and has another vacation scheduled.

19 BY THE HEARING OFFICER:

20 Q. Is that true? Were you on vacation in
21 Florida?

22 A. I was.

23 Q. How did you afford that?

24 A. I didn't. I went to see my father. It was
25 his 60th birthday. It was the first time I seen him

1 in 10 years.

2 Q. How did you get there?

3 A. My sister.

4 Q. Your sister what, drove you?

5 A. She flew me down.

6 Q. Oh. So do you have any documentation to
7 show that she paid for the ticket?

8 A. No.

9 Q. All right. Well, I guess my recommendation
10 is going to be that you be found in --

11 A. I could get it.

12 Q. I'm sorry?

13 A. I can get it.

14 Q. Well, today is the day you were supposed to
15 have it. So I guess my recommendation's going to be
16 that you be held in contempt and that you be given a
17 date to pay it by, which will be really quick, like a
18 week or something. And if you don't do it in that
19 time, you'll be directed to go to Schuylkill County
20 jail and serve some time in jail.

21 A. And that's going to --

22 Q. Well, make you be in and out of jail until
23 you pay it. So hopefully you'll get tired of being in
24 jail and decide to save the money to pay it.

25 A. That's what it is? I don't make the income

1 in order to save the money to pay for it.

2 Q. Well, but now you've had seven months go by
3 for \$1,100. That's not even 200 a month.

4 A. Well, I have my income tax return. I have
5 my income tax return Yeah, you're right. It's not
6 when I make \$900 a month.

7 Q. Did you get a refund?

8 A. Well, that -- my accountant needed to file
9 for a continuance or whatever that's -- extension
10 or --

11 Q. Yeah.

12 A. -- or some sort of thing --

13 Q. Uh-huh.

14 A. -- for legal reasons because my ex-wife
15 claimed a child that she wasn't supposed to.

16 Q. So are you saying that you're going to be
17 getting a refund?

18 A. I am going to be getting a refund.

19 Q. When are you going to be getting it?

20 A. As soon as my accountant gets back to me
21 and lets me know what the status is with the legal
22 part of it so that I'm not in trouble with federal --

23 Q. Well, you might be able to borrow against
24 it or whatever. Until then, my recommendation is what
25 I said. And you can take whatever action you think is

1 appropriate for the refund, if you can expedite it or
2 whatever. Okay. I have to run it by Judge Domalakes.
3 Thank you.

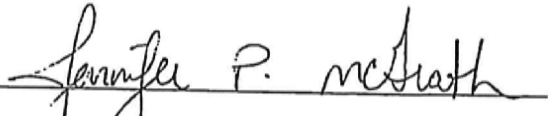
4 MR. DAY: All right. Thank you.

5 (Whereupon, at 1:13 p.m., the proceedings
6 concluded.)
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CERTIFICATE

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I hereby certify that the proceedings from audio recording are contained fully and accurately to the best of my ability and that this copy is a correct transcript of the same.


Jennifer P. McGrath
Official Court Reporter

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.




Valerie West, Esquire
PA. I.D. No. 38919
Counsel for Appellant

Date: June 12, 2019

CERTIFICATE OF COMPLIANCE

I, Valerie West, hereby certify, pursuant to Pa. R.A.P. 2135, that this brief does not exceed 14,000 words.



Valerie West, Esquire

Date: June 12, 2019

CERTIFICATE OF SERVICE

I, Valerie West, hereby certify that I have served Appellant's Brief upon the following persons at the addresses and in the manner listed below.

VIA PACFile and USPS:

Arlen R. Day, II, Esquire
Fanelli, Evans & Patel, PC
One Mahantongo Street
Pottsville, PA 17901

The Honorable John E. Domalakes
Schuylkill County Court of Common Pleas
Schuylkill County Courthouse
401 North 2nd Street
Pottsville, PA 17901



Valerie West, Esquire

Date: June 12, 2019