

**IN THE SUPERIOR COURT OF PENNSYLVANIA**

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**DOCKET NO. 912 MDA 2019**

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**B.A.W. n/k/a B.A.C. v. T.L.W., III**

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**BRIEF OF APPELLEE**

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Appeal from the May 22, 2019 Order of the Court of Common Pleas of Schuylkill County entered at Docket No. S-3416-2009

**This is a Children's Fast-Track Appeal**

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## **I. Counter-Statement of the Case**

As shown by the Docket Sheet for this case, this case involved a substantial amount of litigation, during which Father represented himself, pro se, including the filing of numerous petitions. (R. A8-11). With respect to his petition for in forma pauperis, as shown by the Docket Sheet, the petition was granted without a hearing and without requiring that Father present any evidence that he qualified for in forma pauperis status. (R. A11).

With respect to the present matter, on August 20, 2018 Father filed a pro se petition seeking modification of custody. (R. A11). On October 11, 2018, after conciliation was not successful, the trial court entered an order for custody evaluations, with Father to pay \$1,666.66 of the costs. (R. 1b-2b)<sup>1</sup>. The Order specifically gave notice that "Failure to comply with the terms of this order may result in fines, imprisonment or other sanctions." (R. 2b).

On November 9, 2018 Father filed a Petition for Special Relief, in which he requested lost wages for the time period

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<sup>1</sup> Appellee has appended the applicable orders referenced in her brief for this Court's convenience, in the format of a reproduced record, to track the method used by Appellant.

November 4, 2018 to November 7, 2018, and November 9, 2018 to November 12, 2018, which Father represented under penalty for unsworn falsification he lost wages of \$125.00 per day. (RR.3b-4b). As of November 9, 2018 Father had paid nothing toward his share of the cost of the custody evaluation, such that on November 14, 2018 an Order of Court was entered issuing a Rule upon Father to show cause why he should not be held in contempt of the October 31, 2018 Order. (RR.5b). The November 14, 2018 Order of Court also gave notice that the result could be sanctions, including possible incarceration and fines, and may involve a change in custody if found to be in the best interests of the children. (RR.5b).

At the hearing held November 29, 2018 Father was given the opportunity to be heard and present evidence. Father presented no evidence, but did testify that he was off work since October 24, 2018 because of a surgery and would resume work on November 28, 2018 (RR. 6b). Despite the fact that this is contrary to Father's statement that he lost wages of \$125.00 per day for November 4 through November 7, and November 9



through November 12, 2018 (RR. 3b), and despite the fact that Father presented no evidence that Father has any bills, or of his actual income, on December 4, 2018 an Order of Court was entered giving Father an extension of time to January 10, 2019 to pay his share of the cost of the custody evaluation. (RR. 6b-7b).

As of January 10, 2019 Father had not complied with the October and December Orders of Court, such that on February 4, 2019 an Order of Court was entered issuing a Rule upon Father to show cause why he should not be held in contempt of the October 31, 2018 and December 4, 2018 Orders of Court. (RR. 8b). The February 4, 2019 Order of Court also gave notice that the hearing could result in sanctions, including possible incarceration. (RR. 8b).

On February 14, 2019 a hearing was held at which time Father presented no evidence, and, instead, just gave testimony regarding his alleged employment earnings, including his incredible testimony that he no longer puts money in a bank account. Despite that it is obvious that Father is purposely hiding his funds from the court, and absent any actual evidence of bills

or earnings, in an Order of Court dated February 22, 2019 the trial court did not hold Father in contempt, and, instead, gave Father another 30-day extension of time to pay his share of the costs of the custody evaluation. (RR. 9b-10b).

As of February 23, 2019 Father had not paid anything toward his share of the costs of the custody evaluation, and on March 27, 2019 an Order of Court was entered issuing a Rule upon Father to show cause why he should not be held in contempt of three orders dated October 31, 2018, December 4, 2018, and February 22, 2019, all of which direct Father to pay his share of the costs of custody evaluations. (RR. 11b). The March 27, 2019 Order of Court also gave notice that the result could be incarceration. (RR. 11b).

On May 9, 2019 a hearing was held on the Rule issued upon Father, at which time Father was given a third opportunity to be heard and present evidence. Father presented no documentation of his income or alleged expenses. (R. A12- A18). When asked if he was working, Father responded that he was not working (R. A-14) and the he is a subcontractor (R. A-15). Father presented no



testimony or evidence that he has any impediment, physical or otherwise, that renders him incapable of working full-time; no testimony or evidence that he, a subcontractor, is unable to obtain other work; or, any testimony or evidence that he is otherwise unable to find regular employment. (R.R. A-12 to A-18). Father also presented no witness or documentation to establish that even as to the subcontracting that he does there is no work available. (RR. A-12 to A-18).

At the hearing, it was raised that Father had been on vacation in Florida and had another vacation planned. (RR. A-16). Father represented that his sister paid for the flight, and, finally, the custody hearing officer requested documentation from Father. (RR. A-16). Father had no documentation to support his testimony that someone else paid for his flight, nor did he provide documentation that all other expenses of the trip were paid by anyone other than him. (RR. A-12 to A-18). The custody hearing officer correctly notes that Father was supposed to have such evidence at the hearing. (RR. A-16).

At the hearing Father also said he was getting an income tax refund, but when pressed for a timeframe within which it would be received Father began making excuses about the timeframe in which he was going to get a refund, and presented no documentation that he was even getting a refund or filing for an extension, etc. (RR. A-17). The hearing officer did suggest to Father that he try to see if he can obtain a loan against his income tax refund. (RR. A-17 to A-18).

On May 22, 2019, after having a third opportunity to be heard and present evidence, the trial court finally saw through Father's facade and finally found Father in contempt. (RR. 12b – 14b). Father requested reconsideration, which was denied by Order dated June 6, 2019 (RR. A-3 to A-4), and this appeal followed.

As a result of Father's non-payment, resolution of this custody matter was delayed more than 7 months, and, to date, has been delayed 10 months.

## **II. Summary of Argument**

With respect to Appellant's claims of error, there is no impediment to a custody hearing officer hearing a custody contempt issue, nor did the trial court deny Father due process or deny him counsel. Father was given three notices and three opportunities to be heard and present evidence on the same very simple issue, and each notice included specific language putting Father on notice of the possibility of incarceration.

With respect to the purge condition, in which Father was incarcerated only on weekends, for 48 hours per weekend, such that he could continue to work, and, based on the record, the purge condition set was not in error.

With respect to Father's claim that he had a right to appointed counsel, Father cited to no case in which any court has held that he is entitled to appointed counsel under the circumstances as exist in this case. Further, Father has represented himself in filing a number of petitions and during a number of hearings, and the issue was a simple one requiring no special knowledge or expertise. As such, there is no error.



### **III. Argument**

#### **A. The trial court did not commit an error of law or an abuse of discretion.**

Appellant asserts that the trial court erred in finding Father in contempt without holding a hearing, in that the trial court unlawfully delegated its power of contempt to the Hearing officer; that the trial court denial of a hearing violated the Rules of Civil Procedure; and, that the trial court denied Father due process.

##### **1. The trial court did not unlawfully delegate its power**

Father asserts that the trial court unlawfully delegated its power, and cites to cases involving a court soliciting the advice of a guardian ad litem, and adopting the advice as an order; a court delegating a sentencing decision to adult probation by relying upon a recommendation of adult probation; and, a court presiding over a grand jury investigation appointing a special prosecutor. None of the cases cited are applicable or determinative, as they have nothing to do with a duly appointed custody hearing officer hearing an issue of contempt of a custody order, nor does Appellant cite to any case under which a duly appointed custody hearing officer cannot hear a custody

contempt matter and make a recommendation to the trial court, after which the trial court can review the evidence received by the hearing officer and render a decision.

Upon a review of the Rules of Procedure regarding custody matters, pursuant to Schuylkill County Rule of Civil Procedure 1915.4-2, Schuylkill County adopted the hearing procedure authorized by Pennsylvania Rule of Civil Procedure 1915.4-2, which allows hearing officers to conduct custody matters. The only limitations to hearing officers addressing custody matters are that they may not hear matters of primary custody, as Rule 1915.4-1(a) limits them to hearing actions for partial physical custody, and, pursuant to Rule 1914.4-1(b), if an action for partial physical custody involves complex questions of law, fact or both, or the parties certify there are serious allegations affecting the child's welfare, a party may move the court for a hearing before a judge, rather than a hearing officer. The Rules contain no other restriction on hearing officers in custody cases.

With respect to Sirio v. Sirio, 951 A.2d 1188, 196 (Pa. Super. 2008), which addressed exceptions filed in a custody action, the



case does not stand for that a custody hearing officer cannot hear a matter of contempt, nor does it otherwise support Appellant's claims. However, as correctly set forth in Sirio, the trial court's scope of review is limited to the evidence received by the hearing officer. See Sirio v. Sirio," 951 A.2d at 1195-1196 (emphasis added).

In this case, the hearing officer conducted a hearing and the trial court reviewed the evidence received by the hearing officer, and, given the lack of evidence showing cause why Father should not be held in contempt, the trial court entered the only order it could based on the evidence received by the hearing officer.

Considering the above, Appellant's claim of error is without merit.

**2. The trial court did not deny Father a hearing nor did the trial court violate any Rule of Civil Procedure**

Appellant asserts that the trial court denied him a hearing, and asserts that Pa. R.C.P. 1915.4-1 narrowly limits hearing officers to preside over partial custody actions when there are no complex questions of law or fact. However, the fact is that Father received three hearings at which he had the opportunity to



present evidence of his income and expenses, and any travel paid for by others, and Father's statement of Pa. R.C.P. 1915.4-1 is a misrepresentation of the content of the Rule. Further, Father received more notice and opportunity to be heard than is required under Pa. R.C.P. 1915.12, which is applicable.

With respect to Father's assertion that he was denied a hearing Father was given hearings on November 29, 2018, February 14, 2019, and May 9, 2019. As such, Father's claim he was denied a hearing is frivolous.

With respect to Father's assertion that Pa. R.C.P. 1915.4-1 narrowly limits hearing officers to preside over partial custody actions when there are no complex questions of law or fact, Rule 1915.4-1 provides:

- (a) A custody action shall proceed as prescribed by Pa. R.C.P. No. 1915.4-3 unless the court, by local rule, adopts the alternative hearing procedure authorized by Pa. R.C.P. No. 1915.4-2 pursuant to which an action for partial custody may be heard by a hearing officer, except as provided in subdivision (b).
- (b) Promptly after the parties' initial contact with the court as set forth in Pa. R.C.P. No. 1915.4(a), a party may move the court for a hearing before a judge, rather than a hearing officer, in an action for partial custody where:
  - (1) There are complex questions of law, fact or both; or

- (2) The parties certify to the court that there are serious allegations affecting the child's welfare.  
Pa. R.C.P. 1915.4-1

Clearly, Pa. R.C.P. 1915.4-1 contains no language under which custody hearing officers cannot hear matters of contempt, or that custody hearing officers cannot hear complex matters or serious allegations affecting the child's welfare.

In addition to Rule 1915.4-1 containing no restriction on custody hearing officers hearing contempt matters, there are two Rules regarding contempt matters in custody actions, Pa. R.C.P. 1915.12 regarding civil contempt for disobedience of a custody order, and Pa. R.C.P. 1915.14 regarding disobedience of an order of court other than a custody order, neither of which Father brings to the Court's attention.

Pa.R.C.P. 1915.12 addresses civil contempt for disobedience of a custody order, which Rule sets forth the notice required; service requirements; failure to appear; and, orders committing a respondent to jail for contempt. Upon a reading of the Rule, it provides for notice and a hearing, after which a court committing a respondent to jail shall specify the condition which must be



fulfilled to obtain release of the respondent. See Pa. R.C.P. 1915.12. Unlike the support Rule regarding contempt, Rule 1915.12 contains no terms under which incarceration may not be imposed without a hearing before a judge. Further, Rule 1915.12 does not require the issuance of a report to which exceptions may be filed.

Pa. R.C.P.1915.14, addresses orders other than a custody order, which is the applicable Rule in this matter, as this matter involves an order for payment of custody evaluations, rather than a violation of the terms of a custody order. Pursuant to Pa. R.C.P. 1915.14, upon receiving notice that Father had not paid his share of the custody valuations, the trial court had the authority to issue a bench warrant for Father's arrest and, if the disobedience is found to be willful, after a hearing Father could have been adjudged in contempt. Rule 1915.14 also does not require the filing of a hearing officer's report or provide for the filing of exceptions.



Considering the fact that Father was given multiple notices and opportunities to be heard and present evidence, rather than issuing a bench warrant under which Father would have arrested before receiving a hearing, Father was given more due process than he would have received under Rule 1915.14, such that there is clearly no error on the part of the trial court.

With respect to the remainder of Appellant's assertions regarding comparison of support rules and the like; cases which do not involve custody matters; and, cases which are otherwise not on point with this case, Appellant cites to no case which provides that a custody hearing officer is prohibited from hearing contempt matters, or under which a trial court cannot review the evidence presented at a contempt hearing and render a decision based on its review of the evidence and then enter an order without first having another hearing before a judge.

Upon a review of the differences in the Rules of Civil Procedure with respect to support contempt versus custody contempt, it is clear that the Commonwealth considers custody of children to be of such importance that the rules regarding violations of custody

orders do not require the same process as the rules applicable to violations of support orders, including no provision providing for a five-step process for civil contempt, as discussed below.

### **3. The trial court did not deny Father due process**

Father asserts he was denied due process, and that a five step process must be applied in civil contempt matters. However, as cited in Harcar v. Harcar, 982 A.2d 1230, which Father cites to, fulfillment of all five factors is not mandated; however, the essential due process requisites for a finding of civil contempt are notice and an opportunity to be heard. See Harcar v. Harcar, 982 A.2d at 1234-1235 (citing Wood v. Geisenhemer-Shaulis, 827 A.2d 1204, 1208 (Pa.Super. 2003); Schnabel Assoc., Inc. v. Bldg. and Const. Trades Council, 338 Pa. Super. 376, 487 A.2d 1327, 1334 (1985).

In this case, Father received three notices and three opportunities to be heard and present evidence, such that his claim of a lack of due process is without merit.



#### **4. Father's claim that the record was inadequate is without merit**

Father asserts error on the part of the trial court in that the record is inadequate to find him in contempt, and asserts that the trial court made "paltry findings about Father's finances." Contrary to Father's assertions, the Rule was issued upon Father, not the hearing officer or the trial court, to show cause why Father should not be held in contempt for nonpayment of his share of the costs of the evaluation. As such, it was Father's burden to place evidence on record that is adequate to show cause why he should not be found in contempt.

Upon a review of the evidence available to the hearing officer, Father earns \$125.00 per day; Father is to receive an income tax refund, but did not clarify when he will receive it; the record is absent any impediment that prevents him from working full time; the record is absent any evidence that he is looking for additional work; the record is absent any evidence of Father's actual expenses, and, in fact is absent any evidence that Father actually pays any expenses; the record reflects that Father went on a vacation to Florida, and is absent any evidence that someone else



paid for the flight, as well as absent any evidence of what his itinerary was; and, the record reflects that Father had 7 months within which to make payment.(R. A-14 – A-18).

Father knew the reason for each hearing that was held, and was given the opportunity to testify and present evidence to show that he is unable to pay his share of the costs of the evaluations. As Father failed to present any such evidence, the record is adequate to support a finding that he did not show cause as to why he should not be held in contempt.

#### **5. The hearing was sufficient**

Father asserts that the hearing was somehow insufficient, which is meritless. Father was given three extensions of time, which delayed this custody matter for 7 months, and was given three notices and opportunities to be heard and to present evidence to show cause why he should not be held in contempt. At the last hearing Father was asked the open ended question: "And why haven't you paid"? This question opened Father to presenting any evidence as to why he has not paid. Instead, Father gave only testimony, without any documentary support,

such that the trial court had nothing to rely upon other than his testimony.

With respect to Father's assertion that the trial court relied entirely on his physical appearance, the assertion is baseless and without any support in the record.

Having been given three notices and three opportunities to be heard and present evidence, and failing on each occasion to do so, it is clear that Father's failure to show cause why he should not be held in contempt was such that the trial court had no choice but to find Father in contempt.

**6. The trial court did not err in not appointing counsel for Father**

Father asserts that the trial court erred in not appointing him counsel when it was determined that he may face incarceration. However, no rule, statute, or case has been cited to under which Father was entitled to the appointment of counsel under the circumstances. Furthermore, if our Legislature wanted there to be a right to appointed counsel in all civil proceedings, including in matters of custody, the Legislature would have adopted legislation providing for such a right.



Our Legislature has not adopted legislation which provides for a right to counsel, appointed or otherwise, in custody proceedings under circumstances in which a party may be incarcerated for contempt.

With respect to civil contempt in custody matters, of the two rules that apply to custody cases, neither provides for the appointment of counsel in contempt proceedings. See Pa. R.C.P. 1915.12, Pa. R.C.P. 1915.14.

In this case, Father has represented himself substantially, including the filing petitions for modification, contempt, and special relief, and litigating modification, contempt, and special relief pro se, such that this case does not involve circumstances in which an unrepresented parent is unable to adequately advocate for himself.

In this case, the issue before the court was the simple issue of Father showing the trial court why he should not be held in contempt for non-payment of his share of the cost of the custody evaluation. As such, no specialized knowledge was required on the part of Father, nor did Mother have the upper hand because



she was represented by counsel. In fact, Father makes no claim that the issue before the trial court was in any manner such that he was unable to adequately advocate for himself.

Upon a review of the amicus brief of the A.C.L.U., and that of Father, neither contains citation to any case which has held that under the specific circumstances existing in this case Father had a right to have counsel appointed to represent him. There being no statute, rule or case on point which provides a right to counsel, the trial court did not err in not appointing counsel for Father.

**7. This Court should consider the best interests of the children**

Finally, it is well settled that the best interests of the children is paramount. See Commonwealth ex rel. Parikh v. Parikh, 449 Pa. 105 (1972) (citing Cochran Appeal, 394 Pa. 162, 145 A.2d 857 (1958), Com. ex rel. Graham v. Graham, 367 Pa. 553, 80 A.2d 829 (1951)). Clearly, moving custody matters to resolution is in the best interests of the children, such that the Commonwealth has an interest in getting custody matters resolved timely.

In October of 2018 custody evaluations were ordered to assist in determining the best interests of the children. Due to Father's non-payment of his share of the costs of the custody evaluation this matter was delayed on three occasions, for a total of seven months. Father, who is a sub-contractor, with no physical impediments, reports a daily income of \$125.00 per day, such that if he worked 5 days per week he could earn \$32,500.00 yearly. Despite this, after seven months of delay due to non-payment Father had yet to pay the \$1,666.00 he was ordered to pay.

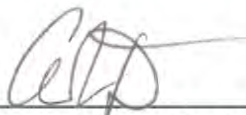
Due to Father's non-payment the children have remained in custody-limbo, which the trial court recognized is not in the children's best interests, such that something had to be done to move this case forward. This Court should also consider the best interests of the children by affirming the trial court so that this matter moves forward.

#### **IV. Conclusion**

In the best interests of the minor children this Honorable Court should Order that the decision of the trial court is affirmed, and remand this matter back to the Court of Common Pleas of Schuylkill County, Pennsylvania as soon as is possible so that the trial court may address the best interests of the children.

Respectfully Submitted:

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**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.

Submitted by: Counsel for Appellee

Signature:  \_\_\_\_\_

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