

The plaintiff is granted leave to file an amended complaint within twenty (20) days hereof.

Exceptions are granted the plaintiff.

HARBAUGH V. KELLER, C.P. Franklin County Branch, No. F.R.  
1988-664

*Custody - Civil v. Criminal Contempt - Right to Purge*

1. If a person is found in violation of a partial custody or visitation order, unlike other types of civil contempt, no provision must be included allowing the party to purge himself of the contempt.

R. Mark Thomas, Esquire, Attorney for Plaintiff  
Jonathan D. Fenton, Esquire, Attorney for Defendant  
Teresa Wolfgang, Chief Domestic Relations Officer

#### OPINION AND ORDER

WALKER, J., October 26, 1990;

#### Procedural History

Plaintiff Terry L. Harbaugh (hereinafter "plaintiff") and defendant Tonya L. Keller ("defendant") are the parents of Jackie Marie Harbaugh ("Jackie"), born August 17, 1988. Plaintiff filed a complaint for custody on December 12, 1989. On February 15, 1990, an order of court for joint legal custody pending a custody hearing was entered by this court awarding plaintiff partial custody on alternate weekends on Saturday or Sunday, at his election.

Plaintiff was to exercise partial custody of Jackie on Father's Day, June 17, 1990. However, the defendant informed him that day that the child was ill and could not go with him. Plaintiff, alleging that the child was not sick, filed a petition for contempt for failure to comply with the custody/partial custody order on June 21, 1990.

Plaintiff, after exercising partial custody on June 24, 1990, failed to return the child. Defendant filed a petition for contempt on June 27, 1990, and, on that date, Judge William H. Kaye issued an order directing plaintiff to return the child to her mother, giving defendant sole physical custody of the child pending a custody

hearing and vacating that section of this court's previous order granting plaintiff partial custody on alternate weekends. Judge Kaye also ordered that defendant's paramour, Jeffrey L. Pine ("Pine"), who had been charged with possession with the intent to deliver, not have any contact with the child while the charges were pending against him. Plaintiff returned the girl on June 28, 1990.

A contempt hearing was held on July 17, 1990 and September 25, 1990.

#### Discussion

This is an unfortunate, yet all too common, situation in which two parents use a child to serve their own self-indulgent interests. To be certain, it is the child who is put in the middle of the senseless battle and who truly suffers. Despite its concerns, however, this court is compelled to rule only on the petitions now before it.

This court must first address the issue of whether the present petitions were properly brought in the nature of petitions for civil contempt or whether, as counsel for the defendant now maintains, the petitions should have been brought as criminal contempt petitions.

Section 4346 of the Domestic Relations Code provides:

A party who willfully fails to comply with any visitation or partial custody order may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:

- (1) imprisonment for a period not to exceed six months;
- (2) a fine not to exceed \$500;
- (3) probation for a period not to exceed six months.

23 Pa. C.S.A. Section 4346 (a).

The Superior Court held in *Vito v. Vito*, 380 Pa.Super. 258, 551 A.2d 573 (1988), that when parties are guilty of contempt for isolated, past violations, the contempt is criminal in nature and the party must be entitled to all of the essential procedural safeguards that a criminal defendant is afforded. The court also explained that civil contempt may only be punished by a fine or imprisonment that

is conditional and capable of being purged. Therefore, according to defendant's counsel, these actions must either be brought as criminal contempt proceedings or this court, if it finds the parties guilty of violating the partial custody orders, must fashion a penalty which allows the parties to purge themselves of the contempt. This court disagrees.

While the argument may have merit with regard to other types of contempt, this court believes that an exception exists for persons who violate visitation or partial custody orders. In *Sutliff v. Sutliff*, 361 Pa. Super. 194, 522 A.2d 80 (1987), the court stated that the appellant:

... claims that if [the action is] viewed as civil contempt, the lower court is 'clearly wrong' because it did not include the required condition whereby (she) could purge herself. While such a condition is a traditional descriptive feature of civil contempt . . . we hold that under 23 Pa. C.S.A. section 4346 when imposing a contempt fine for noncompliance with visitation or partial custody the order need not specify a condition which, when fulfilled, would result in the purging of contempt.

361 Pa. Super. at 200, 522 A.2d at 83.

The Superior Court has recognized that a distinction must be made between partial custody orders and other types of orders. The *Sutliff* decision clearly states that if a person is found to be in contempt of a partial custody or visitation order. Unlike other types of civil contempt, no provision must be included allowing the party to purge himself or herself of the contempt.

This court must now determine whether, in fact, either of the parties willfully violated this court's previous orders and, if so, fashion an appropriate penalty. We note that this court has reaped little benefit from the two days of testimony. At best, the credibility of most of the witnesses was tenuous. The weight to be given to the evidence offered and the credibility of the witnesses is solely a question for the trier of fact. See *Kay v. Kay*, 460 Pa. 680, 683, 334 A.2d 585, 586, (1975), and *Wilson v. Benjamin*, 322 Pa. Super. 211, 221, 481 A.2d 328, 333 (1984).

For ease of discussion, we will address each of the parties' petitions for contempt separately.

## I. Plaintiff's Petition alleging that Defendant Keller was in Contempt

The Plaintiff avers that his ex-wife wrongfully refused to allow Jackie to go with him on Father's Day, June 17, 1990. He testified that when he arrived at the Defendant's home, the defendant told him that the child was ill and could not go with him. Plaintiff also testified that Jackie appeared to be in good health at that time and that, later in the day, he drove by the defendant's house and saw the girl playing in the defendant's backyard.

According to the defendant, a licensed nurse, the child became ill the day before Father's Day and, for the next two days, had a temperature of 102 degrees. Yet, despite the child's alleged illness, the defendant took Jackie to Pine's mother's home, and on the way back to defendant's mobile home, allowed the girl to slide down a sliding board. While she was playing, the girl was hit in the face with a teeter totter.

Several witnesses, all of whom are related to defendant's paramour, testified that Jackie was ill on Father's Day. However, a disinterested witness, John Nicholson, testified that he spent Father's Day with Pine's family and witnessed the teeter totter accident. He also saw Jackie playing outside all day and she did not appear to be ill.

This court simply does not believe that Jackie was as sick on Father's Day as the defendant now alleges or that defendant was justified in refusing to give her to the defendant. We also believe that plaintiff and Nicholson saw the child playing in the yard that day.

This court finds that defendant Tonya Keller was in contempt of the court's February 15, 1990 order by refusing to allow plaintiff to exercise partial custody of the child on June 17.

## II. Defendant's Petition alleging that Plaintiff Harbaugh was in Contempt

Defendant alleges that plaintiff was in contempt of the February 17, 1990 and June 27, 1990 orders by failing to return the child after

exercising partial custody. It is clear to this court that plaintiff, in fact, willfully refused to return the child when he should have and was in contempt of two of this court's orders.

Plaintiff alleges that the child had a bruised eye when he picked her up on June 24 and that he took her to the hospital emergency room. A representative of the Franklin County Children and Youth Service did advise the plaintiff not to return the child to the defendant until the agency had completed its investigation.

Plaintiff, however, was informed by Children and Youth Service the following afternoon that the bruise was caused when Jackie was struck in the face by a teeter totter on Father's Day and that there was no evidence that Jackie was being abused by the defendant. A representative of the agency also told the plaintiff before or on June 26 to return Jackie to her mother and, in fact, Judge Kaye's June 27 order directed plaintiff to return the girl and revoked his rights to partial custody. Plaintiff, however, did not do so until June 28, 1990.

We must also find the plaintiff to be in contempt of this court's orders. We would be very reluctant to do so if he had returned the girl to her mother soon after learning that Children and Youth's investigations showed that the allegations of abuse were unfounded. However, the plaintiff kept her for three additional days, never contacting the defendant to inform her of the child's condition or whereabouts. He also completely ignored Judge Kaye's order directing him to return the girl until he was advised that criminal charges would be filed against him if he did not do so immediately.

#### Conclusion

Both plaintiff and defendant have willfully disregarded this court's orders and are found to be in contempt. Defendant Tonya Keller wrongfully refused to allow plaintiff to exercise partial custody on Father's Day, violating the order dated February 15, 1990. She is ordered to pay the sum of \$150 plus costs. Defendant Terry L. Harbaugh willfully disregarded the orders dated February 15, 1990 and June 27, 1990 by refusing to return Jackie to her mother after exercising partial custody on June 24, 1990. He is also ordered to pay the sum of \$250 plus costs. Costs shall be shared equally by the plaintiff and the defendant.

#### ORDER OF COURT

October 26, 1990, the court finds the defendant to be in contempt of court and orders her to pay the sum of \$150 plus costs.

The court finds the plaintiff to be in contempt of court and orders him to pay the sum of \$250 plus costs.

Both plaintiff and defendant are ordered to appear at the Collections Office, Franklin County Courthouse Annex, Chambersburg, Pennsylvania, within twenty (20) days from the date of this order to work out a payment plan.

IN RE: RUPERT ESTATE, C.P. Franklin County Branch, Orphans' Court Div., No. 171 of 1975

#### *Life Estate - Petition to Sell Real Estate Inalienability of Realty*

1. Property does not become inalienable merely because it is subject to a life estate.
2. Where a decedent devised real estate subject to a life estate with the property to be sold at the death of the life tenant, 20 Pa. CSA, Sec. 8301, does not authorize the Court to direct a sale.

*George E. Wenger, Esq., Counsel for Petitioner  
Thomas B. Steiger, Esq., Counsel for Respondents*

#### OPINION AND ORDER

KELLER, P.J., September 24, 1990:

Mary M. Rupert died testate on October 30, 1974. Her Last Will and Testament dated November 30, 1970, with a codicil dated March 16, 1971, was admitted to probate by the Register of Wills of Franklin County. Under the will, her son Edgar B. Rupert, Jr., petitioner herein, was devised a life estate in the real estate here under consideration and fixtures attached therein. The real estate consisted of a meat market, known as Rupert's Meat Market and a dwelling house; both were located along R.D.#7 in Chambersburg. Mr. Rupert was required to insure the property, pay the taxes and maintain the property in ordinary repair. Upon his demise the property was to be sold, converted into cash and equally divided