

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Julie R. Rowell,	:	
	:	
Petitioner-Appellee,	:	
	:	
v.	:	No. 12AP-262
	:	(C.P.C. No. 08JU-10-13850)
Julie A. Smith,	:	
	:	(REGULAR CALENDAR)
Respondent-Appellant.	:	

D E C I S I O N

Rendered on October 9, 2012

Fey Law Offices, and Carol Ann Fey; Massucci & Kline, LLP, and LeeAnn Massucci, for appellee.

Julie A. Smith, pro se.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relation, Juvenile Branch

CONNOR, J.

{¶ 1} Respondent-appellant, Julie A. Smith ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, awarding sanctions in a contempt proceeding.

{¶ 2} This child-custody action between appellant and petitioner-appellee, Julie R. Rowell ("appellee"), former same-sex partners, presents a lengthy and active litigation history, which will be recounted here only to the extent necessary to address the issues specifically before the court in this appeal. The parties were involved in a relationship when appellant gave birth to a daughter in 2003. Appellee has no biological relation to the child, who was conceived through artificial insemination. After cohabiting and raising the child together for an extended period, the parties ended their relationship

in 2008. Appellee then filed a motion for shared custody and an accompanying motion for temporary orders. The trial court eventually designated appellant as the legal custodian and residential parent of the child, pending a final determination of custody, and granted visitation rights to appellee.

{¶ 3} Appellant refused to comply with appellee's visitation rights under the trial court's various orders in the case. This led to multiple contempt filings by appellee. During these proceedings before the trial court, two initial appeals reached this court: *Rowell v. Smith*, 10th Dist. No. 09AP-147 (Mar. 23, 2009) (dismissed for lack of a final appealable order), and *Rowell v. Smith*, 186 Ohio App.3d 717, 2010-Ohio-260 (10th Dist.) (reversing contempt finding based upon trial court's improper modification of previous order).

{¶ 4} Two subsequent contempt orders concern us here: on March 2, 2010, appellee filed a motion for contempt based upon appellant's continued failure to comply with visitation orders. The trial court imposed a sanction upon appellant of three days in jail and \$2,500 for attorney fees and costs incurred by appellee in attempting to enforce visitation rights. We reversed that contempt finding in *Rowell v. Smith*, 10th Dist. No. 10AP-675, 2011-Ohio-2809, based upon our determination that the trial court lacked jurisdiction to enter and enforce temporary visitation orders in the matter. The Supreme Court of Ohio has now reversed our decision in that case. *Rowell v. Smith*, 2012-Ohio-4313 (slip opinion), decided September 26, 2012. Pending its determination in that appeal, the Supreme Court granted a motion by appellee that reinstated the terms of the trial court's temporary visitation orders pending resolution of the appeal in the Supreme Court.

{¶ 5} Appellee filed a new motion for contempt on August 17, 2011, asserting continued non-compliance with the visitation orders as reinstated by the Supreme Court. This is the order at issue in the case before us. On January 17, 2012, a magistrate issued an order finding appellant again in contempt. By decision and judgment entry on March 6, 2012, the court overruled appellant's objections to the magistrate's decision and maintained the contempt finding. This appeal ensued.

{¶ 6} Appellant brings the following three assignments of error for our review:

1. The trial court erred and abused its discretion in once again finding Appellant guilty of contempt of an invalid temporary visitation order.
2. The trial court erred and abused its discretion in finding Appellant in contempt of an invalid temporary visitation order in violation of Appellant's paramount parental rights as guaranteed by the U.S. and Ohio Constitutions and the U.S. Supreme Court case of *Troxel v. Granville*.
3. The trial court erred and abused its discretion in finding Appellant guilty of contempt of an invalid order on appeal, the effect of which would render the issues on appeal moot, should Appellant purge or serve the underlying sanctions.

{¶ 7} The present matter involves a civil contempt proceeding. The purpose of civil contempt proceedings is to encourage or coerce a party in violation of active court orders to comply with those orders for the benefit of the other party. *Pugh v. Pugh*, 15 Ohio St.3d 136, 139 (1984); *State v. Kilbane*, 61 Ohio St.2d 201, 204-05 (1980). The Supreme Court of Ohio has defined contempt as " 'conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.' " *Denovchek v. Bd. of Trumbull Cty. Commissioners*, 36 Ohio St.3d 14, 15 (1988), quoting *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55 (1975), paragraph one of the syllabus. A court has both inherent and statutory authority to punish contempt. *Howell v. Howell*, 10th Dist. No. 04AP-436, 2005-Ohio-2798, ¶ 19. A sanction for civil contempt must allow the contemnor the opportunity to purge herself of the contempt prior to imposition of any punishment. *Burchett v. Miller*, 123 Ohio App.3d 550, 552 (6th Dist.1997). Upon appeal, our review is limited to a determination of whether the trial court abused its discretion in its discretionary and factual determinations in the civil contempt proceeding. *Williamson v. Cooke*, 10th Dist. No. 05AP-936, 2007-Ohio-493.

{¶ 8} As a preliminary issue, we note that there is some debate between the parties as to whether the present appeal has been rendered moot by appellant's subsequent compliance with visitation orders and the Supreme Court of Ohio's recent disposition of the case. We find that the present appeal is not moot. "An appeal from a contempt charge is moot when a defendant has made payment or otherwise purged the

contempt." *Farley v. Farley*, 10th Dist. No. 02AP-1046, 2003-Ohio-3185, ¶ 62. Appellant does not assert on appeal that she has purged the current round of sanctions for contempt. The sanctions remain ripe for ultimate enforcement by the trial court, and in fact, the record indicates that the trial court has now scheduled an enforcement hearing for contempt sanctions in the matter. There is nothing moot about the case as it is now postured.

{¶ 9} Appellant's first two assignments of error will be addressed together. In these, appellant asserts that the trial court abused its discretion in making the contempt finding, both because the underlying visitation order was invalid for the reasons given in our June 9, 2011 decision, and because the grant of visitation rights to a non-parent violates appellant's fundamental rights as a parent under the United States and Ohio Constitutions. The Supreme Court of Ohio's decision in *Rowell*, 2012-Ohio-4313, extensively discusses and explicitly rejects all the arguments raised by appellant in this context. In particular, that decision rejects appellant's assertion that the United States Supreme Court's plurality decision in *Troxel v. Granville*, 530 U.S. 57 (2000) supports the premise that appellee's fundamental constitutional rights as a parent are of such paramount nature that the state cannot impose visitation with a non-parent against her wishes: "We discussed *Troxel* within the realm of Ohio's nonparental-visitation statutes in *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165. We acknowledged that *Troxel* states that there is 'a presumption that fit parents act in the best interest of their children.' *Id.* at ¶ 44. But that presumption is not irrebuttable. 'Moreover, nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest.' *Id.*" *Rowell*, 2012-Ohio-4313, at ¶ 21. We are therefore bound by the Supreme Court of Ohio's resolution of these issues and overrule appellant's first and second assignments of error.

{¶ 10} Appellant's third assignment of error raises a more complicated corollary issue. Appellant asserts that enforcement through contempt of a court order whose validity is contemporaneously attacked on appeal places her on the horns of a fundamentally unjust dilemma that deprives her of due process of law: she must either comply with a visitation order that, as she believes, violates her fundamental constitutional rights and will be invalidated by the higher court on that basis, or incur

contempt findings that she dare not purge lest she moot out the very appeal that challenges the validity of the orders. Under these conditions, she argues, the contempt order is flawed because it offers no meaningful opportunity to purge, which is required for a valid civil contempt finding. *See Burchett.*

{¶ 11} With due sympathy for the dilemma described, we must acknowledge here that the Supreme Court expressly reinstated the underlying orders that gave rise to the current contempt finding. We must presume that the Supreme Court did not reinstate the orders with the understanding that they could then be freely disregarded by the parties. Appellant does not contest in this appeal that she did not comply with the orders during the period covered by the contempt finding, nor does appellant dispute that she did not take the opportunity to purge the contempt and avoid sanctions in the manner offered by the court's order. Adoption of appellant's logic regarding the enforcement of orders pending appeal would strip a domestic relations court of any ability to manage the proceedings before it. The domestic relations court, by the nature of such proceedings, inevitably must often rely on contempt proceedings to compel compliance with orders issued by the court and currently in force. Due to the reinstatement of the visitation orders by the Supreme Court, the trial court was not deprived of jurisdiction, and had the authority to pursue any proceedings to coerce compliance by appellant even pending an appeal that might eventually vacate those orders. Appellant's third assignment of error is accordingly overruled.

{¶ 12} In summary, we find that the trial court did not abuse its discretion in its contempt finding in this matter, and appellant's three assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed and the matter is remanded for further proceedings.

*Judgment affirmed;
cause remanded.*

KLATT and DORRIAN, JJ., concur.
