

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

IN RE:

J.H.-P.

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:
: Appellate Case No. 26097
:
: Trial Court Case No. 2008-1299
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: (Civil Appeal from Montgomery County
: Common Pleas Court, Juvenile Division)
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O P I N I O N

Rendered on the 13th day of February, 2015.

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C.H.

Appellant, *pro se*

D.P.

Appellee, *pro se*

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FAIN, J.

{¶ 1} Appellant C.H. appeals, pro se, from an order of the Montgomery County Common Pleas Court, Juvenile Division, that confirmed a previous order holding C.H. in contempt of court, imposed a sentence for the contempt, ordered protective supervision of the parties' minor child, J.H.-P., ordered mental health therapy for the child, and set up a graduated schedule of visitation for appellee D.P., the child's father. The mother, C.H., contends that the court erred by failing to find witness testimony to be credible, and therefore the order of the trial court is against the manifest weight of the evidence. The father, D.P., has not filed a responsive brief or otherwise participated in this appeal.

{¶ 2} We conclude that there is evidence in the record to support the trial court's finding that C.H. was in contempt of court, that the penalty for contempt was appropriate, and that findings made to support changes in visitation are not against the manifest weight of the evidence. We also conclude that the trial court erred by ordering protective supervision.

{¶ 3} Accordingly, that part of the order holding mother in contempt and imposing sanctions therefor and instituting the Standard Order of Visitation is Affirmed. The parts of the order related to protective supervision are Reversed.

I. The Course of Proceedings

{¶ 4} This is the second appeal filed in connection with the visitation of the parties' minor child, J.H.-P. See *In re J.H.-P.*, 2d Dist. Montgomery No. 24683, 2012-Ohio-638, hereinafter referred to as the "first appeal." The first appeal

contains sixteen pages of facts, outlining a history of the parties' relationship from the time the child was born in 2006 through the spring of 2009, during which the mother thwarted the father's visitation rights because she believed that the father had sexually abused the child when the child was 18 months old, as a result of which, the child allegedly suffered from mental problems, including post-traumatic stress syndrome.

{¶ 5} In the first appeal, C.H. asked this court to reverse the trial court's finding that the mother's contentions of sexual abuse were unsubstantiated, that the father was not a threat or danger to the child, and that it was in the child's best interest to grant a standard order of parenting time to the father. We affirmed the trial court's order, finding that there was sufficient evidence in the record to support a finding that the father did not abuse his child, and that the trial court's finding to this effect was not against the manifest weight of the evidence. *Id.* We also held that the court order permitting the father to exercise unsupervised visitation was neither an abuse of discretion nor against the manifest weight of the evidence. *Id.*

{¶ 6} While the first appeal was pending, the father, D.P., filed a pro se motion for contempt, alleging that the mother, C.H., had refused to allow him to exercise his visitation rights. A hearing was conducted before a magistrate in June 2012, and a court order was issued overruling the motion for contempt, based on the failure to prove contempt by clear and convincing evidence. After D.P.'s objections to the magistrate's decision were sustained, resulting in a contempt citation against her, C.H. filed a Civ.R. 60(B) motion to set aside the ruling on the basis that she had not been served with a copy of the objections.

{¶ 7} The trial court sustained the Civ.R. 60(B) motion, setting aside the contempt citation, and allowing D.P. an additional 14 days to refile his objections, which he did file timely. The trial court sustained the objections, and set the contempt motion for a new hearing. On December 3, 2012, the court issued an order, finding C.H. in contempt of court for her refusal to allow the father to exercise visitation with the child, and ordered C.H. to serve 10 days in jail and to pay a \$100.00 fine.

{¶ 8} Both penalties for contempt were suspended upon the condition that C.H. comply with all court orders and not interfere with the father's visitation rights. Initially, supervised visitation was ordered through Erma's House, and another hearing was scheduled on January 7, 2013, to determine future visitation. On January 23, 2013, the mother, C.H., filed a motion to hold the father, D.P., in contempt for failing to pay court-ordered child support. On January 31, 2013, the court issued an order setting up two parenting times for the father, D.P., to visit with his child, J.H.-P., and set the case for hearing in March to review visitation and to address the motion for contempt.

{¶ 9} On March 28, 2013, the court issued an order establishing a regular visitation schedule for the father, D.P., and continued the contempt hearing. On August 16, 2013, the father, D.P., filed a second motion for contempt against the mother, C.H., for failing to comply with the order of visitation. On September 6, 2013, the mother filed a second motion for contempt against the father, alleging his failure to pay child support.

{¶ 10} The hearing on the motions for contempt was conducted over a

three-day period, May 7, October 2, and October 9, 2013. An order was filed on January 24, 2014, addressing only the motion for contempt against the mother, finding that C.H. continued to be in contempt of the order of visitation, ordering her to serve 10 days in jail, and setting up protective supervision and a new order of visitation for the father. From this order, C.H. appeals.

II. Standard of Review

{¶ 11} “[T]he weight to be given the evidence and the credibility of the witnesses are primarily matters for the trier of facts to determine.” *In re Guardianship of Smith*, 2d Dist. Clark No. 09CA0069, 2010-Ohio-4528, ¶ 19. The court of appeals has “an obligation to presume that the findings of the trier of fact are correct.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. A trial court’s judgment will be reversed only if its factual findings are against the manifest weight of the evidence. *KeyBank Natl. Assn. v. Mazer Corp.*, 188 Ohio App.3d 278, 2010-Ohio-1508, 935 N.E.2d 428, ¶ 36 (2d Dist.).

{¶ 12} “Abuse of discretion has been defined as an attitude that is unreasonable, arbitrary or unconscionable.” *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985). “It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary. A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning

processes that would support a contrary result.” *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990)

III. Assignments of Error

{¶ 13} Although C.H. filed two briefs, pro se, she did not identify an assignment of error in accordance with App. R. 16. Her second brief includes the following statements as a summary of her arguments:

- 1) THE COURT’S DECISION TO TERMINATE THE MENTAL HEALTH RELATIONSHIP AND PROGRESS MADE BETWEEN THE CHILD VICTIM, THE CHILD [J.H.-P.], AND THERAPIST, TERESA BERTING, M.ED., PCC-S.
- 2) THE COURT CONTINUED VISITATION BETWEEN [D.P.] AND [J.H.-P.] DESPITE HER FEAR AND CONTINUED REQUESTS NOT TO SEE HIM AND THE EXPERT WITNESS’ TESTIMONY STATING THAT CONTINUED CONTACT AND VISITATION IS DETRIMENTAL TO THE CHILD.
- 3) INAPPROPRIATE CONTEMPT FINDINGS RE: MOTHER, [C.H.].
- 4) INACCURACIES IN THE COURT ENTRY REGARDING TESTIMONY AND EVIDENCE.

We will consider her appeal as alleging that the court’s order is against the manifest weight of the evidence and constitutes an abuse of discretion.

IV. The Court's Finding of Contempt Is Not Against the Manifest Weight of the Evidence

{¶ 14} A juvenile court has authority to issue a contempt order for the failure to comply with a visitation order, pursuant to R.C. 2151.21 and 2705.031(A). R.C. 2705.05(A) identifies the appropriate sanctions for contempt, which include for a first offense a fine of not more than \$250, a definite term of imprisonment of not more than 30 days in jail, or both.

{¶ 15} Contempt results when a party before a court disregards or disobeys an order or command of judicial authority. *Flowers v. Flowers*, 10th Dist. Franklin No. 10AP-1176, 2011-Ohio-5972, ¶ 7, citing *Fidler v. Fidler*, 10th Dist. Franklin No. 08AP-284, 2008-Ohio-4688, ¶ 10, citing *First Bank of Marietta v. Mascrote, Inc.*, 125 Ohio App.3d 257, 263, 708 N.E.2d 262 (4th Dist.1998). The law surrounding contempt was created to uphold and ensure the effective administration of justice, secure the dignity of the court, and affirm the supremacy of law. *Fidler* at ¶ 10, citing *Cramer v. Petrie*, 70 Ohio St.3d 131, 133, 637 N.E.2d 882 (1994).

{¶ 16} To establish contempt, a party must prove the existence of a valid court order, that the respondent had knowledge of the order, and a violation of the order. *Benjamin v. Credit General Ins. Co.*, 10th Dist. Franklin No. 04AP-459, 2004-Ohio-6354, ¶ 7, citing *Arthur Young & Co. v. Kelly*, 68 Ohio App.3d 287, 295, 588 N.E.2d 233 (10th Dist.1990). Civil contempt must be established by clear and convincing evidence. *Flowers* at ¶ 9, citing *Sansom v. Sansom*, 10th Dist. Franklin

No. 05AP-645, 2006-Ohio-3909, ¶ 24.

{¶ 17} When reviewing a finding of contempt, including a trial court's imposition of penalties, an appellate court applies an abuse-of-discretion standard. *Fidler* at ¶ 12, citing *In re Contempt of Morris*, 110 Ohio App.3d 475, 479, 674 N.E.2d 761 (8th Dist.1996), citing *Dozer v. Dozer*, 88 Ohio App.3d 296, 623 N.E.2d 1272 (4th Dist.1993); *Arthur Young* at 294. We have defined the abuse-of-discretion standard as a review to determine if the decision is “grossly unsound, unreasonable, illegal, or unsupported by the evidence.” *State v. LeGrant*, 2d Dist. Miami No. 2013-CA-44, 2014-Ohio-5803, ¶ 7.

{¶ 18} The record supports a finding that the three elements of contempt were met; there was an existing court order for visitation, C.H. had knowledge of the order, and she violated the order by taking action that prevented D.P from exercising his right to visitation. In her defense, C.H. presented evidence that she attempted to comply with the order by transporting the child to the police department where the exchange of the child was to occur, but in many instances the child refused to leave with her father. C.H. testified that based on the medical advice of the child's therapist and psychiatrist, she should not force the visitation, which was a trigger for the symptoms of post-traumatic stress syndrome, and if the stress escalates to a verbalized threat of harm to herself or others, the child should be taken to the emergency room for psychiatric evaluation. The medical records produced at the hearing verified that on twelve occasions between February 16, 2013 and August 25, 2013, J.H.-P. was taken to the emergency room based on the child's alleged threats of harm to herself or her father. In each instance, the medical evaluation concluded

that the child was normal and did not represent an imminent threat of harm to herself or others. The medical records further reveal that C.H. repeatedly told medical professionals that the child suffers from PTSD because of sexual abuse by her father, and that she needed to bring the child to the ER for documentation purposes, because she was fighting the legal system to remove the father's visitation rights. Both the therapist and the psychiatrist testified that J.H.-P. was being treated for her current symptoms of PTSD, and neither had investigated or substantiated the allegations of child abuse.

{¶ 19} In contempt actions for violating an order of visitation, several Ohio courts have recognized a defense based on a parent's reasonable, good-faith belief that a child faces imminent harm or has a reasonable, good-faith belief that withholding visitation is necessary to protect the safety of the child. *Hensley v. Hensley*, 6th Dist. Erie No. E-08-26, 2009-Ohio-1738 (citing cases from the 4th, 5th, 8th, 10th and 12th Districts, citations omitted). The trial court does not abuse its discretion in denying the good-faith defense when the trial court properly exercises its discretion to consider all surrounding circumstances and weighs all factors in deciding whether a parent is in contempt. *Id.*

{¶ 20} The trial court specifically found that the testimony of the child's therapist was not credible, based on the conflict between the emergency-room records and the therapist's testimony. Therefore, the court did not find validity in C.H.'s defense that it was medically necessary for her to choose to take J.H.-P. to the emergency room instead of her court-ordered visitation with D.P. The Tenth District Court of Appeals described the role of the reviewing court in a juvenile proceeding as

follows:

A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial. The determination of weight and credibility of the evidence is for the trier of fact. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. The trier of fact is free to believe or disbelieve all or any of the testimony. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. (Citations omitted).

In re B.O.J., 10th Dist. Franklin Nos. 09AP-600, 09AP-601, 09AP-602, 2010-Ohio-791, ¶ 8. Giving appropriate deference to the trial court's findings, we conclude that the findings are not against the weight of the evidence and that the trial court did not abuse its discretion in its order of contempt.

V. The Court Did Not Have Authority to Order

Protective Supervision in a Contempt Proceeding

{¶ 21} The contempt order at issue included an order for "protective supervision," as a remedial measure to help facilitate the implementation of the visitation schedule. As part of that protective supervision, the court required the mother to discontinue using the services of the child's current therapist, and ordered

the children services agency to arrange for a new therapist to help prepare the child for visitation with her father.

{¶ 22} R.C 3109.12(A) grants authority to the juvenile court to issue orders for parenting time or visitation rights to the father of a child born to an unmarried woman. “A juvenile court is vested with broad discretion in determining the visitation rights of a nonresidential parent.” *Gray v. King*, 12th Dist. Clermont No. 2013-01-006, 2013-Ohio-3085, ¶ 12, citing *Otten v. Tuttle*, 12th Dist. Clermont No. CA2008–05–053, 2009-Ohio-3158. However, the court’s authority is limited by R.C. 3109.12 (B), which provides:

Except as provided in division (E)(6) of section 3113.31 of the Revised Code, if the court, pursuant to this section, grants parenting time rights or companionship or visitation rights with respect to any child, **it shall not require the public children services agency to provide supervision of or other services related to that parent's exercise of parenting time rights with the child or that person's exercise of companionship or visitation rights with the child.** This section does not limit the power of a juvenile court pursuant to Chapter 2151. of the Revised Code to issue orders with respect to children who are alleged to be abused, neglected, or dependent children or to make dispositions of children who are adjudicated abused, neglected, or dependent children or of a common pleas court to issue orders pursuant to section 3113.31 of the Revised Code.

{¶ 23} Accordingly, in a visitation proceeding, the juvenile court only has

authority to order “protective supervision” under the authority found in Chapter 2151 or pursuant to R.C. 3113.31.

{¶ 24} Pursuant to R.C. 2151.417, the juvenile court may issue an order for “protective supervision” under the authority of R.C. 2151.353, 2151.414 and 2151.415.

{¶ 25} R.C. 2151.353 provides that “if a child is adjudicated an abused, neglected, or dependent child” the court may place the child in protective supervision.

{¶ 26} R.C. 2151.414 and R.C. 2151.415 apply to proceedings initiated by a children services agency to gain permanent custody of a child.

{¶ 27} R.C. 2151.3514 applies to proceedings when a parent is ordered into treatment for a chemical dependency.

{¶ 28} R.C. 3113.31 applies to proceedings for a protection order based on domestic violence.

{¶ 29} None of these statutory provisions for “protective supervision” apply to the case before us; there has been no complaint filed alleging, or adjudication rendered finding, that the child, J.H.-P. is abused, neglected or dependent. There has been no protection order issued to prevent domestic violence between the parties. There is no allegation of chemical dependency. No child services agency has filed a complaint for custody of the child.

{¶ 30} Although no statutory provision for protective supervision applies to this case, it is also important to examine whether the court had authority to modify visitation as part of the sanction for contempt, as a way to facilitate future compliance. It has been held that “modification of a custody order is not among the available

sanctions listed under R.C. 2705.05(A) as punishment for contempt.” *Fry v. Fry*, 64 Ohio App.3d 519, 522, 582 N.E.2d 11 (3rd Dist.1989). It has further been held that a court does abuse its discretion by modifying visitation as a sanction for contempt and that a court’s continuing jurisdiction to modify visitation is not invoked without a motion for modification, termination or restriction of visitation rights. *Andrulis v. Andrulis*, 26 Ohio App.3d 164, 166, 498 N.E.2d 1380 (9th Dist.1985).

{¶ 31} Accordingly, we conclude that the trial court did not have authority to order protective supervision as part of an order for contempt.

V. The Court Properly Exercised its Discretion to Order Visitation

between the Father, D.P and his Child.

{¶ 32} Pursuant to R.C 3109.12, when the juvenile court grants parenting time or visitation rights to the father of a child born to an unmarried woman, it “shall consider all relevant factors, including but not limited to, the factors set forth in division (D)” of R.C. 3109.051. This statutory provision lists sixteen factors to consider, including the mental and physical health of the child and any factor related to the best interest of the child.

{¶ 33} A court that obtains jurisdiction over, and enters orders regarding, the custody and support of children retains continuing and exclusive jurisdiction over those matters. *Hardesty v. Hardesty*, 16 Ohio App.3d 56, 58, 474 N.E.2d 368 (10th Dist.1984), citing *Loetz v. Loetz*, 63 Ohio St.2d 1, 406 N.E.2d 1093 (1980), and *Addams v. State, ex rel. Hubbell*, 104 Ohio St. 475, 135 N.E. 667 (1922).

{¶ 34} At all times, the court is guided by its statutory mandate to act in the

best interest of the child. We have recognized that “the need of a child for visitation with a separated parent is a natural right of the child, and is as worthy of protection as is the parent's right of visitation with the child; thus, the failure, without just cause, of a divorced or separated parent having custody of a child to accord visitation rights to the other parent is not only an infringement of the other parent's right to visitation but is also an infringement of the child's right to receive the love, affection, training and companionship of the parent.” *Huff v. Huff*, 2d Dist. Montgomery No. 14823, 1995 WL 600012 (Oct. 13, 1995), citing *Porter v. Porter*, 25 Ohio St.2d 123, 267 N.E.2d 299 (1971), paragraph three of the syllabus.

{¶ 35} The record indicates that the court applied the proper legal standard dictated by R.C. 3109.051, and found that it was in the best interest of the child for the father to have unsupervised visitation. The court did not abuse its discretion by issuing the court’s standard order of visitation.

VI. Conclusion

{¶ 36} C.H.’s assignments of errors relating to the order of contempt and the order for standard visitation having been overruled, those portions of the trial court order are Affirmed. The parts of the order related to protective supervision are Reversed.

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DONOVAN, J., and HALL, J., concur.

Copies mailed to:

C.H.

D.P.

Hon. Nick Kuntz