

[Cite as *In re L.R.H.*, 2015-Ohio-2396.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101998

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**IN RE: L.R.H.  
Minor Child**

[Appeal by Father, G.H.]

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. CU 11104302

**BEFORE:** Stewart, J., E.A. Gallagher, P.J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** June 18, 2015

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MELODY J. STEWART, J.:

{¶1} During a pretrial hearing in a custody dispute between plaintiff-appellee mother, R.S., and defendant-appellant father, G.H., the court became aware that the father had been secretly recording conversations between the parties and some therapists treating their child, L.R.H. The court enjoined the father from recording any future conversations and ordered him to give the mother any recordings in his possession. The father filed a motion to vacate the injunction, but the court denied the motion and later found him in contempt for not giving the mother all recordings as ordered. The contempt citation is the basis for this appeal.

{¶2} The injunction at the heart of this appeal was issued by the court following an unrecorded pretrial conference between the judge and counsel for the parties. That order states in relevant part:

It has come to the attention of the court that the father has been surreptitiously recording (video/audio) the activities of the parties, the child, associates of the parties and various therapists and evaluators involved in the case. The court has been further apprised that the father has been publishing matters on the Internet, which relate specifically to the parties and this case. In these regards [sic], the court finds such activities by the father to be contrary to the best interests of the child and in contravention of the orderly proceedings before this court.

Now, therefore, the court hereby orders the father to cease and desist immediately from such further activities. The father is hereby enjoined from recording the conversations and activities of the parties, the child, any associates of the parties, the therapists and evaluators involved in the case and any other person associated with the case without the prior written authorization of this court.

It is further ordered that the father turn over within 14 days of the date hereof to both the mother's attorney and the child's guardian either the originals or copies of all recordings, both audio and video, heretofore made by the father of the parties, the child, the parties' associates, the therapists and evaluators and of anyone else associated with this case which have been made since the filing of the father's Complaint to Determine Custody on March 9, 2011.

{¶3} The father filed a motion to vacate the injunctive order on grounds that the court improperly granted injunctive relief with no motion before it and without affording the parties a hearing, with notice, as required by Civ.R. 65. The court denied the motion to vacate the injunctive order on grounds that "the injunctive orders were issued pursuant to the representations of the guardian ad litem, which were not challenged by the father." The court also stated that "the injunctive orders are no more than what should have been known prohibitions to the father and the requirements to cease and desist from such further activities and to disclose and surrender all of his recordings."

{¶4} The father twice attempted to appeal from the denial of his motion to vacate. We consolidated both appeals and then dismissed them for want of a final order. *See In re L.R.H.*, 8th Dist. Cuyahoga Nos. 100159 and 100292, Motion No. 471999 (Feb. 5, 2014).

{¶5} In the meantime, the mother filed a motion asking the court to have the father show cause why he should not be held in contempt for failing to comply with that part of the injunctive order requiring him to turn over all audio and video recordings he had made. In that motion, the mother stated that “counsel for the father requested a two-week extension of time prior to compliance” with the injunctive order, a request that “counsel granted” to the father’s attorney. The mother claimed that the father never had any intention to comply with the injunctive order and used the extension of time to prepare his motion to vacate the injunctive order.

{¶6} The court found that the father failed to turn over all audio and video recordings within 14 days as ordered and that the father “failed to demonstrate any justifiable excuse for his disobedience.” The court found the father in contempt and sentenced him to serve ten days in the county jail, but allowed him to purge the contempt citation by giving him 14 days in which to turn over copies of all audio and video tapes “in formats prescribed respectively in writing by both the mother’s attorney and the child’s guardian so that the same may be played on the audio and video equipment used by the mother’s attorney and guardian.” The court also ordered the father to pay the mother’s attorney fees expended in prosecuting the motion to show cause.

{¶7} The father appealed. We stayed execution of the court’s contempt citation after the father posted a supersedeas bond.

{¶8} The father’s first assignment of error raises issues relating to the injunctive order. He argues that the court’s injunctive order is infirm in several respects: (1) it was issued without notice and an opportunity to be heard; (2) it was issued in violation of the requirements of Civ.R. 65; (3) the court had no authority to issue the order under Juv.R. 13; (4) the court erred by denying the motion to vacate the injunctive order; and (5) the court erred by denying a request for a hearing and a stay of the injunction.<sup>1</sup>

{¶9} App.R. 3(D) states that the notice of appeal “shall designate the judgment, order or part thereof appealed from[.]” *See also* Loc.App.R. 3(B) of the Eighth District Court of Appeals (“The notice of appeal \* \* \* must have attached to it a copy of the judgment or order appealed from [journal entry] \* \* \*.”). The purpose of App.R. 3(D) is “to notify appellees of the appeal and advise them of ‘just what appellants \* \* \* [are] undertaking to appeal from.’” *Parks v. Baltimore & Ohio RR.*, 77 Ohio App.3d 426, 427, 602 N.E.2d 674 (8th Dist.1991), quoting *Maritime Mfrs., Inc. v. Hi-Skipper Marina*, 70 Ohio St.2d 257, 258-259, 436 N.E.2d 1034 (1982). The failure to attach a copy of the order being appealed from is not a jurisdictional defect, but “appellate courts enjoy discretion to dismiss appeals for failure to comply with App.R. 3.” *Midland Funding L.L.C. v. Hottenroth*, 8th Dist. Cuyahoga No. 100146, 2014-Ohio-5680, ¶ 3 (en banc).

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<sup>1</sup> The mother makes the argument that issues relating to the pretrial conference from which the contempt order issued are “out of rule and improper” because this aspect of the appeal is “an attempt to backdoor issues that were previously dismissed on Appeal in *In Re: L.R.H.*, 8th Dist. Cuyahoga No. 100159, since the order upon which the Appellant appealed was a non-final appealable order.” Appellee’s brief at 10. If the issuance of the injunctive order was non-final, the mother must necessarily accept that this appeal is the first opportunity for the father to raise those issues that were non-final at the time of the earlier appeal. There is nothing improper about it.

{¶10} In his notice of appeal, the father attached the order finding him in contempt — he did not attach the judgment entry that enjoined him from making further recordings and that ordered him to turn over to the mother all recordings in his possession. What is more, the notice of appeal is very clear in stating that the judgment being appealed was the contempt citation. We therefore exercise our discretion to disregard any assignment of error relating to the issuance of the injunction.

{¶11} In choosing not address any assignments of error relating to the issuance of the injunction, we note that there is no real prejudice to the father because nothing about the contempt citation derived from the injunction itself, so any error in the manner in which the court issued the injunctive order would have been harmless.

{¶12} It is important to understand that there were two components to the court’s order: the first enjoined the father from making any further recordings; the second ordered him to turn over to the mother any recordings he had made. The first part of the order truly was a “prohibitive injunction” because it enjoined the father from making further recordings, thus preserving the status quo between the parties. *State ex rel. GMC v. Indus. Comm.*, 117 Ohio St.3d 480, 2008-Ohio-1593, 884 N.E.2d 1075, ¶ 12 (“A prohibitory injunction preserves the status quo by enjoining a defendant from performing the challenged acts in the future.”). We do not understand the father’s position in this appeal to be that he had the right to surreptitiously record conversations, nor that he has the right to continue to make recordings in the future. Nothing in his argument indicates that he believes the court erred by enjoining him from recording events in the future.

{¶13} It is the second part of the court’s order that is the substance of this appeal. That order was not injunctive in nature because, unlike the first part of the order that used words like “enjoined” and “cease and desist,” it directed the father to “turn over” copies of all recordings that he had made. In substance, the second part of the order was a discovery order, the father’s violation of which could cause the court to hold him in contempt. *See* Civ.R. 37(B)(1). Viewed this way, the second part of the order did not involve injunctive relief, so the court had no obligation to comply with Civ.R. 65 when ordering the father to turn over all of the recordings that he made.<sup>2</sup>

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<sup>2</sup> We note that the mother’s argument is that the court validly entered the injunctive order under Juv.R. 13(B)(2)(g), which permits the juvenile court to enter “any other order that restrains or otherwise controls the conduct of any party which conduct would not be in the best interests of the child.” Juv.R. 13(B)(2)(g) is inapplicable by its own terms, however, because it applies only “[u]pon the filing of an abuse, neglect, or dependency complaint[.]” This case arose from a complaint for custody of the child, not from an abuse, neglect, or dependency complaint.



{¶14} Even if the second part of the order did involve injunctive relief, the limited record on appeal shows that the father waived any objection to the manner in which the court issued the injunction. Although there was no transcribed record of the pretrial conference from which the court issued the injunctive order, the court prepared an App.R. 9(C) statement of the evidence for purposes of Appeal Nos. 100159 and 100292. The statement of the evidence described how the court learned from the mother's attorney and the guardian ad litem for the child that the father had been surreptitiously recording conversations. The court stated that "[t]he allegations of the mother's attorney and guardian were not denied by the father's attorney." While not denying something is not always the same as admitting it, the lack of denial was tantamount to an admission in this case. In fact, the father has admitted to making the recordings as alleged; for example, he testified at the contempt hearing that he had told both the mother and guardian ad litem about the recordings. Given this record, it is difficult to accept the father's argument on appeal that his attorney did not waive a formal hearing at the pretrial conference. Having admitted that he made the recordings, the father cannot now stand on procedure to avoid that which he admitted doing.

{¶15} In his second assignment of error, the father argues that the court erred by denying his motion to dismiss the contempt proceeding and abused its discretion by finding him in contempt. He maintains that the court ignored evidence that he had been granted an extension of time in which to turn over the recordings, that compliance within the time frame set by the court was impossible, and that the evidence at the contempt hearing showed that he had complied with the court's order prior to the contempt hearing.

{¶16} The father's argument is premised on the mother's attorney agreeing to grant him an extension of time in which to produce the recordings. The mother's attorney does not dispute that she agreed to extend the 14-day period, having stated in an affidavit she "granted" counsel for the father the additional time he requested. The problem here should be obvious: absent specific language in the order directly authorizing counsel for the mother to grant an extension of time to the father, the parties had no ability to extend the court's deadline for the production of the recordings. *BAC Home Loans Servicing L.P. v. Komorowski*, 8th Dist. Cuyahoga No. 96631, 2012-Ohio-1341, ¶ 21. No such language authorizing the parties to extend the deadline appeared in the order; to the contrary, the court's order was very clear in setting a deadline of "14 days of the date" of the order for compliance. If the father was having difficulty complying with that deadline, his application for an extension of time needed to be made to the court. The father's insistence that he had been given an extension of time has no merit because nothing in the record indicates that the court granted an extension of time.

{¶17} The father also argues that the court failed to “accept impossibility of compliance as a defense to the contempt finding.” He maintains that he had difficulties retrieving the recordings because they were stored on different devices and that a hardware “crash” required the services of an outside restoration company to intervene and restore the recordings.

{¶18} Assertions about the difficulty of retrieving the recordings would be more credible had the father not waited ten months to make them. On June 21, 2013, the court issued its order giving the father 14 days in which to give the mother the recordings. The father filed his motion to vacate that order on July 5, 2013, and the court denied the motion on July 18, 2013. The father filed his notice of appeal in Appeal No. 100539 on July 19, 2013. The mother filed her motion to show cause on August 1, 2013. Yet it was not until April 21, 2014, that the father turned over the recordings to the mother's attorney. During that time, the father did not request an extension of time in which to comply with the court's deadline. What is more, even if the mother had the ability to extend the deadline, she purported to do so for only an additional 14 days. Affidavit of R.S., at ¶ 2. This would have made the new deadline in mid-July 2013 — a deadline that the father did not meet. And we note that we specifically denied the father's request for a stay of the deadline pending appeal. *See In re L.R.H.*, 8th Dist. Cuyahoga No. 100159, Motion No. 466883 (July 24, 2013). In any event, even had a stay been granted, it would not have operated as a per se stay of the discovery schedule. *See Kinnock v. Renaissance Ctr.*, 8th Dist. Cuyahoga No. 101442, 2015-Ohio-768, ¶ 15. And as we earlier indicated, we view the deadline for producing the recordings as a discovery deadline separate and distinct from the injunctive aspects of the court's order barring the father from making future recordings of the parties.

{¶19} So we conclude that the father not only failed to seek an extension of the time deadline, he failed to offer adequate justification for taking ten months to comply with the court's order.

{¶20} Finally, the father maintains he complied with the court's order to produce the recordings at the time the court conducted the contempt hearing, thus rendering the motion to show cause moot. The difficulty with this argument is that compliance with the order to produce the recordings was dependent upon the court's deadline. The father was arguably in contempt when the deadline for producing the recordings passed without compliance. His "better late than never" compliance with the order did not render his contempt moot, *Brown v. Kelly*, S.D.N.Y. No. 05 Civ. 5442, 2007 U.S. Dist. LEXIS 39527 (May 31, 2007), fn. 57, although it may have been a factor in mitigation of punishment.

{¶21} After finding the father in contempt for failing to produce the recordings as ordered, the court set a new deadline for compliance and ordered that the recordings be "in formats prescribed respectively in writing by both the mother's attorney and the child's guardian so that the same may be played on the audio and video equipment used by the mother's attorney and guardian." The father argues that this order is "unclear, vague and impossible to understand" and improperly expands upon the court's initial order for production of the recordings.

{¶22} App.R. 16(A)(7) requires an appellant to file a brief with “[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions[.]” The father has not done so. He does nothing more than assert his conclusion that the court’s order is vague without saying why he cannot comply with it. In any event, we see no vagueness in the order — it very clearly instructs the attorney for the mother and the guardian ad litem to prescribe the file format for the recordings. Nothing in the record shows that the parties have dictated the file format for the recordings, so the father’s complaint is premature at best.

{¶23} Finally, the father complains that the court abused its discretion by giving him only one day in which to comply with its orders.

{¶24} After finding the father in contempt, the court allowed him to purge the contempt under the following conditions: that he present to the mother’s attorney and the guardian ad litem “not later than September 30, 2014, copies of all audio and video recordings described in the Judgment Entry of June 21, 2013[.]” The court journalized this order on September 25, 2014. The father maintains that he did not receive the order until September 29, 2014, which effectively gave him only a day in which to hand over the tape recordings.

{¶25} The father's argument that the court did not give him sufficient time in which to produce the recordings is premature. The father filed his notice of appeal on September 30, 2014 — the same date on which he was to produce the recordings. Although we granted the father's motion to stay proceedings pending appeal, that stay came after the court's deadline, so the court could have found that the father failed to purge his contempt. *Darden v. Darden*, 8th Dist. Cuyahoga No. 75508, 2000 Ohio App. LEXIS 2107, \*12 (May 18, 2000). Nevertheless, the record does not show that the court found that the father failed to purge his contempt. In addition, it is unclear whether the mother and guardian ad litem have, consistent with the court's directive, supplied the father with written instructions regarding the file format of the recordings. Without the fulfillment of these prerequisites, the father's argument relating to his ability to purge the contempt in the time frame ordered by the court is purely speculative. We find no error in the contempt citation.

{¶26} Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court — juvenile division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

EILEEN A. GALLAGHER, P.J., and  
ANITA LASTER MAYS, J., CONCUR