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FAMILY LAW

Child Custody, Relocation, Contempt and Modification

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Two of the most talked about issues among family law practitioners and the bench are child relocation cases and whether custody orders may be modified at contempt hearings. I've written numerous times on these issues. Over the years, there have been multiple cases from the state Superior Court that address these issues. Every so often, a case comes down that causes one to scratch his head or provide clarity and further direction regarding issues such as these.

The recent case of *J.M. v. K.W.*, 2017 Pa. Super. 167 (May 31), addresses both issues and is a very important case. The pertinent facts in the case are as follows: K.W. (the mother) and J.M. (the father) had two children, B.M. and V.M., during their marriage. After the parties separated, the father filed a complaint for custody. The day after the father filed his custody complaint, the parties "entered a stipulated custody agreement that accorded the mother primary physical custody of the children pending the custody trial." According to the opinion, the trial court entered several orders and in a March 25, 2014, scheduling order it "specifically prohibited relocation without prior court approval pursuant to 23 Pa.C.S. Section 5337." One month later, on April 24, 2014, the mother filed a counterclaim to the father's custody complaint and issued "notice of her proposed relocation with B.M. and V.M. from her residence in Pottsville, Schuykill County, to Lancaster, Lancaster County, approximately one-and-one-half hours away." The father then filed a counter-affidavit objecting to the mother's proposed relocation. Prior to the court authorizing the mother to relocate, she relocated with the children to Lancaster during May 2015. She also purchased a property in Lancaster County two months thereafter, and enrolled the children in preschool during her custodial periods. The father then filed a petition for special relief and contempt. On Dec. 24, 2015, the trial court entered an order that found the mother in contempt and as a sanction, reduced her primary physical custody to shared custody. The order referenced that it was to remain in effect until the underlining custody dispute was resolved. The mother filed a timely appeal.

The Superior Court addressed the important issue of whether the order was an appealable order since, on

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its face, it appeared interlocutory/temporary. A contempt order is final and appealable when a sanction is imposed. However, the court went into great detail describing the order on appeal as temporary in name only. According to the Superior Court: "as the prolonged history of this case demonstrates, the judicial machinery may stall or become so congested that a temporary order forms the de facto status quo regardless of its purported impermanence." The court then stated that: "even in ostensibly temporary order granting the modification of physical custody" implicates that court's concerns where a respondent did not receive particularized notice that custody would be at issue in a contempt proceeding. Because of this, such an order is appealable. In other words, if custody is modified at a contempt proceeding where due process notice is lacking and the order is an interim order on its face, the doors to the Superior Court are not necessarily closed upon the order being entered pending the ultimate trial on the underlying custody action.

With regard to relocation, the mother was found in contempt for relocating prior to receiving court approval. The crux of the mother's argument was that though she issued a relocation notice, her move was not actually a relocation since she afforded the father with more custodial time after she moved, and he exercised more custodial time after she moved. She further claimed that the custody order that was in effect did not preclude her from relocation.

The Superior Court opinion reflects that the mother acknowledged that the trial court's scheduling order expressly highlighted in bold that: "No party may make a change in the residence of any child which significantly impairs the ability of the other party to exercise custodial rights without first complying with all of the applicable provisions of 23 Pa. C.S. Section 5337 and Pa.R.C P. No. 1915.17 regarding relocation." The Superior Court found that the mother was put on notice in the scheduling order that she was not to relocate prior to a hearing pursuant to statute and rules. But the mother's position was that since the father's time increased after she moved "the change did not fall within the statutory definition of 'relocation,' and therefore she was not bound by the procedures outlined in Section 5337." Interestingly, the court hangs its hat on the fact that the mother issued a relocation notice to the father as proof that she believed her move was a relocation. The court analyzed the case of *C.M.K. v. K.E.M.,* 45 A.3d. 417 (Pa. Super. 2012), regarding the issue.

With regard to the issue of whether a trial court may modify a child custody order at a contempt hearing when a modification petition has not been filed, the J.M. case provides good guidance and further refinement.

As family law practitioners may recall, the *C.M.K.* case held that the mere issuance of a notice of proposed relocation was not tantamount to tacitly conceding that the proposed move was, in fact, a relocation. Many practitioners strongly rely upon the *C.M.K.* ruling. The Superior Court in the present case differentiates the *J.M.* case from the *C.M.K.* case in that the parent proposing to move in *C.M.K.* "followed the correct procedure and the trial court held an evidentiary hearing before determining, inter alia, that the proposed move constituted a relocation because it involved changes that would significantly impair the father's ability to exercise his current custodial rights." In the *J.M.* case, because the mother moved prior to the relocation hearing, the Superior Court basically says that she put the cart before the horse when claiming that the father had increased custodial time after the relocation which bumped it out of the definition of relocation. The Superior Court's rationale in *J.M.* pertaining to whether providing a relocation notice is a concession by the proposed relocator that the move is actually a relocation is

concerning and appears to be more grounded in an attempt to prevent relocations prior to court hearings.

With regard to the issue of whether a trial court may modify a child custody order at a contempt hearing when a modification petition has not been filed, the *J.M.* case provides good guidance and further refinement. This issue has been evolving and most recently on Feb. 18, 2016, the case of *C.A.J. v. D.S.M.*, 136 A.3d. 504 (Pa. Super. 2016), essentially held that a trial court may modify a custody order at a contempt proceeding if the petition and proposed order provided notice to the respondent that the petitioner was seeking to modify custody as part of the contempt action.

In the *J.M.* case, the Superior Court indicates that is no longer enough. In *J.M.*, the father's petition for contempt reflected that he was seeking to modify custody. In fact, in the father's proposed order, it stated: the "plaintiff is granted primary custody until further order of court." However, the Superior Court focused on the fact that the father neglected to provide the notice and order to appear pursuant to Rule 1915.12(a) and "the scheduling orders that the court issued did not disclose that the trial court would address the matter of physical custody during the contempt proceeding." This author finds it hard to believe that a respondent who receives a petition that seeks a change in custody, whether it be in a petition to modify custody or contempt petition, and had a proposed order states that the relief sought is a change in custody, does not put a respondent on notice that the court may address modifying custody. However, this case is a very important case because it provides guidance that in the event a petitioner seeks a change in custody as a partial remedy in a contempt filing, the required notice and order to appear should also include language that a change in custody may be addressed.

Because there was a failure to provide a notice and order to appear pursuant to Rule 1915.12(a) and the scheduling orders failed to disclose that modification of custody could be addressed at the trial, the Superior Court held that: "absent an award of special relief under Rule 1915.13 ... it is an abuse of discretion for the trial court to transfer custody from one party to the other as a contempt sanction and that custody can be modified only where the parties receive advance notice that custody is to be an issue at the contempt hearing and modification is based upon the determination of the child's best interests." In the present case, it is clear that the custody determination was purely a sanction and the Superior Court found that the mother did not receive her due process notice that a modification could occur.

This case is extremely important for family law practitioners and the bench and should be kept in a safe place for quick reference. It is interesting to note that the Superior Court provided other useful nuggets in this case. For example, the Superior Court stated: "all custody awards are temporary insofar as they are subject to modification by an ensuing court order at any time that it promotes the child's best interests. Thus, by force of circumstances, no award of child custody is permanent regardless of whether the order is styled as interim or final." Further, it is important to remember that under special relief (Rule 1915.13) a trial court may award temporary custody or partial custody as a remedy. The Superior Court highlighted that in *J.M.* the trial court clearly did not enter its order under the special relief section but under contempt. If the trial court issued its order under special relief, it appears that the result of the Superior Court vacating the contempt sanction awarding father shared physical custody may have been different. •