

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

J.P.,	:	
Plaintiff	:	
	:	
v.	:	No. 97-20,763
	:	
J.B.,	:	
Defendant	:	

OPINION

Issued Pursuant to R.A.P. 1925(a)

The defendant has appealed this court's order of September 15, 2004, holding him in contempt for failing to pay child support. In that order, the court sentenced the defendant to three months incarceration, with a purge payment as follows: \$1,000 by noon October 15, 2004, and an additional payment of \$4,000 by noon on December 15, 2004.

The defendant first complains that the court failed to stay the contempt proceedings until the established period of appeal for this court's opinion denying him nurturing parent status. The court denied that request, as defendant has not paid any support since April 14, 2003, and has accumulated an arrears of \$11,300.56. Furthermore, the defendant has done everything in his power to repeatedly delay all support proceedings, and the court has repeatedly indulged him, due to his pro se status. However, we declined to permit him any further delays. Defendant's children need and deserve support now.¹

The defendant next complains the court refused to grant his motion to quash on the basis of his in forma pauperis status. That status, which may well have been incorrectly granted given his assets, does not excuse him from paying support. If that

¹ The defendant has since appealed this court's decision, but we have not stayed his support obligation, due to our firm conviction that the defendant is fully capable of paying support, and should be paying support.

were the case, a large proportion of the individuals in contempt of child support orders would be exempt from paying child support. In forma pauperis status relates to the actual earnings and assets of the individual, whereas child support relates to the defendant's ability to pay, based upon an earning capacity. As discussed at length in our opinion of September 9, 2004, defendant has the ability to earn a good living, but has chosen not to be employed. Moreover, he has financial assets that would more than satisfy his arrears.

The defendant next complains the court failed to examine or consider the exhibits he produced at the hearing. Those exhibits were duly admitted, as well as considered by the court in rendering our decision.

The defendant next alleges the court failed to establish willful contempt. The court's determination of willful contempt is firmly based upon our finding that the defendant has the ability to earn \$2368.92 per month and should not be awarded nurturing parent status, as discussed in our opinion of September 9, 2004.

The defendant next complains the court erred in refusing to recognize or consider his in forma pauperis status and indigence when determining willful contempt. As mentioned earlier, despite his repeated reliance on his in forma pauperis status, that status is not a shield which protects him from paying child support.

The defendant next complains the court refused to allow him access to his attorney. Defendant had fair notice of the hearing, as did his attorney. The defendant chose not to have his attorney present, yet requested an opportunity to consult with her at the hearing. The court believes this request was simply another attempt to delay the proceedings. Furthermore, the attorney had entered her appearance only for purposes of giving notice to the defendant.² N.T., p. 29. And finally, the defendant was awarded an

² Notice has been a continual problem with this defendant, as he repeatedly claimed he did not receive timely notices of court proceedings, despite the notices having been sent to the only residence he has resided in for many years.

attorney from the Public Defender's office, who was available to him before and during the contempt hearing. N.T., p. 4.

The defendant next alleges the court erred in determining that a loan from the defendant's retirement fund was an appropriate avenue for accessing assets, because that would require entering into a repayment contract with terms that cannot be met under his current economic circumstance. This complaint also relates to the court's denial of his nurturing parent status. Despite having the ability to work, the defendant has chosen not to be employed; he has therefore created the "economic circumstance" he complains of, and can change that status at any time he chooses, by finding employment.

The defendant next alleges the court erred in relying on the testimony of plaintiff's counsel with regard to the availability and amount of equity that resulted from the equitable distribution of defendant's marital assets in 1998. Plaintiff's counsel did not testify. Rather, this information was obtained from the testimony of the defendant himself, as well as judicial notice of the equitable distribution court documents from the defendant's prior marriage, both of which established that the defendant received the marital residence in 1998, which had equity valued at \$80,964.67. Although the defendant testified the marital residence was "sold" to his current wife in 2001 for \$10,000, he also admitted the property was placed in her name in order for the couple to obtain a loan.³ N.T., p. 25. Under these circumstances, it was fully proper for the court to determine that the defendant has access to the equity in the property.

The defendant next complains the court did not set a reasonable purge figure, based upon his "full-time, at-home parent" status. Once, again, that status is the defendant's own choice. At any point, he could gain employment. Furthermore, his

³ Since the lending institution would have considered the defendant's child support obligation, it was unlikely the loan would have been approved so long as his name was on the residence.

current assets, namely his retirement account and the equity in his home, are adequate to easily meet the purge payment.

The defendant next complains the purge payment essentially requires his current wife to make the payments. If the defendant and his wife choose to use the money from her earnings to make the payments rather than the defendant's own employment, that is their choice. The court has not, and cannot, require the defendant's wife to make the payments.

The defendant next complains about the impossibility of the purge conditions. He states the order demands that he find day care for his youngest child, hire a qualified teacher to instruct his older son, and find employment that would net him \$5000 within the 90-day purge period. Day care and public school are hardly impossible options, especially as both were used for the children who are the subjects of the support order. Moreover, the defendant could find night-time employment, if he sincerely wished to remain at home during the day. And finally, the defendant has immediate assets, namely the equity in his home and his retirement accounts, with which to pay the purge, without even obtaining immediate employment.

The defendant next complains the court failed to consider the economic and psychological impacts of his ruling and the purge condition on the children of the second family. Again, this relates to the nurturing parent issue, which has been thoroughly discussed in our opinion of September 9, 2004.

The defendant's final complaint is that the court erred in threatening imprisonment as the sole alternative to meeting the purge conditions. The defendant has failed to make a single support payment since April 14, 2003, despite being an able-bodied man with a Master's degree. The defendant is fully capable of working, and has chosen not to do so. Moreover, he has repeatedly filed motions for continuance and other motions to delay the proceedings. The court is convinced the only sanction that will motivate the defendant to pay his child support is imprisonment.

BY THE COURT,

Date: _____
Richard A. Gray, J.

cc: Janice Yaw, Esq.
J.B., defendant
Patricia Bowman, Esq.