

DELAGE V. DELAGE, C.P. Franklin County Branch, No. 70 - 1981 - C

Custody - Contempt - Counsel Fees

1. Before granting a modification of a custody order, the court must consider whether there has been a substantial change of circumstances.
2. A change in an existing custody order cannot proceed initially as an inquiry as to the best interest of the child.
3. Even where a party is held in contempt of court, the opposing parties counsel fees cannot be awarded where the case is one of mixed results.

Mark H. Pettigrew, Esquire, counsel for plaintiff

Courtney J. Graham, Esquire, counsel for defendant

OPINION AND ORDER

EPPINGER, P.J., October 1, 1985:

David J. Delage, father of three children, David G. - 14, Elizabeth - 12, and Kathleen - 8, filed two petitions in this custody action asking that Elizabeth S. Delage, mother of the children, be held in contempt of court and for a modification of the order.

The petition for modification contains no allegations of changed circumstances. Counsel simply argued that modification is necessary in the best interests of the children and, particularly, that with the order as it is and, considering the mother's lack of insistence that the children abide by the order, the father is unable to establish a suitable relationship with the children.

Before granting a modification of a custody order, the trial court must consider whether or not there has been a substantial change of circumstances requiring or permitting a change in the prior order. A change in an existing custody order cannot proceed initially as an inquiry as to the best interests of the children. *Constant A. v. Paul C.A.*, Pa. Super. , 496 A.2d 1 (1985).

The father's complaint is that the mother does not require the children to be at home and available for his telephone calls which, under the order, he is to make on Sunday at 9:00 a.m. and each



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Congratulations to John W. Frey, Esquire, upon his being admitted to the roster of attorneys regularly practicing in Franklin County, Pennsylvania, who maintain their offices within the County.

This was accomplished at ceremonies held before Judge John R. Walker and Senior Judge George C. Eppinger, on Wednesday, May 7, 1986, in the Franklin County Court House, here in Chambersburg.

Editors and Staff of
Franklin County Legal Journal

5-9-86



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LEGAL NOTICES, cont.

thence north 25° 15' 41" east 69.68 feet to a point; thence on a curve to the right on a road known as Peaceful Oak Drive with a chord bearing north 59° 39' 50" east to a point; thence south 85° 56' 00" east 151.10 feet to a point; thence continuing on a curve to the left with a chord bearing of north 85° 35' 21" east and a chord length of 205.29 feet with a radius of 696.27 feet to a point at the intersection of Lots Nos. 19 and 18; thence with Lot No. 18 south 15° 05' 17" west 311.13 feet to a point at land now or formerly of Edgar C. Washabaugh; thence with lands now or formerly of Edgar C. Washabaugh north 70° 01' 26" west 395.75 feet to a point the place of beginning. CONTAINING 2.035 acres and being Lot No. 19 on a plan of lots known as Peaceful Oaks Subdivision as prepared by Nassaux-Hemsey, Inc. dated July 28, 1977 and recorded among the Franklin County Land Records.

BEING the same real estate conveyed to David D. Woodring and Marsha E. Woodring, his wife, by deed of Dorothy Pugh Leaman dated November 8, 1979 and recorded in Franklin County Deed Book 804, Page 221.

AND BEING the same real estate conveyed by David D. Woodring and Marsha E. Woodring to David D. Woodring by deed dated August 29, 1985, and recorded in Franklin County Deed Book Volume 938, Page 437.

SUBJECT to the restrictions covering Peaceful Oak Subdivision as recorded among the Franklin County Land Records.

BEING sold as the property of David D. Woodring, Writ No. DSB 1985-281.

SALE NO. 3

**Writ No. AD 1986-28 Civil 1986
Judg. No. AD 1986-28 Civil 1986**

**Kenneth H. Plummer and
Alvin J. Plummer**

— vs —

**Norman F. Rosenberry, Betty Jane
Rosenberry, Franklin E. Rosenberry
and Kimberly S. Rosenberry
Atty: John McD. Sharpe, Jr.**

ALL THAT CERTAIN following described real estate lying and being situate in Hamilton Township, Franklin County, Pennsylvania:

BEGINNING in the center line of L. R. 28052 at land now or formerly of George E. Ommert; thence by the same, North 74 degrees 30 minutes West 356.4 feet to a point in Back Creek; thence through the same the following courses and distances: North 10 degrees 45 minutes West 371.25 feet to a point; thence North 20 degrees 30 minutes West 198 feet to a point; thence North 52 degrees 30 minutes West 396 feet to a point; thence North 19 degrees West 151.8 feet to a point; thence North 70 degrees 30 minutes West 363 feet to a point at land now or formerly of Donald L. Hefrick; thence by the same, North 21 degrees 30 minutes West 321.75 feet to a point; thence by land now or formerly of Mary D. Scott, North 21 degrees 30 minutes West 61.88 feet to a point; thence by the same, and along Back Creek, North 15 degrees 15 minutes West 1002.38 feet to a point; thence along Back Creek; North 17 degrees West 481.8 feet to a point in said creek; thence through the same the following courses and distances: North 4 degrees 30 minutes East 440.55 feet to a point; thence North 27 degrees 30 minutes East 409.2 feet to a point; thence North 15 degrees 30 minutes East 298.65 feet to a point; thence North 47 degrees 30 minutes East 198 feet to a point; thence South 85 degrees East 359.7 feet to a point; thence by land now or formerly of Marie Wilson, South 66 degrees 40 minutes East 1336.5 feet to a point at land now or formerly of Wilber C. Brindle; thence by the same, South 4 degrees 30 minutes East 1247.5 feet, more or less, to an existing spike in the center line of T. R. 465; thence through the same, North 49 degrees 42 minutes West, 100 feet to an existing spike; thence through the same, North 59 degrees 3 minutes West 25 feet to an

LEGAL NOTICES, cont.

existing spike; thence through the same, South 2 degrees 50 minutes West 19.9 feet to an existing iron pin at land now or formerly of Leroy E. Higgins; thence by the same, South 2 degrees 50 minutes West 205.1 feet to an existing iron pin; thence by the same, South 67 degrees 17 minutes East 135 feet to an existing iron pin at land now or formerly of Nyle Guyer; thence by the same, South 4 degrees 30 minutes East 39.21 feet more or less to a point; thence by the same, South 19 degrees 15 minutes East 173.25 feet to a point; thence by the same, and land now or formerly of Dale Rice and Henry Samuelson, South 8 degrees 15 minutes East 1806.75 feet to the South side of L. R. 28052; thence through the same, North 72 degrees 45 minutes West 275.55 feet to a point in the center of said road; thence through the same, South 63 degrees West 200 feet to an existing nail and washer at land now or formerly of Ronald E. Myles; thence by the same through an iron pin on line, North 30 degrees 34 minutes West 200 feet to an existing iron pin; thence by the same; South 63 degrees West 165 feet to an existing iron pin; thence by the same, South 30 degrees 34 minutes East 200 feet through an iron pin on line to an existing nail and washer in said road; thence through the same, South 63 degrees West 174.55 feet to a point, the place of BEGINNING, containing 152.878 acres, more or less, as per draft of William A. Brindle Associates dated October 18, 1973.

EXCLUDING, however, a tract of 0.91 acres within such description which Franklin G. Fisher and wife retained in deed dated November 1, 1973, recorded in Franklin County Deed Book 694, Page 113 on T. R. 465.

CONTAINING thereon a farmhouse, barn, equipment shed and other outbuildings.

BEING the same real estate which Kenneth H. Plummer and Alvin J. Plummer, joined by their respective wives, by deed dated April 27, 1978, recorded in Franklin County Deed Book 758, Page 249, conveyed to Norman F. Rosenberry and Betty Jane Rosenberry, his wife, and Franklin E. Rosenberry and Kimberly S. Rosenberry, his wife.

BEING sold as the property of Norman F. Rosenberry, Betty Jane Rosenberry, and Franklin E. Rosenberry, Writ No. AD 1986-28.

TERMS

As soon as the property is knocked down to a purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, June 23, 1986 at 4:00 P.M., E.D.S.T. Otherwise all money previously paid will be forfeited and the property will be resold on Friday, June 27, 1986 at 1:00 P.M., E.D.S.T. in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County
Chambersburg, PA

Tuesday and Thursday at 7:00 p.m. Since October 28, 1984, he states there have been seven occasions when he was unable to reach any of the children; that twice two of the children were not there for the call and they did not call back; that five times one was not there and did not call back; that once he was unable to get through on the telephone, twice there was no answer and when the call came back he was not able to speak to all of the children, and that twice he believed the mother hung up the telephone before he could speak to the children.

He also says the calls to the children are not private as the order requires them to be. The living area of the house is open and one of the extensions is in this area. The other is "downstairs" and according to the mother they may use that phone to talk with their father. We are not quite sure what the father expects from that part of the order which requires his telephone calls with the children to be "private". Undoubtedly the stipulated order means she should not listen in on one of the extensions, and there is no allegation she has done this. His position seems to be that her mere presence in the area where the children are using the phone intimidates them so that his conversations with them are not satisfactory. He complains particularly that they don't tell him everything.

We talked to the children. They all felt that they are available for the phone calls as often as possible. The two older ones are finding that other activities sometimes conflict with their being available for the calls from their father. It was established that the mother does not compel them by the threat of some disciplinary action, to be there for the calls, and to that extent she is technically in contempt of the court's order.

This has been a stormy breakup. It was not shown that the children had any role in causing the problems but they surely are in the middle now. The father's contention is that the mother is pulling the children from him. The mother is afraid that if the father talks with them too much he will unduly influence them. Neither parent is on solid ground. The children seem to be fine young people, developing well despite the adverse situation, and are demonstrating remarkable maturity. If each parent simply loves the children and lets them know, there will be no estrangement. This is especially true if they can stop the bickering.

As the hearing in this matter progressed, there was a hopeful sign. It was stated that the parties felt they could work out the phone call problems.

The father wants us to find the mother in contempt of court and, as a sanction, require her to pay his counsel fees. However, no evidence of the amount of counsel fees was presented. Therefore, we cannot make an award but could only hold another hearing to determine what hourly rate the father's attorney charged, what the prevailing rate in the area is, what services were performed and how much time was spent on those services. *In re Estate of Brockerman*, Pa. Super. , 409 A.2d 1199 (1984).

We are not inclined to do that, however, because even if we were to hold the mother in contempt of court, this case is one of mixed results, ¹ and in such cases counsel fees should not be awarded. See *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985). With no sanction to impose, we believe it is unnecessary to find the mother in contempt but do urge her and the children to live up to any agreement which was made with regard to contacts with the father.

ORDER OF COURT

October 1, 1985, the petition to find the mother in contempt is denied, and the petition to modify the custody order is dismissed. The parties shall each pay their own costs.

¹ The petition to modify the custody order must be dismissed.

BARD V. BARD, C.P. Fulton County Branch, No. 32 of 1981-C

Non-Support - Contempt

1. One who has the right to accept or reject a transaction and who accepts and retains benefits from it is bound by it.
2. A person may be estopped by his silence if another has been induced to act to his detriment.



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