

FOURTH DIVISION
October 10, 2013

No. 1-12-3166

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> PARENTAGE OF J.C.,)	Appeal from the
(SHANNON C.,)	Circuit Court of
Petitioner-Appellee,)	Cook County.
v.)	No. 10 D3 50006
MICHAEL M.,)	Honorable
Respondent-Appellant).)	James N. Karahalios,
)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

- ¶ 1 **Held:** The trial court's order finding respondent in indirect criminal contempt must be reversed when respondent was not afforded any of the constitutional protections and procedural rights afforded to other criminal defendants. The trial court's custody and visitation order was not against the manifest weight of the evidence when petitioner, with whom the minor had lived since birth, was granted sole custody.
- ¶ 2 Respondent Michael M. appeals from the trial court's orders finding him in criminal contempt of court and awarding sole custody of a minor child to petitioner Shannon C. On appeal, respondent contends that the trial court abused its discretion when it found him in

indirect criminal contempt of court without providing certain constitutional and procedural protections. He further contends that the trial court erred in entering the order regarding custody and visitation when he was denied notice of petitioner's *pro se* petition and the trial court failed to conduct a "meaningful hearing" on the issue of custody. We reverse in part and affirm in part.

¶ 3 A child was born to respondent and petitioner on November 13, 2008. Petitioner subsequently filed a parentage action against respondent. Ultimately, the trial court entered orders establishing respondent as the minor's natural father and setting child support.

¶ 4 In January 2012, petitioner filed a *pro se* motion alleging that respondent was behind in his payment of child support and seeking enforcement of the child support order. The trial court continued petitioner's motion, ordered respondent to keep a job diary, and continued the case for status on the job diary. Petitioner then filed a *pro se* motion seeking sole custody and asking the trial court to set a visitation schedule for respondent.

¶ 5 The matter proceeded to a hearing on April 5, 2012. Although the record does not contain a transcript of the hearing, respondent has supplemented the record with a bystander's report pursuant to Supreme Court Rule 323(c) (eff. Dec. 13, 2005).

¶ 6 On April 5, 2012, respondent appeared in court and stated that he had found employment. When the trial court asked respondent if he had his job search diary, respondent stated that he did not. The court then found respondent in criminal contempt of court because respondent did not keep a job search diary as ordered by the court. The trial court did not admonish respondent of his constitutional right regarding self-incrimination before questioning him. The court ultimately sentenced respondent to 60 days in jail. The trial court then granted petitioner's motion for sole custody, set respondent's parenting schedule, and struck the matter from the court's call. Respondent's mittimus indicates that he was found guilty of direct criminal contempt, and sentenced to 60 days in jail. Respondent served 30 days in jail before his release.

¶ 7 Respondent then obtained counsel and filed a petition to vacate or reconsider the finding of direct criminal contempt because his failure to keep a job diary occurred outside the court's presence and was therefore not subject to direct criminal contempt proceedings. In the interim, the trial court vacated the order requiring respondent to keep a job diary because respondent was employed and paying child support.

¶ 8 Ultimately, the trial court denied respondent's motion to vacate the contempt finding, in a written order, holding respondent's actions constituted direct criminal contempt when he answered the court's questions and admitted the contempt. The court also denied respondent's motion to vacate the custody and visitation order without prejudice, holding that the court retained jurisdiction to modify custody and visitation.

¶ 9 On December 18, 2012, the trial court held a hearing on a proposed bystander's report. During the hearing, the trial court stated that respondent had committed indirect criminal contempt in that respondent did not comply, at home, with the court's order to keep a job diary. The court also stated that at the April hearing it had listened to respondent explain not only what he had done, but why he had not done certain things, *i.e.*, held an evidentiary hearing. The court further noted that it permitted respondent to explain everything "that he wanted to" the court. The court then stated that although respondent did not act disrespectfully in the courtroom, respondent disrespected the court by not complying with a court order.

¶ 10 Petitioner then testified that the parties' minor child was four years old and had lived with her since birth. She further testified that at the April hearing the court asked "all the questions" regarding custody, but that respondent was "not really paying attention." Respondent heard her answer these questions and respondent answered a question himself. During cross-examination, she admitted that respondent looked to the back of the courtroom several times during the hearing and appeared distracted.

¶ 11 Respondent testified that the only question he recalled the court asking with regard to custody and visitation at the April hearing was if he had previously had the minor for an overnight visit. He did not recall any other questions. Respondent then testified that he told the court at the April hearing that he had begun working on March 29, 2012, that he had worked one day the prior week, and that he was paid in cash. Petitioner was present in court until he was taken away by a sheriff.

¶ 12 At the conclusion of the hearing, the court certified that "the attached and incorporated bystander's report [was] an accurate report of proceedings" when combined and incorporated with the transcript of the instant hearing. The court then approved the bystander's report as amended.

¶ 13 Although petitioner has not filed an appellee's brief, we may consider this appeal under the standards set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976).

¶ 14 Respondent first appeals the trial court's order finding him in contempt and sentencing him to 60 days in jail. He contends that the trial court abused its discretion when it found him in indirect criminal contempt without affording him the constitutional protections afforded other criminal defendants. When, as in the case at bar, the only contention on appeal concerns the legal effect of undisputed facts, this court's review of the contempt judgment is *de novo*. See *People v. Damkroger*, 408 Ill. App. 3d 936, 940 (2011).

¶ 15 Criminal contempt of court is generally defined as "conduct which is calculated to embarrass, hinder or obstruct a court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute." *People v. Javaras*, 51 Ill. 2d 296, 299 (1972). Criminal contempt proceedings ensure, *inter alia*, that judges and other court personnel are shown the respect to which they are entitled when performing their judicial

duties, that court proceedings are conducted in an orderly fashion, and that court orders are obeyed. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 45 (1990). Criminal contempt is retrospective in nature and punishes a party either for performing a prohibited act or for failing to do what the court has ordered. *Levaccare v. Levaccare*, 376 Ill. App. 3d 503, 509 (2007).

¶ 16 Initially, this court notes that although the trial court stated, at the hearing on the bystander's report, that it had found respondent in indirect criminal contempt, respondent's mittimus indicated that he was found in direct criminal contempt. However, the oral pronouncement of the trial court is the judgment of the court, and the written order of commitment is merely evidence of that judgment. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). When the common law record conflicts with the report of proceedings, the report of proceedings controls. *People v. Peeples*, 155 Ill. 2d 422, 496 (1993). Here, it is the court's oral pronouncement that it had found respondent in indirect criminal contempt which controls. *Jones*, 376 Ill. App. 3d at 395.

¶ 17 Moreover, an examination of the record reveals that respondent was held in contempt based upon his failure keep a job diary at home. Direct criminal contempt may occur when either the court personally observes a contemptuous act or a contemptuous act is committed outside the immediate physical presence of the trial court, but within an integral part of the court. *People v. Minor*, 281 Ill. App. 3d 568, 572-73 (1996). Indirect criminal contempt occurs when the contemptuous act occurs outside the presence or constructive presence of the trial court. *Betts*, 200 Ill. App. 3d at 47-48 (distinguishing indirect criminal contempt from direct criminal contempt). Accordingly, respondent was held in indirect criminal contempt because the contempt was based upon his failure, outside the presence of the trial court, to comply with the trial court's order to keep a job diary. See *Betts*, 200 Ill. App. 3d at 47-48.

¶ 18 A person charged with indirect criminal contempt is entitled to all of the constitutional protections and procedural rights afforded to other criminal defendants. *Betts*, 200 Ill. App. 3d at 58. These include, *inter alia*, the right to know the nature of the charges; the right to file an answer; the right to confront and cross-examine witnesses; the right to be personally present at trial; the right to subpoena witnesses; the right to a public hearing; the right to the privilege against self-incrimination; the right to counsel; the right to the presumption of innocence; and the right to be proven guilty beyond a reasonable doubt. *Betts*, 200 Ill. App. 3d at 58; see also *People v. L.A.S.*, 111 Ill. 2d 539, 543-44 (1986) (the alleged contemnor is entitled to "due process safeguards, including notice, opportunity to answer, and a hearing").

¶ 19 Here, respondent correctly argues that he was not afforded the procedural protections that attach to an indirect criminal contempt proceeding. He was not given notice that he might be subject to a criminal sanction and the court did not admonish him regarding the right to counsel. *Betts*, 200 Ill. App. 3d 26 at 58. This fails to satisfy the requirements of due process. See *SKS and Associates, Inc. v. Dart*, 2012 IL App (1st) 103504, ¶ 22 (finding that due process was not satisfied when the contemnor was not given notice that he could be held in indirect criminal contempt, nor told he could be found in criminal contempt until the court actually found him in contempt and imposed a fine, and was never notified of the nature of the charges against him).

¶ 20 Additionally, respondent was not afforded the privilege against self-incrimination. In other words, respondent's admission to the court that he did not keep a job diary was the basis of the court's finding of indirect criminal contempt. Absent notice that he was facing such charges, respondent was unable to assert the procedural rights to which he was entitled. See *SKS and Associates, Inc.*, 2012 IL App (1st) 103504, ¶ 24 (given the lack of notice prior to, and at the hearing, it could not be said that the contemnor actually had an opportunity to exercise his constitutional and procedural rights, including the right to remain silent and the right to present

evidence). Ultimately, in the case at bar, given the complete lack of procedural and constitutional rights afforded to respondent, this court concludes that the trial court's order finding respondent in indirect criminal contempt and imposing 60 days in jail must be reversed. See *Betts*, 200 Ill. App. 3d at 61 (while the trial court's failure to state on the record that it found the defendant guilty beyond a reasonable doubt of indirect criminal contempt might not itself require reversal, the additional denial of other constitutional rights did). We find it unnecessary to remand this case upon reversal of the indirect criminal contempt finding because no pleading has ever been filed charging respondent with this contempt. Thus, there is no pleading or matter to be remanded. *SKS and Associates, Inc.*, 2012 IL App (1st) 103504, ¶ 30 (where, as here, no pleading charging indirect criminal contempt had been filed, eliminating the necessity of a remand upon reversal). We also note that the order requiring respondent to keep a job diary has been vacated by the trial court.

¶ 21 Respondent next contends that the trial court abused its discretion when it entered the custody and visitation order without affording him adequate notice, that is, time to respond to the petition or obtain an attorney. He further contends that the trial court failed to conduct a "meaningful hearing" on the issue of custody before entering the custody and visitation order. Essentially, respondent challenges the procedural process by arguing that he did not receive adequate notice that the custody issue was pending before the court and that the trial court did not adequately examine the issue of custody. He makes no substantive arguments regarding the custody order.

¶ 22 Initially, this court questions respondent's contention on appeal that he was not afforded notice of petitioner's custody petition as respondent admits that he had the petition for "less than a week." Although he contends that the notice he received was not adequate, he cites no authority for the proposition that the amount of notice that he did have, that is, "less than a

week," is not sufficient. Ultimately, contrary to respondent's assertion on appeal, he did have notice that the issue of custody would be before the court at the April hearing when he had previous notice of the petitioner's *pro se* petition for sole custody and a visitation schedule. He did not request a continuance at the April hearing.

¶ 23 This court is unpersuaded by respondent's reliance upon *Ligon v. Williams*, 264 Ill. App. 3d 701 (1994), as in that case, neither party had notice that the issue of custody would be before the court. There, neither party filed a petition relating to custody; rather, the trial court raised the issue of custody *sua sponte* and then entered an order switching custody of the minor from one parent to the other.

¶ 24 On appeal, the court determined that when neither parent had raised the issue of custody before the trial court, the court acted without authority in entering an order affecting custody because custody was not a justiciable matter before the court. *Ligon*, 264 Ill. App. 3d at 708. Therefore, because the trial court acted without jurisdiction, its order was void. *Ligon*, 264 Ill. App. 3d at 709. The court further determined that even if the issue of custody had been brought before the court, the trial court failed to continue the proceedings in order that the mother could be provided with notice and an opportunity to obtain representation. *Ligon*, 264 Ill. App. 3d at 710. There, the mother had no notice and no opportunity to rebut certain allegations challenging her fitness to have custody of the minor. *Ligon*, 264 Ill. App. 3d at 710-11.

¶ 25 Here, respondent had the *pro se* petition for custody and visitation for less than a week, had notice that custody was an issue before the court, and had the opportunity to obtain counsel prior to the hearing. Because the issue of custody was pending before the court through petitioner's *pro se* petition for sole custody, the trial court had jurisdiction to consider the issue of custody. See *Ligon*, 264 Ill. App. 3d at 708-09. The record also reveals that the trial court questioned the parties regarding custody at the April hearing.

¶ 26 Although respondent makes no substantive arguments regarding the trial court's custody and visitation order, he argues that the order must be vacated because the trial court failed to hold a "meaningful hearing" on the issue of custody. Our review of the hearing, however, reveals that the trial court did, in fact, conduct a "meaningful hearing" and further reveals no substantive error.

¶ 27 A trial court's custody determination will not be disturbed on appeal unless the decision was against the manifest weight of the evidence. *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶ 33 (Aug. 28, 2013). The trial court's decision is against the manifest weight of the evidence when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based upon the evidence. *Id.* When determining custody, the primary consideration is the best interest and welfare of the minor child. *Id.* The trial court's decision is afforded great deference because it is in a superior position to judge the credibility of witnesses and determine the best interests of the minor. *Id.*

¶ 28 Here, the record reveals that the trial court asked petitioner questions regarding custody, and petitioner indicated that the minor child had lived with her since birth. The court also asked respondent whether he had ever had the minor for an overnight visit. Although respondent testified at the hearing on the bystander's report that he did not recall any other questions regarding the minor's custody, petitioner testified that respondent heard her answer the court's questions, but that he appeared distracted and looked to the back of the courtroom several times. Ultimately, this court will afford the trial court's custody determination great deference because it observed petitioner and respondent and was best able to judge their credibility and determine the minor's best interest. See *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶ 33. Based on the limited record before us, this court cannot say that the trial court's order awarding custody to

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petitioner was against the manifest weight of the evidence when petitioner testified that the minor had lived with her since birth. See *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶ 33.

¶ 29 Accordingly, for the reasons stated above, the order of the circuit court of Cook County finding respondent in indirect criminal contempt of court and sentencing him to 60 days in jail is reversed. We affirm the circuit court of Cook County in all other aspects.

¶ 30 Affirmed in part; reversed in part.