NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 28, 2018

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Re: ***Virginia Division of Child Support Enforcement ex rel. Karen J. Ines v. John R. Curran, Jr.*, Case No. KM–2018–399**

Dear Counsel and Ms. Ines:

The issue before the Court is whether a party may appeal the amount of a civil appeal bond set by a juvenile and domestic relations district court ("J&DR") to a circuit court without also appealing the underlying substantive ruling of the J&DR. This Court holds that a civil appeal bond is a procedural aspect of a final J&DR order and that a party may not bifurcate the procedural aspects of a J&DR order from the underlying substantive ruling on appeal to circuit court. Therefore, Respondent's "Appeal of Bond Amount Only" is dismissed for lack of subject matter jurisdiction.

OPINION LETTER

I. BACKGROUND

On September 12, 2018, the Fairfax County J&DR determined Mr. Curran to be $27,003.95 in arrears of child support as of August 31, 2018. It also found him in civil contempt, sentencing him to 12 months in jail, with the option to purge the sentence upon his payment of "$12,000 or submission of a suitable payment plan."

Mr. Curran filed a Notice of Appeal with the J&DR on September 13, 2018, noting "only [the] civil contempt finding is appealed from, not [the] determination of arrears" (the "First Appeal").[1] The J&DR set an appeal bond of $27,003.95 for the arrearage amount. The court did not set bond "to secure the payment of prospective support while the appeal is pending," or "to ensure appellant's appearance." Mr. Curran never posted bond. Another judge in this Circuit dismissed the First Appeal based on a lack of subject matter jurisdiction due to Mr. Curran's failure to post the appeal bond.

On September 20, 2018, Mr. Curran filed a second Notice of Appeal, this time noting the appeal was an "appeal of the appeal bond amount only" (the "Second Appeal"). The J&DR did not set any bond for the Second Appeal. In a motion filed before this Court, Mr. Curran asserted that, "the JDR Court was without legal authority to set an appeal bond for child support arrears of $27,003.95." Mr. Curran requests the Court set a new appeal bond at $0.

The Commonwealth maintains this Court lacks jurisdiction to consider any aspect of his appeal until he posts the $27,003.95 appeal bond.

II. ANALYSIS

The statutory provision implicated in this appeal is Virginia Code § 16.1–296, which, as a general matter, permits a party to appeal a final order of a J&DR to circuit court for trial *de novo*. VA. CODE § 16.1–296(A). Virginia Code § 16.1–296 also provides, as a default rule, that "[n]o appeal bond shall be required of a party appealing from an order of a juvenile and domestic relations district court." VA. CODE § 16.1–296(H). There are two exceptions to this default rule. First, an "appeal bond shall be required . . . for that portion of any order or judgment establishing

[1] This Notice of Appeal was not made a part of the record before the Court by either party. As a general matter, "[t]he burden is with appellant to submit to the appellate court a record that enables the court to determine whether there has been an abuse of trial court discretion." *Smith v. Commonwealth*, 16 Va. App. 630, 635 (1993). Where the record does not substantiate the claim of error, an appellate court "will not consider the point," *Jenkins v. Winchester Dep't of Soc. Servs.*, 12 Va. App. 1178, 1185 (1991), and "the judgment will be affirmed," *Smith*, 16 Va. App. at 635 (citation omitted). Moreover, despite it being "well settled that [appellate courts] are without authority to take [] notice of the records of the lower court," *Plummer v. Commonwealth*, 211 Va. 706, 707 (1971), Virginia Code § 16.1–114.1 permits this Court to "direct proceedings to correct . . . omissions, to promote substantial justice to all parties, and to bring about a trial of the merits of the controversy" in "proceedings appealed from the district courts." Here, to promote substantial justice and to bring about a decision on the merits of the Second Appeal, an appeal from the Fairfax County Juvenile and Domestic Relations *District Court*, this Court hereby takes judicial notice of the Notice of Appeal dated September 13, 2018 as filed by counsel for Mr. Curran in the J&DR.

a support arrearage or suspending payment of support during pendency of an appeal." VA. CODE § 16.1–296(H).

Second, "[u]pon appeal . . . from a finding of civil [] contempt involving a failure to support, the [J&DR] may require the party applying for the appeal . . . to give bond." VA. CODE § 16.1–296(H). Under the second exception, a J&DR court may require bond "to insure [the party in contempt's] appearance and . . . to secure the payment of prospective support accruing during the pendency of the appeal." VA. CODE § 16.1–296(H).

To be clear, the issue presented by the "Second Appeal" is a limited one. This Circuit already ruled that it was without jurisdiction over the First Appeal of the civil contempt finding due to Mr. Curran's failure to post bond. "The [law of the case] doctrine, briefly stated, is this: Where there have been two appeals in the same case . . . nothing decided on the first appeal can be re-examined on a second appeal." *Rowe v. Rowe*, 33 Va. App. 250, 262 (2000) (citations omitted). "To allow a trial judge to disregard the holding of a previous panel would be an inefficient administration of justice . . . and would promote uncertainty in a court's decision." *Id.*

Given this Circuit's ruling in the First Appeal, this Court's present inquiry presupposes this Circuit's prior conclusion that it was without jurisdiction to hear the First Appeal due to Mr. Curran's failure to pay the appeal bond. Thus, the Court must now limit its inquiry here to Mr. Curran's appeal of the "appeal bond amount only." However, before the Court can adjudicate the merits of the Second Appeal, it must determine whether it has subject matter jurisdiction over the appeal.

A. Appellants May Not Appeal "Piecemeal."

Notwithstanding Virginia Code § 16.1–296(H), there is no statutory authority for appealing civil bonds comparable to the statutory framework governing appeals of criminal bonds or bail. *Compare* VA. CODE § 19.2–124 ("If a judicial officer denies bail to a person [or] requires excessive bond . . . the person may appeal the decision of the judicial officer."). Virginia's appellate courts provide no express authorization for such appeals, either.

Indeed, the reasoning of the Court of Appeals of Virginia in *Mahoney v. Mahoney*, 34 Va. App. 63 (2000) (*en banc*), suggests a contrary conclusion—that a party cannot appeal only a civil appeal bond set for a final order. In *Mahoney*, the court addressed whether a party could appeal the jurisdiction of a J&DR "to enter any orders," without also thereby appealing the substantive rulings contained in the J&DR's orders (*e.g.*, establishment of support arrearages or a finding of contempt). *Id.* at 65–66. After a J&DR entered a final order including an arrearages determination and a civil contempt finding, a husband appealed to circuit court, challenging the "jurisdiction of the Court [to] enter any orders and the validity of all orders entered in this case based on fraud." *Id.* The husband failed to post the appeal bond set by the J&DR, so the circuit court dismissed the appeal for lack of jurisdiction. *Id.*

At the Court of Appeals, the husband argued "the circuit court erroneously dismissed his appeal *de novo* because he limited his appeal to a challenge of the court's jurisdiction . . . [and] specifically excluded from his notice of appeal the juvenile court's establishment of a support arrearage and its finding of contempt." *Id.* at 66. The Court concluded husband's challenge of the "validity of 'all orders entered'" necessarily appealed all orders of the J&DR and the substantive rulings contained in those orders. *Id.*

The Court of Appeals rationalized that a circuit court's review on appeal from JD&R is "*de novo*," requiring it to completely re-adjudicate the issues appealed. *Id.* at 66. Accordingly, where an appellant challenges a particular issue concerning a substantive ruling of a J&DR, the circuit court must adjudicate all matters "logically related to" and "inherent in" that issue. *Id.* at 66–67. The court held that because the order appealed from addressed "only one subject," support arrearages, husband's failure to post bond was fatal to his appeal and affirmed the dismissal of his appeal. *Id.* at 68. In dissent, Judge Benton opined he would have allowed an appeal of only jurisdiction, permitting what the underlying circuit court judge disparaged as improperly "piecemeal[ing] the appeal." *Id.* at 70 (J., Benton, dissenting).

Of course, this Court is bound by the *Mahoney*'s majority *en banc* decision. *See, e.g.*, *Powell v. Commonwealth*, 267 Va. 107, 128 (2004) ("It is self-evident that [] the opinion of an appellate court, under the doctrine of *stare decisis*, applies to all future cases in the trial courts."). Where a litigant appeals only a particular aspect of a J&DR order, *Mahoney* effectively requires a circuit court to review *de novo* the underlying substantive ruling.

If the Court of Appeals prohibited a litigant from appealing only the J&DR's jurisdiction separate and apart from the underlying arrears determination; the court is unlikely to permit Mr. Curran to "piecemeal" the appeal bond determination from the underlying civil contempt finding. In other words, a litigant cannot "piecemeal" a J&DR order on appeal to this Court by separating jurisdictional issues or procedural aspects from the substantive ruling itself.

To be clear, a single J&DR order including (1) an arrearage determination and (2) civil contempt finding contains two, distinct substantive legal issues. A determination of arrears reflects a court's calculation of vested, past due support installments as part of an order directing the payment of child support. *See, e.g.*, *Goodpasture v. Goodpasture*, 7 Va. App. 55, 58 (1988); *Forte v. Dep't of Soc. Servs.*, 65 Va. App. 1, 10 (2015). In contrast, a civil contempt finding reflects a court's determination "to punish for the wilful disobedience of a proper order." *See Branch v. Branch*, 144 Va. 244, 251 (1926). A court may not hold a party in contempt "when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Turner v. Rogers*, 564 U.S. 431, 432 (2011) (quoting *Hicks v. Feoick*, 485 U.S. 624, 638 (1988)).

A party can be in arrears, but not in contempt, where that party owes money, but is unable to pay due to no willful act of his own. Hence, a party can appeal a civil contempt finding even though it resides in an order including an arrearage determination, because resolution of the

contempt issue will not affect the arrearage determination.[2] *See Avery v. Dep't of Soc. Servs.*, 22 Va. App. 698, 702 (1996). The logical basis for this conclusion is that such an appeal involves a determination of willfulness or actual ability to pay, not a determination of the amount owed. That said, what a party may not do is appeal a procedural aspect within one of the order's substantive rulings without also properly appealing the substantive ruling itself. However, this is precisely what Mr. Curran is trying to do in the Second Appeal.

Mr. Curran cites three cases in support of his argument that he can appeal a bond determination without also appealing the part of the order giving rise to the bond. All three cases fail to give him the support he wants. In *Avery v. Department of Social Services*, 22 Va. App. 698, 699–700 (1996), a circuit court dismissed an appeal from J&DR for lack of jurisdiction due to a husband's failure to post bond. The underlying J&DR order included an arrearage determination and a civil contempt finding. *Id.* On appeal from the circuit court's dismissal, the Court of Appeals held that "[a] finding of contempt is not an order 'establishing a support arrearage.'" *Id.* at 702 (quoting *McCall v. Commonwealth Dep't of Soc. Servs.*, 20 Va. App. 348, 352–53 (1995)). After pointing out the husband clearly demonstrated his intent to appeal just the contempt finding, and not the arrearage determination, the court ruled "that [Virginia] Code § 16.1–296(H) permitted Avery to appeal from the juvenile court's contempt order without the necessity of posting a bond." *Id.* at 700–02.

Avery is inapposite to the present case because the holding there only distinguished a contempt finding from an arrearage determination as separate, *substantive* legal issues. The Court of Appeals permitted Avery to appeal only the contempt finding, and not the arrearage determination, even though the J&DR order concerned both. Reading *Avery* together with *Mahoney*, these cases support the conclusion that a party may appeal one substantive ruling in an order without appealing another, but a party may not appeal a particular aspect of a substantive ruling without appealing the underlying ruling itself. However, the court in *Avery* did not authorize further bifurcation of the order to permit an appeal challenging a procedural aspect of a civil contempt finding without appealing the contempt finding itself.

With this in mind, Mr. Curran's reliance on *Commonwealth v. Neal*, 58 Va. Cir. 205 (Richmond 2002) is evidently misplaced.[3] There, a father appealed to circuit court only a civil contempt finding from a J&DR order containing both a contempt finding and an arrearages determination. *Id.* As a preliminary matter, the circuit court clarified "that no appeal bonds were set by the juvenile court."[4] *Id.* at 206. The court distinguished *Mahoney*, pointing out that in

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[2] Similarly, a party can appeal a court's determination of damages without implicating the underlying liability determination, as those are separate, *substantive* legal issues. *See generally CGI Fed. Inc. v. FCi Fed., Inc.*, 814 S.E.2d 183, 189, 189 n.2 (2018) (citation omitted).

[3] Decisions of other circuits are not binding upon this Court, but may provide guidance. *See, e.g., Orantes v. Pollo Ranchero, Inc.*, 70 Va. Cir. 277, 280 (Fairfax 2006).

[4] The J&DR entered the underlying order on May 22, 2001. *Neal*, 58 Va. Cir. at 205. On June 20, 2001, twenty-nine days later, the J&DR purported to add an appeal bond equal to the amount of arrears, "with the proviso that '[i]f not contesting amount of arrears, no bond required.'" *Id.* at 205–06. Since the May 22 order was a final order, the

Mahoney the husband challenged "all orders entered," whereas in the case before it the father only appealed the civil contempt finding. *Neal*, 58 Va. Cir. at 208. The circuit court explained that pursuant to Virginia Code § 16.1–296(H), "an appeal bond is required only for '*that portion of any order* . . . establishing a support arrearage.'" *Id.* Thus, the court held that because the father appealed only the court's finding of contempt and not the arrearages determination, the court had jurisdiction because the J&DR did not set an appeal bond on the civil contempt finding. *Id.* at 206, 208.

In the present case, Mr. Curran reads the language of Virginia Code § 16.1–296(H) permitting an appeal of only "that portion" of an order too broadly. Mr. Curran attempts to construe the holding in *Neal* to permit a J&DR litigant to bifurcate jurisdictional or procedural aspects of a substantive ruling (*i.e.*, an appeal bond determination) from the ruling itself on appeal to circuit court. Like *Avery*, however, *Neal* stands for the proposition that a party can appeal a civil contempt finding without also appealing a support determination and that an appeal bond is not always a necessary prerequisite to appeals of civil contempt findings. *Neal* does not hold that a circuit court may have jurisdiction over a party's appeal of a procedural aspect logically related to or inherent in a substantive ruling of a J&DR order.

Finally, Mr. Curran relies on *Forte v. Department of Social Services*, 65 Va. App. 1 (2015). Yet, that case reemphasizes the holding of *Mahoney* that when a party appeals an issue logically related to, or inherent in a substantive ruling in a J&DR order on which there is an appeal bond, the party effectively appeals the bonded ruling and must post bond before the circuit court can acquire jurisdiction. In *Forte*, a J&DR court entered a final order denying a father's motion to amend child support and determining arrearages. *Id.* at 4. The father appealed the denial of his motion only, and an appeal bond was set. *Id.* The father objected, contending that he should not have to post bond because he only appealed the denial of his motion. *Id.* at 6.

Notwithstanding the fact the father clearly demonstrated his intent to appeal only the denial of his motion, the Court of Appeals held the denial of the father's motion was intrinsically related to the arrearages determination, finding that "whenever a court issues an order directing the payment of child support . . . it must determine the amount of arrearages, if any." *Id.* at 9 (citing Va. Code § 20–60.3(9)). Thus, when hearing the father's appeal *de novo*, the circuit court would have to issue an order directing the payment of child support, and necessarily reach a determination concerning arrearages. *Id.* at 9–10. Once again, like *Avery* and *Neal*, *Forte* does not authorize a party to piecemeal his appeal by splitting procedural aspects of an order from the substantive ruling.

Here, Mr. Curran seeks to appeal the appeal bond fixed by the J&DR on the civil contempt finding part of the J&DR order only. He hopes to reduce or eliminate the bond to an amount he can afford so that he can then appeal the contempt finding. Unlike in *Avery* and *Neal*, the Second Appeal does not concern the interrelation of two substantive rulings. Rather, the

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Richmond Circuit Court concluded the June 20 act of the J&DR was a nullity as the J&DR no longer had jurisdiction. *Id.* at 206 (citing Va. Sup. Ct. R. 1:1).

Second Appeal questions a procedural aspect of the J&DR's civil contempt ruling. As the *Mahoney* court held, where a party appeals a particular issue from J&DR, the circuit court must adjudicate all matters logically related to and inherent in that issue. *Mahoney*, 34 Va. App. at 66–67. Mr. Curran cannot "piecemeal" the appeal bond determination from the underlying contempt order and appeal the former but not the latter. An appeal bond is a procedural aspect of its underlying substantive order—in this instance, the J&DR's civil contempt finding.

The Court holds that a party may not appeal a procedural aspect of a substantive ruling without appealing the underlying ruling itself. Since Mr. Curran appeals "the appeal bond determination only" and an appeal bond determination is a procedural aspect of a final order, this Court lacks subject matter jurisdiction and the Court must dismiss the Second Appeal.

B. Due Process Does Not Require A Right Of Appeal From Civil Bond Determinations.

In the Second Appeal, Mr. Curran expresses frustration because he wishes to appeal the civil contempt finding, but he is in jail and claims he cannot post the bond necessary to appeal.[5] Mr. Curran claims the appeal bond operates to block him from appealing the civil contempt finding in violation of his constitutional right to due process. However, Mr. Curran is presently incarcerated as a result to the J&DR's finding that he is in civil contempt for his willful failure to pay child support. Mr. Curran's argument overlooks the fact that there is no inherent right to appeal in Virginia and that he had a full and fair opportunity to be heard concerning the underlying liability in the J&DR.

The Fourteenth Amendment of the United States Constitution "provides, among other things, that a State may not abridge 'the privileges or immunities of citizens of the United States' or deprive 'any person of life, liberty, or property, without due process of law.'" *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010) (quoting U.S. CONST. amend XIV, § 1). The central aim of procedural due process is to ensure citizens have notice and a full and fair hearing before the state deprives any significant property interest. *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). "Generally speaking, state law defines property interests." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 707 (2010).

In Virginia, "[t]he right of appeal is statutory and the statutory procedural prerequisites must be observed." *Robert & Bertha Robinson Family, LLC v. Allen*, 295 Va. 130, 145 (2018) (citations omitted). There is no inherent right to a *de novo* appeal from a court not of record. *Cf. id.* No litigant has a right to appeal "[a]bsent a statutory authorization or a constitutional mandate." *Id.* Virginia Code § 16.1–296 permits appeals of rights from final orders. There is, however, no legal authority providing a right to appeal from a J&DR appeal bond determination.

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[5] Mr. Curran could win release by submitting a suitable payment plan to the J&DR court, per that court's order. This Court does not know if he tried this or not.

"Appeal bonds allow appeals to move forward, while protecting the appellee's interest should the appellant fail on appeal." *Zedan v. Westheim*, 62 Va. App. 39, 52 (2013). After the J&DR entered an appeal bond for the civil contempt finding, Mr. Curran "essentially had three options before him in the trial court: (1) pay the child support arrearage, (2) remain in jail under a civil contempt order for failing to pay the child support arrearage, or (3) file an appeal to this Court challenging the child support arrearage (and pay an appeal bond as security for that appeal)." *Id.* at 52.

Mr. Curran had a full and fair opportunity to dispute the amount of arrearages in the J&DR proceedings. The J&DR found him in civil contempt and set an appeal bond reflecting the exact amount of the arrearages, $27,003.95. To challenge the appeal bond determination before this Court, Mr. Curran must appeal from the final order and satisfy the necessary statutory prerequisites, *Allen*, 295 Va. at 145, including posting bond if so required, *Forte*, 65 Va. App. at 9 n.2.

Dismissal of the Second Appeal will not deprive Mr. Curran of his procedural due process rights under the Fourteenth Amendment. In fact, Mr. Curran was provided with a sufficient process to vindicate his appeal. But as this Circuit held in the First Appeal, Mr. Curran failed to observe the necessary statutory procedural prerequisites necessary to invoke this Court's jurisdiction.

Where Mr. Curran had a meaningful opportunity to contest the underlying ruling of the J&DR and where there is a process for Mr. Curran to appeal that ruling, his contention in the Second Appeal that "because he was unable to post an appeal bond as required by [Virginia] Code § 16.1–296(H), he was denied his right to a trial and due process of law . . . is without merit." *Scales v. Dep't of Soc. Servs.*, Record No. 2295–97–3, 1998 Va. App. LEXIS 292, at *2, *5 (1998). Accordingly, this Court holds the statutory authority of a J&DR to make an appeal bond determination without the right to appeal directly therefrom does not violate Mr. Curran's procedural due process rights.

III. CONCLUSION

Is there a mechanism for appealing a civil appeal bond similar to the procedure for appealing a criminal bond or bail determination? There is not. For the reasons stated herein, this Court holds a civil appeal bond is a procedural aspect of a final J&DR order and that a party may not bifurcate the procedural aspects of a J&DR order from the underlying substantive ruling. Accordingly, this Court further holds a party may not, on appeal from J&DR, challenge only the appeal bond determination of the J&DR without appealing the underlying substantive ruling. Consequently, this Court must dismiss Respondent's "Appeal of Bond Amount Only" for lack of subject matter jurisdiction.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

VIRGINIA DEPARTMENT OF CHILD SUPPORT ENFORCEMENT *ex rel* KAREN J. INES	)	
Petitioner,	)	
v.	)	KM-2018-399
JOHN R. CURRAN, JR.,	)	
Respondent.	)	

FINAL ORDER

UPON CONSIDERATION of Respondent's Motion to Appeal Only The Amount of Bond; and

UPON HEARING oral argument by counsel for both parties on the Motion on September 21, 2018; it is hereby

ADJUDGED that the Court does not have subject matter jurisdiction over Respondent's Appeal as required by Virginia § 16.1-296;

ADJUDGED that denial of Respondent's appeal will not deprive him of his procedural due process rights under the Fourteenth Amendment;

ORDERED that Respondent's appeal be DISMISSED for lack of subject matter jurisdiction; and

DECREED that the Opinion Letter from the Honorable David A. Oblon dated September 28, 2018 is hereby adopted by reference into this order as though it were fully restated herein.

[redacted]

Judge David A. Oblon

SEP 2 8 2018

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.