



FOURTH JUDICIAL CIRCUIT OF VIRGINIA  
CIRCUIT COURT OF THE CITY OF NORFOLK

COPY

KAREN J. BURRELL  
JUDGE

November 6, 2009

100 ST. PAUL'S BOULEVARD  
NORFOLK, VIRGINIA 23510

Brent A. Johnson  
Chief Deputy Commonwealth's Attorney  
Office of the Commonwealth's Attorney  
800 E. City Hall Avenue, Suite 600  
Norfolk, VA 23510

**RE: Rhonda Leigh Springer v. Harry Edward Forren**  
**Civil Docket No.: CL09-3336**

FILED  
2009 NOV 19 AM 8:31  
CLERK  
D.C.

Dear Mr. Johnson:

The above-referenced matter is before this Court on appeal from a contempt finding out of the Norfolk Juvenile and Domestic Relations Court arising out of a child custody/visitation matter.

Currently before the Court is a Motion to Dismiss that has been argued and briefed by the parties concerning whether the alleged contempt at issue is civil or criminal in nature. The Court, having reviewed and considered the arguments and authorities presented, has determined that the contempt involved is criminal and not civil. As such, a ruling on the Motion to Dismiss has been deferred for a period of thirty (30) days pending a determination by your Office as to whether or not you will prosecute this matter. The relevant pleadings are available for your review under the above-referenced docket number.

Please advise the Court in writing once your Office has made a decision.

Sincerely,

Karen J. Burrell  
Judge

KJB/nm

cc: Robert Jeffries, Esquire  
Judith Rosenblatt, Esquire  
G. Anthony Yancey, Esquire

LAW OFFICES OF DIANE FENER, P.C.  
1060 Laskin Road, Suite 22B  
Virginia Beach, VA 23451  
email: df@dianefener.com  
Telephone: (757) 491-0240  
Fax: (757) 491-0247

Diane Fener  
Robert Jeffries

October 26, 2009

**Via US Mail to:**

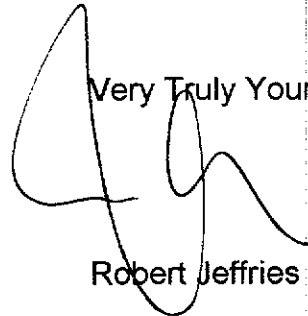
George Schaefer, Clerk  
Norfolk Circuit Court  
100 St. Paul's Blvd  
Norfolk, VA 23510

*Re: Forrien v. Springer*  
*Case No.: CL09-3336*

Dear Mr. Schaefer:

Please accept the enclosed motion for entry of order for docketing on November 5, 2009.

Very Truly Yours,



Robert Jeffries

RBJ/mlt  
enclosures

cc: J. Rosenblatt via fax at (757) 491-7634  
G. Anthony Yancey via fax at (757) 622-8243

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK**

Commonwealth of Virginia, )  
 )  
 Plaintiff, )  
 ) CL09-3336  
 v. )  
 )  
 Rhonda Leigh Springer, )  
 )  
 Defendant. )

**Notice of Motion for Entry of Order**

Notice is hereby given that, by order of the Court, on November 5, 2009 at 9:00AM or as soon thereafter as counsel may be heard the Court will further consider the matter of Respondent's motion to dismiss. In connection with that hearing, Defendant will move for entry of the order that is Exhibit A to this Notice.

Respectfully submitted,

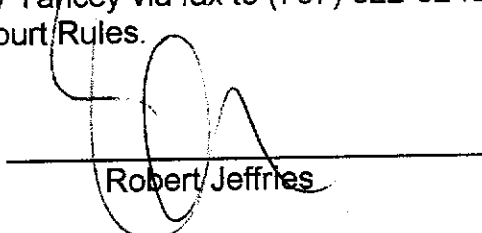
Rhonda Leigh Springer

By:

Robert Jeffries  
Law Offices of Diane Fener, P.C.  
1060 Laskin Road, Suite 22B  
Virginia Beach, VA 23451  
(757) 491-0240  
(757) 491-0247 (fax)

**Certificate of Service**

I hereby certify that on October <sup>26</sup>16, 2009, I served a copy of the foregoing on Judith Rosenblatt, counsel for Harry Edward Forren, via fax to (757) 491-7634 and the guardian ad litem, Anthony Yancey via fax to (757) 622-8243 as provided by Rule 1:12 of the Virginia Supreme Court Rules.

  
\_\_\_\_\_  
Robert Jeffries

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# Exhibit A

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK**

Commonwealth of Virginia, )  
 )  
 Plaintiff, )  
 ) **CL09-3336**  
 v. )  
 )  
 Rhonda Leigh Springer, )  
 )  
 Defendant. )

**Order re: Motion to Dismiss**

This matter came before the court on October 14, 2009 and November 5, 2009 for argument on Defendant's motion to dismiss. The Court having reviewed the briefs submitted by counsel and considered their oral argument, hereby rules as follows:

1. This matter is an appeal from a finding of contempt by the Norfolk Juvenile and Domestic Relations Court. The Defendant's motion begins from the premise that the contempt is criminal because it seeks to punish her for completed conduct with respect to visitation that was ordered to take place over the Thanksgiving weekend in 2008.
2. The Court finds that the contempt alleged is criminal based on the holding of *Bagwell v. United Mine Workers*, 512 U.S. 821 (1994). The U.S. Supreme Court said the following concerning the distinction between civil and criminal contempt:

The paradigmatic coercive, civil contempt sanction, as set forth in *Gompers*, involves confining a contemnor indefinitely until he complies with an affirmative command such as an order "to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance." [citations omitted] Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. *Shillitani v. United States*, 384 U.S. 364, 370, n. 6 (1966) (upholding as civil "a determinate [2-year] sentence which includes a purge clause"). In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus "carries the keys of his prison in his own pocket."

*United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994).

The Court went on to say:

**By contrast, a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a "completed act of disobedience,"** Gompers, 221 U.S., at 443, such that [Page 829] the contemnor cannot avoid or abbreviate the confinement through later compliance. Thus, the Gompers Court concluded that a 12-month sentence imposed on Samuel Gompers for violating an antiboycott injunction was criminal. When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect. "[T]he defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense." *Id.*, at 442.

*United Mine Workers v. Bagwell*, 512 U.S. 821, 828-829 (1994)(emphasis added).

In this case, the alleged act of disobedience is a failure to adequately facilitate visitation over four days in November of 2008. It is no longer possible to render greater compliance with the order concerning those four days. The contempt alleged is unquestionably a "completed act of disobedience" and any punishment can only be imposed retrospectively. Therefore, under the U.S. Supreme Court's holding in *Bagwell*, it is criminal.

3. The second issue before the Court is whether the matter must be prosecuted by the Commonwealth Attorney or may be prosecuted by the father, Mr. Forren, through his counsel, Ms. Rosenblatt. In *Powell v. Ward*, 15 Va. App. 553, 560, 425 S.E.2d 539 (1993), the Court of Appeals said:

In a criminal contempt proceeding, the defendant is presumed to be innocent, he must be proved guilty beyond a reasonable doubt, and he cannot be compelled to testify against himself. Moreover, a civil contempt proceeding is between the original parties to litigation and is instituted and tried as part of the main cause; **a criminal contempt proceeding is between the public and the defendant, and is not a part of the original cause.**

*Powell v. Ward*, 15 Va. App. 553, 560, 425 S.E.2d 539 (1993)(emphasis added).

The *Powell* court went on to hold that where a civil contempt is converted to a criminal proceeding, the Commonwealth must be substituted as the party to prosecute the action. The court said the following:

We hold that the trial judge, after deciding to conduct a criminal contempt trial, should have clearly articulated the criminal nature of the proceedings at the earliest possible moment. ***Thereafter, the trial court should have transferred the matter to the law side of the court, and substituted the Commonwealth as the party to prosecute this action.***

*Powell v. Ward*, 15 Va. App. 553, 559, 425 S.E.2d 539 (1993)(emphasis added).

The Court concludes that, under the reasoning in *Powell*, the prosecution of this matter lies with the Commonwealth. Clearly, the Commonwealth Attorney has standing, under *Powell*, to prosecute this case for contempt.

The Commonwealth Attorney's office has submitted a letter to the Court advising that they do not intend to be involved in this matter. Ms. Springer, argues that this action is the equivalent of a *nolle prosequi* because Mr. Forren cannot prosecute the matter through his attorney.

4. In the case of *Cantrell v. Commonwealth*, 229 Va. 387, 392, 329 S.E.2d 22 (1985), the victim's family retained a private lawyer to assist the prosecution. The private lawyer acted as lead counsel in the criminal trial. The private lawyer was simultaneously engaged to represent the victim's parents in a child custody proceeding in which the parents sought to have custody of the victim's child changed from the defendant father to them. The Court discussed the common law right to employ a private lawyer to assist in a public prosecution.

In its opinion, the Court made these observations with regard to the role of a privately retained lawyer under such circumstances:

His role is more limited than that of the public prosecutor. By the weight of authority, he may not initiate a prosecution or appear before the grand jury, [citation omitted]; he may appear only by leave of the trial court, [citation omitted]; he may participate only with the express consent of the public prosecutor, [citation omitted]; he may make a closing jury argument only in the court's discretion, [citation omitted]; and he may take no part in a decision to engage in plea bargaining, deciding the terms of a plea bargain, or a decision to accept a plea of guilty to a lesser crime or to enter a *nolle prosequi*, [citation omitted]. Although there is no arbitrary limitation as to the proportion of work which may be done by a private prosecutor, [citation omitted] the public

prosecutor must remain in continuous control of the case, [citation omitted].

*Cantrell v. Commonwealth*, 229 Va. 387, 392-393, 329 S.E.2d 22 (1985).

In addition, the court said the following concerning the attorney's simultaneous role in prosecuting a custody proceeding on behalf of the victim's relatives.

The common-law right of a crime victim, or of his family, to assist the prosecution with privately employed counsel is not absolute, but lies within the discretion and continuing control of the trial court. [citation omitted] A private prosecutor is subject to the same high standard of conduct in the trial of the case as is a public prosecutor. [citation omitted]. It follows, in our view, that he is absolutely prohibited from taking any position, making any argument, offering any evidence, or advocating any cause which would be forbidden to a public prosecutor.

*Cantrell v. Commonwealth*, 229 Va. 387, 392, 329 S.E.2d 22 (1985).

Applying these principles, the Court then held that the involvement of the private attorney was improper. In so holding, the court said:

A lawyer who represents the victim of a crime, or the victim's family, in a civil case arising out of the occurrence which gives rise to a criminal prosecution, for which he is hired as a special prosecutor, necessarily incurs a conflict of interest. He cannot serve two masters. His duty to administer the criminal law impartially, in the interest of justice, is essentially a judicial one. *Griffin v. U.S.*, 295 F. 437, 439-40 (3d Cir. 1924). He also has undertaken a duty to represent the interests of his civil client with undivided fidelity and zeal. The likelihood of conflict between these two duties rises to the level of an overwhelming probability.

*Cantrell v. Commonwealth*, 229 Va. 387, 393, 329 S.E.2d 22 (1985).

Like the private attorney retained in the *Cantrell* homicide prosecution, the private lawyer attempting to prosecute this criminal contempt, has represented Mr. Forren in custody proceedings in the Norfolk Juvenile and Domestic Relations Court. Under the holding of that case, Ms. Rosenblatt is precluded from serving in this matter as a privately retained prosecutor. Under *Cantrell*, therefore, the father's attorney cannot prosecute this case of criminal contempt.

5. The Court finds that these decisions leave the Court no alternative but to dismiss this matter. However, the Court will stay this order for a period of 30 days to allow the Commonwealth Attorney's Office to reconsider its position with respect to whether it will prosecute this matter.

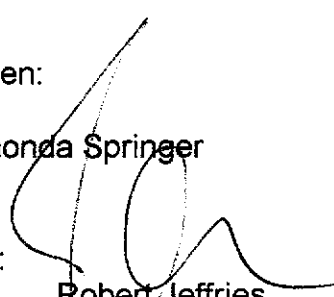
Enter:

\_\_\_\_\_  
Judge

Seen:

Rhonda Springer

By:

  
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