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Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0921-ME

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; ANGELA LANE; JESSICA HUMPHREY; AND JENNIFER CLAY — APPELLANTS

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE MICA WOOD PENCE, JUDGE
ACTION NO. 21-J-00031-001

R.C., A CHILD; AND M.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND ECKERLE, JUDGES.

ECKERLE, JUDGE: The Cabinet for Health and Family Services (the "Cabinet") appeals from orders of the Barren Family Court finding it in contempt for failure to comply with its orders. Cabinet employees, Angela Lane and Jessica Humphrey, and Cabinet attorney, Jennifer Clay, appeal from language in the Family Court's

orders criticizing their actions and accusing them of misconduct. We conclude that the Family Court did not abuse its discretion in finding the Cabinet in contempt for its failure to comply timely with the January 5, 2022, order, and the remedy imposed did not exceed the scope of civil contempt. We further conclude that Lane, Humphrey, and Clay are not aggrieved because those findings did not result in a finding of contempt or imposition of sanctions against them individually. Hence, we affirm.

I. Facts and Procedural History

On February 3, 2021, the Cabinet filed a dependency/neglect/abuse ("DNA") petition on behalf of R.C. ("Child"), who was then 12 years old. In pertinent part, the affidavit supporting the petition alleged that M.C. ("Mother") and two other persons, M.M. and D.H., "have perpetuated the maltreatment of [Child] by other than accidental means." The affidavit further recited that, on December 2, 2020, Mother allowed Child to leave her home in North Dakota with M.M. and D.H. On February 2, 2021, the Cabinet received a report that Child was living with M.M. and D.H. in Glasgow, Kentucky. They resided in an unheated attic, requiring Child and adults to sleep together in one bed. The reporting source stated that Child was unhappy with the arrangement and wanted to go back to North Dakota. The reporting source also stated that M.M. repeatedly kissed Child on the mouth.

The Cabinet social worker went to the residence and confirmed the living arrangements and conditions. Child also reported to the worker that there was a significant roach infestation in the attic, and that M.M. had been showing a sexual interest in her. The worker also observed evidence of opioid abuse by the adults. D.H. admitted to losing custody of her own children, and M.M. had a warrant for his arrest in Tennessee for a probation violation. The Cabinet investigation revealed that Mother was abusing methamphetamine and was unable to maintain her housing. A handwritten note on the affidavit added:

> Child expresses she wishes to leave her caretakers, but feels she is unable to leave the caretakers. Child's mother is unwilling and discouraging to facilitate the Child's return to North Dakota. There is suspician [*sic*] that the child was traded for personal gain.

Based on the petition and accompanying affidavit, the Family Court entered an emergency custody order the same day. The Family Court appointed counsel for Mother and a guardian *ad litem* ("GAL") for Child. At the temporary removal hearing on February 10, 2021, Mother stipulated to the removal but denied the allegations in the affidavit. Following the hearing, the Family Court entered an order placing Child in the Cabinet's custody. During a disposition hearing on March 16, 2021, Mother stipulated that Child is dependent. In addition, Mother agreed to comply with the Cabinet's case plan under the supervision of the North Dakota child-welfare agency. The Family Court dismissed M.M. and D.H.

from the action because they had no legal standing and were being prosecuted criminally.

During the following months, Child was placed in foster care and underwent therapy. The Family Court conducted several reviews of Mother's case plan and the progress she had made on the plan goals. Although the reports indicate Child had been trafficked or exploited, Mother's role in the trafficking was not specified. The record indicates that Mother was cooperative with her case worker in North Dakota. On December 2, 2021, the Cabinet submitted a review report to the Court, which included recommendations to complete a transfer under the Interstate Compact on Placement of Children ("the ICPC")[1] to transition the Child "to North Dakota to be closer to her family and assist visitations and family sessions."

The Family Court conducted a review hearing on December 7, 2021. In an order entered following that hearing, the Court directed Assistant County Attorney Dane Bowles to tender an ICPC order "if CHFS [social worker Brook] Muse furnishes him information of what residence, etc. in North Dakota should have such evaluation." The order further directed Mother to furnish all

[1] The ICPC is a contract among the states intended to ensure that children placed across state lines receive adequate protection and services. Both Kentucky and North Dakota are signatories to the contract. The ICPC is codified in Kentucky at Kentucky Revised Statutes ("KRS") 615.030 *et seq.*

information necessary to determine if it would be appropriate to transfer Child and the case to North Dakota. The Court also directed Muse to follow up with her counterpart in North Dakota to effectuate the transfer. Finally, the order set a review hearing for January 4, 2022, on all remaining matters.

At the hearing, Mother's counsel introduced a certified copy of an order from a North Dakota Court relating to the placement of Child's sister. In pertinent part, that order noted that Child's sister had been removed from Mother's care in February 2021 and placed in foster care. The North Dakota Court found that it would be contrary to the sister's welfare to return her to Mother due to the allegations that Mother had participated in sexual trafficking of Child. The Family Court was further advised that the sister was returned to Mother for a "trial home visit." Neither the Cabinet nor Mother expressed any objections to returning Child to North Dakota. Following the hearing, the Family Court entered an order providing, in pertinent part:

> 1.) In light of this child's sibling being returned to the mother's home for a "trial home visit" by the North Dakota Court until February 2022; the above child shall also be allowed to return to North Dakota for a trial home visit with her mother. Effective immediately the child shall be sent to her mother in North Dakota on a trial home visit. CHFS Muse shall arrange such trial return to North Dakota.
>
> 2.) CHFS shall engage any specialty services available to assist with return of a possible child victim of trafficking.

. . .

3.) This court anticipates returning custody to the mother and closing this action on February 8, 2022[,] to allow North Dakota to resume personal jurisdiction over the child. Any party seeking relief from this order shall schedule and file an appropriate motion within ten days.

4.) This action is set for REVIEW on **Tuesday, February 8, 2022[,] at 10:45 a.m., central time, via Zoom. Zoom information sheet attached herein**.

Order from 01-04-22 Hearing, Jan. 5, 2022. Record ("R.") at 87-88 (emphasis original).

On January 24, 2022, Mother's counsel filed a motion to hold the Cabinet in contempt for failure to comply with the January 5, 2022, order. The motion stated, "As of January 21, 2021, no attempts have been made on the part of the Cabinet to comply with this order of the Court." On January 26, 2022, the Family Court entered an order directing the Cabinet to show cause why it had not complied with the order. The Family Court scheduled the matter for February 8, 2022.

The record on appeal does not include the recording of the February 8, 2022, hearing. The Cabinet's brief states Mother's counsel informed the Court of the circumstances surrounding the filing of the motion for contempt. Specifically, counsel stated she "understood" the regional office had told the local social workers not to comply with the Family Court's order. The Cabinet's counsel

suggested that "Frankfort took it upon itself" not to return Child. Muse also testified at the hearing. The Family Court's order, entered on February 9, recites the following details of that hearing.

> The Cabinet for Health and Family Services have failed to follow the court's previous order entered herein on January 5, 2022, concerning sending the above child home to her mother for a trial home visit in North Dakota, or to seek appropriate relief from such order as outlined therein.
>
> CHFS Muse stated that she had received emails from Angela Lane at CHFS Region Office (cc: Ashley Richey, Danielle Khoury) that they would not be moving the child to North Dakota. She stated that she had received an email from CHFS [Jessica] Humphrey as well, and the child would not be returned due to violation of ICPC and Federal Compact. Hon. [Mary] Locke, attorney for CHFS, identified Danielle Khoury and Angela Lane and Jessica Humphrey as CHFS representatives responsible for the decision not to send the child to North Dakota, and therefore, violate the court order; therefore making them necessary witnesses. In order to avoid an additional waste of judicial resources and time of the court, appointed counsel, the court attempted to contact Ms. Lane by phone in open court. The court was unable to reach Ms. Lane, and therefore continued the hearing in order for CHFS to have necessary witnesses present. The GAL and counsel for mother requested the Court to enter an order requiring their participation. CHFS Attorney Locke requested Danielle Khoury be allowed to participate via zoom due to her distance from court and such requested [*sic*] is granted herein. As both Lane and Humphrey are local, no such barrier for attendance is anticipated.

Family Court Order, Feb. 9, 2022. R. at 94-95.

Based on these findings, the Family Court continued the hearing to February 10. The Court also introduced email correspondence between Khoury, Lane, Muse, and the Judge. The email correspondence included messages from January 4-7 and concerned efforts to complete an ICPC transfer of the Child to North Dakota.

At the hearing on February 10, Jennifer Clay appeared as counsel for the Cabinet because Attorney Locke had a conflict. The first witness called was Lisa Shaeffer, the Cabinet's Deputy Administrator for ICPC. Shaeffer testified that she had been consulted on Child's case but had not formally rendered an opinion. Shaeffer testified that the requirements of ICPC would have to be met to return Child to an "offending parent." Shaeffer added that there had been some question whether Mother would be considered an "offending parent." Shaeffer also added that any visit over 30 days would be considered a "placement," and also subject to the requirements of the ICPC. But based on the information available at the time of the hearing, Shaeffer stated that an ICPC study was not necessary because Mother was not an offending parent, and the home visit would last less than 30 days.

Shaeffer stated that she had not received a request for ICPC services for Child. She could not definitely state whether she had ever informed the local office not to comply with the Family Court's order. However, Shaeffer went on to

say that if Child were placed in violation of the ICPC, then North Dakota would have the option of returning Child to Kentucky. On cross-examination, Shaeffer testified that she could not recall the circumstances surrounding her consultation on this case, but she believed there had been a question about returning Child to North Dakota. Shaeffer also admitted that she had not been aware of the terms of the January 5, 2022, order.

The Cabinet next called Khoury to testify. Khoury works as a social services specialist for the out-of-home care branch of the Department of Community Based Services. Khoury testified that she received an email regarding the January 5 order. Khoury stated that she consulted on the decision whether to send Child to North Dakota, but she did not make any decisions on the matter or direct the local office not to comply with the order. Khoury added that she had concerns about sending Child to North Dakota because Mother had been identified as a perpetrator of trafficking. In addition, Khoury expressed concerns that the local office had provided incorrect information about the case to the Court. On questioning by the Court, Khoury discussed the process for funding the transfer of a child under the ICPC.

The Cabinet next called Angela Lane, Service Region Clinical Associate for the Cabinet. Lane testified that she was consulted on this case on a request from Muse on how to get Child to North Dakota for a trial home visit.

Lane stated that she provided information to Muse about how to arrange the visit and she referred Muse to Shaeffer for assistance with the ICPC requirements. Several days later, Lane received a message from Khoury. Those discussions led Lane to conclude that an ICPC study was necessary before Child could be transported to North Dakota. Lane understood that there were issues with funding the transfer, but she never received a Special Expense Request to cover the cost. Lane stated that she was not the immediate supervisor of any of the local officials or workers and that she never directed the local workers not to comply with the Court's order.

On cross-examination, Lane stated that Muse, Muse's immediate supervisor Joan Norris, and Jessica Humphrey were the ultimate decisionmakers on sending Child to North Dakota. Lane further testified that she had not seen a copy of the January 5, 2022, order and was not aware of its terms until later in January. Upon realizing that the Court had ordered Child sent to North Dakota, Lane consulted with Muse to arrange funding for the transfer.

The Cabinet next called Jessica Humphrey, a Service Region Administrator. However, the recording of her testimony was not included with the record on appeal. The Cabinet's brief and the Family Court's findings state that Humphrey testified she was "not directly" consulted on this case, but she was part of the email thread between Khoury, Lane, and the Family Court Judge.

Humphrey also denied directing any worker not to comply with the Court's order directing that Child be returned to North Dakota. Humphrey volunteered to accompany Child to North Dakota to comply with the Family Court's order.

In an order entered following this hearing, the Family Court noted that it was still unclear why the Cabinet failed to comply with the January 5 order or who was responsible for the delay. Regardless of fault, the Court directed the Cabinet to return Child to North Dakota by February 15. The Court directed Humphrey to take all steps necessary to comply with the January 5 order and to return Child to North Dakota no later than ten days following entry of the order. The Family Court took the remaining matters involving the contempt motion under submission.

The Court further directed the Cabinet to produce all emails in its possession relating to Child's case. Clay asserted that any emails that included her on the thread were covered by attorney-client privilege. The Family Court stated that those emails were not subject to production. However, the Court suggested that Clay's assertion of attorney-client privilege with respect to Lane, Humphrey, and Khoury was improper given her representations about Muse and Norris. Finally, the Court directed Mother's appointed counsel and Child's GAL to file affidavits detailing the additional work each had to complete to enforce the January 5, order.

The Cabinet produced the emails as directed. On February 15, 2022, the Cabinet advised the Family Court that Child was returned to Mother in North Dakota. At a hearing on March 8, 2022, the Cabinet informed the Court that North Dakota was providing services to Child and Mother. After that hearing, the Court ordered Child returned to Mother, and Mother to follow all orders in North Dakota concerning Child and the sibling.

On May 8, 2022, the Family Court entered an order on the contempt motion. The Court discussed the background information, the evidence presented at the prior hearings, and the contents of the emails provided. Most notably, the Family Court found significant inconsistencies between the testimonies of Khoury, Lane, and Humphrey and their statements made in the emails. The Family Court also noted their strenuous objections to the Family Court's order to send Child to North Dakota.

In its conclusions of law, the Family Court pointed out that the decision to return Child lay solely with the Court, and that it had a duty to enforce its orders. The Court concluded that Humphrey and Lane made the decision that Child would not be returned to North Dakota despite the January 5 order and that they failed to offer any assistance to Muse or the local office to carry out the order. The Court also concluded that Attorney Clay had misled the Court by insisting that

the blame lay at the local level and by presenting the false testimony of Humphrey and Lane.

Consequently, the Family Court found the Cabinet "in contempt for willful failure to abide by the Court Order entered January 5, 2022." The Family Court separately found Humphrey and Lane in contempt for failing to abide by the January 5 order and for their false testimony at the February 10 hearing. The Court declined to impose sanctions against Humphrey and Lane but referred the matter to the Commonwealth Attorney for possible prosecutions for perjury.

The Family Court criticized Clay for arguing that the blame for delay rested with the local level, noting that the emails indicated that the higher-level officials were primarily responsible. The Court also criticized Clay for asserting attorney-client privilege to the emails, questioning whether she had a good-faith belief that such a relationship existed. In addition, the Family Court took issue with Clay's defense of the actions of Humphrey and Lane to the detriment of Muse. The Court also suggested that Clay improperly presented false testimony of Humphrey and Lane to cast the blame on Muse and the local office. However, the Family Court did not find Clay in contempt. Rather, the Court referred Clay to the Kentucky Bar Association ("the KBA") for investigation of potential misconduct.

Finally, the Family Court concluded that the Cabinet's actions had led to substantial delays in returning Child to North Dakota and necessitated additional

work on the part of Mother's appointed counsel and Child's GAL. To compensate these attorneys, the Court ordered the Cabinet to pay $2,502.50 to Mother's counsel and $1,750.00 to the GAL. The Court served copies of this order on all counsel of record and unrepresented parties, and also directed that copies of the order be sent to the Attorney General and the KBA.

The Cabinet filed a timely motion to alter, amend, or vacate the contempt pursuant to CR[2] 59.05. In its motion, the Cabinet argued that the evidence failed to meet the standards for either civil or criminal contempt. The Cabinet also argued there was no evidence that it or its employees willfully defied the January 5 order. Finally, the Cabinet asked the Court to vacate its findings regarding Clay.

The motion came before the Court for a hearing on June 14, 2022. Following the hearing, the Family Court entered an order granting the motion in part and denying it in part. The Court clarified and modified its holding as to Lane and Humphrey, stating that it was not finding them individually in contempt:

> This Court believes that both Jessica Humphrey and Angela Lane, individually, committed acts that are clearly subject to the contempt powers of this Court as they both failed to abide by the Court's January 5th Order and they both falsely testified under oath during the Court February 10th hearing. The false nature of this testimony was confirmed by the emails produced by

[2] Kentucky Rules of Civil Procedure.

> CHFS following the February 10th hearing. In direct contradiction to the testimonies of both Humphrey and Lane, the emails submitted confirm that they did in fact advise SW Muse that the Court's order was not to be followed. The explanations provided for this decision in the emails and the testimony at the February 10th hearing does [*sic*] not show cause for failure to comply with the Court's January 5th order in any way as both individuals clearly do not understand the difference between federal and state law, and neither individual holds a law degree that would in any way qualify them to provide such an opinion. Their clear belief that their legal knowledge surpasses that of the Court is simply astounding. *However as "[s]ummary adjudication of indirect contempts is prohibited . . . and criminal contempt sanctions are entitled to full criminal process[.]" [T]his Court will not exercise its contempt power by issuing sanctions herein.*

Family Court Order, Jun. 25, 2022. R. at 336 (footnote omitted) (emphasis original).

With respect to the finding of contempt against the Cabinet, the Family Court again pointed to the email correspondence by Humphrey and Lane regarding the propriety of sending the Child back to North Dakota. For example, on January 5, 2022, Lane sent an email to several Cabinet employees, including Muse and Supervisor Norris, stating that Khoury "intended to let the judge know that we are not going to send this child back to ND." Furthermore, Shaeffer's email to Lane and Khoury on February 7, 2022, which was subsequently forwarded by Lane to Muse and Supervisor Norris, stated that she "was under the impression [that return] was no longer a consideration."

Finally, Muse emailed Supervisor Norris on January 14, 2022, asking "if anything ever came out of returning [Child] or just that we aren't sending her?" Supervisor Norris replied that she also had not heard anything else from the administrators involved in the initial emails on Jan 4th and 5th. Despite the strong suggestions in the emails that ICPC was a barrier to returning Child, Khoury's testimony at the February 10, 2022, hearing was that an ICPC study was not necessary for Child to go on a trial visit with Mother. Consequently, the Family Court found that the Cabinet had failed to show good cause for its failure to comply with the January 5, 2022, order.

The Family Court next clarified its findings regarding Attorney Clay.

> As the Court made clear during the June 1st hearing, the Court referred this matter to the KBA only to investigate whether there was in fact an attorney-client relationship between Clay and individual workers of the Cabinet and if so whether Clay committed malpractice by "presenting evidence that her 'clients' [the same being SW Muse and Supervisor Norris in this context] are in contempt of Court without even consulting with them prior to the hearing nor calling them to testify in their own defense, while also implying that they were the ones who presented false information to the Court." In fact, Attorney Duke made the same argument in the Motion addressed herein that it was a failure of the "local office"; i.e., SW Muse and SW Norris that resulted in CHFS's contempt. This Court cannot reconcile the thought that Muse and Norris are the clients of either Duke or Clay with their statements of blame against the same.

Family Court Order, Jun. 25, 2022. R. at 339.

Finally, the Family Court amended the May 2, 2022, order to correct a grammatical error. Accordingly, the Court granted the Cabinet's motion to amend the May 2 Order in those respects but otherwise denied the motion. The Cabinet now appeals. Additional facts will be set forth below as necessary.

II. Standard of Review of Contempt

The Cabinet objects to the Family Court's finding of contempt against it and the implications of contempt against Lane, Humphrey, and Clay. In *Cabinet for Health and Family Services v. J.M.G.*, 475 S.W.3d 600 (Ky. 2015), the Kentucky Supreme Court extensively discussed the nature and scope of a Court's contempt authority. As an initial matter, the Court defined contempt as "the willful disobedience toward, or open disrespect for, the rules or orders of a court." *Id.* at 610 (quoting *Poindexter v. Commonwealth*, 389 S.W.3d 112, 117 (Ky. 2012) and *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1995)). All Courts have the authority to sanction contempt and to insist upon respect for its processes and compliance with its rulings and judgments. *Id.* at 611 (citations omitted). Thus, the power of Courts to punish contempt is implicit in the judicial function, "is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." *Id.* at 611 (citations omitted).

The Court in *J.M.G.* then went on to discuss the often-elusive distinction between civil and criminal contempt. Generally, sanctions imposed to benefit an adverse party – coercive sanctions, for example, or compensatory ones – are deemed civil and are sought and imposed through civil proceedings between the original parties, very often as part of the underlying cause. *Id.* (citations omitted). On the other hand, punitive sanctions – unconditional sanctions not subject to purgation through compliance with an order and that are imposed principally if not purely to vindicate the authority of the Court – are deemed criminal. *Id.* Criminal penalties for contempt require the full range of constitutional due process protections. *Id.* at 611-12. Furthermore, indirect contempt – that is, contempt occurring out of Court or not immediately apparent to the Court – requires an evidentiary hearing. *Id.* at 612. Summary adjudication of indirect contempt is prohibited. *Id.*

In *J.M.G.*, the Supreme Court suggested that there are "fundamental questions" regarding a Court's ability to initiate a contempt proceeding against the Cabinet as an entity. *J.M.G.*, 475 S.W.3d at 616. In a footnote, the Court noted that compensatory fines may implicate the Cabinet's governmental immunity. *Id.* at 616 n.19. But despite the implied jurisdictional bar, the Supreme Court declined to address the question, since it had not been raised by the Cabinet. *Id.* at 617. *See also Cabinet for Health & Fam. Servs. v. Baker*, 645 S.W.3d 411, 421 n.23 (Ky.

2022) ("Furthermore, as noted in *J.M.G.*, 475 S.W.3d at 616, the possibility of proceeding against the Cabinet as an entity in a contempt proceeding, as opposed to individual Cabinet employees, is something this Court has never addressed."). On the other hand, our Supreme Court has previously held that an executive Cabinet agency is subject to contempt for its failures to comply with court orders and statutory duties. *Campbell Cnty. v. Commonwealth, Kentucky Corr. Cabinet*, 762 S.W.2d 6, 14-16 (Ky. 1988). Because the Cabinet has never raised this issue, and in the absence of any direction from our Supreme Court, we decline to address the question further.

III. Finding of Contempt Against Cabinet

In the current case, the Cabinet argues that the Family Court imposed criminal contempt sanctions on it because they were not subject to purgation. The Cabinet further argues that the Family Court was not authorized to hold it in contempt because it had complied with the order by the time contempt was imposed. We conclude that neither argument was a bar to the Family Court's contempt finding. As a penalty, the Family Court required the Cabinet to pay the additional attorney fees incurred by Mother's counsel and the GAL caused by its delay in complying with the January 5, 2022, order. Such a compensatory penalty is within the scope of civil contempt.

Likewise, the Family Court based its contempt finding on the Cabinet's failure to comply with its order at the time of the February 10, 2022, hearing. As noted above, sanctions for civil contempt "are meant to benefit an adverse party either by coercing compliance with the order *or by compensating for losses the noncompliance occasioned.*" *Nienaber v. Commonwealth ex rel. Mercer*, 594 S.W.3d 232, 236 (Ky. App. 2020) (emphasis added). In the case of the former, the contemnor must, at the time the sanction is imposed, have the ability to purge the contempt. *Id.* But a Trial Court still has discretion to fashion compensatory sanctions, even if they cannot be purged by subsequent compliance with the prior order. *Commonwealth, Cabinet for Health & Fam. Servs. v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011). Rather, payment of the compensatory sanction purges the contempt.

The Court in *Ivy* further discussed the standard of proof for civil contempt.

> In a civil contempt proceeding, the initial burden is on the party seeking sanctions to show by clear and convincing evidence that the alleged contemnor has violated a valid court order. *See, e.g., Roper v. Roper*, 242 Ky. 658, 47 S.W.2d 517 (1932). If the party is seeking compensation, it must also prove the amount. Once the moving party makes out a *prima facie* case, a presumption of contempt arises, and the burden of production shifts to the alleged contemnor to show, clearly and convincingly, that he or she was unable to comply with the court's order or was, for some other reason, justified in not complying. *Clay v. Winn*, 434

> S.W.2d 650 (Ky. 1968). This burden is a heavy one and is not satisfied by mere assertions of inability. *Dalton v. Dalton*, 367 S.W.2d 840 (Ky. 1963). The alleged contemnor must offer evidence tending to show clearly that he or she made all reasonable efforts to comply. *Id.* If the alleged contemnor makes a sufficient showing, then the presumption of contempt dissolves and the trial court must make its determination from the totality of the evidence, with the ultimate burden of persuasion on the movant.

Id. at 332.

We review the Family Court's imposition of civil contempt for abuse of discretion, but we apply the clear error standard to the underlying findings of fact. *Crandell v. Cabinet for Health & Fam. Servs. ex rel. Dilke*, 642 S.W.3d 686, 689 (Ky. 2022). The Court's discretion to impose sanctions for contempt is by no means unlimited, and this Court should not apply a deferential standard of review. *J.M.G.*, 475 S.W.3d at 624. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). More specifically, a Court abuses the discretion afforded it when "(1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision . . . cannot be located within the range of permissible decisions." *Miller v. Eldridge*, 146 S.W.3d 909, 915 n.11 (Ky. 2004) (cleaned up).

In setting out the elements for civil contempt, the Court in *Ivy* did not expressly require a finding that a party's failure to comply with a court order was

"willful." But in *Commonwealth v. Burge*, *supra*, the Supreme Court stated that "[c]ontempt is the *willful* disobedience toward, or open disrespect for, the rules or orders of a court." 947 S.W.2d at 808 (emphasis added). This language in *Burge* suggests that willfulness is a necessary element for any finding of contempt, civil or criminal.

The Cabinet argues that there was no evidence to support a finding that its violation of the January 5, 2022, order was willful. We disagree. "'[W]illfully' means with intent or intention." *Caretenders, Inc. v. Commonwealth*, 821 S.W.2d 83, 87 (Ky. 1991). *See also* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "willful" as "[v]oluntary and intentional, but not necessarily malicious"); *Poindexter*, 389 S.W.3d at 117.

Here, the Cabinet admits that it was aware of its obligations under the January 5, 2022, order. The Cabinet also conceded that it was in violation of the January 5, 2022, order directing that Child be returned to North Dakota. The Cabinet has never attempted to explain what specific provisions of the ICPC served as a barrier to compliance with the Family Court's order. That order also directed, in the alternative, that the Cabinet file a motion detailing any barriers to compliance within ten days. Clearly, the Cabinet did not comply with that provision as well.

Unfortunately, the hearing got sidetracked into a discussion of who was to blame for the lapses. Likewise, the Cabinet's brief focuses on whether the Family Court punished it for the actions of Lane and Humphrey in criticizing the Court's order. The Cabinet failed to show good cause for its failures to comply. Mere disagreement with the Family Court's order clearly was not sufficient. And informal, *ex parte* email discussions between the Family Court Judge, Lane, Humphrey, and Khoury did not satisfy the order's requirement of a formal motion filed within ten days.

Under the circumstances, there was sufficient evidence to support the Family Court's findings that the Cabinet failed to show good cause for its failure to comply with the January 5, 2022, order. Likewise, there was sufficient evidence to support the Family Court's findings that the Cabinet's violation of the January 5, 2022, order was willful. Although there is some question whether the Cabinet supervisors specifically directed the local office not to comply, they actively discouraged Norris and Muse from returning Child to North Dakota as directed. Furthermore, they failed to recognize the Cabinet's obligation to advise the Family Court of their concerns regarding compliance with the ICPC.

Their actions placed the Cabinet in violation of the January 5, 2022, order without good cause. Humphrey and Lane assert that they never intended this result. But the controlling question is whether the Cabinet willfully disobeyed the

January 5, 2022, order. When the evidence is viewed as a whole, the Family Court properly inferred that the Cabinet's violation was willful.

Likewise, the remedy of attorney fees was within the scope of civil contempt. We also note that, as of the February 10 hearing, the Cabinet was still in violation of the January 5, 2022, order. Indeed, the Cabinet never complied with that order, as the time for compliance had already passed. The Cabinet's subsequent compliance with the February 11, 2022, order did not preclude the Family Court from assessing attorney fees against the Cabinet. There is no claim that the amount of attorney fees was unreasonable or unnecessarily punitive. Therefore, the Family Court did not abuse its discretion in finding the Cabinet to be in civil contempt or by imposing compensatory sanctions.[3]

IV. Findings as to Lane, Humphrey, and Clay

The Family Court's findings as to Lane, Humphrey, and Clay are more problematic. Neither Lane nor Humphrey was directly subject to the January 5 order. Rather, they are Cabinet officials and any lapses on their part are

[3] To emphasize the lack of inconsistency with a recent opinion reversing the Barren Family Court's order of contempt against the Cabinet, the Court notes that in this case, the Cabinet willfully failed to obey the Family Court's January 5, 2022, order, and it failed to cure that violation at the time of the contempt hearing. However, in the distinguishable case of *Cabinet for Health and Family Services v. A.T.*, Nos. 2022-CA-0624/0626-0635-ME, the Family Court found the Cabinet in contempt for failures to comply with its duties under the applicable statutes and rules. Furthermore, there was no violation remaining at the time of the Family Court's contempt order, and thus nothing left for the Cabinet to purge or cure. No contempt may lie in such a circumstance. Thus, while the holdings are different, they are not inconsistent given the differing factual scenarios in each one. Contempt is a highly fact-specific determination.

attributable to the Cabinet. They were not personally obligated to comply with that order.[4] Merely "directing others subject to their authority NOT to comply with the Court's order" will not render them personally subject to contempt.

The Family Court had jurisdiction over them once they became witnesses. But as the Cabinet notes, contempt proceedings usually do not lie for perjury unless the falsity of the statement is judicially known. *Miller v. Vettiner*, 481 S.W.2d 32, 35 (Ky. 1972). While their testimony was inconsistent with their prior statements made in the emails, it was not so clear as to meet this standard.

Under the circumstances, we must disagree with the Family Court that Humphrey and Lane were personally subject to contempt for the reasons identified in the Court's orders. Having said this, we must also note that the Family Court did not find either Lane or Humphrey in civil contempt. The Court only stated that they were "subject to the contempt powers of the court," but the Court declined to hold either one in contempt. The Family Court's "referral" of Humphrey and Lane to the Commonwealth Attorney was not a sanction for contempt. Rather, the Court simply placed the decision to investigate and prosecute the suspected perjury in the

[4] The only individual directly subject to the January 5, 2022, order was Muse, as she was specifically identified as the responsible person in that order. The Family Court did not find Muse in contempt, concluding that she was acting at the direction of her superiors. The Cabinet does not appeal this finding.

hands of the appropriate authority. The Family Court's factual findings are not binding on the Commonwealth Attorney.

Appellate review is limited to the Family Court's formal orders and judgments. We are not in a position to review portions of the contempt orders that did not result in a finding of contempt or the imposition of sanctions. Even if we were to review the Family Court's factual findings for clear error, any determination could not have a practical legal effect upon a currently existing controversy. *See Morgan v. Getter*, 441 S.W.3d 94, 98-99 (Ky. 2014). Although Lane and Humphrey may disagree with the Family Court's characterization of their actions, they are not aggrieved by the Family Court's orders.

With respect to Attorney Clay, the Family Court was highly critical of her actions, but it did not find her in contempt. A Court has a right and obligation to refer an attorney to the KBA for suspected misconduct of which it has direct knowledge. *See* SCR[5] 3.130(8.3). The decision to investigate or sanction such conduct lies with the KBA and the Kentucky Supreme Court. The Family Court's comments are essentially dicta, as they are not binding on the KBA. Moreover, the Family Court made no contempt findings against Clay and did not impose sanctions. While Clay may be offended by the Family Court's comments, she is

[5] Kentucky Rules of the Supreme Court.

not aggrieved by any order or judgment of the Court. Therefore, the Family Court's factual findings relating to Clay are moot.

V. Conclusion

In sum, the Family Court did not abuse its discretion in finding the Cabinet in contempt for its failure to comply timely with the January 5, 2022, order. The finding of contempt was supported by substantial evidence, and the remedy imposed did not exceed the scope of civil contempt. The Family Court was clearly frustrated with the actions by the state-level supervisors, namely Lane, Humphrey, and Khoury. Neither the local workers nor the state-level supervisors shared their concerns with the Family Court about returning Child to Mother.

Furthermore, Lane, Humphrey, and Khoury drew conclusions without a complete understanding of the matters of record in this case or the specific provisions of the Family Court's orders. Indeed, many of the issues in this case could have been resolved by a timely motion to the Family Court through proper channels. Instead, they expressed private disagreements with the Court's order and gave ambiguous and contradictory instructions to the local Cabinet workers.

As a result, the Family Court was entirely justified in conducting a show-cause hearing against the Cabinet. On the other hand, the Family Court allowed its frustrations with the Cabinet's conduct to lead to inquiries that were not pertinent to the contempt motion or the ultimate goal of ensuring compliance with

the Court's orders. We are not convinced that the actions by Lane and Khoury would have justified a contempt finding. But since the Family Court did not make such a finding or impose sanctions against them, that question is moot. Similarly, the Family Court did not find Clay in contempt or impose sanctions against her. Therefore, the Family Court's findings with respect to her are also moot.

Accordingly, we affirm the orders of the Barren Family Court finding the Cabinet in civil contempt and requiring it to pay attorney fees as directed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

LeeAnne Applegate
Frankfort, Kentucky

NO BRIEF FOR APPELLEES.