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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-0805-ME

M.D.C. APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JENNIFER R. DUSING, JUDGE
ACTION NO. 11-J-00693-001

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; H.B.; AND
W.J.C., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, EASTON, AND TAYLOR, JUDGES.

EASTON, JUDGE: In this dependency, neglect, and abuse ("DNA") case, M.D.C. ("Father") appeals the denial of his latest contempt motion. He requested the Boone Family Court to again find H.B. ("Mother") in contempt or enforce a sanction for a prior contempt finding for Mother's failure to comply with an order

to engage in a certain type of therapy. Finding no abuse of discretion, we affirm the order of the Boone Family Court.

FACTUAL AND PROCEDURAL HISTORY

Father and Mother are the parents of W.J.C. ("Child"). In 2011, the Cabinet for Health and Family Services ("the Cabinet") filed a DNA petition against both parents because Child (then an infant) was found to have unexplained multiple fractures. The Boone County Attorney's office represented the Cabinet in the DNA proceeding.

The family court found Child to be abused and neglected and initially committed him to the custody of the Cabinet, with both parents to have supervised visitation. Before long, the family court transferred temporary custody to the maternal grandparents. Later, the family court awarded temporary joint custody to Mother and maternal grandparents.

The family court never entered a permanent custody order in this case though it continued to occasionally review the case for more than ten years. In 2015, the family court issued an order requiring that Mother participate in a CATS[1]

[1] In this context, CATS refers to the "Comprehensive Assessment and Training Services" program at the University of Kentucky Center on Trauma and Children.

assessment and PCIT[2] or similar parent/child therapy. Mother was also ordered not to make disparaging remarks about Father in Child's presence.

On December 29, 2013, just after a parenting time exchange, Father shot multiple times into a vehicle occupied by Mother, the maternal grandmother, and Mother's boyfriend. Father gathered the shell casings evidence after the shooting. Father was initially charged[3] with three counts of Attempted Murder, Tampering with Physical Evidence, and First-Degree Criminal Mischief.

Father entered a guilty plea to his charges with amendments to First-Degree Wanton Endangerment instead of Attempted Murder. He was sentenced to serve 16 years.[4] Father did not serve the entire sentence. Upon his release, Father reported that he engaged in self-improvement efforts, and he sought to increase his parenting role.

Some of Father's numerous contempt motions were filed while he was in prison. In two motions, Father sought to have Mother incarcerated for the maximum jail time allowed for failure to pay child support. While child support calculations were done in this case, Mother was not ordered to pay child support, and these contempt motions were denied. Father also complained about

[2] Parent Child Interactive Therapy.

[3] Boone District Court, Case No. 13-F-01339.

[4] Boone Circuit Court, Case No. 14-CR-00079.

disparaging remarks, but some of this was evidenced by social media interactions (not direct comments to Child) about Father's admitted crimes and the related court proceedings.

Another DNA proceeding was commenced against Father, alleging Child was dependent. The family court entered a no contact order restricting Father's contact with Child. In 2017, Father filed another proceeding[5] in the family court seeking custody of Child. This civil action was dismissed in 2019. The family court would refer to this custody action later in the context of the most recent contempt motion.

By 2020, Father had been released from incarceration and had moved to Ohio. In addition to filing a motion requesting that the family court review the parents' compliance with their case plans, Father filed motions seeking to hold Mother in contempt for violating court orders by not participating in a CATS assessment and not undergoing PCIT. Father also filed a motion to re-establish his contact with Child.

The family court initially reserved the motion for contempt, ordered the Cabinet to become involved in the case again, set a date for review, and appointed an attorney for Mother. In December 2020, the family court conducted an evidentiary hearing via Zoom on the contempt and other pending motions.

[5] Boone Family Court, Case No. 17-CI-00623.

Mother appeared with counsel. The Boone County Attorney represented the Cabinet and Child's guardian *ad litem* also appeared at this hearing. Father appeared *pro se*. A few days after the hearing, the court entered written findings of fact, conclusions of law, and an order in mid-December 2020.

The family court found Mother and Child lived in Utah and Father lived in Ohio. It noted having entered an order in Father's custody case finding that it lacked child custody jurisdiction under the UCCJEA[6] because no initial permanent child custody determination had been made in Kentucky and that Utah was a more appropriate forum. This finding had been documented in the civil action dismissed in 2019.

The family court did not find Mother in contempt of an order to undergo a CATS assessment. The record included proof that Mother did not qualify for a CATS assessment, and the family court's handwritten notes indicated Mother had therefore been required to do PCIT instead of the CATS assessment.

The family court did find Mother in contempt of the order requiring Mother to undergo PCIT or some other form of parent/child therapy. Mother testified that she completed PCIT, but she never filed any documentary proof of doing so. The family court stated in its December 2020 order that Mother could purge herself of this contempt by completing PCIT and filing proof of doing so.

[6] Uniform Child Custody Jurisdiction and Enforcement Act.

Mother could also file proof of previous completion of PCIT or similar therapy. The family court further stated it would not impose the punitive sanctions Father was requesting.

The family court also lifted the no-contact order based on Father's proof of completing his case plan. But the family court declined to issue further orders relating to custody or parenting time. Instead, it indicated such matters should be handled by a court with initial child custody jurisdiction. This reinforced the prior references to Utah where Mother and Child had by then lived for years.

In May 2023, Father filed a *pro se* motion again seeking for Mother to be held in contempt. By our count, this appears to be Father's *eleventh* contempt motion. He requested that the family court find that Mother had not completed PCIT, find Mother guilty of contempt, and assess a fine against Mother to be paid to the court clerk as punishment for contempt.

Father appeared before the family court at an in-person hearing on this latest motion to hold Mother in contempt. The family court judge noted that Mother was not at the hearing, expressed concern that perhaps Mother's current

address was unknown, and expressed suspicion that Mother had not gotten actual notice of the hearing.[7]

During this hearing, the family court judge noted that she had previously lifted the no-contact order. She indicated Father should seek relief about contact and any other custody-related matters in Utah, the jurisdiction to which the family court had conceded child custody jurisdiction years earlier. The family court noted that the orders Father sought to enforce were now approximately ten years old.

The family court judge orally noted at the hearing that perhaps, under different circumstances, she would issue a show cause order and take steps to make sure that Mother was actually served with the contempt motion. But she declined to do so. The family court judge stated, orally and in writing, that she would not issue any further contempt sanctions against Mother for past contempt nor issue show cause orders for alleged violations of orders that were now several years old. She also orally stated at the hearing that she intended to close out this DNA case entirely. But no written order of dismissal appears in the record. *See* FCRPP[8] 22 ("Once filed, a [DNA] petition shall be dismissed only upon court order.").

[7] Based on our review of the hearing recording, an attorney was also present at the hearing, presumably from the Boone County Attorney's office or as Child's guardian *ad litem*. But this attorney was not explicitly identified on the record, was not asked to address Father's contempt motion, and did not request an opportunity to address the family court on this matter.

[8] Kentucky Family Court Rules of Procedure and Practice.

Father appealed from the June 2023 order denying him any relief on his most recent contempt motion. Father argues in his appellant brief: "The Boone Family Court abused its discretion by not only refusing to . . . hear a contempt motion properly filed in its Court, but also using the UCCJEA to relinquish jurisdiction of a non-custody case." The Appellee brief[9] argued that the appealed-from June 2023 order did not address the issue of jurisdiction over contempt issues, that the family court did not abuse its discretion, and that any error was harmless.

STANDARD OF REVIEW

Abuse of discretion is the appropriate standard of review. *See Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007) ("we will not disturb a court's decision regarding contempt absent an abuse of its discretion."). *See also Smith v. City of Loyall*, 702 S.W.2d 838, 838-39 (Ky. App. 1986) (recognizing trial court's broad discretion in applying contempt powers to enforce its orders and concluding trial court did not err in not finding contempt and not imposing sanctions against a party due to the party's eventual though tardy compliance with a court order).[10]

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[9] The Appellee brief was filed by an Assistant Boone County Attorney. The certificate of service on Father's appellant brief indicates he also mailed a copy of his brief to a local Cabinet office.

[10] As *Smith v. City of Loyall* squarely reached the merits of the trial court's denial of a motion to hold a party in contempt, it suggests that Kentucky appellate precedent recognizes that the denial of a contempt motion is a final and appealable order. *See* 17 C.J.S. Contempt § 206 (August 2023 update) (noting split in authority regarding whether a court's denial of a contempt motion

A trial court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Nienaber v. Commonwealth ex rel. Mercer*, 594 S.W.3d 232, 235 (Ky. App. 2020). While we review a court's exercise of its contempt powers for abuse of discretion, underlying factual findings are reviewed only for clear error. *See, e.g.*, *Commonwealth, Cabinet for Health and Family Services v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011).

ANALYSIS

Father argues the family court erred in relinquishing jurisdiction of the DNA action. He misconstrues the actions of the family court. The June 2023 written order did not deny that the family court had jurisdiction to enforce its prior orders.[11] Any oral remarks by the judge suggesting that the family court had no

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or refusal to impose sanctions is a final and appealable order). *But see Cabinet for Health and Family Services v. R.C.*, 661 S.W.3d 305, 318 (Ky. App. 2023) (declining to review family court's critical comments about individuals it did not formally find to be in contempt in order granting motion to hold Cabinet in contempt since: "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."). The family court adjudicated the rights of the parties for this particular contempt motion. As a result, the decision was final and appealable under Kentucky Rules of Civil Procedure ("CR") 54.01.

[11] Father made clear at the June 2023 hearing that he was not seeking custody in the Boone Family Court, but simply asking the family court to enforce its prior orders entered in this DNA proceeding. As both parties acknowledge in their briefs, the family court had previously determined that it lacked initial child custody jurisdiction under the UCCJEA. The family court noted in its June 2023 order that it previously relinquished child custody jurisdiction to Utah and directed Father to pursue custody-related matters in a court with child custody jurisdiction. Child custody jurisdiction is not at issue in this appeal. Instead, we are simply faced with the question of whether the family court acted properly in declining to hear Father's May 2023 contempt motion regarding allegations of Mother not complying with an order in this DNA case to complete PCIT and provide proof of completion of PCIT.

jurisdiction to enforce its prior orders based on Mother and Child living in Utah (or otherwise outside Kentucky) for several years are of no consequence. Instead, a court's written statements prevail over any inconsistent oral statements. *Younger v. Evergreen Group, Inc.*, 363 S.W.3d 337, 340 (Ky. 2012). And the family court specifically stated only that it had previously relinquished *child custody* jurisdiction to Utah in its written order.

The written order clearly indicated that the family court was refusing to exercise its jurisdiction to enforce its contempt powers based on the age of the related orders, stating: "This Court declines to issue any further sanctions for Mom's [Mother's] past contempt, nor issue Show Cause orders for any allegations of contempt from orders entered approx. ten years ago."

As we look at the question of contempt, we start with its legal definition. "Contempt is the willful disobedience toward, or open disrespect for, the rules or orders of a court." *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996). "Civil contempt consists of the failure of one to do something under order of court, generally for the benefit of a party litigant." *Id.*

"The main purpose of DNA proceedings is protecting the health and safety of children rather than determining adults' rights to child custody." *S.G. v. Cabinet for Health & Fam. Servs.*, 652 S.W.3d 655, 669 (Ky. App. 2022). While Father does have a constitutionally protected interest regarding the care of his

child, (*see Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014)), the purpose of the family court's order at issue here was not for his benefit. He would receive no benefit from the court issuing a sanction against Mother. "[S]anctions 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*, 594 S.W.3d at 236 (citing *Ivy*, 353 S.W.3d at 332). Father incurred no losses for which he should be compensated, nor would Mother's compliance with the order directly benefit Father.

While the family court certainly still had jurisdiction to enforce its own orders in the DNA proceeding, it was not an abuse of discretion for the family court to decline to issue a sanction against a parent who has been out of Kentucky with the child for several years with no showing of negative events for the Child in the intervening years. Father insists the family court erred by refusing to hear his new contempt motion, but the same issue had previously been heard in December 2020. Father was not making any new allegations of contempt. When initially finding that Mother was in contempt for failing to complete PCIT or file proof of completion, the family court declined to issue any punitive sanctions to satisfy Father. This was a valid option that is completely within the family court's discretion.

A court has "nearly unfettered discretion" when it comes to its powers regarding contempt. *Murry v. Murry*, 418 S.W.3d 432, 436 (Ky. App. 2014). This includes the discretion to decline to issue sanctions despite a contempt finding when the court deems it appropriate. The Kentucky Supreme Court acknowledged this option in its conclusion in *Brighty v. Brighty*, when it stated "[f]or the reasons stated above, we reverse the Court of Appeals and remand this case to the Jefferson Family Court to exercise jurisdiction, *or not*, as is within its discretion." 883 S.W.2d 494, 497 (Ky. 1994) (emphasis added). The Court in *Brighty* concluded that a circuit court retains enforcement jurisdiction even if it has lost modification jurisdiction. *Id.* at 496-97. However, it is not *required* to do so. "A court has broad discretion when exercising its contempt power. A court's discretion in this regard necessarily encompasses the discretion to determine when to apply its contempt powers and when to refrain from imposing sanctions and fines." *Cary v. Pulaski Cnty. Fiscal Ct.*, 420 S.W.3d 500, 520 (Ky. App. 2013) (citations omitted).

We hesitate to sanction any broad statement of future intention to not consider motions. One never knows what may be necessary in a given situation not yet occurring. But we realize that, on this appeal, we may decide only the family court's decision on one motion, the latest contempt motion. And our review must focus on any abuse of discretion in the decision as to that motion. If this case

remains open, and Father yet again files another contempt motion (which we are not encouraging), and such motion is in fact denied, then Father still has the right to challenge as an abuse of discretion an actual future denial of such a motion based upon a flat refusal to consider it, although, again, we note no abuse of discretion in declining to act in the present circumstances.

Having found no abuse of discretion, we are mindful of our authority to affirm a decision of the family court for other reasons apparent in the record. *See Wells v. Commonwealth*, 512 S.W.3d 720, 721-22 (Ky. 2017). There are two such reasons in this case. First, the family court expressed doubt about whether Mother received notice of the latest contempt motion due to uncertainty in the address listed for Mother. For this reason alone, the family court could have initially denied the latest motion and insisted on proof of service before reopening contempt proceedings in this case.

For good reason, contempt proceedings typically proceed in two parts. A show cause motion is made. Had Mother been notified (the family court here wasn't sure of this), then she may have been able to send proof of the PCIT completion (if she had in fact completed it). Then the family court could have chosen not to waste judicial resources by proceeding further with a hearing.

Assuming Mother did not have proof of the PCIT completion, then the family court could choose to schedule a hearing. At that second opportunity before

the court, Mother could provide proof of doing what she should have done or explained why it had not been done. In any event, the family court would have had wide discretion in choosing what to do about enforcing its prior orders, and this discretion including choosing to do nothing due to changed circumstances.

Another reason exists for denial of Father's latest contempt motion. Father failed to follow FCRPP 2(9)(b)'s requirement that a contempt motion must be under oath, verified, or accompanied by a supporting affidavit. Refusing to act on this basis would no doubt not have prevented Father from trying yet again, but it still would have justified denying the present motion.

CONCLUSION

Mother, Child, and Father had all resided outside of Kentucky for several years when this contempt motion was filed over a requirement in this DNA case imposed years earlier. The Cabinet apparently had no concerns about Mother and Child leaving the Commonwealth and was not involved with the family any longer. It may be that no one involved in this case had Mother and Child's current verified address, and Father's motion was not in proper form. Looking past those procedural issues, we do not believe that under the circumstances presented here the family court abused its discretion in declining to issue a sanction against Mother. Father has no right to use contempt as a weapon in a personal arsenal to punish Mother. We affirm the Boone Family Court.

TAYLOR, JUDGE, CONCURS.

CALDWELL, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

CALDWELL, JUDGE: I concur in part and dissent in part. As stated in this Opinion, and I do not disagree, the trial court has a great deal of discretion in applying its contempt powers. And the standard for review of a decision by the trial court regarding holding a party in contempt or to issue sanctions for contempt is the abuse of discretion standard.

Given the circumstances of this particular case, where the trial court had previously found Mother in contempt for failing to complete PCIT and giving Mother an avenue of purging said contempt by providing proof of completion of PCIT, I cannot find the trial court's decision to not issue further sanctions at this time an abuse of discretion. This is particularly so where the most recent contempt motion was not filed properly in accordance with FCRPP 2(9)(b) and where it could not be determined if Mother had been properly served or if even a current address was known for Mother.

However, where the majority Opinion states its hesitation to sanction broad statements of future intentions to not consider future motions, but finds that in this instance it is only, in fact, dealing with the most recent motion for contempt filed by Father, I cannot agree. While the only motions before the court, though improperly so, were the most recent ones filed by Father, the court's order

specifically states, "This Court declines to issue any further sanctions for Mom's past contempt, nor issue Show Cause orders for any allegations of contempt from orders entered approx. ten years ago."

And while it may not be an abuse of discretion for the trial court to not issue sanctions at this time, it can still be concerning to state it would never do so based solely on the age of violated orders. In early 2021, Father filed contempt motions alleging Mother violated court orders by making disparaging remarks about Father and by having unsupervised parenting time with Child. After conducting a hearing via Zoom, the family court found Mother not to be in contempt for making disparaging remarks about Father. But it noted Mother admitted to contempt regarding requirements for supervision of her parenting time with Child. In an informal order, it stated Mother could purge herself of contempt by strictly complying with its orders requiring supervision of her parenting time.

Also, the family court had previously found Mother in contempt for not completing PCIT in December 2020.[12] The 2015 PCIT order was put into place because of Mother's inability to complete the CATS assessment for reasons which were, in themselves, alarming. The family court stated in its December 2020 order that Mother could purge herself of contempt "by completing and

[12] The family court also found: "Mother testified that she completed PCIT yet does not have proof of the completion, despite knowing the matter was set for a motion for contempt on her completion of PCIT. She does not remember where or when she did PCIT." (R, p. 317).

providing proof of PCIT (parent child interactive therapy) or similar therapeutic program." Yet based on a review of the record, nothing was ever filed with the family court documenting Mother's completion of PCIT. And the County Attorney representing the Cabinet's interests did not tell the family court at the hearing whether Mother ever provided proof of completing PCIT to the Cabinet.

The family court still had, and has, jurisdiction to enforce its own orders in this DNA proceeding. And given the paramount interest in child protection and the lack of any indication in the record that Mother had completed PCIT and purged herself of contempt,[13] Father has valid justification to file a motion to hold Mother in contempt regarding PCIT. *See S.G. v. Cabinet for Health and Family Services*, 652 S.W.3d 655, 669 (Ky. App. 2022) ("The main purpose of DNA proceedings is protecting the health and safety of children rather than determining adults' rights to child custody.").

[13] Father may not appear to directly benefit from a finding of contempt against Mother or the contempt sanction he requested to be imposed (a fine to be paid to the court clerk). Nonetheless, I would conclude Father had standing to file the contempt motion at issue as a parent who had a constitutionally protected interest in the care of his child. *See Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d 204, 209 (Ky. 2014) (citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599 (1982)) (noting "fundamental liberty interest" of parent in the custody and care of child even if parent had lost temporary custody of child). Obviously, whether Mother and Child obtained some form of parent/child therapy would have an effect on Child's care and well-being and potentially affect Child's relationship with Father if contact were re-established.

Certainly, Father may not come across as sympathetic in this action; but it is not our job as an appellate court to make findings about his motives. Regardless, he is a father who has completed his case plan and has no restriction on his contact with his child. The only custody order in place for this child is one granting temporary custody to Mother and her parents jointly. And even this custody order is in place only because Mother's contact is ordered to be supervised and for her to complete PCIT. And yet Mother has been found in contempt for ignoring both of these court orders with no real consequence. I cannot find, as the majority has, that the only reason Father has for filing these motions is to punish Mother, although clearly, he may hope that happens.

More importantly though, is that any party to this action has the right to ensure these orders are enforced for the sake of this child. And given the actions and testimony of the parents in the contempt hearings the family court has conducted, it is disheartening that neither CHFS or the Guardian *ad litem* had not previously, and much earlier, filed contempt motions. A blanket order of this Court that it simply will not issue any show cause orders for allegations of contempt from its orders entered approximately ten years ago, is an abuse of discretion. It will be several more years before this child reaches adulthood and, with little compliance with protective provisions put in place and only an order of

temporary custody, the court cannot simply abandon its duty to the protection of this child.

Furthermore, I would reject the Appellee brief argument that the trial court's failure to address the contempt motion on the merits was a harmless error. The goal of the orders at issue was to further Child's best interests by requiring Mother to take actions to improve her parenting abilities. The trial court's failure to even entertain on the merits Mother's alleged violation(s) of orders aimed at improving her parenting abilities was not so inconsequential as to be a mere harmless error.

Also, it is a bit baffling why the Cabinet would be defending no finding of contempt against Mother. If the Cabinet had proof of Mother's compliance, that should be provided to the court. If not, it should also question why.

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