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# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-002072-ME

RAYMOND EVANS — APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE LINDA RAE BRAMLAGE, JUDGE
ACTION NO. 09-CI-01869

APRIL (EVANS) HESS;
HON. MICHAEL J. McMAIN;
BUSALD, FUNK, ZEVELY, P.S.C.;
HON. BRIAN P. HALLORAN;
WILLIAM HESCH; AND JUDGE
LINDA RAE BRAMLAGE — APPELLEES

AND NO. 2014-CA-001512-ME

M.K.G.E. AND L.M.P.E.,
MINOR CHILDREN BY AND THROUGH
THEIR GUARDIAN AD LITEM
RICHARD KONKOLY-THEGE — APPELLANTS

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE LINDA RAE BRAMLAGE, JUDGE
ACTION NO. 09-CI-01869

APRIL PRACHT (FORMERLY EVANS) AND
RAYMOND EVANS — APPELLEES

AND NO. 2015-CA-000043-ME

RAYMOND EVANS APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE LINDA RAE BRAMLAGE, JUDGE
ACTION NO. 09-CI-01869

APRIL (EVANS) HESS APPELLEE

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: D. LAMBERT; COMBS; AND DIXON, JUDGES.

D. LAMBERT, JUDGE: This matter is before the Court on three separate appeals from rulings issued by the Boone Family Court. The Appellant in the first appeal (2013-CA-002072-ME), Raymond Evans (hereinafter "Raymond"), seeks this Court to review the lower court's modification of an existing child custody order, an existing child support order, and to review the order directing him to pay a portion of the attorney fees and expert witness fees expended by the Appellee,

April (Evans) Hess (hereinafter "April").[1] The Appellants in the second appeal

[1] April is referred to as "April (Evans) Hess" in the briefs filed by Raymond and herself in 2013-CA-002072-ME and in 2015-CA-000043-ME. However, she is referred to as "April Pracht

(2014-CA-001512-ME) are M.K.G.E. and L.M.P.E., the minor children of Raymond and April, who seek this Court's review of the Boone Family Court's denial of a motion to strike testimony of their psychotherapist from the proceedings below. The Appellant in the third appeal (2015-CA-000043-ME) is Raymond, who seeks this Court's review of the Boone Family Court's denial of his motion for review of child support following another of the children attaining age eighteen, the Boone Family Court's failure to award make-up parenting time after finding April in contempt, and the court's failure to award immediate payment of attorney fees upon finding April in contempt. For the reasons described herein, we affirm in part, and reverse in part.

## I. FACTUAL AND PROCEDURAL HISTORY

This action has an extensive procedural history spanning several years and two states. The Court will address the general factual and procedural history here, and later supplement it with more specific information as necessary to dispose of the issues presented.

Raymond and April were married for eighteen years and lived in Montana with their five children. On April 14, 2009, they filed a joint petition for the dissolution of the marriage in Montana. Seven days later, they filed a joint parenting plan, which the Montana court accepted and made part of the final decree dissolving the marriage. On July 15, 2009, Raymond filed an emergency

(formerly Evans)" in the brief filed by the guardian *ad litem* of the minor children in 2014-CA-001512-ME.

motion for interim parenting order, a temporary restraining order, a motion for a show cause order, and a motion to amend the parenting plan. The Montana court denied these motions, but set a date for a settlement conference. April moved to Kentucky and filed a petition for the Kentucky courts' recognition of the foreign divorce, custody, and child support order, on August 5, 2009. In this petition, she also requested "the Decree of Shared Parenting be modified." She moved the Montana court to decline jurisdiction on September 4, 2009.

At that point parties began simultaneously litigating the issue of jurisdiction in both states. Raymond filed a response to the petition on September 23, 2009, and moved the Kentucky trial court[2] to dismiss the petition for lack of subject-matter jurisdiction on October 16, 2009. The Montana court granted April's motion and declined to continue exercising its exclusive jurisdiction over the matter in an order entered on December 22, 2009. Specifically, the Montana court ceded its jurisdiction to Kentucky on the basis that Montana was, at that point, an inconvenient forum. Raymond withdrew his motion to dismiss in Kentucky on January 8, 2010, following the Montana court's ruling on April's motion.

Having established Kentucky as the state with jurisdiction over the subject matter, the parties proceeded to extensively litigate the issues of custody and child support, filing multiple motions and conducting multiple hearings.

[2] Unless specified otherwise, the Court's further use of the phrase "trial court" in this opinion will refer to the Boone Family Court.

Raymond filed two different motions for contempt in February of 2010, and a third motion for contempt along with a motion to modify custody and parenting time on March 29, 2010. All of these were denied by the trial court. Raymond also filed a motion for custody on September 28, 2011, which he amended on October 27, 2011. He also moved to modify child support on November 11, 2011.

This litigation culminated in an order, following multiple hearings, issued by the trial court on April 17, 2013. This order denied Raymond's motions to award him sole custody of the parties' four minor children,[3] denied his motion for joint custody of the parties' four minor children, and awarded April sole custody of the parties' four minor children. The same order also directed Raymond to pay child support, calculating the amount based on an income of $181,870.00 annually for Raymond for 2011, 2012, and thereafter, and for April an annual income of $40,406.00 for 2011, and $49,570.95 for 2012. The trial court designated this order as final and appealable. Raymond then filed a motion to alter, amend, or vacate, which the trial court denied on November 15, 2013. On that same day, the trial court also granted April's motion for attorney fees and expert witness fees. Raymond filed the notice for the first appeal on December 9, 2013.

The trial court granted a second motion for attorney fees in favor of April on January 14, 2014. Raymond filed a petition in this Court, seeking a writ

[3] The oldest child became emancipated on January 1, 2012, but lived with Raymond in 2011 and 2012 before moving out and apparently cutting off contact with Raymond.

of prohibition to prevent the enforcement of the trial court's orders. This Court denied the writ, in an unreported opinion entered on July 9, 2014.[4] Raymond argued that the trial court had lacked jurisdiction to hear both issues concerned in the petition: child custody and child support. This Court explicitly determined that "the family court had subject-matter jurisdiction to entertain April's petition to register the Montana custody determination" and further that "…the family court properly exercised subject-matter jurisdiction over April's motion to modify the foreign child support order." Raymond appealed this Court's ruling to the Supreme Court, which dismissed it for failure to perfect the appeal.

On May 29, 2014, Raymond filed a motion for contempt, alleging that April had interfered with his parenting time by not allowing the children to see him. April filed a series of motions in June, including a motion for contempt, and a motion for supervised visitation, in which she contended that Raymond had harmed the welfare of the children by manipulating, abusing, or acting inappropriately with them. The trial court held seven hearings on these motions, spanning the entire month of July 2014.

During the hearing on July 1, 2014, April attempted to call the children's psychotherapist to the stand. The guardian *ad litem* appointed to represent the children objected to the testimony. The trial court overruled the objection and the psychotherapist gave testimony as to the content of the children's

[4] *Evans v. Bramlage*, 2014-CA-000249-OA (Ky.App. 2014).

therapy sessions. The guardian *ad litem* later moved to strike the testimony, citing Rule 507 of the Kentucky Rules of Evidence ("KRE"), which the trial court overruled. Consequently, the guardian *ad litem* filed notice of the second appeal.

The third appeal stems from an order issued by the trial court on April 6, 2014. That order found April in contempt for failure to abide by a prior order regarding Raymond's parenting time with the children. The trial court awarded Raymond attorney fees, but denied his request to modify child support, which he had made as the result of one of the minor children reaching age eighteen and switching residences from April's to Raymond's. The trial court also denied, as moot, Raymond's request to make up missed parenting time with the children. Raymond filed a motion to alter, amend, or vacate, the portions of that order denying the child support modification and his make-up parenting time. April filed a motion to alter, amend, or vacate, the portion of the order awarding Raymond attorney fees. She requested the trial court suspend her payment of Raymond's attorney fees. The trial court entered an order on December 11, 2014, which denied Raymond's motion, and granted April's motion. It is from the December order that Raymond appeals.

## II. ANALYSIS

### A. THE FIRST APPEAL, 2013-CA-002072-ME

#### 1. JURISDICTION WAS PROPER

The Court will first address, as a threshold issue, Raymond's challenge to the trial court's exercise of subject-matter jurisdiction. Raymond contends in this appeal that the trial court lacked subject-matter jurisdiction because April's petition to register the foreign custody and child support order contained language seeking a modification of the terms of the Montana order.

Raymond argues that because the Montana court had not determined Kentucky was the more convenient forum before the petition was filed, and further because the petition requested a modification of the custody terms of the Montana order, the trial court lacked subject-matter jurisdiction. Jurisdiction to modify a foreign court's custody ruling is determined at the time the motion to modify is filed. *Wahlke v. Pierce*, 392 S.W.3d 426, 429 (Ky.App. 2013).

April argues that Kentucky courts had jurisdiction to modify custody because Raymond voluntarily submitted himself to the jurisdiction of the Kentucky courts by participating in the proceedings before the trial court. This argument appears to conflate the requirements for personal jurisdiction with those for subject-matter jurisdiction. While personal jurisdiction may be established by a party's availing himself of the benefits and protections of the laws of the forum state (*Cox v. Cox*, 170 S.W.3d 389 (Ky. 2005) (citing *Int'l Shoe Co. v. State of Washington, Office of Unemp. Compensation and Placement*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)), subject-matter jurisdiction cannot be established by behavior constituting a waiver, nor can it be established by agreement of the

parties. *Cann v. Howard*, 850 S.W.2d 57, 59 (Ky.App. 1993) (citing *Rodney v. Adams*, 268 S.W.2d 940 (Ky. 1954)).

However, neither of these arguments is persuasive. This Court previously addressed the issue of whether the trial court had subject-matter jurisdiction when considering Raymond's petition for a writ of prohibition. The resulting ruling became binding on both the trial court and this Court pursuant to the "law of the case" doctrine. "The law of the case doctrine is 'an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.'" *Brooks v. Lexington-Fayette Urban County Housing Auth.*, 244 S.W.3d 747, 751 (Ky.App. 2007) (quoting *Union Light, Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956)). This Court made specific rulings regarding the trial court's exercise of subject-matter jurisdiction over both the child custody and child support issues when ruling on the petition for the writ. Those rulings were critical to the Court's ultimate decision on the petition. Under the law of the case doctrine, the rule of the prior appellate opinion is binding. The trial court thus had subject-matter jurisdiction to entertain the petition, and issue rulings therefrom.

## 2. STANDARD OF REVIEW

Raymond's first appeal touches on both the issue of child custody and the issue of child support. Because the issues of child custody and child support are legally distinct from each other, the Court will address them separately.

When deciding matters relating to child custody, trial courts are bound to follow the "overriding principle" of the "best interests of the child." *Young v. Holmes*, 295 S.W.3d 144, 146 (Ky.App. 2009) (citing *Burchell v. Burchell*, 684 S.W.2d 296, 300 (Ky.App. 1984)). Determining the best interests of the child is left to the trial court's discretion. *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Because the trial court acts as the fact-finder, it has the discretion to weigh the credibility of the evidence, and that discretion includes believing one party's evidence over another. *Bailey v. Bailey*, 231 S.W.3d 793 (Ky.App. 2007). "Due regard" is to be given to the trial court's findings, since the trial court is in the best position to evaluate the credibility of witnesses and evidence. *Stanford Health & Rehab. Ctr. v. Brock*, 334 S.W.3d 883, 884 (Ky.App. 2010). Any decisions flowing from a trial court's findings of fact in custody matters are reviewed using the abuse of discretion standard. *Young*, at 146.

The same standard of review applies to appellate review of child support rulings. "A reviewing court should defer to the lower court's discretion in child support matters wherever possible." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. 2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal

principles." *Seay v. Seay*, 404 S.W.3d 215, 217 (Ky.App. 2013) (citing *Downing* at 454). Appellate courts are not entitled to overturn a trial court's ruling unless clear error is presented. *Moore v. Asente*, 110 S.W.3d 336, 353-54 (Ky. 2003). Further, mere doubt as to the correctness of a finding does not justify its reversal under a clear error standard. *Id.* at 354.

### 3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING THE CUSTODY ARRANGEMENT

The issue of custody modification is undoubtedly the most contentious issue presented in the matter. Indeed, the parties even dispute which of them filed the motion the trial court ruled on when ordering the modification. Raymond filed three motions for the specific purpose of modifying custody, and while April did not file a specific motion for modification, language requesting such is found within the original petition to register the out-of-state child custody and child support order.

Raymond first argues that April's "motion" was procedurally deficient under Kentucky Revised Statutes ("KRS") 403.350, which requires that two affidavits accompany a motion for modification of custody. However, in *Masters v. Masters*, the Kentucky Supreme Court held that a trial court had authority to rule on a motion for custody modification despite the moving party's noncompliance with the affidavit requirement. 415 S.W.3d 621, 624 (Ky. 2013). "A possible error only renders the family court's decision voidable, not *void ab initio*." *Id.* at

624. In so holding, the Court explicitly overruled *Petrey v. Cain*, 987 S.W.2d 786 (Ky. 1999). *Id.*

The trial court appointed an expert psychologist to conduct a review and evaluation. The psychologist compiled a report, which was introduced into the record at the hearing. The psychologist recommended in the report that the children be placed in Raymond's custody. April objected to the report, positing the following reasons for its exclusion: the report was biased, it did not reflect the daily lives of the children, it misquoted witnesses and misrepresented their actual statements, and the psychologist refused to interview April's witnesses in preparing it. The trial court admitted the report, but afforded it little weight, noting in its findings of fact and conclusions of law that "portions of the written report were contradicted by the testimony at trial." The trial court also made specific findings on the applicable statutory factors of KRS 403.270(2). Ultimately, the trial court awarded sole custody to April following the hearing.

Raymond alleges the trial court abused its discretion in choosing to disregard the report and instead rely on other evidence presented during the hearing. The trial court, in its Finding of Fact/Conclusions of Law and Order, dedicated 12 of the document's 46 pages to detailing the content of the report and the hearing testimony which either directly contradicted it or was otherwise inconsistent. The language of KRS 403.290, the statute allowing a court to appoint a mental health professional to evaluate children and parents as part of a custody

determination, is permissive rather than mandatory. "The court *may* seek advice of professional personnel…." KRS 403.290(2) (emphasis added). A report compiled, and testimony given, by such a professional pursuant to KRS 403.290, should be treated no differently than other expert evidence, with its credibility to be weighed by the trier of fact. See *Chalupa v. Chalupa*, 830 S.W.2d 391, 392 (Ky.App. 1992) (*abrogated on other grounds by Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003) (*overruled on other grounds by Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008)).

With the trial court acting as the trier of fact, this Court must not "substitute its own opinion for that of the family court" where the trial court applied the correct law and substantial evidence supports its ruling. *Coffman v. Rankin*, 260 S.W.3d 767, 771 (Ky. 2008). Here the trial court thoroughly analyzed multiple points within the report with a counterpoint for each from the testimony introduced in the hearing. Having found the report less credible, the trial court relied on evidence other than the report in reaching its conclusion: that the best interests of the children were served by modifying the custody from joint to sole custody, and determining the sole custodian should be April. This evidence included testimony which showed Raymond's concerted and repeated attempts to undermine April with the children. The fact that Raymond disagrees with the trial court's conclusion as to the credibility of the report does not mean the trial court

should have necessarily relied on it, or lacked substantial evidence to reach its conclusion on the main issue presented.

Having reviewed the record and finding the trial court's ruling to be supported by substantial evidence and sound legal principles, this Court can find no abuse of discretion in the trial court's ruling concerning the custody modification.

### 3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN MODIFYING THE CHILD SUPPORT ORDER

Before reaching its judgment of April 17, 2013, the trial court considered voluminous evidence on the issue of child support modification. The trial court considered not only the parties' tax returns, but also the testimony of an expert accountant as to Raymond's income. It is the trial court's reliance on the expert evidence regarding his income which underlies Raymond's arguments on this issue.

The trial court noted that it was Raymond who had requested the modification, as he had alleged a decrease in his own income while April's income had increased during the same time period. April alleged that Raymond had made efforts to hide his income to avoid paying a greater amount in child support. Raymond was self-employed for the time periods pertinent to the trial court's analysis, while April worked for an employer.

The trial court noted the requirement found in KRS 403.212(2)(c) that income from self-employment is calculated by deducting ordinary and necessary business expenses from gross receipts. Three witnesses testified at the hearing regarding Raymond's income: Raymond, Ron Munn (Raymond's bookkeeper) and William Hesch (an expert witness accountant retained by April).

According to the trial court's findings, Raymond "took the position that he had no knowledge regarding his business' finances" and that he would provide his receipts to Munn, and "let him take care of things from there and simply sign his tax returns as provided to him…." The trial court further characterized Munn's testimony as "in no way […] able to substantiate [Raymond]'s income." The trial court found Raymond's testimony regarding his income "has no credibility" thanks to the large number of discrepancies, going so far as to announce its belief that Raymond had intentionally misled both the court and the I.R.S. with respect to his 2010 and 2011 income.

Hesch, on the other hand, provided written expert disclosures and testified consistently therewith. The trial court made a specific finding that Hesch's testimony was more credible than Raymond's. Hesch relied on documents Raymond later introduced as exhibits in reaching the conclusions reached in his report. Hesch also testified that Raymond used a cash basis method of accounting, which lends itself more easily to manipulation than does an accrual basis accounting methodology. Having reviewed Raymond's bank and tax

records, Hesch calculated Raymond's income at $181,870.00 for 2010. The trial court agreed, and, owing to the difficulty sorting through all of the discrepancies in Raymond's records, imputed an identical income for him for 2011 and thereafter. The child support amount was calculated using that figure.

While he characterizes Hesch's conclusions as speculative, Raymond argues that the trial court erred when using Hesch's findings rather than his reported income from his tax returns. This argument is, in essence, a challenge to the weight the trial court gave the evidence presented. As reflected above, the trial court amply justified its findings as to the credibility of the evidence presented. The trial court's ruling was supported by substantial evidence, and is not clearly erroneous.

Absent clear error, this Court cannot disturb the trial court's ruling. To do so would be to encroach upon the exclusive province of the trial court as the arbiter of credibility of the evidence presented before it. The trial court did not abuse its discretion in modifying the child support order.

## B. THE SECOND APPEAL, 2014-CA-001512-ME

### 1. STANDARD OF REVIEW

The second appeal was filed by the guardian *ad litem* on behalf of two of the minor children. The issue before this Court is whether the trial court acted appropriately when it denied the motion to strike the testimony of Dr. Edward Connor, Psy.D., the psychotherapist who treated the children. The guardian *ad*

*litem* made an objection based on the psychotherapist-patient privilege found in Rule 507 of the Kentucky Rules of Evidence. The trial court overruled the objection, directing the doctor to testify. The guardian renewed the objection in its motion to strike the testimony. The trial court also denied that motion, and this appeal followed.

Admissibility of evidence is entirely within the discretion of the trial court. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). Therefore, evidentiary rulings of a trial court are reviewed for abuse of discretion. *Dunlap v. Commonwealth*, 435 S.W.3d 537, 553 (Ky. 2013).

**2. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE TESTIMONY OVER THE CHILDREN'S OBJECTION AND IN FAILING TO STRIKE THE TESTIMONY OF DR. CONNOR**

At the hearing on July 1, 2014, April called Connor to testify as a fact witness on her behalf. Connor was not an appointed expert who had performed a custody evaluation, rather he was a practicing psychotherapist from whom the children had sought and received treatment. Connor's testimony consisted largely of confidential communications divulged in the children's therapy sessions regarding alleged abuse at the hands of Raymond.

Rule 507 governs the privilege that precludes testimony regarding confidential communications between patients and their psychotherapists. Specifically, subsection (b) of that rule contains the privilege, and provides as follows:

> General rule of privilege. A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

KRE 507(b). Subsection (c) spells out three exceptions to the privilege, all of which hinge on the purpose of the evidence being an elucidation of the patient's mental condition. KRE 507(c)(1)-(3). Given that the purpose of the testimony here was the exposition of facts not directly related to the mental health of the children, no exception to the privilege applies. The question before this Court, apparently one of first impression in the Commonwealth, is whether a child has an independent right to assert a KRE 507(b) privilege in custody proceedings instituted by his or her custodian.

The Supreme Court of the United States has previously held that "a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence….'" *Jaffee v. Redmond*, 518 U.S. 1, 9-10, 116 S.Ct. 1923, 1928, 135 L.Ed.2d 337 (1996) (quoting *Trammell v. U.S.*, 445 U.S. 40, 51, 100 S.Ct. 906, 912, 63 L.Ed. 2d 186 (1980)). The Kentucky Supreme Court echoed that sentiment when holding in *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky.

2003), that "the psychotherapist-patient privilege is an 'absolute' privilege, *i.e.,* one that is not subject to avoidance because of a 'need' for the evidence." *Barroso* at 558 (quoting *Jaffee,* 518 U.S. at 17-18, 116 S.Ct. at 1932.).

This Court has considered a similar issue before, in *Bond v. Bond*, 887 S.W.2d 558 (Ky.App. 1994). In *Bond* the parties were involved in a similarly bitter custody battle, and the father tried to invoke the KRE 507(b) privilege, over the objections of the mother, to prevent the introduction of testimony unfavorable to himself. This Court found the trial court's allowance of the invocation of the privilege to be reversible error, primarily because there was "ample proof" presented that the child had developed "some sort of mental/emotional disorder." *Id.* at 560. The Court also noted that "the mental health of *all* individuals is relevant [in custody proceedings]." *Id.* at 561 (emphasis in original).

The trial court relied heavily, almost exclusively, on *Bond* in making its decision. However, *Bond* is easily distinguishable from the instant case: not only was the child not the party seeking to invoke the privilege, but because the mental condition of the child was at issue, the situation is much closer to one of the exceptions found in KRE 507(c). The content of the evidence tended more toward the exposition of facts favorable to April than resolving an issue pertaining to the children's mental condition. More importantly, *Bond* was decided before *Jaffee* and *Barroso*, which both stand for the proposition that the psychotherapist-patient

privilege protects confidential communications from disclosure no matter how relevant they may be to a disputed issue.

Given the lack of Kentucky case law squarely on point on the issue, the Court would survey the landscape of federal case law as well as that of other states who have considered the issue. The Supreme Court of the United States has previously held that children have many of the same due process rights as adults. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). There is also a near consensus among the other states which have examined this issue that parents may not waive the privilege of their children in custody proceedings.[5] The only outlying jurisdiction is Louisiana, which held in *Carney v. Carney*, 525 So.2d 357 (La.App. 1988), that the privilege is to be weighed as part of the analysis of the best interests of the child.

A plain reading of KRE 507(b) shows that the privilege belongs to the patient or the authorized representative of the patient. KRE 507(a)(4) defines an "authorized representative" of the patient is a "person empowered by the patient to assert the privilege granted by this rule…." That definition, coupled with the obligation of the guardian *ad litem* to "stand in the infant's place and determine what his rights are and what his interests and defense demand" (*Goldfuss v. Goldfuss*, 609 S.W.2d 696 (Ky.App. 1980), leads this Court to conclude that when

[5] *In re M.P.S.*, 342 S.W.2d 277 (Mo.App. 1961); *Atty ad Litem for D.K. v. Parents of D.K.*, 780 So.2d 301 (Fla.Dist.Ct.App. 2001); *In re Daniel C.H.*, 220 Cal.App.3d 814 (6th Dist. 1990); *Nagel v. Hooks*, 460 A.2d 49 (Md. 1983); *In re Adoption of Diane*, 508 N.E.2d 837 (Mass. 1987); *In re Berg*, 886 A.2d 980 (N.H. 2005); *In re Zappa*, 631 P.2d 1245 (Kan.App. 1981).

appointed, the guardian *ad litem*, rather than a parent, may invoke or waive the KRE 507(b) privilege. As there was an authorized representative here, the trial court's permitting a parent to waive the privilege on behalf of the children and compel privileged testimony was error.

To allow a parent to waive a privilege held by the child in a custody dispute, over the objections of that child, is not only bad policy, but defeats the purpose of the existence of the privilege. The impropriety of a rule allowing such waiver would be further complicated here by the fact that the parent waiving the privilege was furthering interests which are neutral, if not actually adverse, to those of the children.

As this Court now concludes the trial court acted in contravention of an established rule of evidence, it must likewise conclude that such ruling was an abuse of discretion. To the extent the trial court admitted this incompetent evidence, we reverse the trial court.

## C. THE THIRD APPEAL, 2015-CA-000043-ME

### 1. STANDARD OF REVIEW

It is well-settled that trial courts in Kentucky have the authority to impose sanctions for contempt of court. *Newsome v. Commonwealth*, 35 S.W.3d 836 (Ky.App. 2001). In fact, the discretion vested in the trial court to decide when sanctions are appropriate and what sanctions to impose has been described as "almost unlimited…." *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky.App.

1986). "Therefore, we are governed by the high standard of review as to whether the trial court abused its discretion" when an order concerning contempt is before the Court on appeal. *Ky. Riv. Cmty. Care, Inc. v. Stallard*, 294 S.W.3d 29, 31 (Ky.App. 2008).

As noted above, the appropriate standard of appellate review in child support matters is also abuse of discretion. *See Downing*; *Seay*.

**2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MAKE-UP PARENTING TIME WITH RAYMOND**

Raymond's second appeal and the third which this Court will be examining in this opinion is an appeal of the trial court's order of December 11, 2014. Much like Raymond's other instant appeal, this one has a convoluted history.

Raymond filed the motion which eventually led to this appeal on April 4, 2014. The motion sought, and on the same day the trial court granted, an order restraining April from interfering that evening with Raymond's scheduled parenting time for the children's spring break, and preventing April from allowing Raymond a private phone conversation with one of the children to determine if the child wished to participate in this scheduled parenting time. April failed to abide by this order,[6] prompting Raymond to file his "Emergency Motion for Contempt" on May 29, 2014.

[6] Only the second oldest child, C.H.R.E., was made available for Raymond to pick up for this visit. Raymond alleges April absconded with the other children on that date.

As a basis for Raymond's May 29th motion, he recounted instances of April's noncompliance with orders allowing parenting time on several dates over the course of four years. Raymond argued in his motion that "[i]n order for Petitioner to learn to follow the Orders of the Court, the Court should find her in contempt of Court and sentence her to an appropriate amount of jail time and order her to pay a reasonable attorney fee for the prosecution of this motion." Raymond also suggested the trial court compensate him for his lost parenting time with an extended share of parenting time during the children's summer vacation. This suggestion, while contained within the motion for contempt, made no reference whatsoever to any violation of a court order by April. Finally, the motion also stated that C.H.R.E. would reach age 18 in mid-August of 2014, and had expressed a desire to reside with Raymond. Because the child had not yet completed high school, Raymond requested a modification of child support. Much like the language regarding the "make-up" parenting time, this request contained no language indicating it should be imposed as a sanction.

In the meantime, April filed multiple motions, including her own motion for contempt, on June 23, 2014. The trial court heard all of these outstanding motions in a series of seven hearings throughout the month of July 2014.

The trial court issued its ruling on the outstanding motions on August 6, 2014. The trial court's order found April in contempt, but declined to

incarcerate her as Raymond had suggested. Instead it ordered her to pay attorney fees to Raymond in the amount of $2000.00. The trial court further denied Raymond's request for child support modification as procedurally deficient (for failure to provide required evidence under Rule 9 of the FCRPP[7]) and the motion for make-up parenting time as moot.

On August 18, 2014, both Raymond and April moved the trial court to alter, amend, or vacate, parts of the trial court's August 6th order. Raymond sought further findings of fact regarding the trial court's ruling denying his request for make-up parenting time and sought a new trial pursuant to Kentucky Rules of Civil Procedure ("CR") 59 regarding his request for child support modification. April sought to stay enforcement of the order directing her to pay attorney fees. The trial court conducted a hearing and issued a written order the same day, December 11, 2014, denying Raymond's motion and granting April's. Raymond then filed the instant appeal.

On appeal Raymond argues the trial court abused its discretion in denying his request for make-up parenting time as a sanction for April's contempt. The trial court treated the request as if it were a motion to enforce the existing custody order, owing to the lack of language indicating the request was for a sanction. Because the specific dates Raymond requested for parenting time had already lapsed, the trial court denied the request as moot.

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

As noted above, Raymond now argues that the mere presence of the request in a motion for contempt implies that the make-up time was sought as a sanction, and the trial court abused its discretion denying it. However, he does not address the fact that the same motion contains another request which was wholly unrelated to the imposition of sanctions. He makes no attempt to argue that his request for child support review was a request for sanctions, but argues the trial court should have intuitively known the request for make-up time was such a request, despite the lack of contempt language in both.

The trial court's order addressed the plain language of the request. Contrary to Raymond's assertions, the trial court did not "fabricate a finding." It ruled on the motion before it. Given the context of the motion, absent language to indicate the make-up time was sought as a sanction, the trial court was justified in treating Raymond's motion for contempt as multiple motions in the same document, and further concluding that the request for make-up time was a moot motion to enforce the existing custody order.

The trial court thus did not abuse its discretion in declining to impose a specific sanction on a party when said sanction was not requested.

### 3.THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RAYMOND'S MOTION TO REVIEW CHILD SUPPORT

A minor child reaching the age of eighteen is an event which triggers an obligation on the presiding court to review the relative child support obligations

of the parents. *Seay*, at 218. Additionally, when a child reaches age eighteen, but has not yet completed high school, the non-custodial parent must pay child support to the custodial parent for the time period between the eighteenth birthday and completion of the school year in which the child turns nineteen. KRS 403.213(3). When C.H.R.E. turned eighteen and chose to live with Raymond, a split custody arrangement contemplated by KRS 403.212(6) was created, which also triggered a need for a review of the relative child support obligations of the parents.

Raymond is correct that under this authority, he would be entitled to the review he requested. However, he is incorrect in his assertion that he is automatically entitled to the modification he requested. Under both provisions, certain evidence is required before the adjustment may be granted. Under KRS 403.212(6)(a), two child support worksheets, one for each household, must be prepared for the trial court to review when establishing the new obligations. Under Rule 9(4)(a) and (b) of the FCRPP, the parties are not only obligated to provide completed child support worksheets when seeking to modify child support, but they are also obligated to provide income information and information regarding insurance for the children, and also obligated to share such information with each other and the court.

Rather than provide this necessary information to the trial court, Raymond argued that he should have been immune to the requirements, and the trial court should have used the income information arrived at in its prior

judgment. The trial court found his motion to be procedurally defective and denied it.

Even assuming he had properly requested the trial court to take judicial notice of its prior findings as to income, the necessary worksheets required by KRS 403.212(6)(a) were absent from the record. The statute specifies that in a split custody arrangement, the worksheets contain different information, basing the obligation on the number of children of the relationship in either household, rather than the total number of children of the relationship as is the case in a "normal" child support adjudication. Raymond's contention that the trial court could use the worksheets provided in the prior litigation on the issue is thus incorrect.

Though Raymond is still entitled to a review, he is not entitled to a review based on the motion at issue here. The trial court correctly determined that his motion was procedurally defective, and such finding was not an abuse of discretion.

**4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STAYING APRIL'S PAYMENT OF RAYMOND'S ATTORNEY'S FEES AS A SANCTION**

Raymond argues that the trial court has nearly unfettered authority to determine if sanctions are appropriate and what sanctions to impose, while at the same time paradoxically arguing against that discretion: that a trial court must render punishment when a party is found in contempt. He even cites to *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996), to stand for the proposition

that a failure of a trial court to impose an appropriate sanction is an abuse of discretion though the Court's own review of that precedent finds no such rule.

April contends that the trial court's ruling takes into account the fact that April had filed her own motion for contempt on June 23rd, as well as having an existing order finding Raymond in contempt from January 14, 2014, for which he had not paid her attorney fees in the amount of $200.00.

The trial court's order of August 16, 2014, reserved the issue of attorney fees on both Raymond's and April's motions for contempt, for a later date. The reason for this reservation is the fact that 2013-CA-002072-ME was pending before this Court. April's motion to alter, amend, or vacate the trial court's August 16th order was filed on August 18th, and specifically argued that she should not be obligated to pay the sanction imposed because Raymond had paid nothing toward the attorney fees and expert witness fees as ordered in the trial court's final judgment on the initial petition. However, she also argued in the alternative that the payment should be stayed until such time as this Court rendered our decision.

Raymond correctly argues that a trial court cannot impose a sanction for nonpayment of a judgment. *Rudd v. Rudd*, 214 S.W.791, 795 (Ky. 1919). However, as the Court in *Rudd* stated, the reasoning behind that prohibition is the trial court's lack of subject-matter jurisdiction over an action after the judgment had been entered. *Id.* Moreover, Raymond's contention does not account for

April's alternative argument, that the payment of the sanction should be stayed until this Court issues a ruling on the merits of Raymond's first appeal.

The trial court's order contains no language indicating which of April's arguments it accepted when issuing its ruling on December 11, 2014. But this Court owes deference to the trial court's ruling if supported by sound legal principles. The prevention of possible inconsistent rulings is in the interests of both the parties and judicial economy, and presents a legitimate reason to stay enforcement of the order. This Court therefore cannot conclude the trial court abused its discretion in staying the payment of the sanction it awarded against April.

## III. CONCLUSION

For the reasons set forth herein, we hereby affirm the trial court's decision in 2013-CA-002072-ME, reverse the trial court's decision in 2014-CA-001512-ME, and affirm the trial court's decision in 2015-CA-000043-ME.

ALL CONCUR.

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