RENDERED: JANUARY 24, 2020; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001815-MR

EVELYN M. NIENABER — APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 14-J-01656-002

COMMONWEALTH OF KENTUCKY,
EX REL. MICHAEL R. MERCER — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, TAYLOR, AND K. THOMPSON, JUDGES.

GOODWINE, JUDGE: Evelyn M. Nienaber ("Nienaber") appeals from an order of contempt entered by the Kenton Family Court. The family court found she failed to timely pay $191.10 per month toward her child support and $25.00 per month toward her arrearage owed to the Commonwealth of Kentucky. After a

thorough review of the record and applicable legal authority, we reverse and remand.

BACKGROUND

Nienaber is the biological mother of E.M. who was born on March 20, 2012. The family court entered a child support calendar order on December 14, 2016, ordering Nienaber to pay: (1) $191.10 per month current child support; (2) 39% of unreimbursed medical, dental, vision, daycare, and extracurricular activities; (3) medical insurance; and (4) $25.00 per month toward her arrearage. Paternal grandparents were awarded permanent custody of E.M. on December 28, 2016.

On August 22, 2018, the Commonwealth filed a motion for order showing cause alleging Nienaber was in contempt for failing to pay child support as ordered by the family court. An order to show cause was entered the same day. The family court held a contempt hearing on November 14, 2018. At the hearing, the Commonwealth alleged Nienaber was $3,816.38 behind on her child support payments as of November 12, 2018. Nienaber admitted she had not made a payment since September 2017. Although she had been employed at a restaurant, Nienaber admitted she quit her job due to lack of transportation and did not obtain other employment. She stated she had no excuse for not working. Nienaber was incarcerated from around the time she quit her job through November 2017.

Nienaber was also incarcerated in March 2018 for probation violations. She was released on parole in early November 2018 and ordered to attend inpatient drug treatment. Nienaber was to start a six-month treatment program as soon as a bed was available and would not be permitted to work during that time.

The family court found Nienaber in contempt for the period she was not incarcerated because she voluntarily terminated her employment. The court sentenced her to 90 days in jail discharged for two years on the condition that she complete the previously ordered inpatient treatment program. Counsel objected to the conditional discharge and requested a purge be set. Counsel specifically requested that Nienaber's previously ordered substance abuse treatment serve as her purge. The Commonwealth objected, and the family court declined counsel's request, stating it had never set a non-monetary purge.

Instead, the court set a $500.00 monetary purge payable on or before December 31, 2018. Nienaber requested the family court provide findings on the record that Nienaber was able to pay the purge amount. The family court acknowledged Nienaber would be unable to work during the treatment program. The court stated, "From a realistic standpoint, if I'm supposed to set a purge I think she can obtain, the only purge I could set would be zero, which is no purge at all." (VR 11/14/18 at 4:09:45-4:09:55.) Nienaber also objected to the conditionally discharged sentence, but the court overruled the objection. This appeal followed.

On appeal, Nienaber argues the family court erred in: (1) setting a purge amount she had no present ability to pay; (2) setting a deadline for the purge to be paid; (3) refusing to consider a non-monetary purge; (4) imposing a period of incarceration for her without means to purge; and (5) imposing a period of conditional discharge in a civil contempt case.

STANDARD OF REVIEW

We are mindful that a trial court has broad authority when exercising its contempt powers; consequently, our review is limited to a determination of whether the court abused its discretion. *Kentucky River Community Care, Inc., v. Stallard*, 294 S.W.3d 29, 31 (Ky. App. 2008). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). The trial court's underlying findings of fact are reviewed for clear error. *Commonwealth, Cabinet for Health and Family Servs. v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011).

ANALYSIS

First, we address Nienaber's arguments that the family court erred in setting a purge amount she had no present ability to pay, setting a deadline for the purge to be paid, and imposing a period of incarceration for a defendant without means to purge. Contempt is defined as "the willful disobedience of or the open

disrespect for the court's orders or its rules." *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007) (citing *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky. App. 2001)). "Contempt may be either civil or criminal, depending upon the reason for the contempt citation." *Crowder v. Rearden*, 296 S.W.3d 445, 450 (Ky. App. 2009).

"A civil contempt occurs when a party fails to comply with a court order for the benefit of the opposing party, while criminal contempt is committed by conduct against the dignity and authority of the court." *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986). "It is not the fact of punishment but rather its character and purpose, that often serve to distinguish civil from criminal contempt." *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996) (internal quotation marks and citation omitted).

"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." *Ivy*, 353 S.W.3d at 332 (citation omitted). "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." *Id.* (citing *Clay v. Winn*, 434 S.W.2d 650 (Ky. 1968)).

As required by *Ivy*, the Commonwealth met its burden to show by clear and convincing evidence that Nienaber violated her child support order. *Id.* Nienaber's actions were undisputed. She conceded that she willfully quit her job and did not obtain other employment despite her obligation to pay child support.

"Having found a party in contempt, the court's next task is to fashion a remedy." *Id.* at 334. Sanctions for criminal contempt "are meant to punish the contemnor's noncompliance with the court's order and to vindicate the court's authority[.]" *Id.* at 332. In contrast, 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." *Id.* (citation omitted). "For the punishment to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge[.]" *Id.* at 334. "[T]he defining characteristic of civil contempt is the fact that contemnors 'carry the keys of their prison in their own pockets.'" *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993). Significantly, "the purge condition of a coercive order must be something presently within the contemnor's ability to perform." *Ivy*, 353 S.W.3d at 335. It is logically unsound to use the power of civil contempt "to compel the doing of an impossible act." *Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993).

Here, the family court's finding was one of civil contempt because it found Nienaber failed to comply with its child support order. After finding

Nienaber in contempt, the family court ordered her to pay a purge amount of $500.00 or serve 90 days in jail, conditionally discharged for two years. At the time of the hearing, Nienaber was unemployed, had no income, and, as a condition of her parole in another case, was required to start an inpatient treatment program as soon as a bed became available. On the record, the family court found Nienaber would be unable to pay the purge before the court's deadline because she would be in inpatient substance abuse treatment for the next six months.

Based on the family court's findings, we must reverse the order of contempt. The family court clearly found Nienaber was unable to pay the purge amount. The court seemingly set an unattainable purge amount to ensure Nienaber would be discharged on the condition that she complete inpatient treatment, obtain employment as soon as permitted by her treatment program, and stay current on child support payments thereafter. Although we understand the family court's hope that Nienaber would successfully complete substance abuse treatment, she was required to complete the program as a condition of her parole in another case. The family court abused its discretion in setting the purge amount as the court found it was impossible for Nienaber to pay it.

Second, Nienaber argues the family court erred in refusing to consider a non-monetary purge. In contempt cases where an obligor fails to pay child support, courts typically set monetary purges. Civil contempt orders are coercive

or are meant to compensate for losses. It is unclear whether completing a substance abuse treatment program would compel Nienaber to pay her child support, and completion of the program would not compensate the Commonwealth for its loss. Nienaber cites *Ivy* in support of this argument, but *Ivy* never discussed non-monetary remedies. Instead, our Supreme Court opined that "[t]he court has broad discretion to fashion *compensatory* remedies, but they must be based on evidence of actual loss." *Ivy*, 353 S.W.3d at 335 (emphasis added) (citation omitted). Nienaber cited no other authority to support her argument of error and we found none. Thus, the family court did not err in failing to consider a non-monetary purge. However, we found no prohibition against the use of non-monetary purges.[1]

Finally, Nienaber argues the family court erred in imposing a period of conditional discharge in a civil contempt case. Again, Nienaber cites *Ivy* in support of her argument. *Ivy* held that the family court erred in holding the obligor in contempt because she lacked the ability to pay her child support and never reached the issue of sanctions. Therefore, *Ivy* does not support Nienaber's

[1] *Turner v. Rogers* admonished that incarcerating civil contemnors who lack ability to comply with purge conditions constitutes denial of due process. 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011). Following *Turner*, a study revealed an increase in the use of non-monetary purges in child support contempt proceedings in South Carolina. *See* Elizabeth G. Patterson, *Turner in the Trenches: A Study of How Turner v. Rogers Affected Child Support Contempt Proceedings*, 25 GEO. J. ON POVERTY L. & POL'Y 75 (2017). Whether this practice would be viable in Kentucky remains to be seen.

argument, and she cites no other pertinent authority. Furthermore, in *Schaffeld v. Commonwealth ex rel. Schaffeld*, 368 S.W.3d 129 (Ky. App. 2012) and *C.C. v. Commonwealth ex rel. S.B.*, 568 S.W.3d 878 (Ky. App. 2019), the obligor's jail time in each contempt case was conditionally discharged, and this Court did not condemn the practice. As such, we cannot hold that the family court abused its discretion in imposing a period of conditional discharge in this case.

Before we conclude, we must address a clerical mistake raised by Nienaber. On the record, Nienaber stated she was incarcerated from September 2017 through November 2017 and March 2018 through November 2018. The Court's oral ruling appeared to acknowledge that she was incarcerated during these two periods. However, the family court's written order found her in contempt from September 2017 through March 2018. The Commonwealth agrees that the written order contains this clerical error. Therefore, we grant the family court leave to correct this clerical error under CR[2] 60.01 by separate order.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the Kenton Family Court and remand for the family court to determine an attainable purge amount, if any, and issue findings to support that determination. If the family court

[2] Kentucky Rules of Civil Procedure.

determines there currently is no attainable purge amount, jail time cannot be imposed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Aaron Reed Baker Frankfort, Kentucky	Patrick Grote Special Assistant Attorney General Covington, Kentucky