

ARKANSAS COURT OF APPEALS

DIVISION IV  
No. CA08-1214

JESSICA TEAGUE HENDERSON  
APPELLANT

V.

ROGER MICHAEL TEAGUE  
APPELLEE

Opinion Delivered JUNE 3, 2009

APPEAL FROM THE BENTON  
COUNTY CIRCUIT COURT,  
[NO. DR-2005-17-5]

HONORABLE XOLLIE DUNCAN,  
JUDGE

REVERSED; AWARD VACATED

**M. MICHAEL KINARD, Judge**

Appellant, Jessica Teague Henderson, appeals from the trial court's order finding her in contempt for violating the parties' divorce decree and awarding appellee attorney's fees. We reverse on the finding of contempt and vacate the attorney fee award.

The trial court entered a decree of divorce dissolving the marriage between the parties on September 28, 2005. The parties have one minor child. Pursuant to the decree, appellant was awarded custody of the minor child and appellee was awarded visitation. The decree awarded appellee visitation with the child every other weekend, plus holiday and summer vacation visitation. In addition, appellee was allowed to visit with the child by telephone at least once per week. The decree stated that the parties were to meet in Rogers, Arkansas, to exchange the child. At first, appellee would travel from Eureka Springs, Arkansas, to Tulsa, Oklahoma, where appellant lived with the child, to pick up the child on Friday and appellant would travel to Eureka Springs on Sunday and return with the child to Tulsa. Approximately

six months after the decree was entered, appellant remarried and moved to Houston, Texas, with the minor child. For a period of time after appellant moved to Houston, she voluntarily paid for the child to fly to Tulsa to visit appellee.

In January 2007, appellee filed a petition for modification of custody. In support of his request for a change of custody, appellee cited appellant's move to Houston, which he claimed resulted in the child missing a considerable number of days of school. He also cited testimony of Dr. Martin Faitak, who stated at the divorce hearing that it would not be in the child's best interest for appellant to marry her current husband.

In February 2007, appellant stopped paying for the child to fly to Tulsa to visit appellee, citing the cost of airfare. In June 2007, appellee amended his petition to allege that appellant had refused to provide the minor child for visitation in violation of the decree. Appellee also alleged in his amended petition that appellant had refused to allow him phone visitation with the minor child in violation of the decree.

Following the hearing on appellee's petition for modification of custody, the trial court entered an order that kept custody with appellant and set forth a new visitation schedule. In addition, the trial court found appellant in contempt for violating court orders by refusing to allow appellee to visit with the child in person or by telephone. The trial court sentenced appellant to twenty days in jail, but stated that appellant could purge herself of the contempt by strictly complying with the court's orders between the date of entry on May 7, 2008, and the next hearing date on November 10, 2008. Appellant was also ordered to pay appellee

attorney's fees in the amount of \$4500. Appellant appeals from the finding of contempt and the award of attorney's fees.

We note initially that the contempt finding was civil, not criminal, in nature because, although appellant was sentenced to a term in jail, she was provided with a mechanism by which she could purge the contempt. *See Ark. Dep't. of Human Servs. v. Briley*, 366 Ark. 496, 237 S.W.3d 7 (2006). The disobedience of any valid judgment, order, or decree of a court having jurisdiction to enter it may constitute contempt. *Johns v. Johns*, 103 Ark. App. 55, \_\_\_ S.W.3d \_\_\_ (2008). Before a person may be held in contempt for violating a court order, that order must be in definite terms as to the duties thereby imposed, and the command must be expressed rather than implied. *Id.* We will not reverse a trial court's finding of civil contempt unless that finding is clearly against the preponderance of the evidence. *Id.*

Regarding the lack of physical and phone visitation between appellee and the minor child, our review of the record reveals no clear violation of the terms of the court orders by appellant. The visitation schedule, which was incorporated by reference into the decree, specifically states that, unless otherwise stated in the decree or another court order, the non-custodial parent, appellee, is responsible for the costs of transportation. The decree itself does not address transportation costs, nor is there another court order that does so. Therefore, under the decree, appellee was responsible for the cost of transporting the minor child for the purposes of visitation.

It is true that appellant unilaterally moved to Houston, increasing the costs of transportation, but there is nothing in the decree preventing her from doing so, provided that

she notified appellee, which she did. Nor is there any language in the decree that makes appellant responsible for transportation costs because she moved. Appellant never refused to send the child to visit appellee. She refused to pay the transportation costs for sending the child to visit appellee, which costs, under the decree, are the responsibility of appellee as the non-custodial parent. Although appellant voluntarily paid for transportation from Houston for a period of time, appellee does not argue that appellant is now estopped from refusing to pay for transportation based upon any justifiable reliance upon her actions on his part. In addition, appellee never petitioned the court to modify the decree to make appellant responsible for the transportation costs. We hold that the trial court's finding that appellant violated the terms of the decree pertaining to physical visitation is clearly against the preponderance of the evidence.

Regarding phone visitation, the record reveals that appellant abided by the court order by allowing phone visitation once per week. Appellant may have, for a period of time, allowed more visitation than was called for in the decree; however, the record shows that she consistently allowed the minimum required under the decree. We hold that the trial court's finding that appellant violated the terms of the court orders pertaining to phone visitation is against the preponderance of the evidence. Because the trial court expressly based its contempt finding on its erroneous findings that appellant violated the visitation terms of the decree, we reverse the contempt finding of the trial court.

Appellant also appeals the trial court's award of attorney's fees to appellee in the amount of \$4500. The decision to award attorney's fees is reviewed under the abuse-of-

discretion standard. *Hartsfield v. Lescher*, 104 Ark. App. 1, \_\_ S.W.3d \_\_ (2008). In its order, the trial court states that appellant is responsible for paying appellee's attorney fees because she refused to provide visitation for the minor child. However, as determined above, appellant did not violate the terms of the divorce decree pertaining to visitation. Therefore, there is no basis for an award of attorney's fees. We hold that the trial court abused its discretion in awarding attorney fees in this case and order that the fee award be vacated.

Reversed; award vacated.

VAUGHT, C.J., and BROWN, J., agree.