

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-000236-MR

DWAYNE CROSBY

APPELLANT

v. APPEAL FROM KENTON FAMILY COURT  
HONORABLE CHRISTOPHER J. MEHLING, JUDGE  
ACTION NO. 02-J-00908

HON. CHRISTOPHER J. MEHLING, Judge,  
Kenton Circuit Court, Division II; and  
COMMONWEALTH OF KENTUCKY,  
EX REL. BRANDY M. MAYS, Real  
Party in Interest

APPELLEES

### OPINION VACATING AND REMANDING

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BEFORE: COMBS AND MOORE, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

COMBS, JUDGE: Dwayne Crosby appeals from an order of the Kenton

Family Court finding him in contempt of court for failure to pay child support as

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<sup>1</sup> Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

ordered and sentencing him to 180-days' incarceration.<sup>2</sup> Following our review, we reverse and remand for further proceedings.

On February 26, 2003, Crosby was ordered to pay \$52.85 per week for the support of his minor child. He was also ordered to pay \$2.15 per week toward his share of the expenses associated with the child's birth. He failed to pay the required child support and was eventually ordered to pay an additional \$2.50 per week toward the accumulated arrearages.

On July 28, 2009, the Commonwealth filed an application with the Kenton Family Court seeking a show cause order. The Commonwealth alleged that Crosby had not been compliant with the family court's child support order and that he continued to be in arrears with respect to his child support obligation. The Commonwealth alleged that Crosby's last support payment totalled \$9.30 and that it had been made in February 2006. Finally, the Commonwealth alleged (on information and belief) that Crosby "presently has the ability to comply with the [court's child support order]." Verified Application for Order Showing Cause at 1. The family court promptly ordered Crosby to show cause why he should not be held in contempt.

A hearing was conducted on October 4, 2009. At that hearing, the family court found that Crosby was indigent and appointed counsel to represent him. Although the court cautioned Crosby against making any statements before he

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<sup>2</sup> 170 days of the court's sentence were conditionally discharged.

consulted with counsel, Crosby suggested in open court that he would shortly be able to make current his child-support obligation.

A subsequent hearing was conducted on February 3, 2010. The Commonwealth introduced evidence indicating that Crosby was approximately \$25,000.00 in arrears as of January 31, 2010. Although Crosby did not dispute the arrearage amount, he indicated to the court that he was unemployed and essentially homeless. He also indicated that he suffered from several mental and physical ailments. On cross-examination, Crosby admitted that he had earned nearly \$5,200.00 since 2006 but had failed to remit any part of his child support obligation. He also admitted that he had been denied Social Security disability benefits.

At the conclusion of the hearing, the family court found Crosby in contempt of court and sentenced him to 180-days' incarceration (with 170 days conditionally discharged). The court indicated that Crosby could purge himself of the contempt by paying \$3,000.00 toward his arrearage. After Crosby stated that he could not pay this amount, he was taken into custody. The family court denied his motion to reconsider or to stay the sentence and to reconsider the amount necessary to purge him of contempt.

On February 4, 2010, Crosby filed this appeal. On February 5, 2010, he filed a motion for emergency or intermediate relief. On February 8, 2010, this Court entered an order granting emergency relief pending a ruling by a three-judge

panel on the motion for intermediate relief. After considering the limited record,

Judge Moore, acting for the court, observed as follows:

The amount the family court set to allow Crosby to purge himself of contempt was based on the amount of arrearage and about one half of what Crosby earned since 2006. The family court herein looked only at what Crosby had earned in the past few years and his failure to secure a job during better economic times. The court specially acknowledged that it would be difficult for Crosby to find a job at the present time. It was incumbent upon the family court to make factual findings as to Crosby's current financial circumstances and then limit the contempt proceedings to those amounts that he is found to be able to pay before ordering incarceration. By ordering Crosby's incarceration for contempt and allowing Crosby to purge himself only by payment of \$3,000 – without making findings as to whether Crosby could presently pay this amount – the family court seemingly compelled the doing of an impossible act to avoid incarceration.

Order Granting Relief at 6. The Court concluded that under the law, Crosby “cannot be compelled to do the impossible to avoid incarceration” and ordered the Kenton Family Court's order of contempt and sentence stayed until the matter could be heard by a full panel of this court. *Id.* at 8.<sup>3</sup>

Through its order entered July 7, 2010, this Court granted Crosby's motion for intermediate relief and denied as moot Crosby's petition for a writ of prohibition. The three-judge motion panel concurred with Judge Moore's analysis and held that the family court's purge amount “was calculated only with reference to Crosby's total earnings since 2006 and is unsupported by findings that he has the **present** ability to pay that amount.” Order Granting Motion for Intermediate

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<sup>3</sup> On February 12, 2010, the Kenton Family Court entered its written order of contempt.

Relief at 5. Furthermore, the panel observed that “[the family court] acknowledged that Crosby’s ability to obtain gainful employment in the current economy is questionable.” *Id.* The family court’s order of incarceration was stayed pending appeal.

On appeal, Crosby admits that he did not pay child support as ordered by the family court. As a result, he concedes that the civil contempt proceedings against him were appropriate. However, he contends that the family court erred by failing to make findings of fact with respect to his ability to pay the amount owed. In the alternative, he argues that the court erred by ordering a term of imprisonment for contempt without establishing an attainable purge amount.

It is well established that a trial court has inherent power to enforce its judgment by means of the incarceration of a person who is found in contempt of a lawful order of the court. *Lewis v. Lewis*, 875 S.W.2d 862 (Ky.1993). However, contempt power is an extraordinary use of a court’s authority and carefully circumscribed. *Id.* The power of contempt cannot be used to compel the doing of an impossible act. *Rudd v. Rudd*, 214 S.W. 791 (Ky.1919).

In child support enforcement cases, family courts are required to make findings of fact concerning a defendant’s ability to pay his support obligation. *Clay v. Winn*, 434 S.W.2d 650 (Ky.1968). The court can find a defendant in civil contempt only where the defendant is found to have a **present ability** to pay the obligation.

If he is unable to pay the entire amount then the trial court may properly determine if he is able to pay any portion thereof at the present time. After a proper determination of his ability to pay is made it should be clearly set forth in a finding of fact. Thereafter all contempt orders should be limited in their coverage to those amounts which the court has previously found are within the ability of [the defendant] to satisfy. The court may properly, in its discretion, if it finds [the defendant] unable to satisfy the entire judgment at this time, order payments made on same over a period of time, which are within the ability of [the defendant] to satisfy.

*Id.* at 652. Civil contempt charges must be related to the amount the defendant is found able to pay. *Lewis, supra.*

In this case, the family court erred by failing to make findings of fact concerning Crosby's actual ability to pay his support obligation. This finding must precede a finding of contempt. Consequently, the order of the Kenton Family Court must be vacated, and the matter must be remanded for further proceedings. If Crosby is found to have the ability to pay and thereby to possess the financial means to purge himself of contempt, the court can then find him to be in civil contempt and may imprison him in order to compel compliance with the child support order. If the court finds that Crosby lacks the ability to pay, the court may in its discretion fashion a remedy to address the arrearage still owed.

We vacate and remand the order of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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