

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002088-MR

DEBRA HOLMES

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE MATTHEW B. HALL, JUDGE
ACTION NO. 02-CI-00212

KEITH HOLMES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Debra Holmes appeals from a Hardin Circuit Court judgment which found her in contempt of court for violating a visitation order.

Debra Holmes and Keith Holmes are the natural parents of Keith Jr., who was born on June 7, 1993. Following the dissolution of Debra and Keith's

¹ Senior Judges 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.

marriage, Debra was designated as Keith Jr.'s primary physical custodian.² He lives with her in Maine. Keith resides in Kentucky.

In 2009, Debra filed a motion in Hardin Circuit Court seeking, among other things, to allow Keith Jr. to choose whether he wanted to have summer visitation with his father in Kentucky. According to Keith Jr.'s affidavit, he preferred to spend the summer in Maine where he could participate in activities such as summer soccer, basketball camp, Upward Bound and Junior Firefighting. He also stated that he hoped to get a job to pay for a car. After a hearing, the court ordered that Keith be allowed to exercise summer visitation with Keith Jr. because under Kentucky Revised Statutes (KRS) 403.320(1), a parent not granted custody is entitled to reasonable visitation unless there is evidence that visitation would endanger the child's physical, mental, moral or emotional health. The court did not find any such evidence, although it alluded to problems with visitation in previous years.

Keith voluntarily agreed to postpone summer visitation to allow Keith Jr. to participate in the Upward Bound program in Maine. He and Debra agreed to meet in Danville, Pennsylvania, on August 1, 2009, for Keith to pick up Keith Jr. Debra failed to bring the boy to meet his father.

² The correct term is "primary residential parent" which is used to "denote that the child primarily lives in one parent's home and identifies it as his home versus 'Dad's/Mom's house.' This concept is frequently misnamed 'primary residential custody.'" *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008).

Keith moved the court to order visitation before the end of summer and to recover the travelling expenses he had incurred as a result of Debra's failure to comply with the original order. After conducting a hearing on August 18, 2009, in which Debra participated by telephone, the court ruled that Keith was entitled to exercise his visitation rights between August 19, 2009 and August 23, 2009, all of Fall Break, all of Christmas Break, and six weeks of summer break. The court also held that Debra was responsible for the airfare associated with the visitation and awarded Keith damages in the amount of \$1,039.81.

Debra did not send Keith Jr. to Kentucky nor did she pay any portion of the judgment. She filed a motion to alter, amend or vacate the order with an attached affidavit stating that she could not afford to pay the transportation costs, that her son refused to visit his father and that she was unable to put him on a plane or in a car by force. She also requested the court to amend its order until Keith provided appropriate proof regarding the amount of damages and she moved the court to relinquish its jurisdiction to Maine. The motion was denied.

Keith then filed a motion to hold Debra in contempt of court. The court ordered Debra to appear in court to show cause why she should not be held in contempt for her failure to abide by the orders of the court. Debra appeared telephonically. The court found her to be in contempt and she was ordered to serve 90 days in the Hardin County Detention Center and to pay the sum of \$500 in attorney's fees. This appeal by Debra followed.

Debra's notice of appeal did not name the family court judge as an appellee. On April 15, 2010, this Court ordered the parties to address whether the judge was a necessary party to the appeal and to show cause why the appeal should not be dismissed. While the appeal was pending, another panel of this Court held, in a factually-similar case, that the trial judge is not an indispensable party to an appeal from a contempt order. *See Lanham v. Lanham*, 336 S.W.3d 123 (Ky.App. 2011). On the basis of the holding in *Lanham*, we conclude that the judge was not an indispensable party and that Debra's appeal may consequently go forward.

Debra's main argument is that she did not have the ability to perform the acts ordered by the court and that she should not, therefore, be held in contempt for her failure to comply. "Kentucky recognizes the defense of impossibility to comply . . . but requires proving lack of fault to successfully defeat the contempt charge." *Campbell County v. Commonwealth, Kentucky Corrections Cabinet*, 762 S.W.2d 6, 10 (Ky. 1988) (internal citations omitted). "A party cannot be punished for contempt for failure to perform an act which is impossible. However, an inability to comply must be shown clearly and categorically by the defendant." *Id.*

Debra contends that at the August 18, 2009, hearing, she testified that the cost of a plane ticket to send her son to Kentucky from August 19, 2009 to August 23, 2009, was more than she earned in one month. She states that she also testified that her son is sixteen years of age and that she cannot physically compel him to get on a plane against his will.

The hearing at which this testimony was offered was not designated as part of the appellate record. The family court made no findings regarding her argument of impossibility nor did Debra request such findings although impossibility is her primary defense. All that the record contains is an affidavit attached to her motion to alter, amend or vacate in which Debra states that her son refuses to visit his father and that she does not have the money to pay the transportation costs of visitation.

Kentucky Rules of Civil Procedure (CR) 52.04 states that

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Furthermore, “when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.” *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). “When a court exercises its contempt powers, it has nearly unlimited discretion.” *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky.App.1986). Considering the absence of findings regarding Debra’s defense of impossibility, and the requirement that an inability to comply must be shown clearly and categorically, we cannot say that the court abused its discretion in finding Debra in contempt.

Debra further argues that she cannot be found in contempt for failing to pay the \$1,039.81 judgment because she was never directly ordered to pay the

amount nor did Keith take any steps to collect the judgment, such as garnishing her wages, accounts or filing a judgment lien. She contends that she was never given the opportunity to purge herself of contempt by paying the judgment nor was she given the opportunity to make up Keith's lost parenting time because she was unable to pay the cost of Keith Jr.'s airfare. Again, there is nothing in the record to indicate that Debra requested the court to make findings on these issues or requested an opportunity to purge herself of contempt.

The order of the Hardin Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeremy S. Aldridge
Radcliff, Kentucky

BRIEF FOR APPELLEE:

Barry Birdwhistell
Elizabethtown, Kentucky