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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001990-ME

ANGELA R. MOBLEY (NOW DAVIS) APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 12-CI-501886

ROBERT C. MOBLEY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Angela Mobley, appeals from orders of the Jefferson Family Court terminating Appellee's, Robert Mobley, child support obligation, and finding Angela in contempt of court and awarding Robert attorney's fees. Finding no error, we affirm.

The parties herein were married on August 5, 2005. Two children were born during the marriage. The parties separated in 2012. Shortly thereafter, they attended mediation and entered in an agreement regarding the award of joint custody, an equal parenting schedule, and a child support sum in the amount of $686.83 per month[1] payable by Robert to Angela. A limited decree of dissolution of marriage was entered on April 9, 2013.

Sometime after the mediation agreement was entered into, Robert filed a motion to recalculate his child support obligation. Therein, he argued that Angela had secured additional employment that increased her monthly income, and also that the agreed upon amount of child support did not take into account the parties' equal parenting schedule. Following a hearing, the family court entered its Findings of Fact, Conclusions of Law, and Order on October 29, 2013. With respect to the child support issue, the family court ruled,

> With all due respect, Mr. Mobley is incorrect with regard to the child support and an equal parenting schedule. KRS [Kentucky Revised Statutes] 403.211(2) is very clear that: "Courts may deviate from the guidelines where application would be unjust or inappropriate." But **deviation** from the Kentucky Child Support Guidelines under a shared parenting schedule is not **mandatory**. . . .
>
> On August 23, 2012, the parties entered into a written mediated settlement agreement establishing their shared parenting plan and **in that same agreement** established that Mr. Mobley would pay Ms. Davis child support in the amount of $686.83 per month ($158.50 per week). All of the terms of the parties' August 23, 2012, written

[1] The child support amount in the mediation agreement was derived from the Kentucky Child Support Guidelines based on Robert's yearly income of $48,000 ($4,000 per month) and Angela's yearly income of $30,600 ($2,550 per month).

> mediated agreement (including the shared parenting schedule and child support provisions) were found not to be unconscionable and were incorporated into and made Orders of the Court in a Decree dissolving the parties' marriage entered April 9, 2013. The Court reserved a motion made by Mr. Mobley to modify the existing child support order based on an alleged change in the parties' circumstances filed between the time the parties entered into their August 23, 2012 written mediated agreement and April 9, 2013. Based on the foregoing and all competent evidence of record in this action, the Court has previously found the existing child support provision not to be unconscionable and the Court finds no new evidence that would cause it to change its original finding. [Emphasis in original].

In the order, the family court determined that at the time of the hearing, Robert was earning $49,612.71 ($4,134 per month) and Angela was earning $30,500.00 ($2,542 per month), which did not constitute a substantial or continuing change in the parties' circumstances. As such, the family court denied the motion to modify Robert's support obligation.

Robert then filed a motion to alter, amend or vacate, arguing that he was never ordered to pay child support in the April 9th decree. That motion was denied and Robert appealed to this Court. During the pendency of the appeal, Angela filed numerous motions for contempt because Robert had failed to pay child support. Robert maintained, however, that there was no existing court order regarding child support. As a result, the family court entered an order on April 16, 2014, that provided:

> It was and has been this Court's intention that child support orders, consistent with the terms of the parties' August 23, 2012 written mediated agreement which were

> filed of record in this action on September 18, 2012, be made orders of this court. . . .
>
> In an attempt to make this Court's position on Mr. Mobley's obligation to provide financial support for his children perfectly clear, the Court will issue the following Order, . . .
>
> 1. The terms of the parties' written Mediated Agreement, dated August 23, 2012, and filed of record in this action on September 18, 2012, are hereby incorporated into this Order and made orders of this Court.
>
> 2. The effective dates of said individual issue provisions contained in the parties' written Mediated Agreement, dated August 23, 2012, and filed of record in this action on September 18, 2012, shall retroactively be effective dates of this Court's orders with regard to each individual issue contained therein.
>
> 3. Consistent with provision number 7 of the parties' written Mediated Agreement, dated August 23, 2012, and filed of record in this action on September 18, 2012, **effective "September 1, 2012 Chance (Mr. Mobley) shall pay Angie (Ms. Davis, formerly Mobley) the sum of $686.83 (Six Hundred Eight Six [sic] Dollars and Eighty Three [sic] (cents) per month (%158.50 [sic] per week) as child support."** [Emphasis in original].

Robert thereafter filed a second appeal in this Court claiming that the family court had lost jurisdiction over the child support issue. Subsequently, this Court rendered an unpublished opinion affirming the family court on all issues. *Mobley v. Mobley*, 2013-CA-002162-MR and 2014-CA-000924-ME (May 22, 2015).

The proceedings relating to the instant appeal began on April 29, 2015, when Robert filed a motion requesting a show cause order be entered as a

result of six incidents wherein Angela interfered with his scheduled parenting time. Thereafter, on August 3, 2015, Robert filed a motion seeking a reduction or termination of his child support obligation pursuant to KRS 403.213 based upon a substantial and continuing material change in the parties' circumstances occurring since the 2012 support obligation was established.

On August 5, 2015, and September 16, 2015, the family court held hearings on both the contempt and the child support issues. On November 16, 2015, the family court entered two separate orders. In the first order, the family court found that Robert's average monthly income for the first six months of 2015 was $1,749.00, but after considering certain tax-related business deductions, the court determined that his monthly adjusted gross income was $2,864.64 ($34,375.68 yearly) for child support purposes. Further, the family court determined that Angela's monthly income, based upon her own testimony, was $2,961.67 ($35,000 yearly). The family court concluded that, based upon the evidence presented, Robert's income was reduced and that the reduction constituted a substantial and continuing change in the parties' circumstances since it resulted in a greater than 15% change in the amount of support due. As a result, the family court ruled that child support should be recalculated as follows:

> The Court concludes that the parties have a combined monthly adjusted income of $5,781.31 ($5,782.00 rounded) with [Robert] contributing $2,864.63 (49.55%) and [Angela] contributing $2,916.67 per month (50.45%) . . . Using the Kentucky Child Support Guidelines as instructed by KRS 403.212(7), the base monthly child support obligation is $1,127.00. Since the children are in

> shared possession, the Court will multiply the base obligation of $1,127.00 by 1.5 for a total amount of $1,691.00. Adding the cost of monthly health insurance premiums in the amount of $122.68, the total child support obligation is $1,813.68.
>
> [Robert] is responsible for 49.55% of the parties' combined incomes, and therefore, that same percentage of child support. [Angela] is responsible for 50.45% of the parties' combined incomes, and therefore, the same percentage of child support. Since the parties share an equal custody arrangement, [Angela's] base monthly child support obligation of $915.00 is multiplied by .5 for a total amount due of $457.50. [Robert's] base monthly support of $776.00 ($898.00 minus the $123.00 he pays in child care) multiplied by .5 for a total amount due of $388.00 When [Angela's] $457.50 monthly child support obligation is subtracted from [Robert's] $388.00 monthly child support obligation, the result is a net transfer of child support from [Angela] to [Robert] of $69.50 per month. [Robert], however, is not requesting an award of child support, but is requesting [Angela] be ordered to reimburse him for half the cost of health insurance for the children. The parties have nearly identical incomes, a nearly identical parenting schedule, and therefore, the Court will order the parties [to] split the cost of healthcare and any uninsured medical expenses equally.

As a result of the family court's calculations and its decision to utilize what is referred to the "Colorado Rule," applicable to shared custody arrangements, Robert's child support obligation was terminated.

In the Family Court's second order pertaining to the contempt issue, the court found Angela in contempt for five of the seven occasions wherein she was alleged to have interfered with Robert's parenting time with the children during the previous two years. Because Robert did not request that sanctions be imposed, the

family court granted him four make-up days, as well as an award of $2,356.25 in attorney's fees. Angela thereafter appealed to this Court.

Angela first argues in this Court that the family court erred in terminating Robert's child support obligation. Angela contends that Robert's $686.83 support obligation was enforceable as a contract term pursuant to the parties' August 23, 2012 mediation agreement. In other words, because the amount of child support was negotiated and the mediation agreement reflected the parties' agreed-upon terms, Angela believes that the family court erred in terminating Robert's support obligation without a written finding explaining the extraordinary reason that would make the guidelines unjust or inappropriate. Furthermore, Angela maintains that consideration of this issue is barred under the "law of the case" doctrine because Robert is attempting to relitigate whether he is obligated to pay child support pursuant to the mediation agreement given the shared parenting arrangement, an issue that has already been resolved by this Court in our August 15, 2015, opinion holding the agreement to be conscionable and enforceable.

It is well-settled in this Commonwealth that trial courts are vested with broad discretion in determining the proper amount of child support to be paid by a parent. *Jones v. Hammond*, 329 S.W.3d 331, 336 (Ky. App. 2010). Although "this discretion is far from unlimited, . . . as long as the trial court gives due consideration to the parties' financial circumstances and the child's needs, and either conforms to the statutory prescriptions or adequately justifies deviating therefrom, this Court will not disturb its rulings." *Van Meter v. Smith*, 14 S.W.3d

569, 572 (Ky. App. 2000) (Citations omitted); *see also Bradley v. Bradley*, 473 S.W.2d 117 (Ky. 1971). Thus, a reviewing court will defer to the trial court's decision in the absence of an abuse of the trial court's substantial discretion. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

We are of the opinion that Angela has misconstrued the law applicable to modification of child support. Regardless of whether the original child support agreement was conscionable and enforceable, which we concluded that it was, Robert is nevertheless statutorily entitled to seek a modification of his support under KRS 403.213(1). As a panel of this Court noted in *Tilly v. Tilly*, 947 S.W.2d 63 (Ky. App. 1997):

> KRS 403.180(1) provides that parties may enter into a written separation agreement which contains provisions concerning maintenance, division of property, and the custody, support, and visitation of minor children. KRS 403.180(2) provides that with the exception of those terms providing for custody, support, and visitation, the terms of the separation agreement are binding on the court. Furthermore, KRS 403.180(6) provides that the agreement may expressly preclude or limit the modification of the terms of the separation agreement, except for those terms pertaining to child custody, support, or visitation. Thus, the statute makes it clear that while the parties are free to enter into a separation agreement to promote settlement of the divorce, the court still retains control over child custody, support, and visitation and is not bound by the parties' agreement in those areas.

Id. at 65.

KRS 403.213(1) provides that a party is entitled to modification of an award of child support upon a showing of "a material change in circumstances that is

substantial and continuing." *See Goldsmith v. Bennett–Goldsmith*, 227 S.W.3d 459, 461 (Ky. App. 2007). Under KRS 403.213(2), a change in circumstances is rebuttably presumed to be substantial if application of the child-support guidelines contained in KRS 403.212 to the new circumstances would result in a change in the amount of child support of 15% or more. Thus, a party who is able to show a 15% discrepancy between the amount of support being paid at the time the motion is filed and the amount due pursuant to the guidelines is entitled to a rebuttable presumption that a material change in circumstances has occurred.

The family court herein determined that at the time of Robert's motion to modify or terminate his support obligation, his 2015 gross yearly income was $34,375.68, or $2,864 monthly. In comparison, at the time the mediated agreement was entered into in 2012, Robert's gross yearly income was $49,612.71, or roughly $4,000 monthly. There can no dispute that, as determined by the family court, the evidence established a reduction in Robert's income that constituted a substantial and continuing material change that would have resulted in a greater than 15% change in the amount of support he would owe under the child support guidelines. As such, the family court did not err in concluding that a modification of child support was warranted.

Furthermore, we are not persuaded by Angela's argument that in recalculating Robert's support obligation, the family court was precluded from deviating from the Kentucky Child Support Guidelines and considering the shared parenting schedule simply because the family court initially refused to reduce

Robert's support obligation based upon shared parenting when it considered the issue in 2012. The statutory guidelines offer sufficient flexibility to allow the family court to fashion appropriate and just child support orders. Although the family court chose not to consider the shared parenting arrangement in 2012, likely due in part to the disparity in the parties' incomes at that point, the court recognized that deviation from the child support guidelines under a shared parenting schedule was permissive.

In *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007), a panel of this Court observed,

> While Kentucky's child support guidelines do not contemplate such a shared custody arrangement, they do reflect the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. They also provide a measure of flexibility that is particularly relevant in this case. Under the provisions of KRS 403.211(2) and (3), a trial court may deviate from the child support guidelines when it finds that their application would be unjust or inappropriate. The period of time during which the children reside with each parent may be considered in determining child support, and a relatively equal division of physical custody may constitute valid grounds for deviating from the guidelines. *Brown v. Brown*, Ky. App. 952 S.W.2d 707 (Ky. App. 1997); *Downey v. Rogers*, 847 S.W.2d 63 (Ky. App. 1993).

Id. at 579. Similarly, in *Dudgeon v. Dudgeon*, 318 S.W.3d 106 (Ky. App. 2010), this Court held,

> Under the unique familial circumstances of this case, [Mr. Dudgeon] and [Ms. Dudgeon] earn nearly equal incomes and, concomitantly, exercise nearly equal physical custody of the children. Also, they share almost

> equally other expenses associated with the children. These three particular circumstances are of an extraordinary nature under KRS 403.211(3)(g). Indeed, it is manifestly unjust and inequitable to require [Mr. Dudgeon] to pay [Ms. Dudgeon] $950 per month in child support when each earns nearly equal income, exercises nearly equal physical custody of the children, and shares nearly equal expenses associated with the children. It is beyond cavil that such inequitable result was ever intended by the General Assembly.

Id. at 111.

Herein, the parties were awarded joint custody of the children, and neither of them was designated as the primary residential custodian. Because physical custody of the children is evenly divided between the parents, they bear an almost identical responsibility for the day-to-day expenses associated with their care. And since there is no significant disparity between the parties' annual income, the expenses necessary to provide a home for the children (even when they are not in residence) are also incurred by each party in equal proportion.

We would note that Angela seems to imply that even if the family court was permitted to modify Robert's support obligation, it was error to terminate it entirely. However, as the family court pointed out, the recalculation of the parties' child support responsibilities, taking into account their shared parenting arrangement, resulted in an amount due to Robert from Angela. Indeed, the family court could have modified child support to require that Angela pay Robert. However, since Robert had not requested child support from Angela, the family

court simply terminated the obligation. We find no abuse of discretion in the family court's ruling.

Angela next argues that the factual evidence of record does not support the family court's findings of contempt. In reading Angela's brief, however, she does not actually dispute the facts of each incident as determined by the family court. Rather, she maintains that she was justified with regard to all of the incidents of alleged contempt. We disagree.

A trial court has broad authority to enforce its orders, and contempt proceedings are part of that authority. *See generally Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993). We review the trial court's exercise of its contempt powers for abuse of discretion, but we apply the clear error standard to the underlying findings of fact. *Commonwealth, Cabinet for Health and Family Services v. Ivy,* 353 S.W.3d 324, 332 (Ky. 2011).

KRS 403.240 provides in relevant part:

> (2) The failure of either party, without good cause, to comply with a provision of a decree or temporary order or injunction, including a provision with respect to visitation or child support shall constitute contempt of court, and the court shall remedy the failure to comply.
>
> (3) Good cause not to comply with a provision of a decree or temporary order or injunction with respect to visitation shall include mutual consent of the parties, reasonable belief by either party that there exists the possibility of endangerment to the physical, mental, moral, or emotional health of the child, or endangerment to the physical safety of either party, or extraordinary circumstances as determined by the court.

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. *Roper v. Roper*, 242 Ky. 658, 47 S.W.2d 517 (1932). If the party is seeking compensation, he or she must also prove the amount. As noted by the family court herein, 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. *Clay,* 434 S.W.2d at 650. This burden is a heavy one and is not satisfied by mere assertions of inability. *Dalton v. Dalton*, 367 S.W.2d 840 (Ky. 1963). The alleged contemnor must offer evidence tending to show clearly that he or she made all reasonable efforts to comply. *Id.* If the alleged contemnor makes a sufficient showing, then the presumption of contempt dissolves and the trial court must make its determination from the totality of the evidence, with the ultimate burden of persuasion on the movant. *Ivy,* 353 S.W.3d at 332.

The family court's order summarized the general contempt issues as follows:

> Several issues have arisen from an ambiguity within the Agreement. The Agreement reads in part, "Beginning Sunday August 26, 2012, and continuing each and every week thereafter, the children shall be with [Robert] from Sunday at 3:30 P.M. until Wednesday morning when he takes them to school." The Agreement does not specify an exchange time when the children are not in school and the parties have been unable to come to further agreement on this point. This has resulted in additional

> conflict between the parties and is one of the relevant clauses subject to this Contempt motion.
>
> In addition to the parties' Agreement, the Court entered several additional Orders regarding the parties' parenting schedule which are relevant to the Court's consideration. By Order entered June 17, 2013, the Court ordered "the parties shall have the right of first refusal with regard to childcare for the parties' children for periods during the day in excess of 4 hours or overnights." That Order was entered after the entry of the parties' Decree (which was entered April 9, 2013), but the decree had reserved certain issues which were later heard and addressed in the Order entered October 29, 2013. In an Order dated September 9, 2014, the Court noted that the June 19, 2013 Order regarding the right of first refusal was an "interlocutory order, the terms of which were not incorporated into the Decree or included in its subsequent Findings of Fact, Conclusions of Law, and Order."
>
> Due to ongoing disputes over this issue, on April 28, 2015, the Court entered an Order which reinstated a Right of First Refusal with some additional parameters; "in the event either party required third-party childcare overnight, he or she shall notify the opposing party and grant same the right of first refusal. This arrangement does not preclude the parties' children from overnight sleep-overs with their friends or family members." An additional Order also entered April 28, 2015, ordered that "either party may designate a responsible adult for transportation, i.e. for pick up or return of their children incident to the parenting schedule if the parent is unavailable rather than forego parenting time."

We need not reiterate the family court's findings with respect to each of the seven incidents, other than to observe that the family court made sufficient findings to support its conclusion that Angela was in contempt of the court's orders on five of those occasions. Angela does not dispute the facts of each incident but rather argues that she believes she was justified in violating the family court's

orders and that she only had the children's best interests at heart. However, we are simply not persuaded by her belief that violating the family court's orders was a better solution than creating more litigation. Given Angela's repeated course of conduct, the family court acted well within its discretion in ruling that her behavior was contemptuous.

We similarly find no merit in Angela's argument that the trial court erred in awarding Robert a portion of the attorney's fees he incurred as a result of the contempt proceedings. Angela argues that she requested but was denied attorney's fees during Robert's appeal of the family court's initial child support award, so Robert should not be awarded fees at this juncture.

Contempt is the "willful disobedience toward, or open disrespect for, the rules or orders of a court." *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996). Civil contempt, the focus of this appeal, is "the failure ... to do something under order of court, generally for the benefit of a party litigant." *Id.* Thus, courts have inherent power to impose a sanction for a civil contempt to enforce compliance with their lawful orders. *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993), and nearly unfettered discretion in issuing contempt citations. *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986). We will reverse a finding of contempt only if the trial court abused its discretion in imposing the sentence. *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007). Abuse of discretion is defined as conduct by a court that is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d

941, 945 (Ky.1999) (Citing 5 Am.Jur.2d *Appellate Review* § 695 (1995)). We cannot conclude, based upon the undisputed evidence in the record, that the family court herein abused its discretion in awarding attorney's fees to Robert.

For the reasons set forth herein, the Orders of the Jefferson Family Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Julia B. Barry Louisville, Kentucky	Katie Marie Brophy Louisville, Kentucky