

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

T.W.,

Appellant,

v.

T.H.,

Appellee.

No. 2D21-1069, 2D21-3410
CONSOLIDATED

January 20, 2023

Appeal from the Circuit Court for Manatee County; Teri Kaklis Dees,
Judge.

Terry P. Roberts of Law Office of Terry P. Roberts, Tallahassee, for
Appellant.

Eric R. Maier of Older Lundy Alvarez & Koch, Tampa, for Appellee.

MORRIS, Chief Judge.

In these consolidated appeals, T.W., the father, challenges a series of orders which, in part, required him to pay T.H., the mother, certain health insurance expenses and expenses for Kumon tutoring classes on behalf of the parties' minor child. He also challenges the portions of the orders that denied his motions for prevailing party attorneys' fees against the mother based on his successful defense of a majority of the claims

raised in the mother's July 2018 motion for contempt and enforcement. These appeals arise from an underlying paternity action wherein both parties have filed numerous motions for contempt and for prevailing party attorneys' fees against the other party based on prior court orders. We affirm without further comment the portions of the trial court's orders denying the father's motions for prevailing party attorneys' fees and holding the father in contempt for failing to pay his portion of health insurance expenses on behalf of the parties' minor child. However, we must reverse the portions of the trial court's orders holding the father in contempt for failing to pay his portion of the Kumon payments and subsequently requiring the father to pay previously ordered past due payments for such expenses, and we must remand for the trial court's reconsideration of the portions of those orders awarding attorneys' fees to the mother based on that issue.

BACKGROUND

This case has a long and contentious history which required the involvement of several different trial court judges. However, a complete recitation of the facts is unnecessary to the resolution of this appeal. We thus confine our opinion to the facts that are relevant to the issue of the contempt finding based on the father's failure to pay Kumon payments.

In September 2017, a magistrate entered a report and recommendations as it pertained to the final judgment on the petition to establish paternity and for declaratory relief. The trial court entered its order adopting the report and recommendations and entering a final judgment in October 2017. By virtue of adopting the magistrate's report and recommendations, the court determined in relevant part that the father was indeed the minor child's father, that the parents would share parental responsibility with the mother having the final decision in all

matters, that the mother's submitted parenting plan was approved, that the father had to pay back child support as well as future monthly support, and that the father had to pay various prior medical bills as well as 70% of all "uncovered medical, dental, psychiatric, counseling, insurance, day care, education, or other like expenses of the minor child" (with the mother responsible for 30% of those expenses). The parenting plan adopted by the court required the parties to split the cost of extracurricular activities 50/50.

In July 2018, the mother filed a motion for contempt and enforcement which, in relevant part, alleged that the father had failed to pay \$750 towards Kumon payments. She also alleged that the father had failed to pay private school tuition and extracurricular activity expenses. The mother referenced the requirement for the father to pay 70% of all "uncovered medical, dental, psychiatric, counseling, insurance, day care, education, or other like expenses of the minor child."

In September 2018, and again in February 2019, the parties came before the magistrate on the mother's July 2018 motion for contempt and enforcement. Ultimately, the magistrate issued a March 2019 report and recommendations that addressed child support, the mother's claim for private school tuition, the Kumon payments, and payment for other extracurricular activities. In the portion of the report referencing extracurricular activities, the magistrate noted that the parties' parenting plan provided that for such expenses, the father and mother were equally responsible to pay 50%. The magistrate also noted that in a 2018 stipulated order, there was a requirement for the mother to list all extracurricular activities in an online portal so that the father could access the list and pick four different activities for the minor child, with

the expenses split between the parties equally. The magistrate noted that the revised parenting plan adopted in the 2018 stipulated order did not contain any provisions regarding the parties' obligations for the uncovered medical, dental, psychiatric, counseling, insurance, or educational expenses.

The magistrate determined that the original final judgment was ambiguous with respect to the parties' obligation to pay for private school tuition. The magistrate rejected the mother's argument that the term "education" as used in the final judgment encompassed that obligation. The magistrate explained:

Were this Court to accept the Mother's interpretation of the [original final judgment], and what is encompassed within the term "education," the Mother could unilaterally make the decision to enroll the child in numerous things which could be considered "education" to some extent, and the Father would have no choice but to reimburse the Mother for 70% of those expenses. For instance, because the Mother has ultimate decision making authority if the parties disagree pursuant to the terms of the Final Judgment, the Mother could enroll the child in any class or education program without the Father's consent, no matter what the ultimate financial impact would be on the Father. The Mother could sign the child up for classes to learn twenty (20) different languages, classes to learn how to spin pottery, and classes to learn how to fly helicopters, all of which could reasonably be considered "educational" in nature. But is that what the Court intended at the time the [original final judgment] was entered when it ordered the Father to pay for 70% of any "education" expenses for the child? The undersigned thinks not.

On that basis, the magistrate concluded that the father was not obligated to pay for 70% of the child's private school tuition as an "educational" expense and, therefore, the father was not found in contempt in relation to that issue. Addressing the extracurricular activity expenses, the

magistrate determined that while the father was obligated to pay 50% of such expenses, he was not in contempt because the mother inadequately communicated the expenses and did not provide proper documentation. Notably, while the magistrate referred in a footnote to Kumon as "an educational program that teaches math and reading to children," the magistrate labeled the Kumon expenses as "extracurricular" in the main body of the order and explained that the mother failed to present the father or the magistrate "with any credible and reliable evidence demonstrating what her Kumon expenses actually were."

The mother filed objections and exceptions to the magistrate's March 2019 report and recommendations, though she later dismissed them.

In September 2020, the mother filed a verified amended motion for contempt, alleging that the father failed to pay child support and medical, dental, insurance, education, and extracurricular activity expenses owed under the original final judgment and the subsequent 2018 stipulated order. The mother, in relevant part, alleged that the father was in contempt for failing to pay 70% of the "educational expenses for the child's participation in Kumon" between March of 2019 and July of 2020. She alleged that the father owed \$4,800 for the Kumon expenses.

The trial court conducted a hearing on the mother's September 2020 verified amended motion for contempt. During that hearing, there was testimony that Kumon was a privately-owned tutoring company and that it provided supplemental after-school educational programs, which the parties' minor child attended twice a week. The mother asserted that the Kumon payments should be treated as "educational" expenses rather than "extracurricular" expenses. She testified that she thought that the

original final judgment entitled her to payments for the Kumon payments. At that time, the trial court made various observations about the magistrate's 2019 report and recommendations and opined that the bulk of it "as it pertains to education was dealing with the issue of private school tuition and not Kumon." Thus the trial court opined that it did not believe that the issue of the Kumon payments had been previously adjudicated and that the expenses had only been mentioned by the magistrate as a side note during the private school tuition discussion. The trial court concluded that the Kumon payments were properly included as expenses attributable to the father, and it orally granted the mother's verified amended motion for contempt on that issue.

On March 16, 2021, the trial court issued its written order granting the mother's September 2020 verified amended motion for contempt. The trial court found that the father was in willful contempt, and as part of that order, the father was ordered to pay \$3,696 in Kumon payments within ninety days. The trial court determined that the mother was entitled to attorneys' fees based on her motion for contempt but reserved as to the amount. The father thereafter filed his notice of appeal with regard to that order.

In August 2021, the mother filed another motion for contempt (the third amended motion), arguing in relevant part that the father had failed to pay \$8,885 in previously ordered expenses, including the \$3,696 in Kumon expenses.

The trial court conducted hearings on various pending motions, and on October 13, 2021, it issued a comprehensive order. In that order, the trial court concluded in relevant part that the March 16, 2021, order granting the mother's verified amended motion for contempt was valid

and enforceable. Thus the trial court granted the mother's August 2021 third amended motion for contempt in part on the basis the father had failed to pay "previously ordered past due dental/health insurance costs, and Kumon educational expenses." The father was ordered to pay \$8,885, of which \$3,696 was for Kumon expenses. However, the trial court found that the father was not in willful contempt at that time because due to "the nature of the ongoing litigation, a certain amount of reasonable confusion existed, requiring additional court intervention and entry of additional orders." The court did award prevailing party attorneys' fees to the mother but reserved jurisdiction on the amount.

In another portion of the October 2021 order, the trial court awarded attorneys' fees to the mother based on the reservation in the March 16, 2021, order in an amount of \$11,308.

The father ultimately appealed the October 2021 comprehensive order, and it was consolidated with the appeal from the March 16, 2021 orders.¹

ANALYSIS

We review an order on contempt for abuse of discretion. *Brooks v. Brooks*, 164 So. 3d 162, 163 (Fla. 2d DCA 2015) (citing *Rojo v. Rojo*, 84 So. 3d 1259, 1261 (Fla. 3d DCA 2012)). "A contempt order that is not supported by competent, substantial evidence is an abuse of discretion." *Wolf v. Wolf*, 296 So. 3d 479, 485 (Fla. 2d DCA 2020).

"In order to be held in contempt of a court's order, the order must be 'clear and precise' and the person's conduct must be in clear violation of the order." *Id.* (citing *Akre-Deschamps v. Smith*, 267 So. 3d 492, 494-

¹ The father also appealed other orders in case number 2D21-1069. However, because we have found no merit to his other arguments, it is unnecessary to detail them here.

95 (Fla. 2d DCA 2019)). "[A] judge cannot base contempt upon noncompliance with *something an order does not say*." *Kovic v. Kovic*, 336 So. 3d 22, 26 (Fla. 4th DCA 2022) (alteration in original) (quoting *Oasis Builders, LLC v. McHugh*, 138 So. 3d 1218, 1220 (Fla. 4th DCA 2014)). "If an order is not clear and unambiguous regarding what a party may or may not do or what it must or must not do, then it cannot support the conclusion that the party willfully or deliberately violated that order." *Id.* (quoting *McHugh*, 138 So. 3d at 1220); *see also Kane v. Sanders*, 232 So. 3d 1107, 1111 (Fla. 3d DCA 2017). "When the order that forms the basis for the contempt does not 'expressly' require the action by the party, the trial court fundamentally errs when finding that party in contempt for failure to do that action." *Kovic*, 336 So. 3d at 26. "Although a court's prior ruling 'may be taken to inherently mean that the court intended [for a certain action by the party], such 'implied or inherent provisions of [an order] cannot serve as a basis for an order of contempt.'" *Id.* (alterations in original) (quoting *McHugh*, 138 So. 3d at 1221).

"Before a trial court can hold a party in civil contempt, it must make a finding that the party has the present ability to comply with the order and willfully refuses to do so." *Wolf*, 296 So. 3d at 485 (quoting *Dep't of Health & Rehab. Servs. v. Bills*, 661 So. 2d 69, 70 (Fla. 2d DCA 1995)); *see also Kane*, 232 So. 3d at 1110 (explaining that a trial court must find that a party intentionally violated a court order in order to hold that party in contempt).

Here, the father argues that he should not have been held in contempt for failing to pay 70% of the Kumon expenses which the trial court deemed "educational" in nature. He points out that in the March 2019 report and recommendations, the magistrate deemed the Kumon

classes as "extracurricular" in nature, and he contends that, at most, he would only be responsible for paying 50% of those expenses if the mother had complied with the procedures for selecting extracurricular activities, which he asserts that she did not.² He further notes that the magistrate at that time recommended that the father not be held in contempt due to the mother's failure to provide proof of her expenses for the Kumon classes.

We agree with the father that he should not have been held in willful contempt for failing to pay 70% of the Kumon expenses. The magistrate deemed the Kumon expenses "extracurricular" within the body of the March 2019 report and recommendations and treated those expenses as such. We are not persuaded that the incidental reference in a footnote to Kumon as an "educational program which teaches math and reading to children" suggests that the magistrate had a different intention. If anything, that would only further establish that there was an ambiguity about the type of obligation imposed upon the father.

The magistrate's March 2019 report and recommendations were ultimately adopted by the trial court in May 2021. However, this was *after* the trial court issued its March 16, 2021, order wherein it found that the father was in willful contempt for failing to pay the Kumon expenses which the trial court concluded were "educational" in nature. The trial court's conclusion flowed from its determination that the magistrate never adjudicated the issue of the Kumon payments in 2019; the trial court opined that the issue had only been referenced by the

² He contends that the mother unilaterally enrolled the child in the classes without ever conferring with him about which extracurricular activities the child should be enrolled in and for which the parties would split the cost. He argues that this was in derogation of paragraph 3 of the parenting plan.

magistrate as a side note during the discussion about private school tuition.

However, the March 16, 2021, order holding the father in contempt and the May 19, 2021, order adopting the magistrate's March 2019 report and recommendations were entered by the same judge. Yet there is no explanation for why that judge found that the Kumon expenses were "educational" in March 2021 and then subsequently agreed with and adopted the magistrate's 2019 report and recommendations containing the conclusion that the Kumon expenses were "extracurricular" in nature. The difference in how the same trial judge treated the Kumon expenses on two separate occasions and the fact that even the magistrate referred in a footnote to Kumon as an educational program while at the same time treating Kumon payments as "extracurricular" expenses reveals an ambiguity surrounding the definition of "educational expenses" as used in the final judgment. Moreover, there was no specific reference to Kumon classes in the final judgment or the subsequent 2018 stipulated order. Consequently, there was no "clear and precise" requirement that the father was obligated to pay 70% of the Kumon expenses as "educational expenses." *See Wolf*, 296 So. 3d at 485. Therefore, the father should not have been held in willful contempt for failing to pay 70% of such expenses. *See Kovic*, 336 So. 3d at 26. Nor should the father have been required to pay such expenses while an ambiguity about the nature of the expenses remained.

Because of the unique situation presented in this case—where the same trial judge issued two orders reaching different conclusions about the nature of the Kumon expenses—this issue will need to be reconsidered on remand. If the trial court determines that the Kumon expenses are extracurricular in nature, it should determine whether the

requirements of the 2018 stipulated order relating to selection of extracurricular activities were met before requiring the father to pay his 50% share of such expenses.

Additionally, we note that while the father challenged other portions of the October 2021 comprehensive order in this appeal, he did not make any specific challenge to the portion that granted the mother's third amended motion for contempt and ordered the father to pay "previously properly ordered past due . . . Kumon educational expenses." However, based on our conclusion that it was improper for the father to be held in willful contempt in March 2021 for failing to pay 70% of the Kumon expenses due to the ambiguity surrounding that issue, the trial court will need to revisit this portion of the October 2021 ruling on remand as well.

Because we are reversing the portion of the March 16, 2021, order holding the father in willful contempt for failing to pay 70% of the Kumon payments, the trial court's determination of the mother's entitlement to attorneys' fees contained in that order (for fees associated with the mother's motion) as well as the subsequent award made in the October 2021 comprehensive order will need to be readdressed. The trial court will need to determine what portion of the fee award is attributable to the issue of the Kumon payments and adjust the award accordingly.

Finally, we instruct the trial court to reconsider its determination in the October 2021 comprehensive order that the mother was entitled to prevailing party attorneys' fees based on the mother's third amended motion for contempt. The trial court should determine whether the mother is still entitled to fees as the prevailing party based on our partial reversal of the March 16, 2021, contempt order as it pertained to the

issue of the Kumon payments and the portion of the October 2021 order requiring the father to pay past due Kumon payments.

Affirmed in part, reversed in part, and remanded with instructions.

KHOUZAM and LUCAS, JJ., Concur.

Opinion subject to revision prior to official publication.