

RENDERED: May 29, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2709-MR

GENE HOLLOWAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD J. FITZGERALD, JUDGE
ACTION NO. 88-CI-003564

RUTH M. HOLLOWAY AND ANN B. OLDFATHER, ESQ.

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

* * *

BEFORE: BUCKINGHAM, KNOX, AND MILLER, JUDGES.

KNOX, JUDGE: This is an appeal from the order of the Jefferson Circuit Court holding appellant in contempt of court for failure to comply with a prior agreed order signed by the trial court on September 22, 1995. Following a hearing on the contempt motion, the trial court imposed, as sanctions, a monetary penalty in the form of a \$1,000.00 charitable contribution, and the award of \$2,000.00 in attorney fees.

The underlying matter involves a protracted dissolution action in which the court's involvement has now spanned some ten

years. As the marital estate was sizeable¹, the court addressed an abundance of complex issues regarding the division of property. The final act necessary to bring closure to the entire matter involved appellant's compliance with the above mentioned agreed order directing, inter alia,² that:

On or before 5 o'clock p.m., September 29, 1995, the [appellant] shall execute stock powers, and any other documentation required, to transfer all of his rights, title and interest in and to the stock of MRH Development Co., Inc., and MRH Real Estate Inc. . . . to the parties' daughter, Phyllis Bradbury, and the parties' grandsons, David Abbott and Joe Abbott, with one-third (1/3) going outright to each. Phyllis Bradbury shall be custodian of the stock transferred to Joe Abbott under the Uniform Gift to Minors Act until Joe Abbott obtains the age of majority. Copies of all such transfers and related documentation shall be promptly provided to [appellee].

Mr. Holloway did transmit instruments of transfer for said stock at approximately 5 o'clock p.m. on September 29, 1995, although, the instruments inadvertently failed to note the transfer to the parties' minor grandson was under the Uniform Gift to Minors Act. Corrected instruments of transfer were subsequently issued on October 3, 1995. Between October 1995 and March 1996 there were numerous conversations and correspondence requesting that Mr.

¹ The record reflects the property to be divided retained a value exceeding tens of millions of dollars. Likewise, the property consisted of investment stocks, real estate, notes receivable and payable, trusts, insurance policies, bank accounts, business entities and the like.

² The agreed order under discussion further required appellant to transfer three (3) parcels of real property, the performance, of which, is not at issue here.

Holloway procure the issuance of new stock certificates for the MRH related companies.

The record reflects that on March 28, 1996, Mrs. Holloway filed a motion for a rule based upon Mr. Holloway's failure to comply with the agreed order, in that new stock certificates had yet to be issued. On April 1, 1996 the subject stock certificates were delivered.³ The contempt hearing was held in June 1996 and in August 1996, the trial court entered its order directing that Mr. Holloway be held in contempt for what the trial court perceived to constitute deliberate disregard for the court's orders and attenuated expectations. The trial court's ultimate order held Mr. Holloway in contempt and imposed the \$1,000.00 charitable contribution and \$2,000.00 attorney fees as sanctions. Based upon the foregoing analysis of legal precedent, we reverse the monetary sanction and affirm the award of attorney fees.

BACKGROUND

A cursory background is required to shed some insight on the trial court's procedural history regarding the issues of contempt and attorney fees with respect to these parties. Over the decade's course, the trial court has encountered several occasions

³ There was some question regarding the absence of a date of issuance on the new stock certificates, which left lingering a question as to 1995 tax treatment for purposes of ownership. However, the parties have not raised this matter, hence, it is not a topic under this Court's consideration. Moreover, since the trial judge has rendered a judgment on the effective date of the stock ownership, the issue is moot. Shelby Petroleum Corp. v. Croucher, Ky. App., 814 S.W.2d 930, 933 (1991).

in which it was compelled to exercise its power of contempt by virtue of appellant's contrary conduct.

In July 1989, appellant was held in contempt for failure to comply with the court's expectation regarding the disposition of certain funds. Again in October 1991, the court held appellant in contempt for failing "to appreciate the necessity of conforming his behavior to the expectations of the court in this dissolution proceeding" and imposed a fine of \$1,000.00, the payment of which was suspended until the date of final dissolution decree and conditioned on "strict compliance" with all other compelling orders. In February 1993, a motion was made to hold appellant in contempt for failure to complete work the parties had agreed to be performed on a parcel of marital farm property prior to the closing of same. This particular motion was taken under submission for trial in expectation of an already assigned trial date. Failure to permit appellee access to marital properties for the purpose of conducting an inventory landed appellant with, yet, another contempt citation in January of 1994. In that instance the court specifically admonished Mr. Holloway for "willful and intentional behavior," and provided the payment of attorney fees generated for enforcement of the court's order but withheld the imposition of sanctions until the conclusion of trial on the matter.

===== Appellant argues that the trial judge erred in holding him in contempt as the terms and conditions of the agreed order had been fully complied with prior to the June 11, 1996 hearing. He grounds his argument on the basis that the contempt charge was

civil in nature, thus the imposition of any sanction therefor was impermissible.

Appellee contends the trial judge retained the authority to impose punitive sanctions upon the contemnor for his constant disregard of the court's authority. In other words, the imposed punishment was directed at Mr. Holloway's previous course of recalcitrant conduct. Appellee's position suggests the contempt sanction was criminal in nature and operated as a means of preserving the court's decorum and preventing the obstruction of justice.

Our interpretation of legal precedent within this jurisdiction does not squarely conform with either of the above-mentioned arguments. It is our opinion that although a contempt proceeding is civil in nature, sanctions are permissible. White v. Sullivan, Ky. App., 667 S.W.2d 385, 387 (1983). However, the somewhat extraordinary condition attached to the purely monetary penalty (i.e. a charitable contribution) requires reversal of the trial court's order in that respect; otherwise, the award of attorney fees was proper.

CONTEMPT: Civil v. Criminal

Contempt is "the willful disobedience toward, or open disrespect for, the rules or orders of a court. 'Contempts are either civil or criminal.'" Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1997) (quoting Gordon v. Commonwealth, 141 Ky. 461, 133 S.W. 206, 208 (1911)). Although the distinction between character and conduct constituting civil contempt is often convoluted and

confused with criminal contempt, there exists some fairly clear principles upon which to rely for resolution of this dilemma.

It is not the fact that a sanction has been imposed but rather the nature and purpose of the sanction/punishment that serve to distinguish civil from criminal contempt. Campbell v. Schroering, Ky. App., 763 S.W.2d 145, 147 (1988) (citation omitted). The purpose of civil contempt is to coerce the contemnor into conforming his behavior in accordance with the court's commandment. The familiar phrase defining the characteristic of civil contempt is that those so charged "carry the key of their prison in their own pockets." Shillitani v. United States, 384 U.S. 364, 368, 86 S.Ct. 1531, 16 L.Ed.2d 622, 626 (1966) (citation omitted); Blakeman v. Schneider, Ky., 864 S.W.2d 903, 906 (1993).

If the act of disobedience consists solely of failing or refusing to do what the court has ordered, the conduct constitutes civil contempt. Shillitani, 384 U.S. at 368; Burge, 947 S.W.2d at 808. A contemptuous party may purge himself thereof by merely obeying the court's order. Id. Moreover, the purpose of imposing civil contempt sanctions is for the benefit of a party litigant. Id. In sum, "civil contempts are those quasi contempts which consist in failure to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court. . . ." Levisa Stone Corp. v. Hays, Ky., 429 S.W.2d 413, 414 (1968) (quoting Jones v. Commonwealth, 308 Ky. 233, 213 S.W.2d 983, 985 (1948)).

Alternatively, there is criminal contempt⁴ which is levied for the purpose of punishment. The act of disobedience consists of doing something which the court has prohibited. Blakeman, 864 S.W.2d at 906. "Criminal contempts are all acts in disrespect of the court or its process which obstruct the administration of justice, or tend to bring the court into disrepute." Levisa Stone, 429 S.W.2d at 414 (quoting Jones v. Commonwealth, 213 S.W.2d at 985).

In the case sub judice, we believe Mr. Holloway's conduct, in delaying performance under the agreed order, would have constituted civil contempt. The act of disobedience, untimely compliance with the agreed order, was purely a matter of not doing what the court had ordered, rather than doing something that the court had prohibited. See Blakeman, 864 S.W.2d at 906. The direct result of Mr. Holloway's tardiness was injury, in the form of aggravation, time consumption, uncertainty as to tax consequences, and accumulation of attorney fees, to Mrs. Holloway.

However, Mr. Holloway had delivered the new stock certificates, albeit undated, prior to the June 11, 1996 contempt

⁴ Criminal contempt can take one of two forms; that is, either direct or indirect. Direct contempt is committed in the actual presence of the court, insulting the court's decorum and proceedings. This form of contempt can be punished summarily absent any need for fact finding proceedings as all elements of the offense are within the personal knowledge of the court. In re Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888). Indirect contempt occurs outside the court and requires a hearing be had on all elements of the offense to establish whether the court's order has been violated. Its punishment requires proceedings which satisfy due process. Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1997).

hearing. As such, Mr. Holloway had effectively complied with the court's order and if held in contempt there was no possible means by which to purge himself thereof.

Unlike its criminal counterpart, civil contempt is "wholly remedial" serves only the purpose of a *party litigant*, and is intended to *coerce compliance* with an order of the court or to compensate for losses or damages caused by non-compliance.

White v. Sullivan, Ky. App., 667 S.W.2d 385, 387 (1983) (emphasis added).

Although we can appreciate the trial court's frustration with Mr. Holloway's history of delaying the finality of this dissolution action, the imposition of a monetary sanction, payable to the charity of appellee's choice, can neither operate as a remedy for a party litigant nor coerce compliance. See id. Rather, such a sanction serves merely as a windfall to an unrelated third party. Such is not the intended purpose of compensatory damage awards in civil contempt proceedings. In civil contempt actions the remedies are designed "to compensate the aggrieved party." Id. at 387. For this reason, we believe the trial court erred in directing Mr. Holloway to make a \$1,000.00 charitable contribution.

ATTORNEY FEES

The determination of an award of attorney fees is a matter committed to the sound discretion of the trial court. It is "[t]hat court [which] is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct." Gentry v. Gentry, Ky., 798 S.W.2d 928, 938 (1990).

Furthermore, KRS 403.220 plainly provides:

The court from time to time after considering the financial resources of both parties may order a party to pay reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

In light of the trial court's detailed recitation accounting the obstructive tactics and persistent lack of cooperation on Mr. Holloway's part, we believe the record amply supports the award of attorney fees.

Accordingly, based upon the fact that the monetary sanction was designed for the benefit of a disinterested third party, as opposed to compensate the aggrieved party, we reverse the Jefferson Circuit Court's sanction of \$1,000.00 in the form of a charitable contribution. Since the trial judge acted well within the realm of judicial discretion and under statutory authority, we affirm the award of \$2,000.00 in attorney fees. This case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

David A. Black
Middletown, Kentucky

BRIEF FOR APPELLEE:

Ann B. Oldfather
Jennifer Jordan Hall
Louisville, Kentucky