

# Commonwealth Of Kentucky

## Court Of Appeals

NOS. 1998-CA-002597-MR and 1998-CA-003000-MR

DONALD RAY DENNY

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE DANIEL J. VENTERS, JUDGE  
ACTION NO. 92-CI-00712

SHEILA MOLDEN MOORE;  
JUDGE DANIEL J. VENTERS;  
HON. ANITA M. BRITTON;  
STOLL, KEENON AND PARK, LLP

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: GARDNER, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: Donald Denny appeals the orders of the Pulaski Circuit Court penalizing him in the amount of \$4,800.00 for contempt of court, and awarding his former spouse, appellee Sheila Moore, approximately \$1,050.00 in attorney fees. Having reviewed the record and applicable law, we affirm.

The parties' marriage was dissolved by decree entered February 4, 1993. Incorporated in said decree was a separation agreement wherein the parties agreed on the issues of custody, visitation, and support of their two (2) minor children, Casey born November 29, 1982, and Logan born October 12, 1988. That

was the last thing the parties ever agreed on, and from thereon the gloves came off.

From the onset, the parties experienced difficulty with the custody/visitation arrangement previously agreed upon. Principally, the minor child Casey commenced experiencing disciplinary, emotional, and often physical behavioral problems. Over the course of the next several years, the court held numerous hearings regarding the parties' various motions to modify custody, visitation, and support. Underlying much of this litigation was the issue of Donald's repetitive pattern of returning the children late from the scheduled visitation.

Ultimately, on February 6, 1997, the court issued its order holding, inter alia, that "Donald shall strictly adhere to the specific hours of visitation. He will be assessed a fine of \$10.00 for every minute he is late in returning the children at the end of his visitation period." In this same order, the court directed the parties to attend a mediation conference in order to resolve a number of remaining issues. The resulting mediation conference produced the specific agreement that for "summer visitation with the children . . . (b) Don's visitation will be the first 2 weeks of July, beginning the last evening of his first visitation for that month. For 1997 Don's visitation will be July 8 to July 22."

On August 12, 1997, Sheila moved the court to hold Donald in contempt for failing to return the children at the end of the visitation period on July 22, 1997. She further moved the court to direct Donald to pay \$718.50 in reimbursable medical

expenses, in accordance with the mediation agreement, in addition to attorney fees necessitated by the filing of the motion. A hearing was held in the matter on September 16 with the court issuing its findings of fact, conclusions of law and order on September 17, 1997. Pertinent to this appeal, the court stated:

As agreed in the mediation agreement, Donald's "summer visitation" commenced July 8<sup>th</sup>. On July 22<sup>nd</sup>, Sheila expected the boys to be returned to her at 8:00 P.M. because that was the time which had previously been established for the return of the children to her home. The mediation agreement does not specify a particular hour of the day for the return of the children. It simply recites that "for 1997 Don's visitation will be July 8 to July 22." At or about 10:30 P.M. on July 22<sup>nd</sup>, Don called Sheila and indicated that he wanted to keep the boys for that evening. Sheila declined, and insisted that the boys be brought back to her home that evening. On the morning of July 23<sup>rd</sup>, at 8:22 A.M., [Donald] brought Logan back to Sheila's home. Casey remained with him.

The [c]ourt finds no reasonable justification for the failure of Don to return the children to Sheila's home on July 22<sup>nd</sup>. The only argument presented by his counsel is that the terms of the mediation agreement are ambiguous, and that the return of the children on the morning of July 23<sup>rd</sup> is in compliance. That argument is unpersuasive. There is no construction of the language of the mediation agreement which would support Don in his failure to return the children on July 22<sup>nd</sup>. It is the finding of the [c]ourt that he has, once again, sought to impose his will over Sheila's and over the direction of the Court. Disregarding the issue of whether Casey was due to be returned to Sheila's home on July 22<sup>nd</sup>, the evidence unequivocally established that Donald was due to return Logan to his home on July 22<sup>nd</sup>. Construing the mediation agreement most favorably to Donald would allow him until the end of the 24-hour period designated on our calendars as July 22<sup>nd</sup>. His refusal to return Logan until 8:22 the

following morning means that he is at least eight hours, or 480 minutes, late in returning the child at the end of his visitation period. Actually he was 502 minutes late.

. . . .

The [c]ourt finds that [Sheila] is entitled to the recovery of attorney's fees for the necessity of bringing this motion. When [Sheila] was unable to get a response from Don as to when he would pay the \$718.50, she necessarily consulted her attorney. When her attorney failed to get a response from his inquiry, he had no reasonable alternative but to file a motion. The manner in which the payment was to be made could have been reasonably resolved between the parties, or between the attorneys. By failing to respond within a reasonable time, [Donald] and his counsel effectively communicated that they had no interest in resolving the matter.

The court concluded by ordering Donald to pay the sum of \$450.00 toward the attorney fees incurred by Sheila in that action.<sup>1</sup> The court further fined Donald \$4,800.00<sup>2</sup> for contempt of the court's previous order directing him to return the children in a timely manner from the scheduled visitation. The fine was to be paid to the Pulaski Circuit Court. Donald filed a CR 59.05 motion, which was denied; however, the court further ordered the parties to appear before it on October 2, 1998, for a re-examination of the parties' compliance with the court's order, and to enter a final order with respect to the contempt of court fine. On October 15, 1998, an appeal was taken by Donald.

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<sup>1</sup> Following the service of Sheila's motion seeking redress for the grievances above-stated, and prior to the hearing on same, Donald tendered the \$718.50 due under the mediation agreement. As such, it was unnecessary for the court to order payment of those monies.

<sup>2</sup> \$4,800.00 represents 480 minutes at \$10.00 per minute.

Subsequently, on November 3, 1998, the court, having found Donald's efforts to comply with the court's orders greatly improved, suspended imposition of the September 17, 1997, fine, except that Sheila was to recover \$600.00<sup>3</sup> from those funds for attorney fees expended.<sup>4</sup> Once again, Donald appealed the order of the court. The two (2) appeals have been consolidated and are addressed herein.

On appeal, Donald, in essence, argues the trial court erred on two points: (1) the court abused its power of contempt by penalizing him in that not only was the fine excessive, but it amounted to the trial court's interference with the contractual rights and obligations of the parties under the mediation agreement; and, (2) the court further abused its discretion in failing to follow the mandates of KRS 403.220 in awarding Sheila attorney fees. We disagree.

As a primary matter, we pretermit discussion of the contempt of court penalty. In that the court unconditionally suspended imposition of the fine, it is our opinion the court effectively dismissed said order. Therefore, the matter is rendered moot. Rather, the only viable issue before this Court is the question of whether the trial court abused its discretion in awarding Sheila the total sum of \$1,050.00 in attorney fees. Our review of the record reveals no such abuse of discretion.

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<sup>3</sup> The \$600.00 award of attorney fees was in addition to the \$450.00 previously granted.

<sup>4</sup> Effectively \$4,200.00 of the fine was suspended with the balance of \$600.00 order paid to the circuit court clerk who was instructed to transfer said funds to Sheila for payment of her attorney fees.

It is a well known concept that the trial court has considerable latitude in the exercise of its discretion concerning the award or denial of attorney fees. Hollingsworth v. Hollingsworth, Ky. App., 798 S.W.2d 145, 148 (1990). Although Donald contends the trial court was obligated to follow the provisions of KRS 403.220 to the extent that an inquiry concerning the parties' financial resources be undertaken, it is our opinion this statutory provision is inapplicable under the facts before us. Rather, KRS 403.220 is generally employed in the instance of a dissolution action wherein the court addresses either or both parties' request for attorney fees. In the matter sub judice, the court was ruling on Donald's contempt of the court's prior order, i.e. the timely return of the children from scheduled visitation. In view of the record before us, combined with the trial court's detailed explanation for its ruling, we believe the award of attorney fees was reasonable and will not be disturbed.

In accordance with the foregoing, the order of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Davidson  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Anita M. Britton  
Crystal L. Osborne  
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