

Commonwealth of Kentucky
Court of Appeals

NO. 2002-CA-001958-MR

DAVID MICHAEL OWENS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 98-FC-007077

TERESA ANN OWENS

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: COMBS, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: David Michael Owens appeals, *pro se*, from an order of the Jefferson Family Court denying his motion to hold Teresa¹ Ann Owens in contempt of court for failure to comply with the parties' July 20, 2000, "Property Settlement Agreement"

¹ In the record, the appellee's name is spelled variously as Teresa and Theresa. It is unclear which is the correct spelling, and we have used the spelling contained in the notice of appeal, Teresa.

(separation agreement). For the reasons stated below, we affirm.

On June 30, 1988, the parties had an out of wedlock child, Jamika Dawn Owens. On April 17, 1993, the parties were married. On September 22, 1998, David filed a petition for dissolution of the marriage.

At some point following the filing of the petition, David engaged in violent conduct involving Teresa. As a result, David was charged with first-degree wanton endangerment, unlawful imprisonment, and possession of a handgun by a convicted felon. In the altercation David beat Teresa about her head and body, made her lay down on a bed, held a loaded gun to her head, and fired a shot beside her head. He also made her talk on the telephone to her children, indicated to her what she should say, and indicated to her that her children would hear her die if she did not say what he told her. It appears that David received an eight-year sentence as a result of the charges, and has been incarcerated as a result of the incident since January 2000.

On July 20, 2000, the parties entered into a separation agreement which, among other things, addressed issues concerning custody, visitation, child support, and property issues. However, because Teresa was the victim of David's violent conduct, a no contact order remained in place

prohibiting David from contacting Teresa directly. As a result, the agreement provided that visitation should be coordinated between Teresa's mother and David's mother. On July 27, 2000, the final decree dissolving the marriage was entered.

On April 5, 2001, David filed a *pro se* motion to require Teresa to show cause as to why she should not be held in contempt of court for failure to abide by the July 20, 2000 agreement. The motion alleged that Teresa had violated those provisions of the agreement which require each party to refrain from alienating Jamika's affection toward the other party; require each party to provide records and information concerning the child and to keep each other apprised of his or her current residence and telephone number; and the provision of the agreement which awards David exclusive title and possession of a 1983 Pontiac TransAm vehicle. More specifically, the motion alleged that Teresa was denying him telephone contact with the child; withholding and screening his letters to the child; and that Teresa had permitted the engine, wheels, tires, and window glass to be removed from the 1993 Pontiac.

On August 15, 2002, a hearing was held on David's motion to hold Teresa in contempt. On August 30, 2002, the family court entered an order denying David's motion to hold Teresa in contempt for violating the July 2000 agreement. This appeal followed.

First, David contends that Teresa should be held in contempt because he is being denied visitation with Jamika in violation of the agreement; that he is unable to have telephone visitations with the child; and that he does not know if Teresa's mother is forwarding his letters to Jamika.

Our review of this issue, and the remaining issues in this case, is hindered because neither a recording nor a transcript of the August 15, 2002, hearing is included in the record on appeal.² The burden was upon David to ensure that a transcript or recording of the hearing was included in the appellate record.³ Burberry v. Bridges, Ky., 427 S.W.2d 583, 585 (1968). When evidence presented to the trial court is excluded from the appellate record, we must presume that the missing evidence supported the judgment of the trial court. Miller v. Com., Dept. of Highways, Ky., 487 S.W.2d 931, 933 (1972).

With regard to the David's claims relating to Jamika, the family court made the finding "the Court finds that the respondent has not intervened or obstructed the Petitioner's access to the parties minor child[.]"

² A videotape is included in the record on appeal; however, the only hearing contained on the videotape is the July 20, 2000, hearing wherein the family court approved the parties' separation agreement.

³ We note that David's designation of record filed on September 11, 2002, did not specify the August 15, 2002, hearing but, rather, generally designated "the entire record of the proceedings in this case."

Under CR 52.01, in an action, as here, tried without a jury, “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” A factual finding is not clearly erroneous if it is supported by substantial evidence. Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Uninsured Employers’ Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person. Golightly, 976 S.W.2d at 414; Sherfey v. Sherfey, Ky. App., 74 S.W.3d 777, 782 (2002).

As we do not have the record of the August 15, 2002, hearing before us, we must presume that the evidence and testimony presented at the hearing supported the findings of the family court. Miller, supra. As those findings determined that Teresa has not intervened or obstructed David’s access to Jamika, it follows that she cannot be held in contempt for doing so.

Moreover, this issue concerns David’s allegation that Teresa should be held in contempt for violating the provisions of their July 20, 2000, separation agreement which provide that Teresa may not hinder David’s relationship with Jamika.

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 (1996); citing Gordon v. Commonwealth, 141 Ky. 461, 133 S.W. 206, 208 (1911). The purpose of civil contempt is to coerce the contemnor into conforming his behavior in accordance with the court's commandment. Shillitani v. United States, 384 U.S. 364, 368, 86 S. Ct. 1531, 16 L. Ed. 2d 622, 626 (1966); Blakeman v. Schneider, Ky., 864 S.W.2d 903, 906 (1993). Alternatively, there is criminal contempt which is levied for the purpose of punishment. The act of disobedience consists of doing something which the court has prohibited. Blakeman, at 906.

It is within a court's discretion whether to use its contempt power. Smith v. City of Loyall, Ky. App., 702 S.W.2d 838, 839 (1986). Inasmuch as the discretion in the matter rests with the court imposing sanctions, we will disturb its ruling only if there is an abuse of discretion. "'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, or at least an unreasonable and unfair decision.'" . . . "The exercise of discretion must be legally sound." Sherfey v. Sherfey, Ky. App., 74 S.W.3d 777, 783 (2002) (quoting Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994)).

In the absence of a finding that Teresa hindered or obstructed David's access to Jamika, the family court did not abuse its discretion by denying David's motion to hold her in contempt for violating the no alienation of affections clause of the parties' July 20, 2000, separation agreement.

Next, David contends that Teresa was responsible for damage that was done to the 1983 Pontiac TransAm awarded to him under paragraph 13 of the separation agreement on the basis that it was her responsibility to look after the vehicle during his period of incarceration.

In regards to David's claim concerning the TransAm, the family court made the finding "[b]ecause the Petitioner has been incarcerated [sic] for felonious crimes related to the Respondent since January of 2000 and the parties' Property Settlement Agreement was not reached until July of 2000, the Court finds the Petitioner's testimony regarding the status of the property on the date of the agreement is unreliable."

Again, because of the missing August 15, 2002, record we are unable to conclude that the family court was clearly erroneous in rejecting David's testimony. Miller, supra. As the family court rejected David's version of Teresa's responsibility for damage to the TransAm, the court did not abuse its discretion by denying David's motion to hold Teresa in contempt for the claimed damage. Sherfey, supra.

Finally, David contends that the family court erroneously failed to address the issue of whether Teresa had failed to divide equally their 1999 federal and/or state income tax returns as required in the agreement.

David did not raise this issue in his April 5, 2001, motion to hold Teresa in contempt. David appears to claim that the issue was nevertheless raised and addressed at the August 15, 2002, hearing. However, without the record of the August 15, 2002, hearing, we are unable to determine if this issue was properly raised and preserved before the family court so as to conclude that it was error for the court to fail to address the issue. In the absence of the record of the hearing, we must conclude that the decision of the family court with regard to this issue was correct. Miller, supra.

For the foregoing reasons the judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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