RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001627-ME
AND
NO. 2003-CA-001943-ME

LORRAINE CARRICO FIORELLO — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 00-FC-005351

ANTHONY JOHN FIORELLO AND
TERRY W. HOLLOWAY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Lorraine Carrico Fiorello (hereinafter "Lorrie"[2]) has appealed from several orders of the Jefferson Family Court involving visitation, child support, contempt, and the award of attorney fees and costs. We affirm.

[1] Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.
[2] "Lorrie" is also spelled "Lori" in the record and the parties' briefs.

Lorrie filed a Petition for Dissolution of Marriage in July 2000, which was followed in August by a Counterpetition by her husband Anthony John Fiorello (hereinafter "Tony"). Lorrie and Tony were married on September 30, 1989, and separated in late November 1999. Two children were born of the marriage: Skylar Anthony Fiorello, born March 17, 1993, and Claudia Lorraine Fiorello, born April 16, 1996. Following a contested litigation, the family court entered a decree of dissolution on October 31, 2001. In the accompanying judgment, the family court awarded sole custody of the minor children to Tony, ordered Lorraine to pay child support in the amount of $309.96 per month, and awarded her liberal visitation. The following March, the parties entered into an Agreed Order, in which they settled their disputes as to health insurance, debts and the division of personal property. Paragraph 4 of the Agreed Order, entered March 12, 2002, provided:

> Tony agrees to pay Lorrie forthwith the sum of $23,500.00, said sum being referred to on Page 26 of the aforesaid Findings, but in the actual specific sum of $23,395.81.[3] This payment of $23,500.00, however, is being made in that amount by Tony to Lorrie so as to enable her to purchase a home, for which she now has entered into a contract to purchase. She does, however, acknowledge and agree that Tony only owes to her the actual total sum of $20,000.00. This $20,00.00 figure was arrived at after the

[3] The family court awarded Lorrie the sum of $23,395.81 as her share of the marital residence in the Findings of Fact, Conclusions of Law, Decree of Dissolution and Judgment.

parties reached a compromise and a negotiated settlement pertaining to all of the issues hereinabove, including a division of all marital debts.

In return Lorrie agrees to sign a promissory note payable to Tony in the amount of $3,500.00, with interest at 6% per annum, and said sum is to be repaid by Lorrie to Tony at the rate of $100.00 per month, with the first payment being due on May 1, 2002, and a similar payment due on the first of each and every succeeding month thereafter until the principal sum of $3,500.00, plus all accrued interest, is paid in full. If Lorrie should fail to make two $100.00 payments on time and for two consecutive months in a row, then Tony has the absolute right to [accelerate] the entire remaining unpaid balance of said note, principal plus accrued interest, which will then automatically increase to 12% per annum, at his sole discretion. Lorrie understands and agrees that in the event Tony chooses to exercise his right to accelerate payment on said promissory note as outlined above, that it will not be necessary for him to file suit on said note, or to seek the approval of any Court, or to engage in further negotiation or legal action whatsoever before exercising the legal right to pursue full collection of said note. Further she acknowledges and agrees that immediately upon Tony’s decision to accelerate said note the remaining unpaid balance of same will, as indicated above, then automatically accrue at 12% per annum rather than 6% per annum.

Lorrie further acknowledges that a closing date for the purchase of her new home has not yet been set, but anticipates same to be set within the next 30 days. Lorrie agrees that after the closing for the purchase of her new home has been completed, and her deed thereto has been recorded, she will then convey to Tony a second mortgage

> to be placed against her real property by Tony as additional security in insure the payment of his $3,500.00 loan, plus interest, which he is now making to her as outlined hereinabove.
>
> Lorrie also agrees that if she were to miss two timely consecutive monthly payments under said note, as outlined hereinabove, same would automatically constitute contempt of this Court's Order, and that it will not be necessary for Tony to file any pleadings, or to even obtain a hearing to obtain a contempt finding against her by the Court. Tony would thus be free to exercise his legal rights against Lorrie, under this event, forthwith.

In September 2002, Tony filed a motion to suspend Lorrie's visitation and telephone contact with the children, and requested attorney fees. He alleged that Lorrie's involvement with the children's lives was having a profoundly negative impact on their mental, emotional, psychological and physical well-being. The family court agreed, and on October 18, 2002, entered an Opinion and Order suspending all visitation pending further order, but allowing for telephonic contact with the children once a day. In December, the family court ordered Lorrie to participate in a treatment needs assessment, and allowed for supervised holiday visitation. Social worker Elizabeth Senn was ordered to provide a written report of the treatment needs assessment prior to a review date scheduled for April 25, 2003.

In February 2003, Lorrie filed motions to suspend her child support obligation, citing her job lay-off, to hold Tony in contempt regarding the order providing for telephonic contact, and to compel him to give her gifts to the children. Following an April 18, 2003, hearing,[4] entered an Order on April 25, 2003, ruling on Lorrie's two motions. While the family court recognized that there had been over a 15% change in the amount of support that was due, creating a material change in circumstance, the family court nevertheless determined that the material change was not substantial and continuing, and therefore denied Lorrie's motion to modify child support. The family court also determined that Tony was not in contempt of its prior order and rejected Lorrie's motion to compel him to deliver the presents. Lorrie filed a motion to vacate that order, and on June 2, 2003, the family court denied Lorrie's motion and ordered supervised, weekly, two-hour visitation with the children.[5] On June 11, Lorrie filed a motion to vacate and amend the June 2 order regarding visitation. Tony objected to the motion, and requested $1,500 in attorney fees. On July 3, the family court denied Lorrie's motion to vacate and amend, noting that it had previously made extensive and thorough

[4] None of the hearings held in this case are included in the certified record on appeal; we note that Lorrie did not file a designation of record in either appeal, and that the court clerk properly only included the videotaped recording of the 2001 trial.

[5] Lorrie did not designate this order in her notice of appeal.

findings, and ordered her to pay the requested $1,500 in attorney fees.

In a parallel set of pleadings, Tony moved the family court on May 29, 2003, to hold Lorrie in contempt for failing to pay her financial obligations. He demanded a common law judgment in the amount of $4,914.61, plus interest, as well as $500 in attorney fees. At the time the motion was filed, Lorrie owed $929.89 in support payments from February 7 through May 2, 2003; $290.64 in health insurance premiums; $629.02 in unreimbursed medical expenses for 2001, 2002, and 2003; and had missed the $100 payments for March, April, and May 2003 on the $3,500 debt, for which a $2,600 balance remained. Tony also chose to accelerate the payment of the debt, demanding immediate payment of the remaining balance to accrue at a 12% interest rate. On June 6, the family court scheduled a hearing for July 8 on Tony's pending motions. On July 16, the family court entered an Opinion and Order, in which it held Lorrie in contempt for disregarding its orders to pay child support, health insurance, unreimbursed medical expenses, and the $3,500 debt. The family court also awarded $500 in attorney fees to Tony, and continued the matter to August 8, 2003, for sentencing on the contempt finding. Lorrie filed her first notice of appeal on August 4, 2003, listing the orders entered April 25,

June 6, July 3, and July 16, 2003, as the orders from which the appeal was being taken.

Lorrie did not appear at the August 8 sentencing as ordered; rather, her attorney appeared and moved for a continuance due to her illness. The family court granted the motion, and sentencing was rescheduled for August 12 at 8:00 a.m. On August 12, the family court noted that the back due amounts had not been paid, nor had a supersedeas bond been filed following the filing of the notice of appeal. Consequently, the family court sentenced Lorrie to 180 days in the Jefferson County Jail on four counts of civil contempt, but allowed her purge herself of contempt and be immediately released upon the payment of $5,335.08 to Tony's attorney. An Order of Commitment was entered the same day. Also the same day, Lorrie purged herself of contempt by paying the full amount due, and was accordingly released from custody. The following day, Terry W. Holloway, Tony's attorney, filed a motion for a common law judgment for $2,000, representing the amount he was owed in attorney fees pursuant to the July 3 and July 16, 2003, orders. This motion was granted on August 19, 2003. Lorrie filed her second notice of appeal from two August 12, 2003, orders[6] as well as from the August 19, 2003, order.[7]

[6] We assume these are the Sentencing Order and the Order of Commitment, as both were entered on August 12, 2003.
[7] This Court consolidated the appeals for all purposes on December 18, 2003.

On appeal, Lorrie urges this Court to hold that the family court committed error by restricting her visitation with the children, by denying her motion to modify child support, by awarding attorney fees and costs, and by jailing her for contempt without having entered an order from which she could seek an amendment or vacation. Tony argues that the family court ruled properly on those issues.

At the outset, we must address a jurisdictional issue not raised by either party, but one that must be decided before we may be permitted to review the issue of visitation. First, we note that Lorrie did not list the June 2, 2003, order regarding visitation in either notice of appeal. Rather, she listed the June 6, 2003, order, which merely scheduled a hearing date on Tony's motion to hold Lorrie in contempt. Pursuant to CR 73.03(1), the notice of appeal "shall identify the judgment, order or part thereof appealed from." However, we note that Lorrie did include in her notice of appeal the July 3, 2003, order denying her motion to vacate the June 2 order. Under the standard of substantial compliance announced in Ready v. Jamison,[8] Lorrie's designation of the order denying her motion to vacate the final order regarding visitation is sufficient.

We shall now address the merits of Lorrie's argument regarding visitation. Lorrie argues that the family court

[8] 705 S.W.2d 479 (Ky. 1986).

restricted her visitation rights without finding that visitation would seriously endanger the physical, mental, moral, or emotional well-being of the children, but rather expressed only historical concerns about her behavior. Tony disagrees, and asserts that the family court had a sufficient basis for its ruling from evidence introduced at the October 16, 2002, and the April 25, 2003, hearings.

KRS 403.320(3) provides that, "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health." In the June 2, 2003, order, the family court stated its findings as follows:

> The Court finds that Lori continues to exhibit behaviors which are detrimental to the children. For example, she has used Christmas presents to manipulate the children and she has continued telephone conversations well past a point when the children wanted to stop. Based on these continued detrimental behaviors and the unsuccessful therapy with Ms. Senn, the Court finds that unsupervised visitation is inappropriate at the present time. Based on the information received from the children's therapist, Carol Lindner, the Court finds that weekly supervised visitation would be in the best interests of the children at the present time.

In the order denying Lorrie's motion to vacate that order, the family court stated:

> This Court held a hearing and made specific findings regarding [Lorrie's] continued pattern of conduct which endangers seriously the children's mental and emotional health. . . . At such time as [Lorrie] is able to successfully address the pattern of conduct and manipulation which continues to endanger seriously the children's mental and emotional health, this Court will be happy to consider more reasonable visitation.

Both Lorrie and Tony refer to testimony from the hearings to support their respective arguments. However, the record does not contain any videotaped hearings, other than of the 2001 trial. We shall assume that the omitted portions of the record support the findings of the family court,[9] and the family court properly made the findings necessary to restrict Lorrie's visitation. We perceive no error in the family court's ruling.

Next, we shall examine Lorrie's argument regarding child support. Lorrie asserts the trial court abused its discretion by waiving the requirement that each party verify his or her income and by going beyond the evidence to find that she could undertake further efforts to earn a greater income. Tony, on the other hand, argues that the family court properly denied Lorrie's motion and was justified in determining that the material change, which was caused by Lorrie's being laid off,

[9] Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985).

was not substantial and continuing, and that her potential income was higher. Tony also points out that his income was established by evidence in the record.

KRS 403.213(1) provides, in relevant part, that, "[t]he provisions of any decree respecting child support may be modified . . . only upon a showing of a material change in circumstances that is substantial and continuing." In this case, it is undisputed, and the family court found, that Lorrie met the rebuttable presumption of a change in circumstances because the reduction in her income resulted in a 15% or greater change in her child support obligation.[10] However, it is the "substantial and continuing" portion of the modification statute that is at issue in the present case. The record reflects that Lorrie was laid off from her full-time employment shortly before she moved for a modification of child support in February 2003. She was collecting unemployment benefits and supplementing those benefits by cleaning houses. While it might have been somewhat unfair of the family court to conclude that "with only a little more effort" she would be able to make up a $60 per week shortfall, we nevertheless agree with the conclusion that Lorrie's change in circumstances was not substantial and, in particular, not continuing. Her unemployment benefits should expire, and Lorrie will undoubtedly acquire, if she has not

[10] KRS 403.213(2).

already, full-time employment, hopefully at a higher rate of income than she was receiving at the time she filed her motion. Obviously, should the income situation become substantial and continuing, such as if she were forced to accept employment at a substantially reduced income, Lorrie is always free to file another motion to modify child support. However, the family court will also be able to determine whether Lorrie could be considered voluntarily underemployed, or if potential income should be applied to her. As to the facts of this case, the family court did not abuse its discretion or commit any error in denying Lorrie's motion to reduce her child support obligation. The record contains substantial evidence to support a finding that the material change in circumstance is not substantial and continuing.

Lorrie next argues that the family court abused its discretion when it awarded attorney fees and costs to Tony. She limits her argument to the lack of evidence Tony introduced, which would have been subject to her cross-examination, meaning that she was denied her right of confrontation. Tony disputes this argument, asserting that Lorrie failed to contest the affidavits detailing the fees incurred and that the award did not constitute an abuse of discretion.

KRS 403.220 provides:

> The court from time to time after considering the financial resources of both parties may order a party to pay a 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 Wilhoit v. Wilhoit, the former Court of Appeals held that in light of KRS 403.220, "an allocation of court costs and an award of an attorney's fee are entirely within the discretion of the court."[11] More recently, our Supreme Court held:

> The amount of an award of attorney's fees is committed to the sound discretion of the trial court with good reason. That court 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.[12]

In the present matter, we note that the documentary record does not reflect that the family court considered the financial resources of both parties in awarding attorney fees. However, we shall assume that the videotaped record, which is not part of the record on appeal, supports the family's court's ruling.[13] We cannot hold that the family court abused its discretion in so awarding fees, based upon the lack of basis for

[11] 521 S.W.2d 512, 514 (Ky. 1975).
[12] Gentry v. Gentry, 798 S.W.2d 928, 938 (Ky. 1990).
[13] Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985).

the motions filed and the reasonableness of the fees requested.[14] We perceive no abuse of discretion in the award of fees, or in the entry of a common law judgment in favor of attorney Holloway.

Lastly, we shall address Lorrie's argument that the family court erred when it jailed her for contempt without first entering an order from which she could file a motion to vacate. She relies upon KRS 426.030 to support her argument, and requests that this Court reverse the order sentencing her to 180 days in jail. Tony argues that KRS 426.030 does not apply to this situation, and that in any event she was afforded the opportunity at a hearing to defend against the contempt charges while represented by counsel.

In Lewis v. Lewis,[15] cited by Tony in his brief, the Supreme Court of Kentucky recognized "the inherent power of the trial court to enforce its judgment by means of incarceration of a person who is found in contempt of the lawful orders of the court. Such action is extraordinary and subject to certain limitations. The contempt power should not be used to require the doing of an impossible thing." In other words, the trial court must determine whether the contemnor has sufficient means to pay the amount at issue in the proceeding. "[T]he ability of

[14] In the affidavit supporting the request for the $500 fee, attorney Holloway's billed fees amounted to $1,170.
[15] 875 S.W.2d 862, 864 (Ky. 1993).

a debtor to satisfy a judgment is a question of fact to be determined by the trial judge."[16] Furthermore, the Lewis court held, "[t]he trial court must hold a hearing and allow the contemnor to explain through counsel, or pro se, why he or she should not be incarcerated for civil contempt of court."[17]

In the present matter, the family court held a contempt hearing, during which, we presume, Lorrie was able to present a defense against the charges, satisfying her due process rights. In the Sentencing Order, the family court made a clear finding that Lorrie was able to pay and comply with its orders, citing specifically to its April 25, 2003, order in which it found that her change in circumstance was not substantial and continuing. The record contains substantial evidence to support this finding of Lorrie's ability to pay. Furthermore, the family court properly conditioned Lorrie's incarceration upon the purging of the contempt. In fact, Lorrie purged herself of contempt, and in doing so, erased the 180-day sentence. Again, we perceive no abuse of discretion or error in the family court's Sentencing Order.

For the foregoing reasons, the orders of the Jefferson Family Court are affirmed.

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[16] Id.
[17] Id. at 865.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, ANTHONY JOHN FIORELLO:

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