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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002280-MR

CHRISTIAN SHEA McCUTCHEON — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JERRY J. BOWLES, JUDGE
CIVIL ACTION NO. 02-CI-504001

AMBER NACOLE SMITH
(FORMERLY McCUTCHEON) — APPELLEE

OPINION
AFFIRMING IN PART
AND
REVERSING IN PART

** ** ** ** **

BEFORE: HENRY, JUDGE; HUDDLESTON AND KNOPF, SENIOR JUDGES.[1]

HUDDLESTON, SENIOR JUDGE: Jefferson Family Court held Christian Shea McCutcheon in contempt for violating the terms of a dissolution decree which incorporated and adopted a settlement agreement he had reached with his former wife, Amber Nacole McCutcheon (now Smith). The Family Court also granted common law judgments to Smith, awarding her $1,824.00 and $3,626.00.

[1] Senior Judges Joseph R. Huddleston and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

And, as a sanction for the contempt and because of the disparity in the parties' incomes, the court awarded Smith an attorney's fee to be paid by McCutcheon, although it did not fix the amount of the fee. On appeal, McCutcheon argues that his actions were not contemptuous, that the common law judgments were based on a clearly erroneous finding of fact, and that there was no legal basis for the award of an attorney's fee.

In February 2003, a decree dissolving McCutcheon's and Smith's marriage was entered. The family court adopted and incorporated into its decree a settlement agreement that the parties had reached, two paragraphs of which are relevant to this appeal. In paragraph 16, McCutcheon and Smith agreed that

> [t]he parties shall file separate tax returns for the year 2002. Petitioner [Smith] shall be entitled to claim all deductions related to the residence that she is retaining as her sole property and Respondent [McCutcheon] shall be entitled to all deductions related to the residence he is retaining as his sole property. **The parties can always agree after consulting with an accountant to file a joint tax return for the year 2002.**[2]

In paragraph 8 of the agreement, the parties agreed that McCutcheon would transfer to Smith the sum of $13,500.00 from two savings accounts.

Several months following entry of the decree, Smith sought to have the family court hold McCutcheon in contempt for

[2] Emphasis supplied.

violating the decree, in particular paragraphs 8 and 16 of the incorporated settlement agreement. According to the affidavit that Smith filed in support of her motion, McCutcheon had failed to pay the $13,500.00 to which she was entitled pursuant to paragraph 8 of the parties' agreement. McCutcheon, Smith averred, had also violated paragraph 16 as well. According to Smith, McCutcheon contacted the parties' long-time accountant and sought his advice as to whether they should file joint or separate tax returns for the year 2002. The accountant recommended that the parties file jointly. After consulting with the accountant, McCutcheon told Smith that they would both save money if they filed joint income tax returns. Smith claimed that she told her former husband that if she were to file separately she would receive a tax refund, but if filing jointly would result in a greater refund she would agree to do so.

The parties did file joint tax returns, but instead of receiving a refund as expected, Smith was required to pay additional income taxes amounting to $1,824.00. The parties apparently agreed that McCutcheon would pay Smith's share of the tax burden, $1,824.00, and in return would offset that amount against the $13,500.00 that he owed her. According to Smith, by filing jointly she lost the potential refund she would have received had she filed separately and lost an additional

$1,824.00 that she was required to pay when she filed jointly with her former husband. When McCutcheon refused to pay Smith $13,500.00 as previously agreed and to reimburse her for the additional 2002 income taxes she had been required to pay as a result of filing joint tax returns with him, Smith asked the family court to intervene and hold him in contempt.

Following a hearing on the contempt motion, the family court found that at the end of May 2003, McCutcheon had transferred to Smith $11,676.00 from the savings accounts, but had declined to pay her the remaining balance of $1,824.00. The court determined that he had improperly claimed the $1,824.00 as an offset. So the family court held McCutcheon in contempt and entered a common law judgment for $1,824.00 in Smith's favor.

As to the tax issue, the family court said that

> [T]he parties' agreement to file joint income tax returns for 2002 was based on mutual mistake, in that <u>each</u> party thought they would <u>each</u> mutually benefit from a joint filing. However, the Court finds that Mr. McCutcheon received a benefit by filing jointly and Ms. Smith was damaged in the amount of $3,626.00 by agreeing to the joint filing. Even when Mr. McCutcheon reimburses Ms. Smith, to put her in as good a position as if she [had filed] separately, he still benefits by $1,744.00. Greedily, Mr. McCutcheon wants the benefit of both parties' savings. The Court shall find, in equity and law, that Ms. Smith should be compensated for her loss, even though she is not benefited by the joint filing. Therefore, in order to compensate her for her loss, the Court shall award her a common

> law judgment against Mr. McCutcheon in the amount of $3,626.00, payable immediately.

The family court did not make a finding that Christian had willfully disobeyed any of its orders.

The family court found that there was a substantial disparity between the parties' incomes, and, in reliance on Kentucky Revised Statutes (KRS) 403.220, awarded an attorney's fee to Smith. The court did not set the amount of the fee; instead, it reserved this issue and directed Smith's attorney to file an affidavit in support of her request for a fee. It does not appear from the record before us that an affidavit has been filed nor has a fee been awarded.

On appeal, McCutcheon notes that one of the provisions of the settlement agreement that the family court incorporated into the decree allowed the parties, if they wished to do so, to file joint tax returns for 2002. In order to reform the subsequent agreement to file jointly, McCutcheon argues, Smith had to establish evidence of either fraud or mutual mistake of fact by clear and convincing evidence.[3] As there was no evidence of fraud, the agreement could not be reformed on that ground. Rather, the family court found that the parties had made a mutual mistake of fact and used that finding as the basis for reforming the contract.

[3] *See Mayo Arcade Corp. v. Bonded Floors Co., Inc.,* 240 Ky. 212, 41 S.W.2d 1104 (1931).

McCutcheon argues that the mistake was merely incidental to the transaction between the parties and insists that if Smith had exercised due diligence she would have discovered the mistake. Since the mistake was amenable to discovery, McCutcheon insists, it could not be the basis for equitable relief.[4] And, as Smith did not exercise due diligence, the family court could not reform the agreement based on mutual mistake.

There is no question but that McCutcheon consulted the parties' long-time accountant who recommended that McCutcheon and Smith file joint tax returns and they did so in reliance on that advice. Nor is there any question that had Smith filed separately she would have received a refund and had McCutcheon filed separately he would have had to pay additional taxes. This constitutes substantial evidence that supports the family court's finding of mutual mistake and justifies reformation of the agreement. However, this evidence does not support Christian's argument that Smith failed to exercise due diligence. Therefore, we affirm the judgment awarding Smith the sums of $3,626.00 and $1.824.00 to be paid by McCutcheon.

McCutcheon argues that he and Smith orally agreed that he would pay her share of the 2002 taxes due and would offset that amount against the $13,500.00 he owed her. Inasmuch as

[4] See *Allen Lumber Co. v. Howard,* 254 Ky. 778, 72 S.W.2d 483 (1934).

Smith agreed to the offset, McCutcheon reasons, the family court could not hold him in contempt for violating paragraph 8 of the settlement agreement.

It has long been recognized that the courts of this Commonwealth have the inherent power to punish individuals for contempt.[5] Contempt has been defined as the willful disobedience of a court's order or its rules.[6] Contempt of court falls into two categories: civil contempt and criminal contempt. Civil contempt is distinguished from criminal contempt not by the punishment meted out but by the purpose for imposing the punishment.[7] If an individual refuses to carry out an order of the court, he has committed civil contempt.[8] "While one may be sentenced to jail for civil contempt, it is said that the contemptuous one carries the keys to the jail in his pocket, because he is entitled to immediate release upon his obedience to the court's order."[9] Civil contempt is used to coerce an individual to obey court orders. Criminal contempt differs from civil contempt. When a court seeks to coerce or compel a course

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[5] *Newsome v. Commonwealth,* 35 S.W.3d 836, 839 (Ky. App. 2001).

[6] *Id.*

[7] *A.W. v. Commonwealth,* 163 S.W.3d 4, 10 (Ky. 2005).

[8] *Newsome v. Commonwealth, supra,* note 5, at 839.

[9] *A.W. v. Commonwealth, supra,* note 7, at 10.

of action, the appropriate sanction is civil contempt;[10] but when a court seeks to punish conduct that has already occurred, the appropriate sanction is criminal contempt.[11] The family court held McCutcheon in contempt for violating paragraphs 8 and 16 of the settlement agreement. We will address each in turn.

According to paragraph 8, Smith was to receive $13,500.00 from savings accounts controlled by McCutcheon. McCutcheon paid but $11,676.00. On the surface, it would appear that McCutcheon failed to pay the entire amount due under paragraph 8, and since the family court had incorporated this provision into the dissolution decree, McCutcheon's failure to pay the full amount appears contemptuous. However, McCutcheon paid Smith's additional 2002 taxes in the sum of $1,824.00, and Smith agreed that that amount would be offset against the $13,500.00 that McCutcheon owed her. To justify a finding that an individual is in contempt of its order, the court must find that the individual willfully disobeyed the order.[12] In this case, the parties agreed to the offset (even if there was a mutual mistake of fact as to whether filing jointly would benefit Smith), so McCutcheon did not willfully disobey the family court's order, nor did the court so find. Thus, the

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[10] *Id.*

[11] *Id.*

[12] *Newsome v. Commonwealth, supra,* note 5, at 839.

court erred when it found McCutcheon in contempt for failing to pay Smith the sum of $1,824.00, and we reverse its order doing so. Nevertheless, we agree with the family court that it was appropriate to award Smith judgment against McCutcheon for the sum of $1,824.00, although we do not agree with its basis for doing so.

Paragraph 16 of the settlement agreement provides that the parties could, if they agreed to do so, file joint tax returns for 2002, and in reliance on the advice of their accountant they did so. As has been noted, had Smith filed separately she would have not have owed additional taxes and would have instead received a refund, while McCutcheon would have had to pay additional taxes. Although this evidence supports the family court's finding of mutual mistake, it does not support a finding that McCutcheon willfully disobeyed the court's order. Thus, there was no basis for holding McCutcheon in contempt.

McCutcheon argues that there was no legal basis for the family court's award of an attorney's fee to Smith. The general rule is that an attorney's fee may not be awarded unless there is a contract or statute that expressly provides for it. However, as Kentucky's highest court said in *Dorman v.*

Baumlisberger,[13] "in equity the award of costs and [an attorney's] fee is largely within the discretion of the court, depending on the facts and circumstances of each particular case."[14] Once an attorney's fee has been awarded, the award will not be disturbed on appeal absent an abuse of discretion.[15]

In the present case, the family court awarded Smith an attorney's fee pursuant to KRS 403.220, which provides that

> [t]he 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.

This statute, however, only applies to proceedings brought under KRS Chapter 403. The judgment for money damages granted by the family court was not based on KRS Chapter 403; it was based, as the court explicitly stated in its order, on common law. Therefore, the family court abused its discretion when it

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[13] 271 Ky. 806, 113 S.W.2d 432 (1938).

[14] *Id.,* 271 Ky. at 809, 113 S.W.2d at 433. *See also Batson v. Clark,* 980 S.W.2d 566, 577 (Ky. App. 1998), and *Kentucky State Bank v. AG Services, Inc.,* 663 S.W.2d 754, 755 (Ky. App. 1984).

[15] *Giacalone v. Giacalone,* 876 S.W.2d 616, 621 (Ky. 1994).

awarded Smith an attorney's fee on top of the common law judgments for money damages.

We affirm that part of the Jefferson Family Court order that awards Smith common law judgments in the sums of $3,626.00 and $1,824.00. We reverse those portions the court's order holding McCutcheon in contempt and awarding Smith an attorney's fee.

HENRY, JUDGE, CONCURS.

KNOPF, SENIOR JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

KNOPF, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I respectfully dissent from that portion of the majority opinion which reverses the finding of contempt and award of attorney fees. It is clear under the plain language of KRS 403.180(5) that the terms of a separation agreement which has been incorporated into the decree are enforceable by all remedies available for enforcement of a judgment including contempt. Nor can there be any doubt that a trial judge retains continuing jurisdiction to enforce the terms of a judgment or decree.[16] The use of contempt power as a means of enforcing orders in dissolution proceedings has long been judicially approved in this Commonwealth.[17] The majority opinion suggests that in order to utilize the sanction of contempt a trial judge

[16] *Penrod v. Penrod*, 489 S.W. 2d 524 (Ky. 1972).

[17] *Goodman v. Goodman*, 695 S.W.2d 865 (Ky. App. 1985).

is required to make a specific finding that the violation was willful. I am of the opinion that such a finding is implicit in the trial judge's decision and that no specific finding to that effect is required. The trial court was well within its authority as a fact-finder to conclude that McCutcheon's action in failing to perform his agreement was a willful disregard of its decree punishable by sanctions in the form of attorney fees.

However, even if the contempt sanction could be considered inappropriate, the award of attorney fees should nevertheless be upheld. Although the majority found no legal basis for the award of attorney fees, I am convinced that KRS 403.220 provides the requisite statutory basis. Despite the fact that the trial judge labeled its award a "common law judgment," it nevertheless proceeds from an action for enforcement of a judgment under KRS Chapter 403 and remains under the auspices of that chapter.

Accordingly, because the trial judge specifically awarded attorney fees "both as sanctions for the Court's findings of contempt and due to the disparity of the parties income," even without the finding of contempt he retained authority under KRS 403.220 to require McCutcheon to pay Smith's costs and attorney fees. As noted in *Gentry v. Gentry*,[18] "there is no abuse of discretion nor any inequity in requiring the

[18] 798 S.W.2d 928,938 (Ky. 1990).

party whose conduct caused the unnecessary expense to pay it." In this case, McCutcheon's refusal, for whatever reason, to comply with the requirements of the decree necessitated the proceeding to enforce it.

I would affirm the judgment in all respects.

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