

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002158-ME

K.L., A MINOR CHILD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 04-J-54939-001

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY, and
D.M., MOTHER OF K.L.

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR
JUDGE.

KNOPF, SENIOR JUDGE: K.L., a minor, appeals the August 22, 2007, and

September 5, 2007, orders of the Jefferson Circuit Court, Family Division, denying

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

her motion to hold the Cabinet for Health and Family Services (CHFS) in contempt. We affirm.

On October 20, 2004, following the filing of a dependency, neglect or abuse action by CHFS, K.L. was removed from the custody of her mother, D.M., and her stepfather, and placed in the temporary custody of her maternal grandparents. K.L.'s case was subsequently closed by CHFS. Almost three years later, on June 18, 2007, D.M. filed a motion to regain custody of K.L. The motion was heard on June 27, 2007, and no one representing CHFS was present. D.M.'s motion was granted, by agreement of those parties attending, with certain conditions, including no corporal punishment.

On July 16, 2007, CHFS received a call to the child abuse hotline reporting that K.L. had been returned to the custody of her mother and stepfather, and that K.L. had been slapped in the face by her stepfather. The caller also reported that a review was scheduled in K.L.'s case for July 25, 2007.

The parties returned for a review on July 25, 2007, and again CHFS failed to attend. At this time, K.L.'s guardian ad litem (GAL), informed the court of the new allegations and also voiced concern that K.L. had been removed from her psychiatric treatment. The trial court then ordered CHFS to reopen its case concerning K.L. and to investigate any new allegations. The matter was set for a review on August 15, 2007.

At the August 15, 2007, review, a court support worker, Venus Cardell,² appeared on behalf of CHFS. No attorney appeared on behalf of CHFS. The GAL, after reminding the court of its July 25, 2007, order for CHFS, stated that he would be making a motion for a finding of lack of reasonable efforts and for a finding of contempt against CHFS. At the request of the GAL, the court placed K.L. in the temporary custody of CHFS. The case was set for another review on August 22, 2007. On August 17, 2007, the GAL filed his motion, asking the court to find that CHFS had failed to provide reasonable efforts to provide services for K.L. and that CHFS was in contempt of court for failure to comply with the court's July 25, 2007, order, and for the failure of an assigned worker to attend the August 15, 2007, hearing. CHFS did not file a response.

On August 22, 2007, the case worker, Edin Smhalagic, and an attorney for CHFS, Tara Hagerty, attended the review. After a hearing, the trial court found that although it appeared as though nothing had been done by CHFS on K.L.'s case, it would not make a finding of contempt but would find that reasonable efforts were not made and that the case would be continued in order to allow CHFS to redeem itself.

On August 30, 2007, the GAL filed a motion to alter, amend, or vacate pursuant to CR³ 59 to which CHFS filed an objection. Specifically, the

² Ms. Cardell was not the CHFS worker assigned to K.L.'s case. It was later testified by the assigned CHFS investigating worker, Edin Smajlegic, that Ms. Cardell was present at the August 15, 2007, review, because he had asked her to cover him.

³ Kentucky Rules of Civil Procedure.

GAL sought to have the trial court hold CHFS in contempt. The motion was denied at a hearing on September 5, 2007. This appeal followed.⁴

On appeal, K.L., through her GAL, argues that the trial court erred by failing to hold CHFS in contempt, despite its finding that CHFS had failed to comply with its previous order. K.L. believes that CHFS should be found in contempt and fined. D.M. agrees with K.L.'s argument.

Contempt falls into two categories: civil and criminal. Refusal to abide by a court's order is civil contempt. *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky.App. 2001). Criminal contempt includes: obstruction of justice; obstruction of the court process; displayed disrespect for the court; degradation of the court's authority; bringing the court into disrepute; or contaminating the purity of the court. *A.W. v. Commonwealth*, 163 S.W.3d 4, 11 (Ky. 2005) (citations omitted).

The two types of contempt are distinguishable not by the punishment they impose, but for the purpose of their imposition. *Id.* at 10. A civil contempt order is designed to coerce or compel a course of action, whereas a criminal contempt order is designed to punish conduct that has already occurred, or to vindicate the court's authority. *Id.* "When contempt is criminal in nature, it is necessary for all elements of the contempt to be proven beyond a reasonable doubt." *Commonwealth v. Pace*, 15 S.W.3d 393, 396 (Ky.App. 2000). "Evidence

⁴ On November 7, 2007, the Court entered a show cause order questioning the finality of the order from which this appeal stems. A response was filed on November 27, 2007, after which the matter was passed to this panel. After reviewing the record, we believe that this is an appropriate appeal of a final order.

necessary for a finding of contempt must show willful disobedience toward, or open disrespect for, the rule or orders of a court.” *Id.*

When a court exercises its contempt powers, it has nearly unlimited discretion. Consequently, we will not disturb a court's decision regarding contempt absent an abuse of its discretion. The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Meyers v. Petrie, 233 S.W.3d 212, 215 (Ky.App. 2007) (citations omitted).

After reviewing the record, it is clear that CHFS did not receive proper notice of D.M.'s June 18, 2007, motion. Furthermore, it is questionable which, if any, of the court proceedings after June 18, 2007, and before August 15, 2007, CHFS was actually made aware. It appears also that the trial court recognized that this situation was one resulting from a breakdown in communication and not willful disobedience or disrespect for the court. This is evidenced by the court's refusal to punish the assigned worker for the breakdown in communication within CHFS but instead entered a finding that reasonable efforts were not made and continuing the case to allow CHFS to complete its investigation.

“The courts' discretionary power necessarily includes the power to refrain from imposing sanctions and fines in the face of compliance.” *Smith v. City of Loyall*, 702 S.W.2d 838 (Ky.App. 1986). CHFS filed a brief report with the trial court on August 22, 2007. On September 5, 2007, after being given an

opportunity to complete its investigation, CHFS filed a more substantial report, showing compliance with the trial court's order to investigate the new allegations.

We recognize that the breakdown of communication in proceedings regarding the well being of a minor child can be especially harmful. However, K.L. has failed to show harm from CHFS's error, in that it was remedied in a timely manner. Accordingly, K.L. has failed to show an abuse of the trial court's discretion in refusing to enter a finding of contempt.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher Harrell
Guardian Ad Litem
Louisville, Kentucky

BRIEF FOR APPELLEE, CABINET
FOR HEALTH AND FAMILY
SERVICES:

G. Thomas Mercer
Assistant Counsel
Cabinet for Health and Family
Services
Louisville, Kentucky

BRIEF FOR APPELLEE, D.M.:

John H. Helmers, Jr.
Louisville, Kentucky