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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000803-MR

CHRISTOPHER CIRULLI APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 96-CI-02132

JANA PENDERY APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Christopher Cirulli appeals the Kenton Family Court's April 3, 2012 Opinion and Order addressing certain financial issues affecting the parties' two minor children. Cirulli contends the family court ignored its prior ruling(s) when it refused to consider selected expenses submitted by him totaling $18,078.88. We agree, and so must reverse and remand.

Cirulli and Pendery married in 1991. Two children were born of the marriage. Pendery petitioned for dissolution of the marriage in 1998.[1] On December 20, 1999, the family court entered the decree of dissolution, which reserved matters concerning child custody, child support, and timesharing.

Over the course of several months, the family court received evidence and heard arguments concerning the reserved issues. By opinion and order entered on July 24, 2000, the family court resolved those issues (July 2000 Order). The order's specific details are not relevant here. Suffice it to say that the family court: granted the parties joint custody of the children; ordered Cirulli to pay $2,200.00 in monthly child support; and equitably allocated the children's remaining expenses between the parties.

A period of peace ensued lasting almost ten years, but sadly was not to last. In what appears to be a feverish attempt by both parties to "one up" the other, each filed numerous competing motions between 2010 and 2012. Child support and payment of the children's expenses were at the heart of the parties' dispute.

Specifically, in 2010 the parties each filed a motion seeking to hold the other in contempt for non-payment of certain expenses under the July 2000 Order. The family court set the matter for a hearing on January 28, 2011. At that hearing, the parties advised the family court that they had reached an incredibly detailed agreed order resolving their differences (January 2011 Agreed Order).

[1] Pendery initially sought dissolution in 1996. Before a decree of dissolution was entered, the parties reconciled. When those efforts failed, an amended petition was filed in 1998.

The agreed order identified precisely which party, going forward, would be responsible for which expenses related to the children. Counsel for Cirulli read the agreement into the record. The parties then confirmed, under oath, that counsel had accurately stated the terms of the parties' agreement; that this was in fact their agreement; and that it was their complete agreement. The family court tasked Cirulli's counsel with reducing the agreement to writing, achieving the necessary signatures, and filing the agreed order with the family court.

Despite the appearance of cooperation, the parties continued to bicker incessantly over the terms of the agreed order. Pendery ultimately refused to sign the agreement, and another round of motion practice occurred. This time, each party sought to hold the other in contempt for failing to pay certain expenses under the terms of the January 2011 Agreed Order. Cirulli also moved the family court to formally enter the January 2011 Agreed Order.

Another hearing was held on June 16, 2011. During the hearing, the family court stated:

> I want the Order [*i.e.*, the January 2011 Agreed Order] in my hand by the close of business tomorrow. Then I want you within 30 days -- you're to exchange all these things that you say should have been paid ***under the terms of this Order***. I do not allow offsets in my Court. Each of you will pay what you are to pay – period – with no offsets. Ok. I'll give you 30 days, each side to get current on what you guys are going to owe.
>
> . . . .
>
> I'm to have the Agreed Order from our last session [in January 2011] together by 4:30 tomorrow. . . . The

> parties have 30 days from that order [*i.e.*, the January 2011 Agreed Order] being entered [which occurred on June 17, 2011] to give to each other ***the expenses or whatever they say the other owes a share out of that order***, all the pending stuff.

(June 16, 2011 hearing; emphasis added). The family court's docket sheet from that date memorialized its oral ruling. (R. at 725).

The January 2011 Agreed Order was formally stamped entered on June 17, 2011. The family court also entered an order on June 22, 2011 memorializing the verbal instructions it gave during the June 16, 2011 hearing. The June 22, 2011 order states, in pertinent part: "[w]ithin thirty (30) days of the date hereof, each of the parties shall submit to the other proof of whatever expenses he/she incurred on behalf of the parties minor children and for which he/she is seeking reimbursement ***pursuant to the Order entered herein on June 1[7], 2011***." (R. at 731) (emphasis added).

In the months that followed, the parties exchanged bills and expenses. Still unable to resolve their differences, the parties again filed competing contempt motions. Another hearing was held on December 2, 2011. The family court stated that that its intent in June 2011 was to "force each party . . . within 30 days [to] just cough up every bill you say the other owes – old rule, new rule – whatever it is, cough it up, get the other the documentation and then pay within 30 days or protest it." Because of the confusion surrounding the family court's prior rulings, the court afforded the parties up to ten days before their next hearing to identify any additional unpaid expenses and bills:

> I'm going to let you up to ten days before that hearing to add any more you say you haven't been paid, ok, so I can get them all done up to ten days before the hearing. So anything else that you have submitted you've gone 30 days and you either got a written protest or you didn't get paid and you didn't get a response, you can up to ten days before the date of that hearing just file a list or however you want to do so that it's in writing. We know what it is and I'll take those up too. And, I'm going, you know, we're probably going to set aside a few hours I'm going to wipe them all out.

Likewise, the family court's December 2, 2011 docket sheet states: "new hearing date – on each party's expenses – can add to them up to ten days before hearing." (2nd R.[2] at 80). Thereafter, on January 9, 2012, the family court entered an order stating, among other things:

> The parties are to obtain a hearing date. At that hearing the Court will hear evidence as to any and all medical, dental, vision, daycare and extracurricular expenses incurred by either of the parties on behalf of their minor children. This Court Ordered at an earlier hearing that parties were to exchange within 30 days of this Court's order of June 22, 2011 documentation of those expenses. The purpose of that order was to give the parties a thirty day window to send to the other for any expenses that had not been paid in the past up to the date of that order.

(2nd R. at 81).

The parties obtained a March 16, 2012 hearing date. On March 2, 2012, Cirulli submitted to Pendery additional expenses dating back to as early as 2004. Pointing to the July 2000 Order, Cirulli claimed Pendery's portion of those expenses totaled $18,078.88.

[2] The circuit clerk began a second record in this case, starting with a new page "1", following dismissal of a prior appeal to this Court, *Cirulli v. Cirulli (Pendery)*, 2011-CA-001317 (Ky. App. Dec.14, 2011) (Order dismissing appeal).

Following the March 16, 2012 hearing, the family court entered an opinion and order on April 3, 2012 resolving all outstanding issues. Relevant to this appeal, the family court denied all of the expenses Cirulli submitted on March 2, 2012, stating that "[t]he expenses presented by [Cirulli] that pre-date this Court's June 22, 2011 order shall not be ordered paid. They were to be presented to [Pendery] within 30 days of June 22, 2011, but were not presented until a short time before the hearing." (2nd R. at 196). From this order, Cirulli appealed.

Before this Court, Cirulli contends the family court erred when it denied as untimely the expenses and bill submitted by him on March 2, 2012.

We note at the outset that Pendery failed to file a brief.[3] When that occurs, we have three options: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case. CR[4] 76.12(8). Under the specific facts of this case, we choose to reverse the family court's decision because Cirulli's brief reasonably appears to sustain this result. CR 76.12(8)(ii).

The family court deemed untimely the expenses Cirulli submitted on March 2, 2012. Specifically, the family court faulted Cirulli for not notifying

[3] Pendery's brief was stricken for failing to comply with CR 76.12. This Court afforded Pendery additional time in which to re-file her brief; she failed to avail herself of that opportunity.
[4] Kentucky Rules of Civil Procedure

Pendery of these expenses within 30 days of June 22, 2011. We agree with Cirulli that he was not required to do so.

The family court's June 16, 2011 verbal ruling, June 16, 2011 docket sheet entry memorializing that ruling, and its June 22, 2011 order all state that the parties were required to exchange within 30 days proof of any expenses that they were claiming should have been paid ***under the terms of the January 2011 Agreed Order***. The circuit court's rulings do not touch upon or discuss outstanding expenses related to the July 2000 Order. Cirulli claimed reimbursement for those expenses submitted on March 2, 2012, pursuant to the July 2000 Order, not the January 2011 Agreed Order. Accordingly, the March 2, 2012 expenses fall outside of the thirty-day window imposed by the family court.

Furthermore, and perhaps more importantly, during the December 2, 2011 hearing, the family court afforded the parties additional time – up to ten days before the next scheduled hearing – to add to his or her list of submitted yet unpaid bills and expenses. This ruling was without qualification. The family court again memorialized its ruling on its daily docket sheet.

We agree with Cirulli that the family court's latter rulings permitted him (and Pendery) to submit any and all outstanding expenses – whether claimed under the July 2000 Order or the January 2011 Agreed Order – if done at least ten days before the March 16, 2012 hearing. Cirulli complied. He submitted his additional expenses on March 2, 2012. This was more than ten days before the March 16, 2012 hearing.

All of the family court's rulings and orders before entry of the final and appealable April 3, 2012 Opinion and Order were interlocutory in nature and therefore could have been altered at any point. *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 103 (Ky. App. 2011) ("A court's authority for reconsidering an interlocutory order is actually found under common law and in CR 54.02 which make such orders 'subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.'" (quoting CR 54.02)); *Bank of Danville v. Farmers Nat'l Bank of Danville, Ky.*, 602 S.W.2d 160, 164 (Ky. 1980) ("Order was interlocutory and subject to change by the trial court at any time prior to the final adjudication."). The record indicates, however, that no subsequent order modified the family court's "ten day" ruling. The January 9, 2012 order did not countermand the December 2, 2011 order. Instead, we read the family court's January 9, 2012 order as simply recounting the case's history and summarizing the family court's prior orders. The January 9, 2012 order makes no mention of the family court's 10-day ruling, and in no way alters or amends it.

Because Cirulli's brief reasonably supports his position that the family court erred when it denied his expenses as untimely, we reverse and remand for additional proceedings consistent with this opinion. On remand, we direct the family court to consider only those expenses submitted by Cirulli on March 2, 2012. This opinion shall not be construed as in any way suggesting an outcome of that review.

The family court's exasperation with the parties is evident and certainly justified. The family court described the parties as "dysfunctional parents who are being manipulated by their kids about money" and who desperately need "co-parenting therapy more than anything else." The record certainly confirms the family court's assessment. We implore the parties – and their attorneys – to act with the upmost professionalism on remand, and to afford the family court the proper deference and respect to which it is certainly entitled.

For the foregoing reasons, we reverse the Kenton Family Court's April 3, 2012 order only to the extent that the family court deemed untimely those expenses submitted by Cirulli on March 2, 2012 and remand for additional proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Deanna L. Dennison
Covington, Kentucky

NO BRIEF FOR APPELLEE