

RENDERED: SEPTEMBER 21, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000228-ME

ERIN LEANELL CASH

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT  
HONORABLE DANIEL BALLOU, JUDGE  
ACTION NO. 07-CI-00625

JOSHUA DAVID MCFARLAND AND  
SANDRA REEVES

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \*\*

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND KRAMER, JUDGES.

KRAMER, JUDGE: Erin Galliher (f/k/a Erin Cash) appeals the Whitley Circuit Court's order holding her in contempt and modifying the timesharing of Joshua McFarland with their minor child. After careful review of the record and applicable law, we find no error in the court's determination. Therefore, we affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Erin and Joshua are the parents of K.A.M. (“Child”), born in 2007.

Following Child’s birth, Erin filed a petition for custody in Whitley County. In 2008, Erin and Joshua entered an agreed order of joint custody, which designated Erin as primary residential parent and granted timesharing to Joshua. At some point Erin moved out of state with Child without giving Joshua notice or seeking permission from the court. Between 2010 and 2016, Erin and Child moved several different places throughout the country, finally settling in Georgia. Throughout this time, Joshua continued to live in Kentucky. Despite the unannounced relocation, the parties worked together amicably since the agreed order in 2008.

In 2016 Joshua moved to transfer venue of the case to Fayette County where he resided. Once transferred his intention was to have timesharing modified. In October 2016, the circuit court declined to transfer venue and ordered the parties to mediate a timesharing agreement. Erin and Joshua reached an agreement modifying Joshua’s timesharing schedule, which was recited into the record and later reduced to writing. Thereafter, the ability of the parties to work together amicably deteriorated significantly.

The first instance of this deterioration revolved around Child’s juvenile diabetes diagnosis. Erin became concerned that Joshua would not be able to properly take care of Child. To calm Erin’s concerns, Joshua agreed to attend

medical certification training to learn how to properly manage Child's diabetes. Joshua promptly completed the training, so he could exercise his Christmas 2016 visitation. He also ensured that his girlfriend and his mother got the proper training so they could be back-up caregivers. Erin complained that Joshua's training was inadequate and demanded that he complete another training course. To appease Erin, Joshua promptly completed three additional training programs, so he could exercise his Christmas timesharing.

Following the completion of these trainings and prior to Christmas timesharing, Erin refused to permit her attorney to execute the October 2016 agreed order.<sup>1</sup> Although she orally agreed, Erin refused to allow her attorney to sign the order, which led him to move to withdraw from the case. The order was ultimately executed and entered. Despite the various attempts by Erin to interfere with the Christmas 2016 timesharing, Joshua was able to enjoy that time with Child.

In March 2017, Erin filed an "Ex Parte Motion to Restrict Respondent's Visitation," which would restrict Joshua's spring break timesharing. Included in Erin's motion was an affidavit where she alleged that: (1) Joshua

---

<sup>1</sup> Although the October 2016 was recited into the record, it was not entered until January 5, 2017.

could not take care of Child's medical needs because of the Dexcom<sup>2</sup> meter readings she received of Child's blood sugar during the Christmas 2016 timesharing; (2) Joshua did not recalibrate the Dexcom meter; (3) she had to assist Child over the phone to help her do so; (4) Child had experienced several low drops in her blood sugar; and (5) Child was "terrified" to stay a week with Joshua because of what occurred during the Christmas 2016 timesharing. Erin never communicated any of these concerns to Joshua prior to filing this motion. The circuit court denied the motion, and Joshua was able to exercise his timesharing with Child during her spring break in 2017.

Erin continued her attempts to hinder Joshua's timesharing by filing a motion to compel Joshua to undergo a drug screen. Erin alleged that Joshua had posted memes and articles on social media about drugs, which caused her to believe that he was using illegal drugs. The circuit court ordered both Erin and Joshua to get drug screened, and both screens came back negative.

Shortly thereafter, Joshua moved to compel Erin to produce Child for timesharing. On June 8, 2017, a hearing was held, and the circuit court granted Joshua's motion. That same day, the parties made another timesharing agreement with specific dates, which was recited into the court's record and later reduced to writing.

---

<sup>2</sup> A Dexcom meter is a medical device, which monitors one's glucose level. It tracks activity in real time and delivers the readings to a compatible smart device or Dexcom Receiver.

Erin's next attempt to interfere with Joshua's timesharing occurred on June 11, 2017. Erin took Child to Joshua's residence for the first week of summer timesharing. Upon arrival, Child did not have an overnight bag or her stuffed animal that she slept with at night. Child refused to get out of the vehicle and go with Joshua. Because Child refused to go with Joshua, he suggested that everyone go to dinner together so that he could spend some time with Child. Child ended up leaving dinner with Erin, and they planned to stay the week at Erin's mother's home in Whitley County. Eventually, Child agreed to stay Saturday night with Joshua at his residence and spend Father's Day with him, which was the next day. After midnight that Saturday night, Erin arrived at Joshua's residence, unannounced, where she continuously knocked on the door, demanded to see Child, and claimed Child was having a medical emergency. Joshua called the Fayette County police, who upon their arrival, performed a wellness check on Child. The officer found that Child was safe and ordered Erin off the premises. Shortly thereafter, Erin's brother, a Kentucky State Vehicle Enforcement Officer, arrived at Joshua's home to see Child, which Joshua allowed before asking him to leave.

Joshua was again unable to exercise his timesharing on June 23, 2017. On this day, Joshua drove to Georgia to pick up Child and exercise his second week of summer timesharing. Joshua called the local police to accompany him to

Erin's home. Upon arriving at Erin's residence, Erin refused to turn Child over to Joshua and asked him to produce a signed order stating she had to. Joshua had the June 8th agreement, but it was not signed and entered until June 28, 2017, resulting in him leaving Georgia without Child.

On July 1, 2017, Joshua filed a motion for contempt, make-up timesharing, reimbursement of costs for travel to Georgia, and attorney's fees. A hearing was scheduled for July 6, 2017. However, the circuit court appointed Child a Friend of the Court and advised the parties to try to come up with an agreement on their own. The circuit court explained that if a hearing was held and a ruling on the motion had to be made, Erin would likely be held in contempt, incarcerated, and Joshua would have custody during that time.

The parties met with their counsel, the Friend of the Court, and at times Child to negotiate an agreement. Once the parties came to an agreement, the circuit court decided the specific dates of Joshua's timesharing, at which time the agreement was recited into the record. It further ordered that Child was to go with Joshua immediately following court to begin timesharing. Erin asked the court what she was supposed to do if Child refused to go with Joshua. The circuit court explained that Joshua had the right to physically take Child if that is what he decided to do.

Following the explanation, Erin led Child down the stairs of the courthouse, accompanied by her mother, husband and brother.<sup>3</sup> Joshua and the Friend of the Court followed Erin and Child down the stairs, where Erin's family berated and yelled at them. Once outside the courthouse, Erin and Child continued to cling together, while Joshua continued to be berated. The growing hostility outside the courthouse led counsel for both parties to contact the court to see how they should proceed. The court instructed security to order Erin's family off the premises and to effectuate Joshua's timesharing. Joshua tried to physically take possession of Child as he was told he could do by the Court. Erin merely removed her hands from Child but did not do anything to assist Joshua in physically taking Child. When Joshua attempted to physically take possession of Child, Erin's brother attempted to confront him and had to be restrained by security. Ultimately, Joshua decided to allow Child to stay with Erin to avoid any further altercations or distress to Child.

Following that incident, timesharing was to occur the last week of July. Erin and Joshua were to meet in Asheville, North Carolina, a half-way point, to exchange Child. As an attempt to hinder timesharing, Erin filed another "Ex Parte Motion to Restrict Respondent's Visitation" on July 21, 2017, two days before Joshua's timesharing. In this motion, Erin alleged that visitation should be

---

<sup>3</sup> Of note, brother was in his full police uniform at the time of this incident.

restricted due to Child's being extremely reluctant to go. She also alleged that Joshua's girlfriend had a criminal record that showed an active bench warrant for arrest stemming from a hit and run. Consequently, Erin refused to allow Joshua to exercise his timesharing that week. Thereafter, Joshua filed a "Re-Notice of Motion for Contempt for Failure to Abide by Timesharing Guidelines" and a "Motion for Sanctions and Attorney's Fees." These motions were set for hearing in September 2017.

At the hearing, Joshua introduced evidence to support his motions, which included his testimony as to the various incidents that have occurred over time, the Friend of the Court's testimony as to the incident that occurred at the courthouse on July 6th, and the surveillance video of the July 6th incident. In support of her motion to restrict, Erin testified as to her versions of events. At the end of the lengthy evidentiary hearing, the circuit court explained that the conduct of Erin was an "outrageous disgrace." It further explained that the relationship between Joshua and Child had been harmed by the conduct of Erin; that she had violated prior court orders; that she had interfered with timesharing; and that she failed to facilitate and encourage Child to engage in timesharing.

On September 14, 2017, the circuit court entered an order ruling on all motions made by Erin and Joshua. The circuit court denied Erin's motion and adjudged her to be in contempt, sentencing her to 179 days of incarceration but



allowing her to purge herself of contempt by continuously abiding by all the court's orders. The order explained that Joshua would have timesharing with Child on alternate weekends; Erin will be responsible for transporting Child back and forth for timesharing; the parties will exchange Child at the Williamsburg Police Department; and set out specific dates for timesharing during holidays and breaks. It further ordered that if Erin failed to comply a bench warrant would be immediately issued, she would be incarcerated, and Joshua would become the primary custodial parent. Regarding attorney fees, the circuit court ordered that Erin pay the amount of \$1,000 directly to Sandra Reeves, Joshua's attorney, within thirty days.

Erin complied with the September 14th order; however, she failed to pay the attorney fees. Erin moved to alter, amend, and vacate the September 14th order. In January 2018, the circuit court ordered Erin to pay Joshua's attorney's fees within seven days or she would be incarcerated for six months and denied her motion to alter, amend, or vacate.

This appeal followed.

### **STANDARD OF REVIEW**

Erin's arguments fall under two categories: timesharing modification and contempt.

In cases involving timesharing modification, this Court must review under the clearly erroneous standard.

Courts are charged to exercise sound discretion with regard to visitation/timesharing modification determinations. *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). “[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR<sup>[4]</sup> 52.01. Appellate review of a trial court’s decision on custody related issues is limited to a clearly erroneous standard. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

*Meekin v. Hurst*, 352 S.W.3d 924, 926 (Ky. App. 2011).

In cases involving contempt, this Court reviews the decision of the trial court under the abuse of discretion standard.

When a court exercises its contempt powers, it has nearly unlimited discretion. *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986). 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.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

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

---

<sup>4</sup> Kentucky Rule of Civil Procedure.

## ANALYSIS

At the outset, we pause to note that Erin does not properly preserve several of her issues for appellate review. Erin's brief failed to provide pinpoint citations or explanations of whether, where, and how the alleged errors were preserved in compliance with CR 76.12(4)(c)(v). Compliance with this rule is essential so that this reviewing Court

can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

*Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012).

Although compliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike this brief for noncompliance. However, due to the nature of this case we will review the issues on their merits.

### *(a) Modification of Timesharing*

Erin argues that the circuit court lacked jurisdiction to modify timesharing, and that modification was not in the best interests of Child. We disagree. The governing statute for modifying timesharing is KRS<sup>5</sup> 403.320. Although neither party filed a specific motion to modify timesharing, there was no need for one for the court to make such a modification.

---

<sup>5</sup> Kentucky Revised Statute.

KRS 403.320(3) states 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.” (Emphasis added.) The circuit court stated in its order that it was in the best interests of Child to have “regular and more frequent” timesharing with Joshua.<sup>6</sup>

The Kentucky Supreme Court has stated in *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008), that “KRS 403.320(3) controls, which allows modification of visitation/timesharing ‘whenever modification would serve the best interests of the child[.]’” By stating that timesharing modification can be done “whenever” the court finds it to be in the best interests of the child, “the legislature effectively gave the family court continuing jurisdiction . . . until the child reaches the age of majority or is emancipated.” *Anderson v. Johnson*, 350 S.W.3d 453, 456 (Ky. 2011). Therefore, the circuit court did not lack jurisdiction to modify timesharing.

Erin also argues that there was no evidence presented that would show that increased timesharing or the transportation arrangement would be in the best

---

<sup>6</sup> Of note, Erin wrongly relies on KRS 403.340 in her modification of timesharing argument. KRS 403.340 is the governing statute for modification of custody, not modification of timesharing.

interests of Child. We disagree. The circuit court relied upon the evidence presented at the hearing and noted in the written order that the relationship between Child and Joshua had been severely damaged. A family court has substantial discretion in determining appropriate timesharing, which we determine equally applies to transportation for timesharing. The circuit court noted at the hearing that the basis for the transportation arrangement was for Joshua to be able to rebuild his relationship with Child.

From our review of the record, there is sufficient evidence to support the circuit court's findings regarding the timesharing modification and the transportation arrangement. Therefore, the finding of the circuit court was not clearly erroneous.

*(b) Contempt*

Erin argues that the circuit court erred when it held her in contempt because no evidence was presented that she willfully disobeyed the circuit court's prior order.

Contempt sanctions are classified as either criminal or civil depending on whether they are meant to punish the contemner's noncompliance with the court's order and to vindicate the court's authority and dignity, or are meant to benefit an adverse party either by coercing compliance with the order or by compensating for losses the noncompliance occasioned.

*Commonwealth, Cabinet for Health & Family Servs. v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011) (citation omitted).

Contempt is the willful disobedience toward, or open disrespect for, the rules or orders of a court. “Contempts are either civil or criminal.” Civil contempt consists of the failure of one to do something under order of court, generally for the benefit of a party litigant. Examples are the willful failure to pay child support as ordered, or to testify as ordered. While one may be sentenced to jail for civil contempt, it is said that the contemptuous one carries the keys to the jail in h[er] pocket, because [s]he is entitled to immediate release upon h[er] obedience to the court’s order.

*Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996) (internal citations omitted).

The circuit court exercised extreme patience with Erin, but Erin nonetheless refused to comply with its orders. Erin had previously been warned that her behavior was contemptuous at a previous hearing. Despite that warning, Erin continued to ignore the orders of the circuit court. The Kentucky Supreme Court has “construed ‘willful’ in the contempt context to mean not merely knowing but intentional, and the difference is along the lines of a conscious purpose to disobey the authority of the court. The disobedience may be reluctant, polite, and regretful[.]” *Cabinet for Health & Family v. J.M.G.*, 475 S.W.3d 600, 620 (Ky. 2015). Erin’s conduct throughout this case has shown her reluctance to

abide by the court's orders on various occasions.<sup>7</sup> Therefore, the circuit court did not abuse its discretion by holding Erin in contempt.

(c) Bench warrant

Erin next contends that for a bench warrant to be issued for her failure to comply with the circuit court's order she is due a new hearing. We disagree. The Kentucky Supreme Court has 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." *Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993). This Court has also explained that "reasonable notice of a charge of contempt and an opportunity to be heard in defense before punishment is imposed are 'basic to our system of jurisprudence.'" *Payne v. Commonwealth*, 724 S.W.2d 230, 231 (Ky. App. 1986) (quoting *Groppi v. Leslie*, 404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972)).

The circuit court held a contempt hearing, during which Erin was represented by counsel and able to present a defense, satisfying her due process rights. In the circuit court's order, Erin was adjudged to be in contempt. The circuit court made it clear at the hearing and in its order that she would be capable

---

<sup>7</sup> It seems from the record that Erin takes issue with the circuit court not using the phrase "willfully hindering" during the hearing. However, the circuit court did use the words in the order, and there is sufficient evidence to support this finding. This Court has previously explained that the "[c]ircuit courts speak 'only through written orders entered upon the official record.'" *Oakley v. Oakley*, 391 S.W.3d 377, 378 (Ky. App. 2012) (citing *Kindred Nursing Ctrs. Ltd. P'ship v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010)).

of complying with this order. It was proper for the circuit court to condition her incarceration upon the purging of her contempt. The issuing of the bench warrant would not violate Erin's due process rights because she is on notice that if she fails to comply, the bench warrant will be issued. Therefore, there was no abuse of discretion.

(d) The contingent change of custody

Erin also presents an argument regarding the portion of the contempt order that would change custody should she fail to purge herself of contempt and be incarcerated. However, the record does not reflect that Erin has been incarcerated for her failure to comply with the contempt order. Without that evidence in the record, there is only a contingent order to change custody. Accordingly, there is no justiciable issue before this Court. "It has been long established that judicial power may constitutionally extend to only justiciable controversies. Therefore, an appellate court is generally without jurisdiction to reach the merits where no 'present, ongoing controversy' or case in controversy exists as the court is unable to grant meaningful relief to either party." *Cabinet for Health & Family Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 382 (Ky. App. 2016) (internal citations omitted) (quoting *Dep't. of Corr. v. Engle*, 302 S.W.3d 60, 63 (Ky. 2010)). Therefore, this is a premature argument and would require this Court to render an advisory opinion.



*(e) Attorney's Fees*

Lastly, Erin argues that she should not have to pay Joshua's attorney's fees. It is clear from the record that the attorney's fees awarded were a sanction for contempt. The proper statute to be applied is KRS 403.240(4) which states, "[t]he court may, if no reasonable cause is found for denial of visitation, award attorney's fees to the prevailing party." The Kentucky Supreme Court has explained that,

the only appropriate award of attorney's fees as a sanction comes when the very integrity of the *court* is in issue. To that end, attorney's fees may be awarded under . . . Civil Rule 37.02 for failing to comply with a court order. Likewise, attorney's fees may be awarded in a contempt action, because the conduct undermined the authority of the court. *See Kentucky Retirement Systems v. Foster*, 338 S.W.3d 788, 803 (Ky. App. 2010). In these instances where attorney's fees are appropriate as a sanction, it is not for the benefit of the individual plaintiff, but because there has been an intrusion on the very power of the court.

*Bell v. Commonwealth, Cabinet for Health & Family Servs.*, 423 S.W.3d 742, 749 (Ky. 2014).

Here, the circuit court awarded attorney's fees as part of the contempt action because Erin continuously disregarded the authority of the circuit court by not abiding by its prior orders. The integrity of the court had been compromised, therefore the circuit court had discretion to award the reasonable amount of \$1,000 in attorney's fees.

**CONCLUSION**

For the above stated reasons, we AFFIRM the September 14, 2017 order of the Whitley County Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Amanda Hill  
Corbin, Kentucky

BRIEF FOR APPELLEE:

Sandra Reeves  
Corbin, Kentucky