

RENDERED: MAY 3, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001077-MR

JENNIFER YVONNE (YOUNG) DIGENIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 12-CI-500193

ALEXANDER GEORGE DIGENIS;
HON. RENE HEINRICH

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Jennifer Digenis Young appeals an order of the Jefferson Circuit Court finding her in contempt for failing to comply with the court's visitation order and awarding attorney's fees to Hon. Rene Heinrich. We vacate and remand.

Jennifer married Alexander Digenis in October 2007, and twin sons were born in 2010. The parties separated in January 2012, and extremely contentious divorce proceedings ensued. The court ultimately determined that Jennifer and Alexander should share joint custody of the children, and a September 2015 order provided that the parties would have equal parenting time. The court ordered that Jennifer would have the children Monday and Tuesday, Alexander would have them Wednesday and Thursday, and the parties would alternate Friday through Sunday each week. The court also determined that Jennifer would have visitation on all holidays in even numbered years, and Alexander would have holiday visitation in odd numbered years. In January 2017, the parties disagreed as to who received visitation on Martin Luther King Day. This dispute led Alexander to file a motion for clarification of the court's visitation order concerning holidays and school breaks. At motion hour on February 13, 2017, counsel for both parties appeared, and the court addressed the motion from the bench. A transcript of the hearing provides, in relevant part:

THE COURT: Did I miss anything?

MS. HEINRICH: The only other thing that I saw in the schedule when I was preparing for this morning is there are a bunch of what I'm going to call little days off school in the Jefferson County calendar. Most of those end up on Mondays, which is Jenny's normal day.

THE COURT: Uh-huh.

MS. HEINRICH: But those can be three-day weekends because of the way that they fall on the Monday.

THE COURT: Or four-day.

MS. HEINRICH: Or four-day if it's a Monday and Tuesday because sometimes they have, like, in-service days and those sorts of things. That's the only other thing that I can think of that we might end up battling over down the road.

THE COURT: Well, hopefully you won't.

MS. LINTNER [Jennifer's then-counsel]: They've had a couple of those days come up just this spring, and Dr. Digenis has had them because it's – it's –

THE COURT: Okay.

MS. LINTNER: -- an odd-numbered year.

THE COURT: I would hope –

MS. HEINRICH: I mean, as long as we do the odd – even/odd thing.

THE COURT: -- that if they are doing it that way, they just keep it. I mean, I really would prefer it to be lock, stock, and barrel alternate years. He gets everything one year. She gets –

MS. HEINRICH: Okay. Okay.

THE COURT: -- everything the next because people can plan that way.

The court's written order addressing the motion hour hearing was entered on February 15, 2017. The order stated:

The Court, having reviewed [Alexander's] motion to clarify, and being otherwise fully advised, does hereby order that the parents shall rotate spring break, from Friday after school until dropping them off again at school when it resumes the following Monday morning, with Father having spring break in odd years and Mother having spring break in even.

It is further ordered that the Thanksgiving holiday has been already determined per prior orders of this Court. Thanksgiving shall be rotated and held from 9 a.m. on Thanksgiving Day until 6:00 p.m. on Friday, the day after.

Fall break shall be rotated each year with Father having odd years and Mother having even.

The written order did not address school in-service days. Thereafter, Jennifer refused to allow Alexander to have visitation with the children when they were out of school for teacher in-service days on Monday, February 27 and Monday, March 13. Alexander then filed a motion for contempt and requested attorney's fees. He alleged Jennifer withheld visitation on the in-service days in violation of the court's verbal order on February 13. The court held a hearing on the contempt motion on May 17, 2017.¹ In addition to the parties, the court also heard testimony from Jennifer's former counsel, Ms. Lintner. The court rendered a detailed order, stating, in relevant part:

¹ The recording of the contempt hearing was not certified as part of the video record on appeal, although Jennifer designated it to be included. Despite the omission, the trial court's detailed written order summarizes the relevant testimony and evidence necessary to resolve the issues on appeal.

After hearing all the testimony and some arguments of counsel, the Court found, on the record, that the Court had entered a verbal order, from the bench, at the Motion Hour of February 13, 2017. Furthermore, that verbal order established that any scheduled days off from school were considered holidays for parenting time purposes and were to follow the alternating pattern the parties currently exercise for holidays.

After making its finding of contempt, the court awarded Alexander his attorney's fees incurred as a result of the motion to clarify and the contempt motion.

Alexander's attorney subsequently submitted an affidavit, and the court entered an order directing Jennifer to pay \$6,425.75 to Ms. Heinrich. The court denied Jennifer's motion to alter, amend, or vacate, and this appeal followed.

We are mindful that a trial court has broad authority when exercising its contempt powers; consequently, our review is limited to a determination of whether the court abused its discretion. *Kentucky River Community Care, Inc. v. Stallard*, 294 S.W.3d 29, 31 (Ky. App. 2008). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

"Contempt may be either civil or criminal, depending upon the reason for the contempt citation." *Crowder v. Rearden*, 296 S.W.3d 445, 450 (Ky. App. 2009). "A civil contempt occurs when a party fails to comply with a court order for the benefit of the opposing party, while criminal contempt is committed by

conduct against the dignity and authority of the court.” *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986). “It is not the fact of punishment but rather its character and purpose, that often serve to distinguish civil from criminal contempt.” *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996) (internal quotation marks and citation omitted). Sanctions for criminal contempt “are meant to punish the contemnor’s noncompliance with the court’s order and to vindicate the court’s authority[.]” *Commonwealth, Cabinet for Health and Family Services v. Ivy*, 353 S.W.3d 324, 332 (Ky. 2011). In contrast, sanctions for civil contempt “are meant to benefit an adverse party either by coercing compliance with the order or by compensating for losses the noncompliance occasioned.” *Id.*

Jennifer contends that the court found her in criminal contempt of the visitation order because the sanction of attorney’s fees was meant to punish her for noncompliance. We disagree and believe the court’s finding was one of civil contempt because the court found Jennifer failed to comply with a visitation order, which was for Alexander’s benefit. After finding Jennifer in contempt, the court ordered her to comply with the visitation schedule and imposed attorney’s fees as a sanction to compensate Alexander for expenses he incurred litigating the visitation/contempt issue.

“In a civil contempt proceeding, the initial burden is on the party seeking sanctions to show by clear and convincing evidence that the alleged

contemnor has violated a valid court order.” *Id.* (citation omitted). In the present case, Alexander submitted the transcript of the February 13, 2017, hearing to establish that Jennifer violated a valid court order when she withheld visitation on February 27, March 13, and May 5. Jennifer argues that the verbal statements made by the court during the motion hour hearing did not constitute a valid court order. Jennifer notes that she was not present at the hearing, and the court did not address the issue of school in-service days in its written order following the motion hour hearing.

At the outset, we would note the court’s alleged “verbal order” took place during a motion hour proceeding wherein no hearing on Alexander’s motion was held. Moreover, it was undisputed that Jennifer was not present at motion hour, nor did she have actual notice of the judge’s statements. Furthermore, we note that the court subsequently entered a written order concerning some of the issues addressed at motion hour; however, no written order was entered concerning the court’s “clarification” that “scheduled off days from school” should be included in “holiday” parenting time. Under the facts presented, we must decide whether the court’s oral ruling constituted a valid order supporting the subsequent finding of contempt. We hold the court’s oral pronouncement was not a valid order; consequently, the contempt order must be vacated.

In Kentucky, it is well-settled law that a circuit court “speaks only through written orders entered upon the official record.” *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010). More specifically, for a court’s order to take effect, it must be in writing, signed by the judge, and entered into the record by the clerk. *Murrell v. City of Hurstbourne Acres*, 401 S.W.2d 60, 61 (Ky. 1966). As a result, “an oral pronouncement is not a judgment until it is reduced to writing.” *Brock v. Commonwealth*, 407 S.W.3d 536, 538 (Ky. 2013). Further, this Court cannot consider an oral ruling on appeal “unless specifically incorporated into a written and properly entered order.” *Sloan*, 329 S.W.3d at 349.

Here, while the trial court may have considered designating in-service days as holidays for visitation purposes, the court clearly did not do so in its written order entered by the clerk on February 15, 2017. The record is clear that the written order addressed only visitation on spring break, fall break, and Thanksgiving; the court’s oral pronouncements as to in-service days were not incorporated into the written order. Under the circumstances presented, we must conclude the judge’s verbal assertions of how she preferred the parties handle in-service days did not constitute a valid order because those statements were not incorporated into the court’s properly entered written order. *See id.* It is clear there was no written order directing Jennifer to allow Alexander visitation on in-

service days; consequently, Jennifer did not violate a valid court order when she withheld visitation on in-service days. The court abused its discretion by finding Jennifer in civil contempt and awarding attorney's fees to Alexander; consequently, we vacate the contempt order and remand the matter to the trial court. We view Jennifer's remaining appellate arguments as moot.

For the reasons stated herein, the Jefferson Circuit Court's order of contempt is vacated, and this matter is hereby remanded to the court to enter an order denying the motion for contempt.

ALL CONCUR.

BRIEF FOR APPELLANT:

F. Todd Lewis
Louisville, Kentucky

BRIEF FOR APPELLEE:

Rene B. Heinrich
Newport, Kentucky