

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000426-MR
AND
NO. 2002-CA-001553-MR

MELISSA PHEBUS

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 99-CI-03258

BRYAN McCONATHY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. These are two consolidated appeals from orders adjudging appellant in contempt for withholding visitation in violation of the court's visitation orders. Appellant raises several arguments which she maintains entitled her to ignore the court's visitation orders. We deem all of her arguments to be devoid of merit and, thus, affirm.

Appellant, Melissa Phebus, and appellee, Bryan McConathy, were married in 1995 and one child was born of the marriage, Ian McConathy, born May 23, 1995. In September of 1999, Melissa filed a petition for dissolution of the marriage. The parties thereafter entered into a separation agreement wherein Melissa would have sole custody of Ian with Bryan having visitation every Saturday and alternating Sundays. The agreement also contained provisions for weekday and holiday visitation. Immediately after filing this agreement, Melissa began withholding visitation from Bryan, prompting Bryan to file a motion for temporary visitation. In November of 1999, Melissa sought and obtained an Emergency Protective Order alleging that Bryan had sexually abused Ian in February of 1999 and that Bryan had a serious drug and alcohol problem. The court thereupon ordered that the Commonwealth of Kentucky Cabinet for Families and Children (the "Cabinet") and the Fayette County Friend of the Court investigate the allegations and report their findings. The Cabinet at first substantiated sexual abuse by Bryan, but reversed its finding after a full hearing on the matter. The report of the Friend of the Court accepted the ultimate finding of the Cabinet regarding the allegations of sexual abuse by Bryan, but recognized there were areas of concern relative to both parties' mental health and Bryan's use of alcohol and drugs.

In January of 2000, Ian was removed from Melissa's home and placed in foster care because of Melissa's mental instability. Ian was returned to Melissa's custody in June of 2001 and supervised visitation by Bryan was ordered. Thereafter, Melissa again began withholding visitation from Bryan.

On November 8, 2001, an evidentiary hearing was held wherein the court heard evidence on Melissa's allegations regarding Bryan's mental problems, drug and alcohol abuse, and sexual abuse of Ian. At the conclusion of this hearing, the judge determined that Melissa had not proven her allegations, but nevertheless, to be cautious, ordered visitation by Bryan to be supervised by Bryan's mother and stepfather. The court then proceeded to verbally set forth an explicit visitation schedule to be followed by the parties immediately which was ultimately reduced to writing and entered by the court on December 7, 2001. At the hearing, Melissa personally made inquiries of the court and voiced objections regarding this supervised visitation.

Thereafter, Melissa again disregarded the court's order and refused visitation on November 8, 2001, November 22, 2001, November 24, 2001, and December 8, 2001. On December 14, 2001, Bryan moved the court to hold Melissa in contempt for violation of the November 8 visitation order. The court then entered an order requiring Melissa to show cause why she should

not be held in contempt and a hearing thereon was held on February 22, 2002. At the conclusion of this hearing, the court held Melissa in contempt and ordered her to serve 30 days in jail. The court allowed that Melissa could purge herself of the contempt if she began complying with the visitation order.

Despite the contempt ruling, Melissa continued thereafter to refuse to make the child available for visitation. Thus, Bryan filed another motion to have Melissa held in contempt. On June 24, 2002, the court held a lengthy hearing on the contempt motion and allowed Melissa to present testimony and call numerous witnesses regarding her allegations of mental illness/sex abuse/substance abuse by Bryan. On June 28, 2002, the court entered its second order finding that Melissa did not meet her burden of demonstrating why she should not be held in contempt. Consequently, Melissa was held in contempt and sentenced to 90 days in jail, 85 days of which was to be held in abeyance so long as she complied with the visitation order in the future. From the February 22, order and the June 28, order, Melissa now appeals.

Melissa first argues that she could not have been held in contempt for refusing visitation after the November 8, 2001, hearing because the visitation order made pursuant to that hearing was not entered in writing until December 7, 2001. Melissa contends that she had no obligation to comply with the

verbal visitation order entered on November 8, 2001, until it was reduced to writing and entered by the court. As noted earlier, the court's verbal visitation order during the November 8 hearing stated that visitation would be every other Saturday and would start immediately on November 10, 2001. The court even addressed the holiday visitation schedule, which included Thanksgiving, which was prior to the written entry of the December 7, 2001, order. Melissa was present at said hearing and clearly had actual notice of the verbal order, as she personally asked questions of the court regarding the visitation ordered. It has been held that where an individual has actual notice of a court's verbal ruling, violation of said ruling is punishable by contempt. Vaughn v. Asbury, Ky. App., 726 S.W.2d 315 (1987). Melissa attempts to distinguish Vaughn from the instant case by the fact that Vaughn was a case of direct contempt wherein violation of the court's order took place in the court's presence. See Commonwealth v. Pace, Ky. App., 15 S.W.3d 393 (2000). We do not see this as a meaningful distinction. Although Melissa's contemptuous conduct may have taken place outside the presence of the court, it is undisputed that she was in court and aware of the court's verbal ruling at the time it was issued. The cases cited by Melissa as authority for the proposition that an order must be signed and entered by the court to have effect, see Davis v. Bowling Green, Ky., 289

S.W.2d 506 (1955); Staton v. Poly Weave Bag. Co., Ky., 930 S.W.2d 397 (1996); and Charles v. Appalachian Regional Healthcare, Ky. App., 59 S.W.3d 466 (2001), however, are distinguishable by the fact that no verbal orders were entered in those cases. Hence, there was no issue as to whether a prior verbal order was enforceable.

Melissa next argues that she could not be held in contempt for violation of the December 7, 2001, written order of visitation because she did not receive notice of said order since it was mailed to her former counsel who did not forward it to her until late December. Given the undisputed evidence that Melissa had actual notice of the November 8, 2001, verbal visitation order as discussed above, this argument is moot.

Melissa's third argument is that there was insufficient evidence of contempt – that she intentionally acted in willful disobedience or open disrespect for the rules or orders of the court. See Commonwealth v. Burge, Ky., 947 S.W.2d 805, 808 (1997). We disagree. Bryan filed in the record an affidavit specifying the dates that he was refused visitation and testified at the June 24 hearing to these dates. Moreover, Melissa admitted at the June 24 hearing that she had not allowed the visitation. Hence, there was more than sufficient evidence that Melissa willfully violated the visitation order of the court.

Melissa also claims that she was entitled to a full evidentiary hearing on the contempt charge since she was convicted of indirect criminal contempt. "Criminal contempt is conduct 'which amounts to an obstruction of justice, and which tends to bring the court into disrepute.'" Id. (quoting Gordon v. Commonwealth, 141 Ky. 461, 463, 133 S.W. 206, 208 (1911)). "If the court's purpose is to punish, the sanction is criminal contempt." Burge, 947 S.W.2d at 808. Civil contempt is described as follows:

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 his pocket, because he is entitled to immediate release upon his obedience to the court's order. Campbell v. Schoering, Ky. App., 763 S.W.2d 145, 148 (1988).

Id. Direct criminal contempt occurs in the court's presence and may be punished summarily by the court, whereas indirect criminal contempt, which occurs outside the court, requires a hearing and the presentation of evidence to establish the violation of the court's order. Id.

In our view, the contempt adjudged by the court in the present case is more properly characterized as civil contempt because the visitation order was for the benefit of a party

litigant and because Melissa was allowed to purge the contempt citations by following the visitation order. The court's main objective was clearly to elicit compliance with the visitation order. However, even if the contempt is characterized as indirect criminal contempt, we believe Melissa was afforded due process. Melissa was given notice of the show cause hearings, was represented by counsel, and had the opportunity to be heard. Melissa does not allege that she attempted to present certain evidence at these hearings and was denied said opportunity. In fact, at the second contempt hearing, the court allowed Melissa's counsel to call numerous witnesses, including Melissa, the child, a police officer, her mother, her aunt, Ian's teacher, and Bryan's mother and stepfather, to establish she had good cause to deny visitation.

Melissa's next assignment of error is that the trial court erred in denying her motion to modify the visitation order to allow for a neutral supervisor for the visitation. According to Bryan's motion to supplement the record herein, which was granted, this issue is now moot because the court has since appointed a neutral supervisor for the visitation.

Finally, Melissa argues that the court erred in holding her in contempt when she demonstrated good cause pursuant to KRS 403.240 to not comply with the visitation order. "Good cause" is defined in KRS 403.240 as a "reasonable belief

by either party that there exists the possibility of endangerment to the physical, mental, moral, or emotional health of the child, or endangerment to the physical safety of either party, or extraordinary circumstances as determined by the court." Like in other domestic matters, the court's findings of fact regarding visitation will not be overturned if they are not clearly erroneous. Ghali v. Ghali, Ky. App., 596 S.W.2d 31 (1980).

As stated earlier, the court heard much evidence at the June 24 hearing relative to Melissa's claim that she had good cause to refuse to comply with the visitation order. Most of this evidence had previously been heard by the court pursuant to the court's November 8, 2001, order of visitation, from which Melissa did not appeal. The only new evidence was the testimony of Ian, who was then age 7, in chambers. Ian testified that his father had held a handgun on him and threatened to kill him in McDonald's, had touched his privates during a visit, and that Bryan and a friend of his had taken a video of him with his clothes off. However, as noted by the court, there were several inconsistencies within Ian's testimony and from what he had told others about the alleged incidents in the past. Bryan testified at the hearing that he had never owned a handgun. At the conclusion of the hearing, the court adjudged that in viewing all of the evidence, including the Cabinet's ultimate finding

that sexual abuse by Bryan had not been substantiated, he did not believe that Melissa had good cause to deny supervised visitation. The court noted that it had erred on the side of caution in the November 8, 2001, order requiring that the visitation be supervised and that Melissa had never even given the supervised visitation a chance.

We also recognize the inconsistencies as to the circumstances of the alleged abuse within the child's testimony and within the various versions of the allegations offered by other witnesses in the record. The record also contains evidence regarding the mental instability of Melissa and her propensity for depression, paranoia, and delusional behavior. There was some suggestion in the Friend of the Court report that Melissa's mental condition may have contributed to her perception that Ian was sexually abused by Bryan. Melissa maintains her mental problems are the result of a serious physical illness, Lupus, which is now under control.

There was evidence that Bryan may have had a substance abuse problem at some point and that Bryan had been drinking alcohol prior to one of his visits with Ian in February of 2001. However, the results of two random drug tests which the court required were negative with the exception of prescription medications Bryan was taking for medical conditions. There was also evidence of two instances of domestic violence that Bryan

had perpetrated against Melissa during the marriage, although there was no evidence that Bryan had ever physically abused Ian, aside from the allegations relating to sexual abuse and Ian's testimony that Bryan had held a gun on him.

Bryan presented evidence that Melissa had filed a tort action against him during the pendency of the visitation dispute and had offered to dismiss the claim if he agreed to terminate his parental rights to Ian. When questioned about her motive for this offer, Melissa admitted that she wanted to move to Colorado with Ian.

Finally, Bryan's mother and stepfather both testified that they were aware of the allegations against Bryan and stated that they understood and agreed that they were to have direct visual contact with Bryan and Ian at all times during visits. They further agreed that Bryan was not to be under the influence of alcohol during these visits.

In viewing the evidence as a whole, we cannot say that the lower court's finding of a lack of good cause to deny visitation was clearly erroneous. Accordingly, for the reasons stated above, we affirm both orders of the Fayette Circuit Court adjudging appellant in contempt.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard Ducote
New Orleans, Louisiana

Terry Anderson
Nicholasville, Kentucky

BRIEF FOR APPELLEE:

Patrick F. Nash
Lexington, Kentucky

Brian P. Gilfedder
Lexington, Kentucky