

RENDERED: July 15, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-000465-ME
AND
NO. 2004-CA-001567-ME

JULIE MAUDE POLSTON CLARK

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 00-FC-001587

KENNETH RAY CLARK, SR.;
STEPHEN M. GEORGE, JUDGE,
JEFFERSON FAMILY COURT

APPELLEES

OPINION
REVERSING

** ** *

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: We consider herein, collectively, two
appeals brought by Julie Maude Polston Clark, Case No. 2004-CA-
000465-ME and Case No. 2004-CA-001567-ME. The appeals are from

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

various orders of the Jefferson Family Court, including an order transferring primary residential custody of the parties' two minor children to appellee Kenneth Ray Clark, Sr. Because Kenneth's motion to modify custody did not comply with the requisite affidavit requirements contained in Kentucky Revised Statutes (KRS) 403.340 and KRS 403.350, we are compelled to reverse the family court's July 7, 2004, order transferring primary residential custody of the children.

All other issues raised by Julie in her two appeals, except one, challenge the family court's custody modification order and are unlikely to arise again upon any further custody modification proceedings. Based upon our disposition of the custody modification issue, these issues are moot and need not be addressed on the merits. However, Julie's contention that the family court erred by holding her in contempt and incarcerating her for failure to comply with its orders is not mooted by our disposition of the custody modification issue. Because the family court improperly imposed a definite sentence of 180 days for civil contempt, and because the court further failed to provide a means for Julie to purge herself from the contempt, we vacate any remaining unserved time on the 180-day sentence.

Julie and Kenneth were married On July 14, 1992, in Bermuda. The parties have two children, Kenneth Ray Clark, Jr.,

born June 28, 1994, and Kolton Robert Clark, born June 7, 1996. On February 21, 2000, Julie filed a Petition for Dissolution of Marriage in Jefferson Family Court. Protracted and acrimonious litigation has occurred since that time.

Kenneth was incarcerated in federal prison at the time the petition for divorce was filed, having originally been incarcerated on July 9, 1996. In the spring of 2001, Julie moved with the children to Ft. Myers, Florida. Kenneth was released from Federal prison on June 8, 2001. At some point Julie returned with the children to Louisville.

On January 24, 2001, the family court entered a decree dissolving the marriage; issues concerning custody and visitation were specifically reserved for later determination. A hearing on the reserved issues was held on May 22 and 23, 2003. On June 23, 2003, the family court entered an order awarding the parties joint custody of the children and designating Julie as their primary residential custodian. On September 24, 2003, Julie filed a motion to relocate with the children to Florida.

Throughout the litigation Kenneth has complained that Julie has failed to follow the court-ordered visitation schedule and has repeatedly filed motions to hold Julie in contempt for same, some of which were granted. On October 3, 2003, a hearing was held on yet another motion by Kenneth to hold Julie in

contempt. Following the hearing, the family court, by order entered October 7, 2003, found Julie in contempt and sentenced her to 180 days incarceration, with 177 days being conditionally discharged contingent upon Julie's "strict compliance" with the family court's orders.

On December 11, 2003, Kenneth filed a motion to modify custody so as to name him as the primary residential custodian of the children.

On January 13, 2004, a hearing was held on various outstanding matters, including Kenneth's motion to modify custody and yet another motion to hold Julie in contempt. On January 20, 2004, the family court entered an order which, among other things, held Julie in contempt and ordered her to serve 60 days of the remaining 177 days of incarceration previously imposed. The order also awarded Kenneth "the emergency temporary care, custody and control of the children until further order of this Court." The order further determined that Julie's motion to return to Florida was moot and assigned Kenneth's motion to modify custody for a case management conference following Julie's release from incarceration. After the family court overruled her motion to alter, amend, or vacate its January 20, 2004, order, and before a ruling had been entered on Kenneth's motion to modify custody, Julie filed appeal 2004-CA-000465-ME.

On May 25 and June 10, 2004, a hearing was held on Kenneth's motion to modify custody. On July 7, 2004, the family court entered an order wherein, among other things, it designated Kenneth to be the primary residential custodian of the children. Julie subsequently filed Case No. 2004-CA-001567-ME.

We first address Julie's contention raised in Case No. 2004-CA-001567-ME that the family court erred by permitting Kenneth's motion to modify custody to proceed when his motion was not supported by multiple affidavits as required by KRS 403.340(2).

The initial custody decree in this case was entered on June 23, 2003. Kenneth filed his motion to modify custody so as to name him as the primary residential custodian on the children on December 11, 2003. This brings his motion to modify custody within the rules applicable to motions filed within two-years of a prior custody decree. KRS 403.350 provides as follows:

A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause

why the requested order or modification should not be granted. (Emphasis added).

KRS 403.340(2) provides as follows:

(2) No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:

(a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or

(b) The custodian appointed under the prior decree has placed the child with a de facto custodian. (Emphasis added).

In Petrey v. Cain, 987 S.W.2d 786, 788 (Ky. 1999), the Supreme Court addressed and interpreted the language, meaning, and significance of KRS 403.350 and KRS 403.340(2) as follows:

Read together, these two statutes require that a motion to modify a prior custody decree must be accompanied by at least one affidavit; and if the motion is made earlier than two years after its date, it must be accompanied by at least two affidavits. See Copas v. Copas, Ky.App., 699 S.W.2d 758 (1985). If the applicable requirement is not met, the circuit court is without authority to entertain the motion. Chandler v. Chandler, Ky., 535 S.W.2d 71 (1975); Robbins v. King, Ky., 519 S.W.2d 839 (1975); Gladish v. Gladish, Ky.App., 741 S.W.2d 658, 661 (1987); *cf.* Duncan v. O'Nan, [Ky., 451 S.W.2d 626, 631 (1970);] (subject matter jurisdiction is absent "where the court has not been given any power to do anything at all"). Thus, the circuit court does not acquire subject matter jurisdiction over a motion to modify

a prior custody decree unless the motion is accompanied by the requisite affidavit or affidavits.

See also Crossfield v. Crossfield, 155 S.W.3d 743 (Ky.App. 2005).

Because Kenneth's motion to modify custody was filed less than two years prior to the original custody decree, two affidavits were required in support of the motion. An examination of Kenneth's December 11, 2003, motion discloses that it was accompanied by only one affidavit. As such, the motion failed to vest subject matter jurisdiction of the issue in Jefferson Family Court. It follows that the family court's July 7, 2004, order designating Kenneth as the primary residential custodian of the children is invalid. The order is accordingly reversed.

We note with disapproval that Julie has not cited us to where in the record she raised this issue before the family court, and it appears that she did not. Had she done so, much time, effort, and expense may have been saved. However, this is an issue of subject matter jurisdiction. The question of subject matter jurisdiction may be raised at any time and is open for the consideration of the reviewing court whenever it is raised by any party. Gullett v. Gullett, 992 S.W.2d 866, 869 (Ky.App. 1999). Though it appears that Julie failed to raise the issue before the family court concerning Kenneth's failure

to comply with the affidavit requirements for a custody modification occurring less than two-years following a decree, she may nevertheless raise this issue for the first time on appeal. Id.

As previously noted, all other issues raised in Julie's two appeals, except for the contempt issue, are for the purpose of challenging the transfer of primary residential custody of the children to Kenneth.² As we have reversed the custody modification on the grounds stated above, and because the issues are unlikely to recur upon any additional custody modification proceedings, we will not address those issues on the merits.

The other issue to be addressed is Julie's contention that the family court erred by imposing a definite sentence upon her of 180-days for civil contempt and by failing to provide her with a means to purge herself of contempt. We agree with this contention.

Power to punish for contempt is inherent in every court. Arnett v. Meade, 462 S.W.2d 940, 947 (KY. 1971); Underhill v. Murphy, 117 Ky. 640, 78 S.W. 482, 484 (1904). Any

² An additional issue raised by Julie which does not directly concern custody modification relates to her motion to return with the children to Florida. However, the family court never denied this motion. Instead, in its January 13, 2004, order the family court determined that the issue was moot based upon the emergency transfer of the children to Kenneth. Should the issue arise again, the family court should apply the principles contained in Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003).

court or judge may punish any person guilty of contempt for disobeying a judicial order entered under the authority of the Court. KRS 432.280. In Commonwealth v. Bailey, 970 S.W.2d 818 (Ky.App. 1998), the Supreme Court defined contempt as "the willful disobedience of -- or open disrespect for -- the rules or orders of a court." Id. (*citing* Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996)).

Contempt of court is either civil or criminal in nature. Civil contempt involves the failure of one to do something under order of the court, Burge, supra; on the other hand, criminal contempt is conduct "which amounts to an obstruction of justice and which tends to bring the court into disrepute." Bailey, supra (*citing* Gordon v. Commonwealth, 141 Ky. 461, 463, 133 S.W. 206, 208 (1911)).

The purpose of civil contempt is to coerce rather than punish. Campbell v. Schroering, 763 S.W.2d 145, 147-148 (Ky.App. 1988) (*citing* Shillitani v. United States, 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966)). Ultimately, then, the defining characteristic of civil contempt is the fact that contemnors "carry the keys of their prison in their own pockets." Id. If the contemnor absolutely has no opportunity to purge himself of contempt, then such imprisonment can be deemed punitive in nature and in the nature of a proceeding for criminal contempt. Id. The United States

Supreme Court has unequivocally held that a civil contemnor cannot be incarcerated beyond the opportunity to purge himself of his contempt. Shillitani, 384 U.S. at 371, 86 S.Ct. at 1536. A contemnor is entitled to representation by counsel and an opportunity to terminate one's incarceration. Blakeman v. Schneider, 864 S.W.2d 903, 906 (Ky. 1993).

We conclude that the nature and purpose of the contempt proceedings against Julie amounted to civil contempt. The purpose of holding her in contempt was for the reason of compelling her into following the orders of the family court (primarily as concerns visitation) for the benefit of Kenneth. As such, it was essential that the family court afford her with an opportunity to purge herself of contempt, as, for example, providing her assurance of future compliance with the family court's visitation orders. An opportunity to purge is an essential element of civil contempt. Such was not afforded in this instance.

In this case, the family court imposed a 180-day sentence for contempt and, initially, required her to serve three days of the sentence without an opportunity to purge herself. Upon further violation of the court's orders, Julie was ordered to serve 60 additional days of the sentence, again without any identifiable means of purging herself of the contempt. We are of the opinion that this violates the

fundamental principle of civil contempt that the contemnor must be afforded with a means of purging herself of the contempt. We accordingly vacate any remaining time associated with the 180-day contempt sentence. Further, any future incarceration imposed by the family court for civil contempt upon Julie must include a means whereby she may purge herself of the contempt.

For the foregoing reasons the July 7, 2004, order designating Kenneth as the primary residential custodian of the children is reversed, and the October 7, 2003, order is reversed insofar as it imposes a 180-day sentence on Julie for civil contempt.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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