2017 IL App (3d) 160748-U

Order filed November 13, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

FRANK J. PAYTON, III,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Petitioner-Appellee,	)	Will County, Illinois.
	)	
v.	)	Appeal No. 3-16-0748
	)	Circuit No. 14-F-215
DOBANNEY N. WESLEY,	)	
	)	Honorable
Respondent-Appellant.	)	Jessica Colon-Sayre
	)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court erred in holding respondent in contempt of court for failure to comply with court orders where the record does not establish respondent had ability to comply with the orders or purge the contempt.

¶ 2 Petitioner Frank Payton and respondent Dobanney Wesley were ordered by the trial court to pay $2,500 each for an evaluator for their two sons, with whom Payton sought visitation. The trial court also ordered the parties to contact the evaluator to set up an appointment. Wesley

failed to comply with the trial court's orders and the court held her in indirect civil contempt. She appealed. We reverse and remand.

¶ 3 FACTS

¶ 4 In March 2014, petitioner Frank Payton filed a petition seeking joint custody of and visitation with his two sons with respondent Dobanney Wesley. Both Payton and Wesley filed petitions to sue as a poor person. Wesley's affidavit filed with her petition stated she had no job or income and one asset, a vehicle valued at $22,000. The trial court granted both motions. The trial court appointed a guardian *ad litem* (GAL) to represent the children and ordered Wesley and Payton to equally split pay $2,000 fee. The trial court ordered the children to attend counseling, with Wesley and Payton to share the costs 50% each for sessions for the children and 100% for their own individual sessions with the counselor. On June 10, 2016, the trial court appointed a 604.10(b) evaluator in June 2016 and ordered Payton and Wesley to split the costs evenly, subject to reallocation. See 750 ILCS 5/604.10(b) (West 2016). Both parties were ordered to contact the evaluator within 14 days. On July 21, 2016, the trial court again ordered the parties to contact the evaluator within 14 days.

¶ 5 On October 11, 2016, Payton filed a petition for rule to show cause for Wesley's failure to comply with the trial court's June 10, 2016, and July 21, 2016, orders requiring her to contact and pay the evaluator. The petition stated that Payton had paid his half of the retainer and contacted the evaluator, and alleged that Wesley had never contacted or paid the evaluator. The trial court issued the rule and a citation. An affidavit of service indicated Wesley received notice of the petition and that it would be raised at the next case management conference scheduled for October 14, 2016. On that date, the hearing on the citation was scheduled for November 15,

2016. At that hearing, Wesley was granted 14 days to respond to the petition and the case was continued until December 2, 2016.

¶ 6 On December 2, 2016, Wesley filed an "emergency motion to vacate orders entered June 10, 2016 and July 21, 2016 and dismiss visitation petition and grant defendant transcripts, impounded documents, all counseling reports and GAL reports in the best interest of the minors." In the motion, Wesley argued as set forth in the title and also alleged that during the proceedings the trial court and the GAL failed to focus on the children's best interests and protect them. She also challenged the requirement that she pay half of the evaluator's fee, claiming indigency and that payment would "cause a significant financial hardship." She further asserted violations of her due process rights.

¶ 7 Also at the December 2, 2016, hearing, the trial court entered an order finding Wesley in indirect civil contempt for her failure to comply with the court's June 10 and July 21 orders. To purge the contempt, Wesley was required to pay $2,500 to the evaluator by March 3, 2017, and make an appointment with the evaluator. The trial court granted Wesley's request for copies of the impounded GAL reports and denied the rest of her emergency motion. Wesley appealed.

¶ 8 ANALYSIS

¶ 9 The issue on appeal is whether the trial court erred when it held Wesley in indirect civil contempt of court. She argues that she was denied due process and lacked the means to purge. She further argues that the best interests of the children were not considered during the proceedings.

¶ 10 Civil contempt involves one party's failure to do something ordered by the court that results in the loss of a benefit or advantage to the other party. *In re Marriage of Knoll & Coyne*, 2016 IL App (1st) 152494, ¶ 50. Indirect contempt occurs when the party's action or inaction

does not take place in the court's presence. *Pryweller v. Pryweller*, 218 Ill. App. 3d 619, 629 (1991). Once the petitioner demonstrates by a preponderance of the evidence that the respondent failed to comply with a court order, the burden shifts to the respondent to show the lack of compliance was not willful and contumacious and that there was a valid excuse for the failure to comply. *Marriage of Knoll & Coyne*, 2016 IL App (1st) 152494, at ¶ 50.

¶ 11 "A person held in civil contempt must have the ability to purge the contempt by complying with the court order." *In re Marriage of O'Malley*, 2016 IL App (1st) 151118, ¶ 26. Before a court may impose sanctions for indirect civil contempt, the contemptor must be accorded due process of law, including notice and an opportunity to be heard. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 53 (1990) (quoting *Crooks v. Maynard*, 718 F.Supp. 1460, 1465 (D. Idaho 1989)). A person alleged to be in contempt is entitled to present extensive evidence at a hearing on the contempt petition. *Eden v. Eden*, 34 Ill. App. 3d 382, 388 (1975). The trial court must hear sufficient evidence before holding a person in contempt. *Id.* at 389. The question of whether a party is in contempt is a fact issue and we will not disturb the trial court's finding unless it is against the manifest weight of the evidence or an abuse of discretion. *In re Marriage of Logston*, 103 Ill. 2d 266, 286-87 (1984).

¶ 12 On June 10, 2016, the trial court ordered Wesley to pay 50% of the evaluator's fee and to contact the evaluator within 14 days to set up an appointment. On July 21, 2016, the trial court again ordered the parties to contact the evaluator within 14 days. Wesley was present at the June hearing but she was not present on July 21. She did not appear at hearings on August 9 and October 5, 2016. She did not appear at the October 14, 2016, hearing on Payton's petition for rule where the citation issued, although she received notice of it. At the next hearing on November 15, Wesley was present. The trial court granted her 14 days to respond and continued

the cause to December 2, 2016. At the December 2 hearing, Wesley presented her emergency motion. In her motion, she argued, in part, that she lacked the financial ability to pay the evaluator as established in her petition to defend as a poor person.

¶ 13 As an initial matter, the record does not indicate that the trial court considered Wesley's ability to pay the evaluator before ordering her to be responsible for half of the $5,000 fee. The court's authority to order an evaluation falls under section 604.10(b) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act), which provides that the trial court allocate the costs of the evaluator according to section 508(a) of the Marriage Act. 750 ILCS 5/604.10(b), 508(a) (West 2016). Section 508(a) allows that the court may order the parties to pay a reasonable amount toward ordered fees, "after due notice and hearing, and after considering the financial resources of the parties." 750 ILCS 5/508(a) (West 2016).

¶ 14 The trial court also failed to afford Wesley a full opportunity to defend the contempt citation. In *Eden*, the plaintiff contemnor was alleged to have disobeyed a court order regarding harassment and temporary visitation. *Eden*, 34 Ill. App. 3d at 384. The contemnor did not appear at several hearings where the alleged contempt was discussed and the trial court engaged in *ex parte* communications with the defendant in chambers. *Id.* at 384-85. At a subsequent hearing, the trial court found the contemnor guilty of contempt and ordered her jailed. *Id.* at 385. The reviewing court reversed, finding that the record suggested the contempt petition was decided *ex parte* in the judge's chambers, denying the alleged contemnor a full hearing on the petition. *Id.* at 389. The court considered that despite the various proceedings and orders regarding the defendant's rule to show cause, the plaintiff was not afforded a full hearing. *Id.* at 388-89. See also *Pryweller*, 218 Ill. App. 3d at 630-31 (contemnor must be afforded a full opportunity to present evidence to explain her noncompliance); *Panvino v. Panvino*, 60 Ill. App. 3d 525, 526

(1978) (finding plaintiff was not provided a "fair and reasonable hearing" where court did not hear plaintiff's evidence in defense of contempt petition).

¶ 15 In Wesley's emergency motion filed the same date the court held her in contempt, Wesley argued that she could not afford to pay her share of the evaluator's fee. She maintains the same argument on appeal, contending that the trial court's grant of her indigency petition establishes her inability to pay. The affidavit Wesley filed with her petition was dated July 2014 and established that she was unemployed, with no income and one asset, a vehicle worth $22,000. The record does not contain any financial information except the July 2014 affidavit. We acknowledge that the burden to provide a complete record on appeal falls on Wesley. *In re Marriage of Deike*, 381 Ill. App. 3d 620, 633 (2008) (inability to pay must "be shown by definite and explicit evidence. General testimony does not meet that burden"). Nevertheless, the trial court was required to hear evidence on Wesley's ability to pay before it could hold her in contempt for failing to pay. The trial court also had a responsibility to ensure that the Wesley had the ability to purge the contempt.

¶ 16 It does not appear the trial court determined whether Wesley had the financial means to pay the evaluator and purge the contempt. The sole evidence, the three-year-old affidavit, indicates that Wesley lacked the ability to pay $2,500 toward the evaluator. The trial court's order does not specify any factual findings regarding Wesley's ability to pay. We are cognizant of the trial court's concern that the children be timely evaluated to assist it in making parenting time determinations. That concern, however, does not override Wesley's due process rights to a full and fair hearing. We consider that Wesley was not afforded sufficient due process and remand for a hearing on Wesley's ability to pay the evaluator's fee. If she lacked the ability to pay, a finding of contempt cannot stand.

¶ 17 For the foregoing reasons, the judgment of the circuit court of Will County is reversed and the cause remanded.

¶ 18 Reversed and remanded.