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FIFTH DISTRICT

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Honorable
Ellar Duff,
Judge, presiding.

1

2002. In a final dissolution judgment entered in June 2003, the parties were awarded joint legal custody of the two children with primary physical custody with Amy. The visitation schedule provided that Jeffrey would have the children on alternate weekends, one evening per week, certain holidays, and two weeks per summer.

¶ 4 In mid-2005, visitation issues were revisited by the court, culminating in an order in late July 2005, setting forth the exact two weeks that summer that Jeffrey would have visitation with the children. There were no modifications to the June 2003 order.

¶ 5 In March 2009, Amy filed a motion to restrict visitation. In this motion, Amy recounted visitation issues that occurred over the years. She detailed a child exchange on Christmas 2003 involving a physical altercation between Jeffrey, his mother, and Amy's father. In the spring of 2008, at a barbeque at Jeffrey's sister's home, he was allegedly intoxicated and the parties' daughter contacted Jeffrey's girlfriend to come and pick up the girlfriend's one-year-old son. Upon her arrival, the girlfriend got into a fight with Jeffrey. All the children were ultimately left at Jeffrey's sister's home, and later that evening, Jeffrey yelled at his daughter for contacting his girlfriend and getting him "into trouble." In June 2008, at the parties' son's baseball game, Jeffrey got into a physical altercation with Amy's present husband. Amy further alleged that Jeffrey told his daughter that he might end up in jail for killing her stepfather. At some point after this time, in the presence of his children, Jeffrey got into a fight with his girlfriend while horseback riding in Missouri. Later, Jeffrey and his son drove to the girlfriend's home and parked out front. Jeffrey passed out in the vehicle, and his son was unable to wake him up and was also not able to get into the home. The parties' son spent the night on Jeffrey's girlfriend's front porch. Thereafter, Jeffrey voluntarily discontinued exercising his visitation rights for the next nine months.

Upon expressing his intent to resume visitation, Amy filed this motion in order to restrict the visitation because she feared that Jeffrey could endanger the physical, mental, moral, and emotional health of the children. Amy also sought an *in camera* interview of the two children with respect to their wishes and their experiences with their father.

¶ 6 On April 30, 2009, Jeffrey filed his motion for child counseling, seeking an order from the court directing Amy to cooperate with Jeffrey in scheduling counseling related to issues of parental alienation. He also filed a motion seeking an order to require Amy to notify him of medical decisions and/or treatment for the children.

¶ 7 The trial court conducted an *in camera* interview of the parties' son on May 7, 2009. A transcript of this hearing is not included in the record. Because there is no transcript, we do not know if the trial court entered an oral order at the conclusion of the hearing in order to effect the resumption of visitation pending the entry of the written order. A written order labeled as a "temporary" order was entered on June 26, 2009, by which the trial court reinstated visitation, directing visitation two evenings each week, at two hours each evening, and four hours of visitation with the children every weekend on either Saturday or Sunday. The court further ordered each party to undergo a psychological evaluation, and the court ordered the same for each child.

¶ 8 On July 17, 2009, Jeffrey filed a petition for an adjudication of indirect civil contempt related to the court's June 26, 2009, temporary visitation order. Jeffrey alleged that in this period of three weeks, Amy denied his visitation at five of the scheduled times, refused to allow his visitation on Father's Day,¹ refused to cooperate

¹Father's Day in 2009 was on June 21, 2009, and so predated the entry of the temporary visitation order by five days. Jeffrey's complaint about Father's Day appears

in scheduling the psychological evaluations of the children, and continued to encourage and empower the children to act in a disrespectful fashion to him. In answer to the petition, Amy responded that Jeffrey "persisted in an unreasonable and aggressive pattern of requesting visitation at the last minute and frequently involving the police in custody exchanges even though there was no dispute and the children were exchanged without incident."

¶ 9 The various motions and petitions were called for a hearing on May 17, 2010. At this hearing, both parties testified, as well as Amy's present husband, Eugene Hartman. At the conclusion of the hearing, the trial judge made a statement on the record as follows:

"The Court finds based on its observation of the Hartmans that the two of them have engaged in covertly and overtly in [*sic*] undermining the relationship between the father and the two minor children to the extent that the children are completely disrespectful to their father. ***

The behaviors that have been demonstrated by both parents clearly demonstrate that either you don't have any idea how to behave in a civilized environment or you have no concern about the effect of what you are doing to your children has on teaching them to behave in a civilized environment and exercise sound judgment, which is thoroughly distressing to this Court ***.

With that being said, the Court finds that neither of you are actually fit and proper persons to be custodial parents; however, the Court's option is to choose one of the two of you. Since the children have been with the mother for such a long

unrelated to the June 26, 2009, temporary visitation order, about which he was seeking to have Amy held in contempt for her alleged "violations" of that order.

period of time, even though she does not respect them enough and does not take her job as a mother seriously enough to teach them to behave appropriate in a civilized society, she nonetheless has the upper hand on maintaining custody of the children. Even though you have not behaved in a manner that fosters a decent relationship with your children, the Supreme Court says that you still have right to have visitation with your children."

¶ 10 The written order was filed on July 21, 2010. The court found that Amy was in indirect civil contempt for her failure to comply with the court's orders regarding visitation. The court sentenced Amy to an indeterminate period in the Madison County jail due to her contemptuous conduct, but it stayed the sentence so long as she fully complied with the visitation order. The trial court reinstated the schedule of visitation previously ordered—alternating weekends, one evening per week, alternating legal holidays, and summer visitation. The order regarding summer visitation was modified to increase summer visitation to a 14-day uninterrupted period during each of the three summer months. Additionally, the court ordered the parents to place the children in counseling at Amy's sole expense. Finally, the court ordered Amy to notify Jeffrey of and allow him to participate in and attend any of the children's activities without interference from Amy, Amy's husband, Amy's parents, or any other agent of Amy and her husband.

¶ 11 From this order, Amy appeals.

¶ 12 ISSUES, LAW, AND ANALYSIS

¶ 13 Indirect Contempt. Amy alleges that the trial court abused its discretion in finding her in indirect civil contempt.

¶ 14 Indirect contempt simply refers to contempt that occurs outside of the courtroom. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 107, 855 N.E.2d 953, 961

(2006). The type of conduct at issue is that which obstructs a court in its administration of justice or lessens the authority and dignity of the court. *Id.* A typical situation would involve the willful disobedience of a court's order. *In re Marriage of Spent*, 342 Ill. App. 3d 643, 653, 796 N.E.2d 191, 200 (2003).

¶ 15 Contempt of court is classified as either civil or criminal. Civil contempt involves the contemnor's refusal to obey a court. *Busey Bank v. Salyards*, 304 Ill. App. 3d 214, 217, 711 N.E.2d 10, 13 (1999). Civil contempt is considered coercive in its nature—to get the contemnor to comply with the court's order. *In re Marriage of Depew*, 246 Ill. App. 3d 960, 966, 616 N.E.2d 672, 677 (1993). Civil contempt is not a punishment. *Id.* Civil contempt has two fundamental requirements. First, the contemnor must have the ability to do what the court asked, and second, upon doing so, there can be no further sanctions imposed. *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 279, 860 N.E.2d 539, 547 (2006). Civil contempt is considered a prospective remedy—structured to compel future compliance with the court's order. *Id.* In contrast, while criminal contempt also involves conduct that is calculated to obstruct a court, the purpose of criminal contempt is to punish the contemnor. *People v. Goleash*, 311 Ill. App. 3d 949, 956, 726 N.E.2d 194, 199 (2000). Criminal contempt requires intent—willful conduct by the contemnor. *D'Agostino v. Lynch*, 382 Ill. App. 3d 960, 968, 887 N.E.2d 590, 597 (2008).

¶ 16 In analyzing the court's contempt order to determine if the contempt was considered to be civil or criminal in nature, we look to the purpose for which the contempt sanctions were imposed. *In re Marriage of Sharp*, 369 Ill. App. 3d at 278-79, 860 N.E.2d at 547. The penalties imposed by the court also shed light on the nature of the contempt. If the punishment is purely punitive—to vindicate the court's authority—the contempt is criminal in nature. *Goleash*, 311 Ill. App. 3d at 956, 726

N.E.2d at 199. Additionally, criminal contempt involves doing something that the court prohibited. *People v. Warren*, 173 Ill. 2d 348, 368-69, 671 N.E.2d 700, 710-11 (1996).

¶ 17 The burden rests upon the alleged contemnor to show that her noncompliance was not willful—that she has a valid reason for failing to comply with the court's order. *In re Marriage of Tatham*, 293 Ill. App. 3d 471, 480, 688 N.E.2d 864, 871 (1997).

¶ 18 We will not overturn a trial court's finding of contempt unless that finding is contrary to the manifest weight of the evidence. *In re Marriage of Charous*, 368 Ill. App. 3d 99, 108, 855 N.E.2d 953, 961 (2006); *Pryweller v. Pryweller*, 218 Ill. App. 3d 619, 628, 579 N.E.2d 432, 439 (1991).

¶ 19 Amy contends that the trial court's order finding her in indirect civil contempt was erroneous in that there was no credible evidence of her willful disobedience with the court's order. She also argues that evidence merely establishing that she failed to comply with a court's order is an insufficient basis for holding her in contempt. We disagree with both of Amy's arguments.

¶ 20 The trial court heard testimony and thus had the ability to judge the credibility of all the parties. Jeffrey's contempt petition filed on July 17, 2009, expressly asked that the court hold Amy in contempt for violating the temporary visitation order of June 26, 2009. The hearing on the contempt petition was not held until May 17, 2010. From our review of the transcript of this hearing, it is obvious that all the witnesses testified about visitation matters before, during, and after this three-week period. Much of the testimony outside the three-week period was being offered, according to Jeffrey's attorney, to establish a pattern of problems he experienced with Amy about visitation.

¶ 21 Amy testified that, during this three-week period Jeffrey got his scheduled

visitation but that the consistency of the visitation was made difficult because of the schedules the children had. She stated that she never denied him visitation. She claimed, however, that every time he picked up the children, he brought the police with him. Regarding the Father's Day visitation, Amy testified that the order provided that he would get four hours with the children on the weekend.² Jeffrey called her to say that he was going to be camping in Fredricktown, Missouri, that weekend and that he would not return until Sunday. On that Sunday, their son was playing in a championship baseball game. The number of games that were to be played that day depended upon whether the earlier games were won or lost. It ended up that their son played in three games on Father's Day. Amy testified that she told Jeffrey about the tournament and that he said he would call again when he returned to the area from his camping trip. Jeffrey called at about 1 p.m., and Amy advised him that the games would not likely be over until 5 p.m. and that she would let him know when the games were over. In the meantime, their daughter called Amy, who was at her grandmother's home, to report that the police were looking for Amy pursuant to a call from Jeffrey. Amy also testified about an incident on July 9, 2009, in which her children were left outside in Jeffrey's car when he went into a restaurant to eat. The children called Amy from the car. She testified that she suggested they go into the restaurant but that the

²Although not included during the three weeks between the date the temporary order was entered and the date the petition for contempt was filed, Jeffrey included the Father's Day visitation issue in his contempt petition. Until June 26, 2009, the original June 2003 visitation order remained in place, which granted Jeffrey visitation rights with his children on Father's Day from 9 a.m. until 8 p.m. Amy's testimony that Jeffrey was only to receive four hours of visitation on that weekend is therefore erroneous, because the weekend at issue predated the June 26, 2009, order limiting Jeffrey to four hours of visitation each weekend.

kids did not want to do so. They then left the car and went to a gas station, and Amy came to pick them up at the gas station. Amy then called the police to come out to document that she was taking the children. She did not call Jeffrey to tell him that the children were then going home with her. Amy testified that she did not call Jeffrey to tell him that the kids were in the car and upset because she did not trust Jeffrey to take proper care of them.

¶ 22 Jeffery testified that he had intended to take his children camping in Missouri for his visitation time on Father's Day weekend but that did not occur because of conflicts with activities of his son. He testified that his son had a baseball game on Father's Day but that he was unaware of that schedule because Amy never provided him with his children's sports/activities schedules. He went to an area police station to have the police try to contact his daughter about the visitation scheduled for that day. Amy answered her daughter's phone and essentially told Jeffrey that he was not going to see his kids that day. Other testimony by Jeffrey about visitation problems during the three weeks between the entry of the temporary order and his filing of the contempt petition was that there were five occasions when he wanted to have his children but did not. Details were not included in his testimony.

¶ 23 Amy cites to the *Pryweller v. Pryweller* case for authority supporting her contention that her noncompliance with the court's visitation order was not a sufficient basis for holding her guilty of indirect contempt of court. In *Pryweller*, the trial court mislabeled the type of contempt. The mother was found to be in direct civil contempt for failing to produce her children for therapy and for visitation with their father pursuant to an earlier order of the court. *Pryweller*, 218 Ill. App. 3d at 621, 579 N.E.2d at 434. On appeal, the court stated that the proper type of contempt in *Pryweller* was indirect civil contempt: "Where a parent is found in contempt for

failure to turn a child over to the other parent for visitation or custody, the conduct occurs outside of the court's presence and must be construed as *indirect* contempt." (Emphasis in original.) *Pryweller*, 218 Ill. App. 3d at 630, 579 N.E.2d at 440 (citing *In re Marriage of Ruchala*, 208 Ill. App. 3d 971, 977-78, 567 N.E.2d 725, 729 (1991)). The appellate court explained that mislabeling the type of contempt alone is insufficient grounds to reverse the order. *Pryweller*, 218 Ill. App. 3d at 630, 579 N.E.2d at 440. The court, however, reversed the order of contempt because the trial court found the mother's conduct to be contemptuous in a summary fashion without a hearing. *Id.* The mother did not receive her due process requirements of a full and fair hearing. *Id.* The court explained that indirect contempt can only be proven by extrinsic evidence—which means that the accused must be allowed to offer evidence on her own behalf. *Id.*

¶ 24 In this case, Amy was given a complete opportunity to present evidence at the hearing on Jeffrey's contempt petition. The evidence heard by the court during the hearing detailed a specific instance of noncompliance with the court's visitation order, as well as several other nondetailed visitation problems in the three-week time frame at issue. Because the trial court actually saw and heard the witnesses testify during the hearing, we will not substitute our judgment for the credibility determinations made by the court. The evidence in the record from that hearing supports the court's order. We do not find that the court's order of indirect civil contempt is contrary to the manifest weight of the evidence.

¶ 25 Increase of Summer Visitation. Amy next argues that the trial court abused its discretion in tripling the summer visitation requested by Jeffrey when there was no pleading or evidence seeking that remedy or relief.

¶ 26 We begin analysis of this issue by noting the court's expressed intent to

reinstate the original June 2003 visitation order. Regarding visitation, the court announced at the conclusion of the May 17, 2010, hearing as follows:

"I am reinstating the former visitation schedule; that he will have visitation Wednesdays each week, alternating weekends from Friday to Sunday at 7. *** He gets Father's Day. She gets Mother's Day. Holidays are alternated ***. Christmas vacations will be split ***.

*** During the summers Mr. Foss will have visitation with the minor children for 14 uninterrupted days in the months of June, July, and August between June 15th and August 15th of each year."

Because the court referred to the original visitation order of June 2003, we review the summer visitation schedule ordered at that time:

"Two one-week uninterrupted 7 day periods during the school Summer vacation (June, July, August) of the minor children. [Jeffrey] may select the two weeks of the summer period by notifying [Amy], in writing, by May 1. [Amy] shall thereafter be able to exclude two uninterrupted 7 day periods for her vacation with the children and shall notify [Jeffrey] in writing by June 1st of each of those periods."

¶ 27 The written order entered by the trial court on July 21, 2010, tripled the summer visitation schedule from that originally ordered in June 2003 and modified the scheduling from 7-day periods of time to 14-day periods of time. The order clearly states, "During the summer, the Father shall have fourteen (14) uninterrupted days each month in the months of June, July, and August between June 15th th and August 15th each year."

¶ 28 Amy's argument on appeal centers on the fact that Jeffrey never sought six weeks of summer visitation in this proceeding. In response, Jeffrey does not dispute

the fact that he did not ask for this visitation, but he contends that the trial court has many equitable powers in visitation situations, and he contends that the trial court's order amounted to a finding of visitation abuse pursuant to section 607.1 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/607.1 (West 2008)).

¶ 29 Jeffrey is correct in that if the trial court makes a finding of visitation abuse, the court is allowed to modify the visitation order and otherwise order relief deemed equitable. 750 ILCS 5/607.1(c) (West 2008). However, the rule also mandates that the party complaining of visitation abuse file a petition seeking relief pursuant to that statute. 750 ILCS 5/607.1(b) (West 2008). "Section 607.1 provides a party an alternate remedy to seek enforcement of court-ordered visitation that is separate and apart from the trial court's contempt power." *In re Marriage of Charous*, 368 Ill. App. 3d 99, 114, 855 N.E.2d 953, 966 (2006).

¶ 30 Upon careful review of the procedural history in this case, there was no petition filed by Jeffrey asking the court to find visitation abuse. We turn to the four pending motions at issue in the May 17, 2010, hearing. The outstanding motions were Amy's motion to restrict visitation filed in March 2009; Jeffrey's motion for child counseling and his motion to require Amy to inform him of all child-related medical treatments and decisions, both filed on April 30, 2009; and Jeffrey's July 17, 2009, petition for indirect civil contempt. The motion Amy filed seeking to restrict visitation came about after Jeffrey sought an end to his self-imposed visitation ban, which he started in the summer of 2008. After the first three motions were filed, the court conducted an *in camera* interview of one of the two Foss children and entered a temporary visitation order. Jeffrey was to have visitation two evenings each week—but only two hours each of the two nights. Instead of alternate weekends,

Jeffrey was awarded a four-hour period every weekend to spend with his two children. The parties were ordered to work together to determine agreeable visitation times and to take into consideration the schedules of the children. The temporary order did not dispose of all the pending motions, and so those four motions were what was at issue when the court held its hearing on May 17, 2010.

¶ 31 As stated earlier, the trial court expressly indicated that the intent was to reinstate the former visitation order—the order of June 2003. There was no petition before the court seeking the enforcement of a visitation order in conformance with section 607.1 of the Act, and the order did not find visitation abuse. Jeffrey's petition for indirect civil contempt only addressed the three-week period following the court's entry of the temporary order. Upon a careful review of the trial judge's comments and order from the transcript of the May 17, 2010, hearing, we find a conflict between the trial court's expressed intent and the written order entered two months later on July 21, 2010. The trial court stated its intent to reinstate the June 2003 order, which provided only 14 days of summer visitation. Tripling that amount without a request by Jeffrey to do so and without a finding of visitation abuse appears to be inconsistent with the court's stated intent. We vacate the summer visitation portion of the trial court's July 21, 2010, order and remand the case for the entry of a new order directly addressing and resolving this conflict.

¶ 32 In addition to this order partially vacating the visitation order and pursuant to our powers under Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we conclude that the June 2003 order relative to summer visitation remains in effect until the court enters the order upon remand. Therefore, as originally ordered by the court, Jeffrey shall receive two uninterrupted seven-day periods of visitation this summer between June 15 and August 15 at the agreement of the parties.

¶ 33 Order Directing Payment of All Psychological Costs for Children. Jeffrey's motion for child counseling prayed for an order of the court directing that Amy cooperate with Jeffrey in scheduling counseling for both children through the Boeing Employee Assistance Program. He asked the court to order that the parties share equally any uninsured medical expenses. He also sought a reasonable attorney fee and asked the court to grant "other relief as may be just."

¶ 34 The court's order stated that the children should begin counseling immediately with Jeffrey at Amy's sole expense. However, if there were charges associated with Jeffrey's presence in the sessions, then Jeffrey was to bear that expense himself. The immediate aspect of this order was stated by the court to be "subject to the contempt powers of the Court." The court did not connect the contempt order with the counseling order. Amy contends that this order was an improper contempt order, in that she was found in indirect civil contempt, and that the payment of these psychological counseling expenses would be more in the nature of a criminal contempt punishment.

¶ 35 Upon a review of the pleadings and of the record on appeal, we conclude that Amy has misconstrued the trial court's order. This portion of the court's order had nothing to do with Jeffrey's petition to hold Amy in contempt. Instead, the court was addressing Jeffrey's pending motion for child counseling. While Jeffrey asked the court to order that the parties split the uninsured costs associated with the counseling, we find that the court was within its discretion to order that the amounts be paid by Amy. There was ample evidence at the hearing supportive of Jeffrey's claim that the children were alienated from him as a result of actions taken by Amy and her present husband. Her present husband admitted in testimony that it was his opinion that Jeffrey should never see his children and that he did not always hide this opinion from

Jeffrey's children. Amy acknowledged situations in which she had interfered with visitation by picking the children up upon being contacted by the children. The trial court also had the opportunity to witness Jeffrey, Amy, and Amy's present husband when they testified and therefore was able to judge their credibility. Accordingly, we affirm this order.

¶ 36

CONCLUSION

¶ 37

For the foregoing reasons, the judgment of the circuit court of Madison County is hereby affirmed in part and vacated in part, and the cause is remanded for an additional order. Pursuant to Supreme Court Rule 366(a)(5), we direct the parties to resume summer visitation pursuant to the earlier June 2003 visitation order until the court enters its order upon remand.

¶ 38

Affirmed in part and vacated in part; order entered; cause remanded.