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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001279-ME

RENEE IVY (NOW KNIGHTEN) — APPELLANT

v.

APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 08-J-00098

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; AND LARRY BARNES — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Renee Ivy (now Knighten) appeals from an order of the McCracken Family Court holding her in contempt and ordering her to pay child support or be jailed for thirty days. After careful review, we reverse.

Renee Ivy had a child, D.G., on February 20, 2008. Larry Barnes filed a petition to establish paternity and child custody on February 22, 2008. At the time D.G. was born, Ms. Ivy and Mr. Barnes were not married and were not in a relationship. In fact, Ms. Ivy was in a relationship with Jonathan Knighten at the time D.G. was born. Issues of paternity, custody, visitation, and child support have been the subject of numerous hearings before the McCracken Family Court during the twenty-one months of D.G.'s life.

On April 14, 2008, the family court awarded joint custody of D.G. to Ms. Ivy and Mr. Barnes, but appointed Mr. Barnes primary residential custodian. In that order, as part of its findings concerning why Ms. Ivy would not have primary residential custody of her newborn, the trial court found that Ms. Ivy had "a history of past and present mental health issues that adversely affect her ability to function, and that could have resulted in her being found disabled by the Social Security Administration, with a representative payee appointed to handle her financial matters and to receive benefit payments on her behalf."

On May 15, 2008, pursuant to the April court order, Mr. Barnes filed a notice of filing of petitioner's wage information. In this document, he stated that Ms. Ivy received Social Security Income (SSI) disability benefits with a monthly gross income in 2008 of $637.00. That amount was used in calculating Ms. Ivy's support obligation, and on May 16, 2008, the family court entered an order setting her child support at $106.00 per month. Ms. Ivy did not file a motion for reconsideration or a notice of appeal.

Ms. Ivy made only a few child support payments, but continued to file motions and participate in hearings. At a hearing on August 26, 2008, Ms. Ivy acted as her own counsel. Her testimony suggested that she was able to drive an automobile and that she was again pregnant. At later hearings she testified that she gave birth to a child, who was living with her. Ms. Ivy testified that her husband, Mr. Knighten, supports the child but that she buys diapers when she can afford to purchase them. With respect to her bipolar condition which gave rise to her claim for SSI benefits, Ms. Ivy testified that it was now under control, and she was currently taking her medications.

When Ms. Ivy failed to make her child support payments for a significant length of time, a motion was made for a "rule" requiring Ms. Ivy to show cause as to why she should not be held in contempt for failing to pay her child support as ordered by the McCracken Family Court. The family court held a hearing on this motion on June 16, 2009. At the hearing, the county attorney stated that the family court had previously set child support at $106.00 per month, and the last payment that had been received was in June 2009 in the amount of $38.31. The county attorney also testified that Ms. Ivy was in arrears in the amount of $1,124.53, and she had never been held in contempt before.

Ms. Ivy called Hon. Kenneth Anderson, who is a practicing attorney and a public guardian and administrator for thirteen counties, including McCracken. In 1992, the public guardian's office was appointed as the official agency of the Social Security Administration to provide supervisory and financial

assistance services to Ms. Ivy after her disability was approved. Ms. Ivy's impairment was such that she required supervision, and her benefits are paid into a fiduciary account. Mr. Anderson's office disburses these benefits according to the guidelines and regulations of the Social Security Administration for Ms. Ivy's shelter, maintenance, and support.

Mr. Anderson testified that Ms. Ivy receives $647.00 per month. Out of that, Mr. Anderson pays Ms. Ivy's rent in the amount of $400.00 per month and her utilities. He takes a fee of $37.00 per month for his services and then gives Ms. Ivy the leftover between $25.00 and $50.00 per month, depending on the amount of her utilities, for personal hygiene items and groceries. Finally, Mr. Anderson testified that he did not know the nature of Ms. Ivy's disability and had no knowledge of any other income.

Ms. Ivy testified about the SSI she receives and stated that she lives with her husband and their new baby. Her husband works construction, and she estimated that he made $7.00 to $8.00 per hour and worked twenty to twenty-five hours per week. She testified that her husband does not contribute to the rent because the lease is in her name only, but he contributes to utilities when needed. Ms. Ivy stated that they are on food stamps, and her husband buys necessities she is unable to purchase from her SSI benefits, such as toilet paper, dishwashing soap, and items for the baby. Her husband supports the baby, and the baby receives WIC benefits. Finally, Ms. Ivy testified that she has applied for low income housing,

but the waiting list is six months long, and she has no other income besides her SSI benefits to use for child support.

The family court found that Ms. Ivy was able to perform some work and that her failure to make any child support payments constituted contempt of court. The court reduced the child support amount from $106.00 per month to the minimum amount, $60.00 per month and required Ms. Ivy to pay only $5.00 per month on her arrearage. This appeal timely follows.

"When a court exercises its contempt powers, it has nearly unlimited discretion." *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007) (citing *Smith v. City of Loyall*, 702 S.W.2d 838, 839 (Ky. App. 1986)). As such, we will not disturb a court's decision regarding contempt absent an abuse of its discretion. "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999)).

Ms. Ivy first makes a very attenuated argument that she was subjected to criminal contempt and, as such, was entitled to an evidentiary hearing that comports with due process. However, Ms. Ivy was clearly found to be in civil contempt and, thus, her argument is without merit.

An individual who has refused to abide by a court's order has committed civil contempt. *Newsome v. Commonwealth*, 35 S.W.3d 836, 839 (Ky. App. 2001). "[W]illful failure to pay child support as ordered, or to testify as ordered" are examples of civil contempt. *Commonwealth v. Burge*, 947 S.W.2d

805, 808 (Ky. 1996). Because Ms. Ivy did not abide by the family court's order requiring her to pay child support, civil contempt proceedings were appropriate, and Ms. Ivy's argument that she was instead subjected to criminal contempt is without merit.

Ms. Ivy argues that even assuming the contempt is classified as civil, the family court still violated her due process rights by failing to make a finding about her ability to actually pay the child support. She argues that the evidence overwhelmingly supports the notion that she is unable to pay the child support, due to only having $25.00 to $50.00 per month after her bills are paid. Upon careful review of the circumstances in this case, we agree.

In *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993), the Kentucky Supreme Court held that civil contempt charges must be related to the amount the defendant is found able to pay. *Id.* at 865. In so holding, the Supreme Court reasoned that it is unfair "to compel the doing of an impossible act." *Id*. at 864. Pursuant to undisputed testimony, Ms. Ivy only receives $25.00 to $50.00 per month for personal expenses and has no other source of income. Under this current arrangement, it is simply impossible for Ms. Ivy to pay $60.00 per month in child support and $5.00 per month in arrearages. The family court's finding that Ms. Ivy was able to pay those amounts was therefore arbitrary, unfair, and an abuse of discretion.

Pursuant to the trial court's finding, the Cabinet argues that Ms. Ivy can make up this shortfall by working to support her child. However, Ms. Ivy

contends that there was no evidence presented that she could work in any capacity. The Commonwealth disagrees, citing to Ms. Ivy's testimony at a previous hearing that she could perform tasks such as driving and mowing the yard.

In light of the substantial evidence establishing Ms. Ivy's inability to work or care for her child, we agree that her testimony from a previous hearing that she could mow her yard and drive her car is not sufficient to support the trial court's general finding that Ms. Ivy was an "able[-]bodied person capable of providing financial support to her child." Ms. Ivy's testimony must be put in context. The trial court previously denied her custody of her own infant due to "a history of past and present mental health issues that adversely affect her ability to function . . . ." The record further establishes that her disability requires a representative payee to handle her financial matters and to receive benefit payments on her behalf.

Moreover, were Ms. Ivy to seek employment, she would lose her disability benefits if she earned more than $780.00 per year. *See* 42 U.S.C § 1382a (b)(4)(B)(i) (in determining the income of an individual receiving SSI benefits, the first $780.00 earned by the recipient per year "shall be excluded.") Calculating the $65.00 per month the family court is requiring Ms. Ivy to pay, the amount of child support totals $780.00 per year. Ms. Ivy is therefore forced to find a job that does not generate income in excess of $780.00 per year in order to retain her current disability benefits.

We find this requirement by the family court to be tenuous, given that even a minimum wage job would generate income in excess of $780.00 per year. Were Ms. Ivy to maintain a job to provide the required support for her child, she would most likely lose her disability benefits. By ordering her to pay the above child support and arrearages or else be held in contempt, the trial court is essentially forcing Ms. Ivy to forgo her disability benefits. In light of the substantial evidence establishing Ms. Ivy's disability and her entitlement to said benefits, we are compelled to find such an order arbitrary, unfair, and an abuse of discretion.

Based on the foregoing, we reverse the June 22, 2009, order of the McCracken Family Court holding Ms. Ivy in contempt of court and ordering her to pay $60.00 per month in child support obligation and $5.00 per month toward her child support arrearage. This record conclusively establishes that Ms. Ivy is currently unable to work in any capacity and, therefore, the trial court's order to the contrary is an abuse of discretion and is in error.

STUMBO, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, DISSENTING: Parents have an obligation to support their children. *Jewell v. Jewell*, 255 S.W.3d 522,524 (Ky. App. 2008) (recognizing the longstanding policy of imposing a duty on parents to support their children). Child support guidelines are established for the purpose of setting child support. *Gossett*

v. Gossett, 32 S.W.3d 109, 112 (Ky. App. 2000) (the purpose of the statutes and guidelines relating to child support is to secure the support needed by the children commensurate with the ability of the parents to meet those needs). Past due amounts of child support are commutable to judgment. *See Arnold v. Arnold*, 825 S.W.2d 621 (Ky. App. 1992). Stated simply, one who has the children incurs the obligation and owes support accordingly.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CABINET FOR HEALTH AND FAMILY SERVICES:

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