

In re Parental Resp. of M.T.

COLORADO COURT OF APPEALS

---

Court of Appeals No.: 04CA2318  
Douglas County District Court No. 97DR704  
Honorable Kenneth E. Barnhill, Jr., Judge

---

In re Parental Responsibilities of Gordon Stadnyck,

Appellant,

and

Carolyn M. Taylor,

Appellee.

---

JUDGMENT AFFIRMED

Division IV

Opinion by: JUDGE VOGT  
Casebolt and Furman, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**

Announced: March 16, 2006

---

Gordon Stadnyck, Pro Se

Law Office of Madeline Wilson, Madeline Wilson, Denver, Colorado, for  
Petitioner-Appellee

Gordon Stadnyck (father) appeals the trial court's judgment finding him in contempt, awarding attorney fees to Carolyn M. Taylor (mother), restricting his parenting time, and imposing a suspended jail sentence. We affirm.

Although they never married, the parties had one child, who is the subject of this action for allocation of parental responsibilities. In the 1998 permanent orders, mother was named the primary residential parent. Father was granted parenting time and ordered to pay \$770 per month for child support. In 2000, after various modifications to father's parenting time, a Special Advocate (SA) was appointed and made further recommendations regarding father's parenting time. The court ordered each party to cooperate with the SA and to pay half of the SA's fees, and it advised the parties that willful failure to "pay or otherwise cooperate" could be punished by fine or imprisonment as a contempt of court.

In January 2004, the first SA was relieved of his appointment and was replaced with a second SA. The court ordered that the second SA was to have the same "authority and responsibility" as the first, and that all prior orders were to be followed by the parties. Therefore, father continued to be subject to the order to cooperate

with and pay the second SA.

In April 2004, the second SA reported to the court that father's failure to pay had delayed the commencement of the evaluation process, and that mother was "increasingly concerned about the absence of an assessment of [father's] mental status since he continues to have contact with their daughter." In a hearing held the following month on a related matter, the SA testified that he had still not been paid, and recommended that until father cooperated with the evaluation process, his parenting time should be suspended. At that time, the magistrate did not act on the SA's recommendation to suspend parenting time.

In July 2004, mother filed a motion requesting that a contempt citation be issued to father for his failure to obey the order to pay the SA. Mother requested that father be ordered to show cause "why he should not be fined, imprisoned, or both, for Contempt of this Court in order to vindicate the dignity of the Court, [and] for [father] to pay [t]he attorney fees of [mother]." A citation was issued, instructing father to show cause "why he should not be punished for contempt, for neglect and refusal to comply with the order of the Court heretofore entered herein, and

that, to vindicate the dignity of the Court, a fine or imprisonment may be imposed upon him.”

Father appeared with counsel at the hearing and testified that he had paid the SA in full the day before.

After the hearing, father was held in contempt. The court found that “there is a valid order in existence requiring the father to cooperate with [the second SA] in order to enable the Court to determine the appropriateness of visitation”; that “father understood he must obtain an evaluation before continuation of the existing parenting time”; and that the evaluation, in turn, was conditioned on payment “up front.” The court also found that father had the ability to pay the SA, and that his failure to pay was intentional.

Father was ordered to pay mother’s attorney fees, and the court imposed a thirty-day jail sentence. However, the sentence was suspended pending a review hearing. The court stated that it would continue to suspend the sentence if father completed the assessment, continued to cooperate with the SA, and paid mother’s attorney fees as ordered.

Finally, the court suspended father’s unsupervised parenting

time until the evaluation was completed by the second SA. The court also found, based on statements made by the first SA, that “father poses a significant real danger to [the child].”

I.

Father contends that the court erred by expanding the scope of the contempt issues by finding him in contempt not only for failure to pay the SA, but also for failure to cooperate with the SA. He argues that without specific notice in the citation of the exact scope of the issues, he was deprived of adequate notice of the charge. We disagree.

Due process requires that the alleged contemnor have notice of the purpose of the hearing and an opportunity to be heard. Such notice is generally provided by the charging document and orders referenced or incorporated in that document. See Dooley v. Dist. Court, 811 P.2d 809 (Colo. 1991)(finding of contempt was reversed where notice was inadequate and court made findings on matters that were neither part of the show cause order nor addressed at the hearing); Wright v. Dist. Court, 192 Colo. 553, 561 P.2d 15 (1977)(because contempt citation referred only to father’s duty to maintain insurance policies, and he appeared at the hearing with

evidence showing that he had performed that duty, he could not also be charged with failure to provide child support and to remove the lien on his spouse's residence, as those charges were not included in the citation); Harthun v. Dist. Court, 178 Colo. 118, 495 P.2d 539 (1972)(where citation referred to an attached order, which recited that appellant was cited for contempt because of his failure to appear, notice was sufficient); Eatchel v. Lanphere, 170 Colo. 545, 548, 463 P.2d 457, 459 (1970)(“the citation for contempt plays a very important role in enabling the person charged to understandingly shape his course and prepare his defense”); People v. Tyer, 796 P.2d 15 (Colo. App. 1990)(where the citation set forth sufficient details of the nature of the defendant's contemptuous conduct to provide her with adequate notice, due process was afforded, and therefore the occurrence of other procedural deficiencies was not prejudicial).

Here, the order that is the subject of this contempt action is the 2004 order appointing the second SA, which incorporated the 2000 order appointing the first SA and advising the parties of their obligation to both pay and cooperate with the SA. Although mother’s motion requesting a contempt citation mentioned only the

payment aspect of the order, the citation itself was not so limited. Because the citation is the controlling document, and the citation referred to the order as a whole, we conclude that father had adequate notice that he could be held in contempt for disobeying the entire order.

We recognize that the trial court's comments at the hearing about the scope of the issues involved were sometimes inconsistent and confusing. However, we are nonetheless satisfied that father had adequate notice, before the hearing began, that the issue of parenting time hinged on his completion of the evaluation, which could not even start until he paid the SA. Thus, he knew that cooperation and payment were inextricably intertwined, and that failure to make timely payment necessarily could result in sanctions for noncooperation.

## II.

Father raises two issues as to the sanctions imposed.

### A.

First, father contends that the trial court erred in failing to give him adequate notice of whether remedial or punitive sanctions would be imposed and that the court impermissibly blended the two

types of sanctions. We are not persuaded.

To find a party in contempt for violation of a lawful order of which the party is aware, the trial court must find that: (1) the party did not comply with the order; (2) the party's refusal to comply with the order was willful; and (3) the party had the ability to comply with the order. A finding of contempt is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of this discretion. In re Marriage of Lodeski, 107 P.3d 1097 (Colo. App. 2004).

These findings are required for contempt involving both remedial and punitive sanctions. However, because the two types of sanctions have different purposes, each requires specific additional findings.

If the contempt sanction is intended to be remedial in nature, the trial court must find that the party is presently able to comply. This finding is required because the contemnor must be provided with a means to purge the contempt. Accordingly, a remedial sanction may include imprisonment until performance of the act forming the basis for the contempt. In re Marriage of Lodeski, supra.

Any remedial sanction imposed -- not just imprisonment -- “will be in effect until the contempt is purged,” C.R.C.P. 107(d)(2), because remedial sanctions are “imposed to force compliance with a lawful order or to compel performance.” C.R.C.P. 107(a)(5). Attorney fees may also be awarded as a remedial sanction. In re Marriage of Lodeski, supra; see C.R.C.P. 107(d)(2).

In contrast, to impose punitive sanctions, the court must make an express finding that the contemnor's conduct was offensive to the authority and dignity of the court, and any order for imprisonment must be limited to a definite period. In re Estate of Elliott, 993 P.2d 474 (Colo. 2000); see In re Marriage of Nussbeck, 974 P.2d 493 (Colo. 1999); C.R.C.P. 107(d)(1). A punitive sanction may not be suspended based upon the performance or non-performance of any future acts. C.R.C.P. 107(e).

The lines between the two types of contempt often become blurred, resulting in hybrid orders which defy clear characterization as either remedial or punitive in nature. In such cases, courts have construed the sanction as remedial where the record justifies the characterization. See In re Estate of Elliott, supra, 993 P.2d at 478 n.1; In re Marriage of Zebedee, 778 P.2d 694 (Colo. App. 1988)

(where trial court purportedly issued punitive contempt order to vindicate dignity of court, but duty involved was obligation owed by husband to his child and court mentioned suspension of jail term, contempt was remedial in nature); McVay v. Johnson, 727 P.2d 416 (Colo. App. 1986)(where trial court's stated purpose was to vindicate dignity of court, but punishment was conditioned on husband's future performance of a duty, order was remedial rather than punitive); In re Marriage of Crowley, 663 P.2d 267 (Colo. App. 1983) (where punishment is conditioned upon contemnor's future performance of duty he has to another person, contempt order is no longer punitive, but becomes remedial).

Here, the award of attorney fees, the suspended sentence, and the lack of language concerning vindication of the court's authority and dignity, all indicate that the sanctions imposed -- both the suspended jail sentence and the suspension of parenting time until completion of the evaluation -- were remedial. Furthermore, and contrary to father's assertion, the trial court did impose a purge clause because parenting time was suspended only until father cooperated with the SA by completing a mental health evaluation. We note that father erroneously asserts that the citation provided

that punitive, not remedial, sanctions were sought. Although the court's order directing the clerk to issue the citation contained such language, that order was not directed to father. Neither mother's motion nor the citation itself mentioned either remedial or punitive sanctions.

Because father paid the fees, we agree that imposition of a remedial jail sentence was unwarranted under C.R.C.P. 107(d) for his prior disobedience of that portion of the order. See In re Marriage of Zebedee, supra; McVay v. Johnson, supra. However, because the sentence also related to father's lack of cooperation with the SA, the suspended sentence stands.

#### B.

Next, father contends that the court erred in suspending his parenting time, including all telephone contact. He asserts that the court was bound by the endangerment standard set forth in § 14-10-129(4), C.R.S. 2005, and that there was insufficient evidence to support the finding that the child was endangered. We disagree.

Father has mischaracterized the nature of this proceeding. Contrary to his assertion, this proceeding did not involve a motion to restrict parenting time under § 14-10-129(4), and therefore the

endangerment standard governing such proceedings is inapplicable. Inasmuch as father had complete control over the resumption of unsupervised parenting time, there was no “restriction” as contemplated by the statute.

As set forth above, the exercise of contempt powers is discretionary, and sanctions will not be reversed unless the contemnor shows that the court abused its discretion. In re Estate of Elliott, supra; People v. McGlotten, \_\_\_ P.3d \_\_\_ (Colo. App. No. 04CA2636, Dec. 1, 2005).

We find no abuse of that discretion here. Although the trial court was not required to consider whether the child was endangered, it was permitted to consider that factor in shaping an appropriate sanction for father’s contemptuous conduct. There was evidence in the record -- in particular, the report of the first SA -- casting some doubt as to father’s ability to use sound judgment in parenting the child. The court appropriately considered this in exercising its discretion to curtail parenting time until the SA evaluated father’s mental state.

### III.

We also reject father’s contention that the trial court’s

advisement of his rights was untimely and insufficient.

An advisement is required only when punitive contempt proceedings are contemplated. C.R.C.P. 107(d). Here, because we have concluded that the court imposed remedial sanctions, the advisement was unnecessary. In any event, father's attorney requested an advisement, and the court gave one.

#### IV.

Father's final contention is that the trial court prejudged the case and therefore was biased. Because father failed to file a motion for change of judge under C.R.C.P. 97, we decline to consider these allegations. See In re Marriage of Zebedee, supra, 778 P.2d at 699.

The judgment of contempt is affirmed.

JUDGE CASEBOLT and JUDGE FURMAN concur.