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IN THE
COURT OF APPEALS OF INDIANA

JAMES TRAYLOR,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 29A02-1102-DR-247
	)	
BETH TRAYLOR,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Wayne A. Sturtevant, Judge
Cause No. 29D05-0812-DR-2674

October 28, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

James Traylor appeals the trial court's finding that he was in contempt, the fine imposed, and the award of attorney fees to his ex-wife Beth Traylor. We affirm in part, reverse in part, and remand.

Issues

James raises three issues, which we consolidate and restate as:

I. whether the trial court properly found him in contempt; and

II. whether the trial court properly sanctioned him.

Facts

James and Beth were married and had two children, B.T. and D.T. They separated in 2008. D.T. had dyslexia and a language-based disorder. For seventh grade, D.T. attended The Hutson School ("Hutson"), which has a curriculum designed for children who have such learning difficulties. In April 2010, Beth re-enrolled D.T. at Hutson for his eighth-grade year, which was scheduled to begin on August 20, 2010. The enrollment agreement with Hutson provided that if enrollment was cancelled after May 30, 2010, the parents would be obligated to pay the full tuition amount of $13,750.

In May 2010, unbeknownst to Beth, James enrolled D.T. in Carmel Clay Schools ("Carmel") for his eighth-grade year, which was scheduled to begin on August 10, 2010. James did not include any information pertaining to Beth, other than her name, on the enrollment form. Specifically, James omitted Beth's address, phone numbers, and email address from the form.

On June 2, 2010, James and Beth executed a mediated settlement agreement for custody, parenting time, support, and property distribution, which was approved by the trial court on June 7, 2010. The settlement agreement provided that the parties would share physical custody and included a detailed parenting time schedule. The parties agreed to share joint legal custody, and the agreement provided, "If the parties are unable to agree after a reasonable good faith effort on a major decision (other than a decision relating to the choice of [D.T.'s] high school) Wife shall make the final decision." App. p. 16. The agreement also provided, "[D.T.] shall complete eighth grade at Hutson[,]" and required Beth to pay the full amount of the tuition. Id.

During the summer of 2010, James only exercised one week of parenting time from August 8, 2010 through August 15, 2010. On August 10, 2010, James had D.T. start school at Carmel. Although James understood that the settlement agreement required D.T. to attend Hutson, James claimed to be "looking at a opportunity for [D.T.] to shadow Carmel for the nine-day period . . . ." Tr. p. 49. James also acknowledged, "All decisions are made by Beth, so all I could do is gather information and—and expose [D.T.] to a variety of experiences so that Beth can make the final decision." Id. at 50.

On August 12, 2002, Beth learned from D.T. that he had been attending Carmel. According to Beth, D.T. "really liked the school" and, because placement for D.T. had been difficult in the past, she was willing to do anything that was in his best interests. Id. at 20. Beth agreed to let D.T. continue at Carmel and withdrew D.T. from Hutson. On August 19, 2010, Beth told James to take D.T. to Carmel instead of Hutson on August 20, 2010. Because Beth's instructions were not in writing, James took D.T. to Hutson the

next morning without a uniform, lunch, or supplies. Beth picked D.T. up from Hutson later that day and took him to Carmel, where he continued to go to school thereafter.

On October 12, 2010, Beth filed a motion for rule to show cause and request for sanctions, and James responded. On January 19, 2011, following a hearing, the trial court issued an order that provided in part:

> The evidence is undisputed that Respondent (Father) enrolled [D.T.] in Carmel Middle School in violation of this provision. Father claims that the enrollment was temporary and was not a final decision on where [D.T.] would attend school in the 8th grade. Father however clearly opposed this provision, and the total lack of communication with Mother and the secrecy with which Father pursued the "temporary" enrollment convinces the court that his actions were taken to undermine the settlement agreement and to disobey the orders of this court. He is therefore found in contempt.
>
> Accordingly, an appropriate sanction must be determined. This is not measured by the tuition of over $13,000 that Mother must pay to the Hutson School on her contractual commitment. The commitment was made before the parties entered into their settlement agreement and Mother could obtain no refund after 5/31/2010 regardless of Father's actions taken in August. The Court does find however that a substantial monetary sanction is appropriate for Father's contempt to provide a deterrent against future violations. Therefore, the Court orders Father to pay Mother $13,000, $6,500 of which is to paid [sic] within 30 days. If not paid within that time, the Clerk is ordered to enter this as a civil judgment in favor of Mother, and against Father. Payment of the balance is stayed on condition of Father having no future violations of this Court's orders. Father is also ordered to pay Mother's attorney fees in the amount of $4,250 . . . .

App. p. 11. James now appeals.

Analysis[1]

I. Contempt Finding

James argues that the trial court improperly found him in contempt. "Indirect contempt is the willful disobedience of any lawfully entered court order of which the offender had notice." Richardson v. Hansrote, 883 N.E.2d 1165, 1171 (Ind. Ct. App. 2008). Whether a person is in contempt of a court order is a matter left to the trial court's discretion, and we will reverse a trial court's determination only where an abuse of discretion has been shown. Id. "An abuse of discretion occurs only when the trial court's decision is against the logic and effect of the facts and circumstances before it." Id.

"'Contempt of court involves disobedience of a court which undermines the court's authority, justice, and dignity.'" Carter v. Johnson, 745 N.E.2d 237, 240 (Ind. Ct. App. 2001) (quoting Hopping v. State, 637 N.E.2d 1294, 1297 (Ind. 1994)). "There are two types of contempt, direct and indirect." Id. at 240-41. Direct contempt involves an action that interferes with the business of the court of which the court has firsthand and immediate knowledge. Id. at 241. "Alternatively, acts of indirect contempt are those which undermine the activities of the court but fail to satisfy the requirements to be direct contempt." Id.

Indiana Code Section 34-47-3-1 provides:

> A person who is guilty of any willful disobedience of any process, or any order lawfully issued:

[1] In his reply brief, James contends that Beth did not respond to several of his arguments and asserts his arguments are reviewable for prima facie error. Because Beth appropriately responded to James's arguments, we decline to impose that standard of review.

> (1) by any court of record, or by the proper officer of the court;
>
> (2) under the authority of law, or the direction of the court; and
>
> (3) after the process or order has been served upon the person;
>
> is guilty of an indirect contempt of the court that issued the process or order.

Indiana Code Section 34-47-3-6 provides in part:

> (b) If the defendant answers to the facts set forth in the rule by:
>
> (1) showing that, even if the facts set forth are all true, they do not constitute a contempt of the court; or
>
> (2) denying, or explaining, or confessing and avoiding the facts, so as to show that no contempt was intended;
>
> the court shall acquit and discharge the defendant.
>
> (c) If the defendant's answer to the rule does not sufficiently deny, explain, or avoid the facts set forth in the rule, so as to show that no contempt has been committed, the court may proceed to attach and punish the defendant for the contempt, by:
>
> (1) fine;
>
> (2) imprisonment; or
>
> (3) both fine and imprisonment.

James contends that the trial court committed fundamental error when it found him in contempt because the finding is based on his May 2010 enrollment of D.T. at Carmel,

which occurred prior to the trial court's June 7, 2010 approval of the settlement agreement. He argues that he could not have violated an order that did not yet exist.

Beth's motion for rule to show case referenced the provisions of the settlement agreement awarding Beth and James joint legal custody of the children and specifying that D.T. shall complete his eighth grade year at Hutson. Although Beth mentioned the May 2010 enrollment at Carmel in her motion, she explained that James did not provide Carmel with any of Beth's contact information and he arranged for D.T. to begin school at Carmel on August 10, 2010, during James's parenting time and without her knowledge or consent. The trial court based its contempt finding on "the total lack of communication with Mother and the secrecy with which Father pursued the 'temporary' enrollment[.]" App. p. 11. The trial court was convinced that James's "actions were taken to undermine the settlement agreement and to disobey the orders of this court." Id.

We are not convinced that the contempt finding is based on the May 2010 enrollment at Carmel; rather, it was based on a concerted and secretive effort by James to secure D.T.'s attendance at Carmel without Beth's knowledge or consent. The totality of James's actions shows a willful disobedience of the joint legal custody and Hutson provisions of the settlement agreement.

James also argues that, because he took D.T. to Hutson on the first day of school as required by the settlement agreement, he purged himself of the alleged contempt, rendering Beth's subsequent contempt action moot.[2] Taking James's argument to its

[2] In support of James's argument that the contempt was rendered moot by his compliance, James relies on State ex rel. Pigg v. Hamilton County Circuit Court, 250 Ind. 17, 234 N.E.2d 649 (1968). Pigg

logical conclusion, a contempt finding would never be valid as long as the contemnor complied with the trial court's order at some point prior to the filing of a contempt action, regardless of how blatant or extensive the contempt was. We reject such an argument. See, e.g., MacIntosh v. MacIntosh, 749 N.E.2d 626 (Ind. Ct. App. 2001) (affirming trial court's finding of contempt for mother's failure to have either of the parties' children attend a planned trip to Switzerland with father but vacating sanctions that were neither compensatory nor coercive), trans. denied.

By having D.T. attend Carmel without Beth's knowledge or consent, James willfully disobeyed the settlement agreement. The act of dropping D.T. off at Hutson on August 20, 2010, did not purge James of his previous disregard for the settlement agreement.

Similarly, Beth's subsequent decision to withdraw D.T. from Hutson and permit him to continue at Carmel does not shield James from his contempt.[3] It was within the trial court's discretion to determine that James's actions, regardless of Beth's reaction, constituted a willful disobedience of a court order, and James has not established that that decision was an abuse of discretion.

II. Sanctions

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involved a writ of prohibition and did not address the merits of the underlying contempt proceeding. We do not believe that it stands for the proposition that, by taking D.T. to Hutson, the subsequent contempt action was rendered moot.

[3] James contends that, by permitting D.T. to continue at Carmel, Beth's "actions placed her in violation of the same order and for the same reason as she complained to the trial court." Appellant's Br. p. 9. However, that question is not before us today.

James contends that the fine imposed by the trial court was punitive and erroneous.

> It lies within the inherent power of the trial court to fashion an appropriate punishment for the disobedience of its order. Sanctions in a civil contempt proceeding may seek both to coerce behavior and to compensate an aggrieved party. "In a civil contempt action the fine is to be paid to the aggrieved party, and imprisonment is for the purpose of coercing compliance with the order." Penalties designed to compel future compliance with a court order are considered to be coercive and avoidable through obedience.

MacIntosh, 749 N.E.2d at 631 (citations omitted).

A. Fine

Regarding the first $6,500 portion of the fine that was payable immediately, James relies on MacIntosh, in which we held that the imposition of a $1,000 fine was improper where it neither coerced the contemnor into compliance with the court order nor compensated the person seeking the contempt citation for losses sustained. MacIntosh, 749 N.E.2d at 631. We further observed that the contemnor had no opportunity to purge herself of the fine and concluded that the fine was an inappropriate punishment for the contemnor's past behavior and could not be imposed in a civil contempt proceeding. Id.

Beth argues that the fine partially compensated her for losses sustained. In making this argument, however, Beth acknowledges that the fine was not measured on the amount of the nonrefundable tuition. In fact, the trial court acknowledged that the commitment to Hutson was made before the parties entered into the settlement agreement and expressly stated that it was imposing "a substantial monetary sanction . . . to provide

a deterrent against future violations." App. p. 11. Given this language, we cannot agree with Beth that the fine was intended to compensate her for the lost tuition.[4]

Likewise, the trial court's order does not support Beth's assertion that the fine was intended to compensate her for her inconvenience and frustration. It is not clear whether Beth sought damages on this basis before the trial court, nor does she provide us with an explanation of how these damages should be calculated on appeal.[5] Without more, Beth's inconvenience and frustration do not warrant the imposition of the $6,500 fine.

James contends that, because the fine was not compensatory, he must be afforded an opportunity to avoid the fines through obedience. He argues that once Beth decided D.T. should attend Carmel, "she removed any need for, or possibility of, James's future compliance with that order." Appellant's Br. pp. 11-12. Beth contends there was no way for James to purge himself regarding D.T.'s eighth-grade school attendance because "that bell cannot be unrung." Appellee's Br. pp. 13-14. She also asserts that James has the opportunity to avoid one half of the $13,000 fine with his future compliance and that the suspension of one half of the fine coerces him into future compliance.

We disagree with Beth that staying one of half of the fine somehow made the full $13,000 fine appropriate. Further, because the first $6,500 portion of the fine neither coerced James into compliance not compensated Beth for losses sustained, it was an

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[4] Beth notes that, had she been aware of James's intention to have D.T. attend Carmel sooner, she might have been able to negotiate with Hutson regarding a reduction of the tuition amount. This argument, however, is purely speculative.

[5] Beth testified that she is a self-employed physician and arranged to take two days off work for the hearing. Beth, however, does not direct us to any specific evidence valuing the lost income and does not argue on appeal that the days off provide a basis for the fine.

inappropriate punishment for James's past behavior. See MacIntosh, 749 N.E.2d at 631. Although we certainly do not condone James's actions, the first $6,500 fine was improper.

As for the stayed $6,500 portion of the fine, James contends that it is "an impermissible future, fixed, punitive fine" because there is no way to predict whether his future non-compliance would warrant a sanction of $6,500. Appellant's Br. p. 14. In making these arguments, James relies heavily on International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 114 S. Ct. 2552 (1994). The question addressed in Bagwell was "what procedural protections are due before any particular contempt penalty may be imposed." Bagwell, 512 U.S. at 831, 114 S. Ct. at 2559. The Supreme Court decided that $52 million dollars in fines levied by a Virginia trial court for widespread, ongoing, out-of-court violations of a complex injunction were criminal and "constitutionally could not be imposed absent a jury trial." Id. at 838, 114 S. Ct. at 2563.

Bagwell is of limited relevance here, where James concedes that a criminal jury trial is not required and instead requests, without citation to authority, an order vacating the sanction. Moreover, the Bagwell court acknowledged, "Because the right to trial by jury applies only to serious criminal sanctions, courts still may impose noncompensatory, petty fines for contempts such as the present ones without conducting a jury trial." Id. at 838-39, 114 S. Ct. at 2563. The court declined to answer "the difficult question where the line between petty and serious contempt fines should be drawn, since a $52 million fine unquestionably is a serious contempt sanction." Id. at 838, 114 S. Ct. at 2562 n.5.

Without any analysis from James of whether the fine imposed by the trial court here is a serious contempt fine like the $52 million fine imposed in Bagwell, we decline to assume that it was. Thus, we are not convinced that under Bagwell the stayed portion of the fine is erroneous.

Instead, we are guided by our analysis in MacIntosh, where, in addition to a fine, the contemnor was also sentenced to a two-year suspended incarceration. We acknowledged that, although incarceration undoubtedly has a punitive component, the contemnor could avoid incarnation by ensuring that her ex-husband received parenting time under the general visitation order. MacIntosh, 749 N.E.2d at 631-32. We concluded that the trial court was not precluded from ordering imprisonment as a condition for compliance with its order. Id. at 632; see also In re Paternity of M.P.M.W., 908 N.E.2d 1205, 1210 (Ind. Ct. App. 2009) (recognizing that a suspended sentence conditioned on adhering to the trial court's orders has generally been held a proper remedial contempt sanction).

We are not persuaded by James's argument that it is impossible for him to comply with order because D.T. attended Carmel, not Hutson, at Beth's behest. The trial court expressly stated that it was attempting to deter against future violations its orders. Thus, James can avoid the imposition of the fine by complying with the trial court's orders in the future. This portion of the sanction was not improper.

B. Attorney Fees

James appears to argue that the $4,250 award of attorney fees was improper because he was not given an opportunity to purge himself of the contempt. He goes on to

acknowledge, "Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge." Appellant's Br. p. 12. Beth presented evidence that, before the hearing, she had accumulated $3,500 in attorney fees on her motion for rule to show cause. In the absence of specific argument to the contrary, we believe the attorney fee award is compensatory and proper. See MacIntosh, 749 N.E.2d at 631 (concluding that requiring contemnor to pay litigation expense, including attorney fees, related to an emergency petition and contempt proceeding were compensatory in nature and a proper exercise of the court's inherent authority to compensate an aggrieved party); Adler v. Adler, 713 N.E.2d 348, 355 (Ind. Ct. App. 1999) (affirming award of attorney fees in a contempt proceeding because, "Without regard to economic resources, once a party is found in contempt, the trial court has 'the inherent authority to compensate the aggrieved party for losses and damages resulting from another's contemptuous actions.'" (citation omitted)).[6]

Conclusion

James has not established that the contempt finding was erroneous. Although the first $6,500 portion of the fine was improper, the stayed $6,500 portion of the fine and attorney fee award were proper sanctions. We affirm in part, reverse in part, and remand for the trial court to vacate the first $6,500 portion of the fine.

[6] Because we conclude that the award of attorney fees was proper as part of the contempt proceeding, we need not address James's argument that, absent a valid contempt finding, it was an improper post-dissolution attorney fee award.

Affirmed in part, reversed in part, and remanded.

ROBB, C.J., and BRADFORD, J., concur.