

RECEIVED
JAN 22 2007

FILED

IN THE CIRCUIT COURT OF GILMER COUNTY, WEST VIRGINIA

2007 JAN 16 PM 1:18

BARBARA CONLEY DEITZ
Petitioner,

LANE SMITH
CIRCUIT CLERK
GILMER COUNTY, WV

vs.

Civil Action No. 03-D-60

BILLY HARRAH DEITZ,

**FINDINGS OF FACT
CONCLUSIONS OF LAW
ORDER AFFIRMING, IN PART,
AND
REVERSING, IN PART,
FAMILY COURT ORDER on
THIRD PETITION FOR CONTEMPT**

On a prior day there appeared the above named petitioner, in person and by counsel, James Wilson Douglas, and the above named respondent, Billy Harrah Deitz, self represented for a hearing upon the appeal of Billy Harrah Deitz, to the Family Court's Final Order on Third Petition for Contempt, of June 19, 2006.

Whereupon, the Court, took the matter under advisement, pending further review of the matter. Thereafter, the Court did further consider the argument of counsel, the pleadings and the record herein.

Before this Court may overturn a Family Law Court's order, this Court must review the findings of fact by the Family Court Judge under the clearly erroneous standard and the application of the law under an abuse of discretion standard. **W. Va. Code 51-2A-14 (b).**

The Court makes the following:

Findings of Fact

1. That by order entered on August 15, 2005, which order has become final, the Respondent, was required, in part, to:

26. That spousal support of and from the Respondent unto the Petitioner on Respondent's equitable conduct is appropriate, taking into account all the factors enumerated in West Virginia Code 48-6-301; however, the same will not be permanent, nor rehabilitative, in nature, but spousal support herein shall be alimony or spousal support, in gross. Therefore, the petitioner is hereby granted a spousal support award in gross from the Respondent in the amount of Forty-five Thousand Dollars (\$45,000.00) which shall be paid in three annual installments of Fifteen Thousand Dollars (\$15,000.00), beginning and due on September 1, 2005 and like amounts due and owing on September 1, 2006 and September 1, 2007.

2. The Respondent failed to pay said sum that was due on September 1, 2005.

3. That a Second Petition for Contempt¹ was filed by the petitioner on September 1, 2005, by the petitioner, alleging that the respondent was in contempt for failure to pay certain sums as required by the August 15, 2005 order as more particularly set forth in said petition.

4. On March 10, 2006, pursuant to a hearing held on February 21, 2006, the Family Court found the respondent in civil contempt for failure to pay the Fifteen Thousand Dollars spousal support due on September 1, 2005, the monthly debt installment, the debt due in regards to the Billy Deitz Well Service, Inc., the Billy Deitz Wash Service, the AIG credit

¹ It appears from the file that a petition for contempt was filed by the petitioner, prior to the August 15, 2005 order and the issues raised in that order were addressed in the August 15, 2005. Although the style of the petition for contempt filed on September 15, 2005 is a second petition for contempt, it appears to be only the first petition for contempt filed as to the August 15, 2005.

card debt, the Stonewall Jackson Hospital debt, some temporary alimony payments and attorney fees in the sum of \$5,000.00, which were to be paid in \$250.00 a month installments.

5. The Family Court found that the total due the petitioner, for the arrearages set forth in the preceding paragraph 4 was \$27,102.00.

6. The respondent by said March 10, 2006, was ordered to pay said sums by March 15, 2006, or to be jailed for 45 days, or until such time as he purges himself of contempt, whichever shall occur first, effective March 15, 2006.²

7. The respondent was jailed on March 17, 2006 and was released from jail on or about May 4, 2006.

8. On May 16, 2006, a Third Petition for Contempt was filed for failure of the respondent to pay the sums for which he was jailed on March 17, 2006.

9. The Family Court issued a rule to show cause on May 26, 2006, setting the matter for hearing on June 12, 2006.

10. That a hearing was held on June 12, 2006, and at that hearing the Family Court found that the respondent was in contempt by failure to pay the sum of \$27,602.00 (of which \$27,102.00), was included in the March 15, 2006 and the respondent was ordered to pay said sum by June 19, 2006 or be jailed for six months or until such time as he purged himself of that contempt.

11. An order was entered on June 19, 2006, and in that order as to the ability to pay the Family Court stated:

14. That further, the Respondent has the present ability to purge himself of contempt insasmuch as: a) Respondent has not reported that he is in default of any major debt; b) Respondent in March, 2006, transferred the Wash Service property to a Third Party; that the former marital residence a 109 Charles Street in Glenville (owned by the same Woodford family who owns the Wash Service) is still occupied rent free by the Respondent; c) the Respondent's utilities have been paid by a Third Party, now and during incarceration; d) a down payment of approximately \$2300.00 for the Respondent's new truck was paid by a Third Party; and e) the Court is unmindful of its

² Although said order was not appealed, the order appears to deficient as to the respondent's current ability to pay.

findings of the August 15, 2005 Final Divorce Decree regarding Respondent's failure to account for approximately \$100,000.00 from the proceeds of the unauthorized August 9, 2004 sale of a marital service rig by a cashier's check made payable to the Respondent and the Bank of Gassaway. As a consequence the Court believes that the Respondent is currently accessing those unaccounted for funds in order to support his current lifestyle.

12. That this Court by order entered on June 19, 2006, entered a temporary stay of the respondent's incarceration pending a hearing on June 28, 2006, at which time the parties would be heard on the stay.

13. The hearing of June 28, 2006, due to a conflict in schedule of counsel for the petitioner was re-scheduled to June 29, 2006.

14. This Court granted a stay of the June 19, 2006, order of incarceration at the June 29, 2006 hearing but as a condition of said stay the respondent, who is now gainfully employed is required to pay unto the Clerk of this Court within 24hours of his payday (every two weeks), the sum of \$400.00 per pay period.

15. The respondent has faithfully complied with the payments required by this Court.

Discussion

Before this Court may overturn a Family Law Court's order, this Court must review the findings of fact by the Family Court Judge under the clearly erroneous standard and the application of the law under an abuse of discretion standard. **W. Va. Code 51-2A-14 (b).**

As to the powers of contempt of a Family Court, there are two applicable provisions of the West Virginia Code.

West Virginia Code 48-1-304, provides:

(a) Upon a verified petition for contempt, notice of hearing and hearing, if the petition alleges criminal contempt or the court informs the parties that the matter will be treated and tried as a criminal contempt, the matter shall be tried in the circuit court before a jury, unless the party charged with contempt shall knowingly and intelligently waive the right to a jury trial with the consent of the court and the other party. If the jury, or the circuit court sitting without a jury, shall find the defendant in contempt for willfully failing to comply with an order of the court made pursuant to the provisions of article

three, four, five, eight, nine, eleven, twelve, fourteen or fifteen of this chapter, as charged in the petition, the court may find the person to be in criminal contempt and may commit such person to the county jail for a determinate period not to exceed six months.

(b) If trial is had under the provisions of subsection (a) of this section and the court elects to treat a finding of criminal contempt as a civil contempt and the matter is not tried before a jury and the court finds the defendant in contempt for willfully failing to comply with an order of the court made pursuant to the provisions of article three, four, five, eight, nine, eleven, twelve, fourteen or fifteen of this chapter, and if the court further finds the person has the ability to purge himself of contempt, the court shall afford the contemtor a reasonable time and method whereby he may purge himself of contempt. If the contemtor fails or refuses to purge himself of contempt, the court may confine the contemtor to the county jail for an indeterminate period not to exceed six months or until such time as the contemtor has purged himself, whichever shall first occur. If the petition alleges civil contempt, the matter shall be heard by the family court. The family court has the same power and authority as the circuit court under the provisions of this section for criminal contempt proceedings which the circuit court elects to treat as civil contempt.

(c) In the case of a charge of contempt based upon the failure of the defendant to pay alimony, child support or separate maintenance, if the court or jury finds that the defendant did not pay because he was financially unable to pay, the defendant may not be imprisoned on charges of contempt of court.

(d) Regardless of whether the court or jury finds the defendant to be in contempt, if the court shall find that a party is in arrears in the payment of alimony, child support or separate maintenance ordered to be paid under the provisions of this chapter, the court shall enter judgment for such arrearage and award interest on such arrearage from the due date of each unpaid installment. Following any hearing wherein the court finds that a party is in arrears in the payment of alimony, child support or separate maintenance, the court may, if sufficient assets exist, require security to ensure the timely payment of future installments.

(e) At any time during a contempt proceeding the court may enter an order to attach forthwith the body of, and take into custody, any person who refuses or fails to respond to the lawful process of the court or to comply with an order of the court. Such order of attachment shall require the person to be brought forthwith before the court or the judge thereof in any county in which the court may then be sitting.

and

West Virginia Code 51-2A-9:

§ 51-2A-9. Contempt powers of family court judge

(a) In addition to the powers of contempt established in chapter forty-eight of this code, a family court judge may:

(1) Sanction persons through civil contempt proceedings when necessary to preserve and enforce the rights of private parties or to administer remedies granted by the court;

(2) Regulate all proceedings in a hearing before the family court judge; and

(3) Punish direct contempts that are committed in the presence of the court or that obstruct, disrupt or corrupt the proceedings of the court.

(b) A family court judge may enforce compliance with his or her lawful orders with remedial or coercive sanctions designed to compensate a complainant for losses sustained and to coerce obedience for the benefit of the complainant. Sanctions must give the contemtor an opportunity to purge himself or herself. In selecting sanctions, the court must use the least possible power adequate to the end proposed. A person who lacks the present ability to comply with the order of the court may not be confined for a civil contempt. Sanctions may include, but are not limited to, seizure or impoundment of property to secure compliance with a prior order. Ancillary relief may provide for an award of attorney's fees.

Although the petition for contempt does not identify the type of contempt the petitioner believes has occurred, the Family Court found the respondent to be in civil contempt³.

There is no question that the respondent is in contempt of the Family Court's prior order by failing to pay the sums previously ordered and this Court is of the opinion that the record adequately supports the family court's findings in that regard.

However, the sanctions imposed by the family court appear to both clearly erroneous as to the application of law and an abuse of the family court's discretion.⁴

³ The Family Court is without jurisdiction to try criminal contempt proceedings under 48-1-304.

⁴ This Court notes that West Virginia Code 48-1-304 is poorly drafted, ambiguous and confusing as to when the provisions of 48-1-304 (b) are applicable to a family court proceeding and

48-1-304 and 51-2A-9 must be read in "pari materia", to ascertain the authority that a family court judge has in matter contempt matters for different statutes that cover the same subject must be construed with reference to each other. Meadows v. Hopkins, 566 S.E.2d 269, 211 W. Va. 382 (2002).

48-1-304 (b) provides, in pertinent part:

...if the court finds the person has the ability to purge himself of the contempt, the court shall afford the contemtor a reasonable time and method by which he may purge himself of contempt.

48-1-304 (c) provides:

In the case of a charge contempt based upon the failure of the defendant to pay alimony, child support or separate maintenance, if the court of jury finds that the defendant did not pay because he was financially unable to pay, the defendant may not be imprisoned on charges of contempt of court.

51-2A-9 (b) provides:

A family court judge may enforce compliance with his or her lawful orders with remedial or coercive sanctions designed to compensate a complainant for losses sustained and to coerce obedience for the benefit of the complainant. Sanctions must give the contemtor an opportunity to purge himself or herself. In selecting sanctions, the court must use the least possible power adequate to the end proposed. A person who lacks the present ability to comply with the order of the court may not be confined for a civil contempt. Sanctions may include, but are not limited to, seizure or impoundment of property to secure compliance with a prior order. Ancillary relief may provide for an award of attorney's fees."

All of the afore cited code sections clearly require that the contemtor must be given a reasonable opportunity to purge himself of the contempt. The family court abused its discretion when it allowed the respondent a very limited period of time to pay the sum of

when a family court has the authority to impose the incarceration of an indeterminate sentence not to exceed six months or until such time as the contemtor purges himself of the contempt, This Court declines to address that issue herein, in that such issue is moot since that issue need not be addressed to properly resolve the issues in this case.

approximately twenty-seven thousand dollars, that the family court was due from the respondent. As to the hearing that was held on February 21, 2006, (even if one gives the family court the benefit of the doubt that the period of time should be calculated from February 21, 2006, when the order was not entered until March 10, 2006), the respondent only had 23 days to come up with twenty-seven thousand dollars, and as to the June 12, 2006 hearing, (which order was not entered until June 19, 2006), the respondent was only given seven days to come up with twenty-seven thousand dollars. Such limited period of time is clearly an abuse of discretion by the family court, under both 48-1-304 and 51-2A-9.

In addition, the respondent was out of jail, as a result of the previous order of incarceration by the family court, approximately 40 days, when the family court ordered his incarceration for a second time, for the failure to pay the same sums. When adding this fact, the limited period of time to purge the contempt is especially egregious.

The family court order's order was clearly erroneous in the application of 48-1-304 (b) in that the family court failed to even set forth a "method" by which the contemtor may purge himself of the contempt.

The family court abused its discretion in finding that the respondent had the current ability to pay the twenty-thousand dollars that was ordered. When one examines the factual finding in that regards, to-wit:

14. That further, the Respondent has the present ability to purge himself of contempt insasmuch as: a) Respondent has not reported that he is in default of any major debt; b) Respondent in March, 2006, transferred the Wash Service property to a Third Party; that the former marital residence a 109 Charles Street in Glenville (owned by the same Woodford family who owns the Wash Service) is still occupied rent free by the Respondent; c) the Respondent's utilities have been paid by a Third Party, now and during incarceration; d) a down payment of approximately \$2300.00 for the Respondent's new truck was paid by a Third Party; and e) the Court is unmindful of its findings of the August 15, 2005 Final Divorce Decree regarding Respondent's failure to account for approximately \$100,000.00 from the proceeds of the unauthorized August 9, 2004 sale of a marital service rig by a cashier's check made payable to the Respondent and the Bank of Gassaway. As a consequence the Court believes that the Respondent is currently accessing those unaccounted for funds in order to support his current lifestyle

Such finding is not fact specific as to assets that the respondent has available to pay the

lump sum of twenty-seven thousand dollars and attempts to rely upon facts that the family court found, in its order of divorce entered on August 13, 2005, and is not fact specific as to any assets that the respondent had in his possession to pay the sums for which the respondent is in contempt. The speculation that the respondent is accessing funds unaccounted for in the divorce proceeding is not sufficient to find a present ability to pay and there was no finding that the respondent was gainfully employed or had any source of income.

The family court further abused its discretion under 51-2A-9, in that the family court is obligated to use the least possible power adequate to the end proposed.

The Court notes that although the record is unclear as to when the respondent became employed, the respondent was employed as of June 29, 2006 and has been compliant as to the payments required to be made to the petitioner, as a condition of the stay.

CONCLUSIONS OF LAW

It is accordingly **ADJUDGED** and **ORDERED** as follows:

1. That the portion of the order of the Family Court of Gilmer County, West Virginia, entered on June 19, 2006, finding the respondent in contempt of its prior order is **AFFIRMED**.

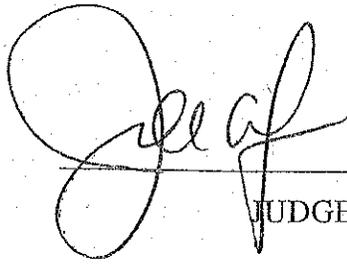
2. That the portion of the aforesaid order incarcerating the respondent is **SET ASIDE** and **HELD FOR NAUGHT**, the same being an **ABUSE OF DISCRETION** and **CLEARLY ERRONEOUS**, for the reasons heretofore set forth.

3. That this case is **REMANDED** to the Family Court of Gilmer County, West Virginia, with direction that the Family Court enter an order of contempt, allowing the respondent to purge himself of that contempt by remaining gainfully employed and by making payments of \$400.00 per pay period, to the Clerk of this Court, within 24 hours of his receipt of said pay, which sum upon receipt thereof shall be paid by the Clerk to the petitioner.

4. Each party's exceptions are noted by the Court.

The Clerk of this Court shall send certified copies of this Order to counsel of record for the parties, to any unrepresented party and to the Family Court.

Enter this 12th day of January, 2007.

A handwritten signature in cursive script, appearing to read "Jill of", is written over a horizontal line.

JUDGE