

IN THE COURT OF APPEALS OF MARYLAND

No. 47

September Term, 1996

THOMAS E. OTT, III

v.

FREDERICK COUNTY
DEPARTMENT OF SOCIAL SERVICES

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Raker
Wilner,

JJ.

Concurring opinion by Wilner, J.

Filed: May 22, 1997

I concur in the result reached by the Court in this case. My concurrence is based on my agreement that (1) this case, which was tried before January 1, 1997, is governed by the pronouncements and holdings in *Lynch v. Lynch*, (2) under those holdings, the court was precluded from entering a finding of civil contempt unless the evidence showed that Ott had the financial ability, then and there, to discharge his obligation under the support order, and (3) there was no evidence that he had such ability.

Fortunately, as noted by Chief Judge Bell in footnote 2 of his opinion, some of the rigid pronouncements and holdings of *Lynch* have since been superseded in support cases by the adoption of Md. Rule 15-207(e), which, as amended by this Court on December 10, 1996, took effect January 1, 1997.¹ I write separately to emphasize the point made in the footnote that the Court's opinion in this case will not control cases of this kind decided after January 1, 1997.

In adopting Rule 15-207(e), with the amendments submitted by the Rules Committee at the Court's invitation, the Court has expressly overruled the holding in *Lynch*, as to support cases, that a finding of constructive civil contempt cannot be made unless the

¹ Regrettably, the current 1997 edition of the Maryland Rules does not contain the amended version of Rule 15-207(e). The new contempt rules, submitted as part of the Rules Committee's 132nd Report, were initially adopted on June 10, 1996. At the Court's direction, the Rules Committee reconsidered those rules in light of *Lynch v. Lynch*, and, in a supplement to its 132nd Report, submitted amendments specifically designed to overrule some of the holdings in *Lynch*. This Court adopted those amendments on December 19, 1996, which, apparently, was too late for them to be included in the 1997 Volume of the Maryland Rules.

evidence establishes that, on the day of the finding, the defendant has the ability to purge the contempt. Wisely, in my view, the law now separates the ability to find a civil contempt from the options available to punish it. Subject only to two stated conditions, the rule expressly allows the court to find a civil contempt if the petitioner proves by clear and convincing evidence that the alleged contemnor "has not paid the amount owed, accounting from the effective date of the support order through the date of the contempt hearing." The conditions, stated in § (e)(3) of the Rule, preclude a finding of contempt only if, and to the extent that, the alleged contemnor proves by a preponderance of the evidence that (1) from the date of the support order through the date of the hearing, he or she "(i) never had the ability to pay more than the amount actually paid and (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment," or (2) enforcement by contempt is barred by limitations.

If the court finds the person in civil contempt, it must enter an order stating the amount of arrearage for which enforcement by contempt is not barred by limitations, any sanction imposed for the contempt, and how the contempt may be purged. In that last regard, the rule provides that, if the contemnor does not have the present ability to purge the contempt, "the order may include directions that the contemnor make specified payments on the arrearage at future times and perform specified acts to enable the contemnor to

comply with the direction to make payments."

A Committee Note to the rule warns that, "[i]f the contemnor fails, without just cause, to comply with any provision of the order, a criminal contempt proceeding may be brought based on a violation of that provision." The clear intent of the Court, in adopting Rule 15-207(e), as amended, was to abrogate unnecessary impediments to the effective enforcement of spousal and child support orders.

I would hope that, consistent with the concerted efforts of the Congress and the Maryland General Assembly, the courts of this State, while respecting in every detail the Constitutional rights and privileges of all persons charged with contemptuous disobedience of court-entered support orders, will nonetheless use the new rule as it was intended to be used and force recalcitrant obligors, by every lawful and available means, to discharge their obligations timely and faithfully.