Circuit Court for Baltimore County
Case No. C-03-FM-19-004662

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0677

September Term, 2023

BEJAMIN DAVID

v.

HEATHER DAVID

Wells, C.J.,
Leahy,
Eyler, Deborah S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: June 24, 2024

*This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In the Circuit Court for Baltimore County, appellee Heather David ("Mother") requested a finding of contempt against appellant Benjamin David ("Father") for failing to make complete and timely child support payments under a court order. After a hearing, the circuit court agreed with Mother. The court found Father in contempt, sentenced him to a period of incarceration, but suspended it, established the child support arrears, and as a purge, ordered Father to pay an amount toward the arrearage in addition to meeting his monthly court-ordered child support obligation to avoid incarceration.

Father timely appealed. In an informal brief he raises several issues, but we conclude the only issue we may properly address is whether the circuit court erred in finding him in constructive civil contempt.[1] We conclude it did not and affirm.

BACKGROUND

The parties were divorced in 2021. The parties' judgment of divorce establishes that Father is to pay Mother $1,637 per month for the support of the parties' two minor children, starting from March 1, 2021. At the time of divorce the child support arrears were $8,018. Father was to pay an additional $135 toward the arrears.

In her contempt petition, Mother alleged that Father had only paid $500 starting in June 2021 and at the time of her petition the arrears "exceed[ed] $10,000…." In his answer, Father averred that the court ordered amount "exceed[ed] [his] current income." He further claimed that the court imposing jail time or revoking his driver's license, as Mother requested, would "not help [him] earn more money."

[1] Mother did not file a brief.

At the May 4, 2023, contempt hearing Mother and Father testified. Mother's testimony was straightforward and was largely uncontradicted. She reiterated what she had alleged in her petition, namely that Father paid the full court ordered child support amount in March, April, and May 2021, but by June had paid no more than $500 per month. She added that Father would pay for the children's extracurricular activities on an as-needed-basis. More significantly, she testified that a month after the divorce, in April 2021, Father received a lump sum payment of $30,000 from his employer. According to Mother, Father used the money to take vacations, buy a recreational vehicle, purchase another vehicle, and a boat. Father moved within "a half mile" of Mother and pays $700 to $800 more in rent, according to her. By her estimation, the child support arrears were "over $30,000."

Father admitted he had not paid the full amount of child support, but after reading the transcript of the hearing, his explanation for why is difficult to follow. He started by explaining that the child support order was based on his 2019 income of $80,000, which, in his reckoning, was $47,000 more than he made when the child support was established. In 2021, Father claimed his income was $12,850 and in 2022 his income was $25,900. Apparently, he lost his job at United Parcel Service (UPS) and now earned a living by doing "painting and caulking," as well as by cutting grass. He admitted that he was $29,265.25 in arrears as of November 2022. A large part of his testimony focused on facts and concerns which though legitimate, were not the focus of the contempt hearing. These matters included an allegation that he had molested his daughter, communication problems

between him and the children, and his frustration with trying to navigate the legal system on his own.

Mother's cross examination of Father revealed that Father received $33,000 from UPS upon his separation from that company. Father also admitted that, at the time of divorce, he had $150,000 in an Individual Retirement Account (IRA). Father testified that, on the one hand, he "transferred" the IRA money to an account to be managed by his sister at Edward Jones, a financial planning business. On the other hand, Father acknowledged that he used some of the money "[t]o make ends meet."

When the court directly asked him, Father clarified that after he received the $30,000, he bought a truck and paid off his credit cards, and then the money simply "went." As for the $150,000, Father testified that IRA account's value by the time of the hearing was $75,000. When the court asked where the other $75,000 had gone, Father's response was, "Lord knows. Lord knows." The court asked Father explicitly whether he spent $105,000 ($30,000 + $75,000) on necessities, to which Father admitted he had not, saying:

> And yes, I probably -- I could have sent that to her in August, but then how would I have mended or created the opportunity to spend that time with the kids. I could have done it otherwise. People do a lot more with a lot less. That was frivolous on my part.

After hearing the parties' closing statements the court ruled as follows:

> And based on the evidence, I don't believe Mr. David has proven that he never had the ability to pay more than he paid. The testimony is that -- and this is even with his income drop, I understand his income drop. But at the time of the divorce, or the day after the divorce, he gets a thirty some thousand-dollar lump payment, or a couple days after. He signed the agreement the day after the divorce became final and signed. Then he gets a payment of $30,000 within a short time frame. And he has, at the time,

> $150,000 in an IRA account. So shortly after the divorce he had access to $180,000, the $150,000 plus the $30,000. And for three months he did pay the ordered amount of $1,600, whatever it was, he paid in. And then in June it dropped down to $500 a month. And he's been paying $500 a month. And it doesn't sound like he's not trying to pay anything, he's paying $500 a month. And there's some additional payments as well. And I noted and I questioned him, I guess about there was some additional payments there. You know, $127, $150, $80, unusual smaller amounts which were, as he testified to, he paid extra when needed.
>
> In any event, $30,000 is the amount that everybody agrees on is owed as of now, as of this hearing. So I don't find that he's proven by a preponderance of the evidence that he never had the ability to pay more than he had, because he had the $180,000. And he used it for purposes that are important to him and his family and so forth. I'm not saying that they're frivolous at all, but there were these funds available to pay more child support in this case. And he had the funds. He had the funds necessary to make the payment, but he just elected not to do it.

Ultimately, the court found Father in constructive civil contempt, concluding he had sufficient funds to pay his current child support plus the arrears but had chosen not to do so. To purge himself of contempt and stay out of jail, the court ordered him to pay down the arrears at the rate of $500 per month for 60 months, and to continue to meet his child support obligation. All payments were to be submitted through the local bureau of child support enforcement. The court issued a written order of the court's oral findings and conclusions the following day. This appeal followed.

ANALYSIS

The body of law on constructive civil contempt is now well-established. As the Supreme Court of Maryland (at the time called the Court of Appeals) explained in *Arrington v. Dept. of Human Resources*, 402 Md. 79 (2008)

> [A] civil contempt proceeding is intended to preserve and enforce the rights of private parties to an action and to compel obedience to orders and judgments entered primarily for their benefit. Such a proceeding, we said, is remedial, rather than punitive, in nature, intended to coerce future compliance, and, accordingly, "a penalty in a civil contempt must provide for purging."

Id. at 93. *See* Rule 15-206 (delineating the rules for seeking a constructive civil contempt petition). "[T]his Court will not disturb a contempt order absent an abuse of discretion or a clearly erroneous finding of fact upon which the contempt was imposed." *Kowalczyk v. Bresler*, 231 Md. App. 203, 209 (2016). A trial court abuses its discretion when its decision encompasses an error of law, *Schlotzhauer v. Morton*, 224 Md. App. 72, 84-85 (2015), which this Court reviews without deference, *Walter v. Gunter*, 367 Md. 386, 392 (2002).

In a civil contempt proceeding for failure to pay child support, the moving party must prove, by clear and convincing evidence, that the "alleged contemnor has not paid the amount owed. . . ." Rule 15–207(e)(2). Once this threshold has been met, the obligation shifts to the defendant to prove by a preponderance of the evidence that one or more of the defenses set out in Rule 15–207(e)(3) are present. If the court finds that the moving party has met its burden of proof and none of the defenses apply, it shall enter an order pursuant to Rule 15–207(e)(4), which provides:

> (4) Order. Upon a finding of constructive civil contempt for failure to pay spousal or child support, the court shall issue a written order that specifies (A) the amount of the arrearage for which enforcement by contempt is not barred by limitations, (B) any sanction imposed for the contempt, and (C) how the contempt may be purged. 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.

The authority granted to a court to fashion both a sanction and a purge under Rule 15–207(e)(4) is constrained because a defendant in a civil contempt proceeding "must have the ability to avoid both the commencement and the continuation of incarceration." *Arrington*, 402 Md. at 101. Any purge must be within the present ability of the defendant to perform at the time of sentencing. *Arrington*, 402 Md. at 101; *Bryant v. Soc. Servs*., 387 Md. 30, 48 (2005); *Jones v. State*, 351 Md. 264, 275(1998). The reason for the rule lies in the coercive, as opposed to punitive, nature of sanctions in a civil contempt proceeding. *Jones*, 351 Md. at 281 ("If a defendant is unable to pay a purge provision, no amount of time in prison will induce compliance."). Therefore, if the sanction is incarceration and the purge is the payment of money,

> the question will be whether the defendant is then, on that day, able to make that payment. The court may not order an incarceration to commence in the future, because the finding of ability to purge must be contemporaneous with when the incarceration is to commence and must remain in existence throughout the period of incarceration.

Arrington, 402 Md. at 101 (citing *Jones*, 351 Md. at 282) (italicized emphasis in original, underlined emphasis added); *see also Wilson*, 364 Md. at 601–02.

And, importantly, this Court has emphasized that an order holding a person in constructive civil contempt must satisfy certain basic requirements. The order must: (1) impose a sanction; (2) a purge provision that gives the contemnor the opportunity to avoid the sanction by taking specific action of which the contemnor is reasonably capable; and (3) be designed to coerce the contemnor's future compliance with a valid legal requirement rather than punish the contemnor for past, completed conduct. *Breona C. v. Rodney D.*, 253 Md. App. 67, 74 (2021).

In this case, the court issued a valid contempt order under Rule 15-207(e)(4) for Father's failure to make timely child support payments under the judgment of divorce. The court heard the testimony of both parties, largely crediting Mother's testimony and discounting Father's. The court found that Father had the ability to pay child support during the period specified in the petition but, by his own admission, chose not to do so. Instead, he exhausted a $30,000 cash settlement from his former employer and depleted half of a $150,000 IRA account. In both cases, Father admitted that he spent the money on vacations, various motor vehicles, a boat, and other non-essential items, rather than paying the child support ordered in this case. Further, the court found that Father had the present ability to pay child support, because he could work, offered no proof of a mental or physical disability that would have prevented him from earning what he had at the time of the divorce. Additionally, he had $75,000 left in his IRA account. The court's written order complied with the Rule in that it established the arrears, imposed a sanction of incarceration, and articulated that Father could avoid jail time by meeting his child support

obligation while paying down the arrears at an established rate.[2] Accordingly, we perceive no error with the court's findings, or the civil contempt order the court fashioned. We, therefore, affirm.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED. APPELLANT TO PAY THE COSTS.

[2] We understand Father's concerns and frustrations about navigating the legal system without an attorney. We suggest he and Mother, because she too was self-represented, explore the possibilities of obtaining assistance in better understanding the court system through the judiciary's website which offers information about what to expect when going to court in family law-related issues. Additionally, the Family Services Office within the circuit court may have resources to assist both parents.