

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 22, 2015 Session

PAULETTE E. DUKES v. JAMES F. DUKES

**Appeal from the Chancery Court for Lawrence County
No. 1015400 Stella L. Hargrove, Chancellor**

No. M2014-00847-COA-R3-CV – Filed August 13, 2015

Husband and Wife were declared divorced in 2009; incorporated in the final decree of divorce was a Marital Dissolution Agreement containing a provision that required Husband to pay premiums on two life insurance policies, one which covered his life and named Wife as beneficiary and one on Wife's life, naming him as beneficiary. In 2014 Husband cancelled the policy on his life because the premium had increased significantly. Wife filed a Petition for Contempt; after a hearing, the court held Husband in civil contempt and ordered him to obtain a \$50,000 life insurance policy to replace the one he had cancelled. In the event he could not obtain such a policy, the court entered a \$50,000 judgment against Husband and required him to make monthly payments on the judgment to the clerk of the court. Husband appeals. We affirm the judgment holding Husband in contempt and remand for entry of a supplemental order clarifying the conditions of the \$50,000 judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed
in part and Remanded.**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J. joined.

George D. Spanos, Nashville, Tennessee, for the Husband, James F. Dukes.

J. Daniel Freemon, Lawrenceburg, Tennessee, for the Wife, Paulette E. Dukes.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

Paulette Dukes (“Wife”) and James Dukes (“Husband”) were married for 25 years and were divorced by the Chancery Court for Lawrence County on October 6, 2009. They had no children together, and at the time of the divorce, Wife was in her early 60s, and Husband was 76. The divorce was uncontested, and the parties represented themselves in the proceedings. In drafting the Marital Dissolution Agreement (“MDA”), they used a “fill in the blank” form which had been obtained from Southeast Tennessee Legal Services. The document contained a section titled “Debts to Be Paid by Husband” which stated:

The husband shall pay the debts set forth below:

Pay car note on 2004 Toyota until paid in full. Provide and pay for spouses future Health Insurance and pay it through electronic pay or autopay. To be responsible for future household bills and expenses until Oct 1, 2009[.] To pay future Life Insurance and leave and leave [sic] both Beneficiaries as is.

/s/ James F. Dukes

The MDA was incorporated in the final decree of divorce.¹

From the date of the entry of the final decree until early 2014, Husband paid the monthly premiums on two life insurance policies, one on his life that listed Wife as beneficiary, and the other on her life that listed him as beneficiary. Husband remarried in October 2013. In December 2013 or January 2014, Husband noticed that the premiums on the insurance policy on his life had increased to \$681 per month and canceled the policy; after doing so, he notified Wife of the cancellation.

On March 4, 2014, Wife filed a Petition for Contempt, in which she alleged that she had “recently been advised that the Respondent has either already dropped or intends to drop the premium for the life insurance policy covering the life of the Respondent and payable to the Petitioner as beneficiary.” On March 25, the court held a hearing at which Husband, then 80 years old, and his current wife testified; the court entered an order on April 7 holding, *inter alia*, the following:

That respondent, JAMES F. DUKES, is in willful civil contempt of Court pursuant to Tennessee Code Annotated §29-9-104, based upon the

¹ References to the MDA in this opinion are to the terms of that agreement, as incorporated in the Final Decree of Divorce (“order”). We will use the terms “MDA” and “order” interchangeably.

following determination and findings by the Court.

- (a) There was a valid Court Order requiring the Respondent to maintain life insurance and that there was no ambiguity in regards to the Respondent[']s requirements.
- (b) The Respondent has the ability to pay for the life insurance policy he was required to maintain pursuant to the parties['] divorce.
- (c) The Respondent made a calculated decision to forego payments on that policy thus resulting in cancellation of this policy.
- (d) That this action in failing to maintain the policy was in violation of the terms of the parties' divorce decree.
- (f) [sic] That the actions of the Respondent were willful.

The court ordered Husband to obtain a \$50,000 life insurance policy, payable to Wife, within 60 days. If Husband was unable to obtain the life insurance policy within 60 days, the court granted Wife a "conditional judgment" in the amount of \$50,000 against Husband, secured by a lien on his property, and ordered him to pay \$500 per month into the court as installment payments on the judgment.

Husband appeals the court's April 7 order.

II. ANALYSIS

All courts in Tennessee have the authority to impose punishment for "willful disobedience or resistance of any officer of the [sic] such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts." Tenn. Code Ann. § 29-9-102(3); 16-1-103; *see also State v. Gray*, 46 S.W.3d 749, 750 (Tenn. Ct. App. 2000); *Thigpen v. Thigpen*, 874 S.W.2d 51, 53 (Tenn. Ct. App. 1993). Tenn. Code Ann. §§ 29-9-101 to 108 define the scope of the contempt power and the punishment and remedies for contemptuous acts. Contempt may be either criminal or civil in nature, depending on the action taken by the court to address the contempt. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). "Sanctions for criminal contempt are generally both punitive and unconditional in nature, designed to punish past behavior, not to coerce directly compliance with a court order or influence future behavior." *Baker v. State*, 417 S.W.3d 428, 436 (Tenn. 2013). On the other hand, "civil contempt ... occurs when a person refuses or fails to comply with a court order and a contempt action is brought to enforce private rights." *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 613 (Tenn. Ct. App. 2006) (citing *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996)). Civil contempt proceedings serve to either coerce future compliance with a trial court's order, *see Doe v. Bd. of Prof. Resp. of S. Ct. of Tennessee*, 104 S.W.3d 465, 473 (Tenn. 2003), or to provide compensation as "relief to a party who has suffered unnecessarily as a result of contemptuous conduct." *XL Sports, Ltd v. Lawler*, M2006-00637-COA-R3-CV, 2007 WL 2827398, at *6 (Tenn.

Ct. App. Sept. 28, 2007). “Contempt is a proper remedy for one party’s breach of a provision in a marital dissolution agreement.” *Clarkson v. Clarkson*, M2006-02239-COA-R3-CV, 2007 WL 3072772, at *7 (Tenn. Ct. App. Oct. 22, 2007) (citing *Long v. McAllister-Long*, 221 S.W.3d 1, 9–10 (Tenn. Ct. App.2006)).

We review the decision to hold a person in civil contempt under the abuse of discretion standard of review. *Konvalinka v. Chattanooga-Hamilton County Hosp. Authority*, 249 S.W.3d 346, 358 (Tenn. 2008). Under this standard, “[R]eviewing courts will set aside a discretionary decision only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.” *Id.* We review the trial court’s factual findings *de novo* upon the record, accompanied by a presumption of correctness. Tenn. R. App. P. 13(d). We review the court’s legal conclusions *de novo* with no presumption of correctness. *Caudill v. Foley*, 21 S.W.3d 203, 206 (Tenn. Ct. App. 1999).

A. THE CONTEMPT HOLDING

There are four elements essential to sustain a holding of civil contempt based on disobedience to a court order: (1) “the order alleged to have been violated must be ‘lawful’”; (2) “the order alleged to have been violated must be clear, specific, and unambiguous”; (3) “the person alleged to have violated the order must have actually disobeyed or otherwise resisted the order”; and (4) “the person’s violation of the order must be ‘willful.’” *Konvalinka*, 249 S.W.3d at 354-355.

Husband does not contest that the final decree was lawful or that he violated the order when he canceled the policy. He contends that the language in the MDA — “To pay future Life Insurance and leave and leave [sic] both Beneficiaries as is” — was ambiguous and could not support a finding of contempt. Husband also contests the court’s finding that he had the “ability to pay for the life insurance policy he was required to maintain pursuant to the parties divorce.” We will address these contentions in order.

In making the determination whether the provision is ambiguous, we follow the instruction of our Supreme Court in *Konvalinka*:

A person may not be held in civil contempt for violating an order unless the order expressly and precisely spells out the details of compliance in a way that will enable reasonable persons to know exactly what actions are required or forbidden. . . . Orders alleged to have been violated should be construed using an objective standard that takes into account both the language of the order and the circumstances surrounding the issuance of the order, including the audience to whom the order is addressed. . . .

Determining whether an order is sufficiently free from ambiguity to be enforced in a contempt proceeding is a legal inquiry that is subject to de novo review.

Id. at 355, 356.

Husband contends that the provision's failure to list policy numbers, insurance companies, coverage amounts, time frames in which to acquire the policies, or to specify on whose life the insurance should be placed renders the provision ambiguous. He also asserts that the provision contradicts itself because there "cannot be present 'Beneficiaries' for 'future Life Insurance' policies." The record shows that the parties, who drafted the provision themselves, knew what actions were required.

Wife asserted in the petition for contempt, "[t]hat pursuant to the terms of the divorce [Husband] was required to pay future life insurance benefits for both the parties and to leave both beneficiaries on the policies as named at the time of the divorce"; in his answer to the Petition, Husband admitted this allegation. Pursuant to the MDA, Husband paid the premiums for more than four years without issue and cancelled the policy only when the premiums increased; this is conduct which is inconsistent with his argument that the provision is ambiguous. Further, at no time prior to his decision to cancel the policy did he seek clarification or modification of the MDA or relief from this obligation. In light of Husband's acknowledgement at the hearing that he was obligated to pay the premiums on the policy which was to be "paid out to [Wife]," and his actions consistent with that understanding from 2009 until 2014, it is clear that he understood what the order required of him. The record supports the conclusion that the order was not ambiguous.

Husband next contends "that all evidence presented and testimony given very clearly proves that he was unable to pay the increased cost of the life insurance policy on his life. No evidence or testimony presented at trial supports the Trial Court's finding that the Appellant had the ability to pay." He argues that he should not have been held in contempt because the increase in monthly premiums was "a material change in circumstances that left him unable to afford the policy for insurance on his life."

In reviewing the trial court's contempt holding, we must determine whether Husband's actions in cancelling the policy were willful or not. "Whether a party violated an order and whether a violation was willful are factual issues, which appellate courts review de novo, with a presumption of correctness afforded the trial court's findings." *Lovlace v. Copley*, 418 S.W.3d 1, 34 (Tenn. 2013). Although this case does not involve the failure to pay spousal or child support, it is apparent that the trial court employed an analysis similar to that in *Ahern v. Ahern*, in which our Supreme Court held that "[f]or the court to find that [the respondent]'s failure to pay alimony and child support was

contemptuous, the court first must determine that [the respondent] had the ability to pay at the time the support was due and then determine that the failure to pay was willful.” 15 S.W.3d 73, 79 (Tenn. 2000). The case before us however, is a contempt action, where we consider Husband’s conduct in cancelling the policy as the “willfulness” at issue, rather than whether he had the financial ability to maintain the particular policy, which we address in the context of his ability to comply with the sanction for his contempt, to be discussed in Section (B), *infra*.

Husband testified that he paid the increased premium on the life insurance policy for “only like two months” and “remember[ed] reading ... that the insurance went to \$681. So I called them right then. I said, I want to cancel this thing. I can’t afford that. So I cancelled it.” After canceling the policy, Husband notified Wife. Rather than file the appropriate pleading to obtain relief from the order, Husband unilaterally cancelled the policy. As our Supreme Court has held:

[W]illful conduct “consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is ‘willful’ if it is the product of free will rather than coercion. Thus a person acts ‘willfully’ if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.” Thus, acting contrary to a known duty may constitute willfulness for the purpose of a civil contempt proceeding.

Konvalinka, 249 S.W.3d at 357 (citing *State ex rel. Flowers v. Tenn. Trucking Ass’n Self Ins. Group Trust*, 209 S.W.3d 602, 612 (Tenn. Ct. App. 2006); *United States v. Ray*, 683 F.2d 1116, 1127 (7th Cir. 1982)).

The evidence is clear that Husband’s decision to cancel the policy, and the actions taken to do so, were intentional and voluntary; the evidence does not preponderate against the holding that Husband’s failure to comply with the MDA was willful.² We affirm the order finding Husband to be in civil contempt.

B. THE SANCTION IMPOSED

As an initial matter, we address Husband’s contention that the evidence preponderates against a finding that he had the ability to pay for the higher insurance premiums. The order stated that he was to apply for and obtain a \$50,000 life insurance policy within 60 days of March 25, 2014. If he did not do so, then on the 61st day, May 25, 2014, a \$50,000 judgment would be entered against him, secured by a lien on his

² While Husband asserts that the change in premiums constituted a material change of circumstance which led him to cancel the policy, his failure to file a motion to modify the order or otherwise seek relief cannot be ignored. As a result of his decision to cancel the policy, he violated the order, and it is the consequences of that action that we review.

property, and he was ordered to pay \$500 per month installment payments on that judgment. It is apparent that he did not comply with the order to purchase a new life insurance policy; consequently, we proceed to determine whether the \$50,000 judgment to be paid in \$500 monthly installments was a reasonable exercise of the court's power to punish for civil contempt.³

The law is clear that “[a]fter a finding of contempt, courts have several remedies available depending on the facts of the case.” *State ex rel. Flowers v. Tenn. Trucking Ass’n Self Ins. Group Trust*, 209 S.W.3d 602, 613 (Tenn. Ct. App. 2006) (citing *Bailey v. Crum*, 183 S.W.383, 387 (Tenn. Ct. App. 2005)). “Civil contempt sanctions are remedial and coercive in character, designed to compel a party to comply with the court’s order.” *Id.* (citing *State ex rel. Anderson v. Daugherty*, 191 S.W. 974, 974 (Tenn. 1917)). The “party to be held in civil contempt must have the ability to perform the act it is ordered to perform,” but “the burden of proof is on the contemnor to show the inability to pay.” *State ex rel. Flowers v. Tenn. Trucking Ass’n Self Ins. Group Trust*, 209 S.W.3d at 612 (citing *Leonard v. Leonard*, 341 S.W.2d 740, 743 (Tenn. 1971); *Pirrie v. Pirrie*, 831 S.W.2d 296, 298 (Tenn. Ct. App. 1992); *Gossett v. Gossett*, 241 S.W.2d 934, 936 (Tenn. Ct. App. 1951)). “Appellate courts review a trial court’s decision to impose contempt sanctions using the more relaxed ‘abuse of discretion’ standard of review.” *Freeman v. Freeman*, 147 S.W.3d 234, 242 (Tenn. Ct. App. 2003) (citing *McDowell v. McDowell*, No. M2000–00164–COA–R3–CV, 2001 WL 459101, at *5 (Tenn. Ct. App. May 2, 2001)). We examine the court’s sanction from the viewpoint of whether Husband had the ability to comply with it, i.e., by purchasing some form of insurance or by paying installment payments on the judgment.

Husband entered his income and expense statement as an exhibit at the hearing. It is a four-part itemized statement showing that his monthly net income was \$3,346.11; his mortgage and household expenses totaled \$1,181.25; his vehicle expenses totaled \$633.77 per month; and his general expenses totaled \$1,705.91 per month. He testified that his current wife drives the car he purchased and does not contribute to the household expenses; that he would turn 81 in a few months; and that the increase in insurance premiums to \$681 per month caused his bank account to be overdrawn. In response to questioning by the trial court, Husband testified that he continues to pay \$90 per month for the \$25,000 life insurance policy on Wife’s life that lists him as beneficiary; that he called Liberty National to see if he could reinstate the policy but “couldn’t do it because I was 81. They didn’t accept no applications for people over 81”; that he contacted some insurance companies to see if it was possible to get a new policy and one indicated that it might be possible to obtain a policy at a rate of \$1500 per three months.⁴

³ The only evidence in the record relating to Husband’s efforts to secure a different insurance policy was his testimony relative to the efforts he made prior to the hearing.

⁴ After testifying in response to the court’s questions regarding the sale of his home and his impending

Husband's current wife testified that she receives \$738 per month in income and pays her own bills: the balances on two credit cards, life and accident insurance, cell phone service, and insurance on her truck.

The evidence shows that Husband has income over and above his household expenses. The deficit which he contends makes him unable to afford the life insurance is in the "vehicle expenses" and the discretionary "general expenses". His financial priorities, as reflected in how he spends his discretionary income, may make it difficult for him to do so, but the evidence does not preponderate against the trial court's finding that he has the ability to either pay the premium for life insurance or \$500 per month on the judgment.⁵

Husband next contends that the court's April 7 order provided "improper relief" under Tenn. Code. Ann. § 29-9-104,⁶ because it was an "award of damages to the Wife." We do not agree with Husband's characterization of the relief. The trial court clearly wanted to ensure that the Wife would receive \$50,000 in the event Husband predeceased her in death, the result that would have obtained had the MDA been followed and the life insurance policy not cancelled. The \$50,000 judgment did not constitute an award of damages but, rather, was designed to secure Husband's compliance with the final decree; as such, it was a reasonable exercise of the court's contempt power.

move to Florida, Husband testified as follows:

Q: How much would it cost to reinstate this life insurance policy, Mr. Dukes?

A: I don't think they would insure me anymore since I am 81. They will not accept it. There are a couple of them I checked. The only one that I could find that would even talk about it was the one that I got my car and truck financed with, Farm Bureau. They did talk to me but it didn't do no good. I don't think it will go through.

Q: Did they quote you a premium?

A: No. It was to see if I could qualify for it. And I think the premium was \$1,500 every three months or something.

⁵ With respect to the vehicle expenses, Husband testified that he purchased, but does not drive, a Lexus automobile and that his wife drives him wherever he needs to go. His wife testified that she owns a truck on which no balance is owed.

⁶ Tenn. Code Ann. § 29-9-104 reads as follows:

(a) If the contempt consists in an omission to perform an act which it is yet in the power of the person to perform, the person may be imprisoned until such person performs it.

(b) The person or if same be a corporation, then such person or corporation can be separately fined, as authorized by law, for each day it is in contempt until it performs the act or pays the damages ordered by the court.

A court abuses its discretion when it employs reasoning that causes an injustice to the party challenging the decision, applies an incorrect legal standard, reaches an illogical or unreasonable decision, or bases its decision on a clearly erroneous assessment of the evidence. *Konvalinka*, 249 S.W.3d at 358. The sanction imposed by the court was within the court's power, was supported by the evidence, and was not illogical or cause an injustice to Husband. The court did not abuse its discretion.

We are concerned, however, that judgment as entered by the court does not require that Wife survive Husband in order to receive the \$50,000, as would be required to receive the proceeds of a life insurance, which was the objective of the provision in the MDA. Further, the order does not provide that the judgment and the lien securing it dissolve in the event Husband obtains a life insurance policy.⁷ Lastly, the order does not provide how the funds will be handled by the clerk pending the payout and the manner in which the funds are ultimately disbursed.

Accordingly, we affirm the judgment of the trial court and remand the case for entry of a supplemental order addressing these matters, specifically, clarifying that the judgment and judgment lien will dissolve in the event Husband obtains a \$50,000 life insurance policy naming Wife as beneficiary and payable in the event he predeceases her, and such other matters as may be necessary to accomplish the foregoing.

⁷ This was also a concern of Husband which the court addressed at the hearing. The transcript contains the following colloquy between Husband's counsel and the court:

MR. SPANOS: Okay. We can have some language in the order that if he acquires new life insurance and then passes away, that she is not receiving the \$50,000 from the judgment, and the \$50,000 from the life insurance? Because I think that goes –

MR. FREEMON [Wife's counsel]: If he obtains the life insurance, we dissolve the judgment, Your Honor.

THE COURT: The life insurance takes care of it. Obviously, the judgment would go away. She is only entitled to the \$50,000.

MR. SPANOS: So that equity would just be held in escrow or annuity or whatever we decide to put it in?

THE COURT: Oh, I think for the rest of his life. He's 81.

MR.SPANOS: Yeah.

THE COURT: You know, his life determines that, not hers.

MR. SPANOS: Correct.

MR. SPANOS: Okay. And can we also say that it will dissolve on her – if she predeceases my client?

THE COURT: Yes. Yes.

III. CONCLUSION

For the reasons set forth above, the judgment of the Chancery Court is affirmed and the case remanded for entry of a supplemental order in accordance with this opinion.

RICHARD H. DINKINS, JUDGE