Circuit Court for Howard County
Case No.: 13-C-10-084542

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 695

September Term, 2015

ROBERT E. DAY, JR.

v.

KIM M. STERRETT

Meredith,
Nazarian,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: October 23, 2017

The Circuit Court for Howard County found appellant, Robert E. Day, Jr. ("Husband"), in contempt for failure to pay alimony and child support to his former wife, Kim M. Sterrett ("Wife"), appellee. The court ordered that Husband could purge the contempt by making payment in the amount of $10,000 within 30 days.

Husband appealed and presents the following questions for our review, which we have rephrased:[1]

1. Did the circuit court err in finding Husband in contempt?

2. Did the circuit court err in setting a purge provision of $10,000 to be paid in 30 days?

Finding no error, we affirm.

BACKGROUND

Husband and Wife are the parents of three children, one of whom is a minor child, born in 1998, whom we shall refer to herein as "minor son."[2] On August 26, 2013, the

[1] The questions, as presented by Husband, are:

> 1. Did the circuit court err in finding Husband in contempt where the evidence clearly established that Husband was not able to pay more in support that the amount he paid from the date of the support order?
>
> 2. Did the circuit court err in setting a purge provision of $10,000 to be paid in 30 days in spite of Husband's inability to meet this purge?

[2] Husband and Wife also have an adult son born in 1992 and daughter born in 1996, both of whom are emancipated. *See Day v. Sterrett*, No. 2148, September Term 2013 (filed October 15, 2015) (affirming judgment of child support, alimony and counsel fees following judgment for divorce) ("*Day I*").

circuit court entered a judgment of absolute divorce. On November 18, 2013, the court ordered Husband to pay child support in the amount of $1,886 per month beginning on October 1, 2013, with an increase to $2,963.00 per month effective June 1, 2014, and further ordered Husband to pay rehabilitative alimony to Wife in the amount of $3,500 per month for seven (7) years commencing November 1, 2010 (collectively, the "support order").[3]

As of November 18, 2013, the court found the existing arrearage was $126,000. Husband was further ordered to notify the court within ten days of any change of address or employment. Husband appealed the support order, and this Court affirmed the support order in an unreported opinion. *See Day v. Sterrett*, No. 2148, September Term 2013 (filed October 15, 2015).

On September 30, 2014, Wife, representing herself, filed a petition for constructive civil contempt, alleging that Husband had failed to make family support payments as ordered, and, as of September 24, 2014, the outstanding amount owed for such payments was $187,999.54. Wife alleged that Husband failed to report his employment with NARUS Inc. to the court and Maryland Child Support, as required by the support order. Wife further alleged that Husband was employed by Soul Tree Consulting, LLC ("Soul Tree"), and had failed to report employment with Soul Tree to the court or Maryland Child Support, as required by the support order.

[3]The order of November 18, 2013, included additional mandates which are not set forth here because they do not relate to the issues on appeal.

Following a hearing before a magistrate (then known as a "master") on January 23, 2015, the magistrate issued a report recommending:

> A. That Husband be found in willful contempt of court for failure to comply with the court order regarding payment of family support.
>
> B. That Husband purge his contempt by payment of $3,500 within 15 days of the order of contempt.
>
> C. That Husband be found in willful contempt for failure to update the court within 10 days of change of address and change of employment.
>
> D. That Husband purge his contempt by providing written notification to the court of any employment change and/or address change within 10 days of said change by document titled, Notice of Change of Employment or Address.

Husband and Wife filed exceptions to the magistrate's recommendations, and they requested a hearing on the exceptions. Wife requested that the purge amount be increased to the full amount of arrears owed of $200,251.77.[4] Husband countered that the court could not find him in willful contempt for failing to pay; he claimed that he was currently unemployed, and, during the period subsequent to the court's order, he had "paid what he had the ability to pay."

On May 14, 2015, the circuit court issued an order finding Husband in contempt for failing to make payment of family support to Wife as required by the support order.

[4]Wife also contended that Husband had violated an order of the court dated November 5, 2013, by failing to pay one-half of the private school tuition for their minor son. It appears that the alleged violation of the November 5, 2013, order was not argued at the hearing on exceptions to the master's report, and it was not addressed by the circuit court.

The court further ordered that Husband could purge the contempt by making payment to Wife in the amount of $10,000 within 30 days. Husband noted a timely appeal. [5]

DISCUSSION

Introduction

"[T]he purpose of civil contempt is to coerce present or future compliance with a court order, whereas imposing a sanction for past misconduct is the function of criminal contempt." *Dodson v. Dodson*, 380 Md. 438, 448 (2004) (citing *State v. Roll and Scholl*, 267 Md. 714, 728 (1973)). "The sanction imposed for civil contempt is coercive and must allow for purging." *Rutherford v. Rutherford*, 296 Md. 347, 355 (1983). "[I]n light of the coercive nature of civil contempt, a *present* inability to comply with the prior court order, or with the purging provision if it is different from the prior order, is a defense in a civil contempt action and precludes the imposition of a penalty." *Dodson*, 380 Md. at 449 (emphasis in original).

Typically, in constructive civil contempt actions, the court cannot find the defendant to be in contempt unless the defendant has the present ability to comply with the earlier order or the purging provision. *Id.* at 450 (citations omitted). But a modified version of that rule applies with respect to spousal or child support orders. As the Court

[5]We note that Wife also raised arguments in the circuit court asserting that the marital home and Ocean City condominium unit have fallen into foreclosure because she has been unable to pay the mortgages on those properties due to Husband's refusal to pay alimony and child support. Her complaints that Husband has refused to move out of the marital home, and that she has requested use and possession of the home to repair damage caused by Husband, were not addressed by the circuit court and therefore are not before this Court on appeal.

of Appeals noted in *Dodson*: "The only exception to this general rule [requiring a present ability to comply] is set forth in Maryland Rule 15-207(e), which permits a finding of contempt, and the issuance of certain court orders, where a defendant has failed to comply with spousal or child support orders under conditions specified in the Rule." *Id.* at 451. In this case, however, the purge provision required the payment of a certain sum of money within 30 days.

Maryland Rule 15-207(e) sets forth the procedures for the enforcement of support orders through constructive civil contempt actions:

> (1) Applicability: This section applies to proceedings for constructive civil contempt based on alleged failure to pay spousal or child support, including an award of emergency family maintenance under Code, Family Law Article Title 4, Subtitle 5.
>
> (2) Petitioner's burden of proof. Subject to subsection (3) of this section, the court may make a finding of 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.
>
> (3) When a finding of contempt may not be made. **The court may not make a finding of contempt if the alleged contemnor proves by a preponderance of the evidence that** (A) from the date of the support order through the date of the contempt hearing **the alleged contemnor (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 (B) enforcement for contempt is barred by limitations as to each unpaid spousal or child support payment for which the alleged contemnor does not make the proof set forth is subsection (3)(A) of this section.
>
> (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.

(Emphasis added.)

In the present case, Husband does not contend that Wife failed to meet her burden under Rule 15-207(e)(2) to establish by clear and convincing evidence that he had not paid the support owed in full since the time of the support order. Indeed, he states in his brief: "Husband has not contended, and does not intend to raise the contention here, that Wife, the petitioner, failed to establish . . . by clear and convincing evidence that Husband had not paid the support owed in full since time of the support order." Accordingly, because lack of payment in full is uncontested, the burden shifted to Husband, pursuant to Rule 15-207(e)(3), to prove by a preponderance of the evidence that, from the date of the support order through the date of the contempt hearing, "he never had the ability to pay more than the amount [he] actually paid," *and* that he "made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment" of support to Wife. *See Arrington v. Human Resources*, 402 Md. 79, 97 (2007) ("If the petitioner proves that the defendant failed to pay the amount owed and the defendant fails to prove either that he or she could not have paid more than was paid . . . the court may find the defendant in contempt.").

We first review whether the trial court erred in finding that Husband did not prove an inability to pay more than was paid and sufficient efforts to become or remain

employed or otherwise lawfully obtain the funds necessary to make payment from November 18, 2013, the date of entry of the support order to January 23, 2015, the date of the hearing on the contempt petition (the "contempt period"). *See id.* at 100-101. We then review the purge order separately to determine whether the contemnor had the ability to meet the purge provision. *See Wilson v. Holliday*, 364 Md. 589, 603 (2001).

Standard of Review

As noted in *Droney v. Droney*, 102 Md. App. 672 (1995), on appeal from a decision holding a party in contempt, we review any factual findings under the "clearly erroneous" standard, and we review for abuse of discretion the court's decision to hold the party in contempt and impose sanctions:

> The decision of whether to hold a party in contempt is vested in the trial court. This Court will only reverse such a decision upon a showing [1] that a finding of fact upon which the contempt was imposed was clearly erroneous or [2] that the court abused its discretion in finding particular behavior to be contemptuous. Ordinarily, in a review of contempt proceedings, this Court does not weigh the evidence; rather, we merely assess its sufficiency.

102 Md. App. 672, 683-84 (1995) (citations omitted); *accord Royal Investment Group, LLC v. Wang*, 183 Md. App. 406, 447-48 (2008); *Marquis v. Marquis*, 175 Md. App. 734, 746 (2007).

I.

Contempt

Husband raises a number of arguments in support of his contention that the court erred in finding him in contempt of the support order. He claims that the evidence clearly

established that he never had the ability to pay more in support than he paid due to his unemployment and bankruptcy. Husband further argues that it was clear error for the magistrate to find, and for the circuit court to adopt the finding, that he had the ability to pay more than he did based on "purported evidence" of his employment or ownership relationship with Soul Tree. He also contends that he sufficiently established that he made reasonable efforts to find employment, remain employed or otherwise lawfully obtain funds.

Wife, representing herself, responds that the circuit court order should be affirmed because husband "did not submit one shred of evidence establishing his inability to pay -- not one bill, one past due notice, one bank statement, one credit card statement, one receipt, one budget or one income/expense statement. Nothing." Wife maintains that the record in the case reflected that Husband had considerable assets at the time of the divorce in November 2013 in the form of bank accounts, investment accounts, retirement accounts and cars that Husband could have used to pay family support before or after his bankruptcy, but he did not utilize those assets or funds to make support payments. Wife contends that Husband has the ability to earn income "upwards of $300,000" annually, as he did prior to the divorce, but he willfully refuses to pay support, he "orchestrates" his employment status prior to court appearances to appear impecunious, and he "shields his income to protect it from garnishment[.]"[6]

[6] In *Day I*, we stated: "We are satisfied that the finding of voluntary impoverishment was adequately supported . . . ." Slip op. at 18. We noted that the circuit continued…

Husband bore the burden of proof on the issues regarding capacity to pay, and the circuit court's finding that he could have paid more was not clearly erroneous. At the time the support order was entered on November 18, 2013, Husband had recently become unemployed. Shortly thereafter, Husband filed for bankruptcy. Husband became employed by NARUS in March 2014, when he was hired at an annual salary of $175,000 plus commission, and was paid a signing bonus of $15,000. Husband was laid off in December 2014. He testified that he received a "left over" commission check at that time, but did not specify the amount of the check. He also said he had "applied for severance" pay, but had "not received it yet." During the contempt period, Husband owed $71,094 in child support and alimony. Husband also owed support arrearages in the amount of $194,562.77. During the contempt period, Husband paid support in the total amount of just $37,094.34, mostly by way of attachments of wages by support enforcement.

It was undisputed that Husband did not notify the court or Child Enforcement of his employment with NARUS within ten (10) days as required by the support order.[7] Husband did not begin making payments through Child Enforcement until May 23, 2014,

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continued…
court had "credited Ms. Sterrett's testimony that Mr. Day had expressed his intention to 'financially devastate' Ms. Sterrett in the divorce action." *Id*.

[7] But the court determined that the Magistrate's recommended findings of contempt for Husband's failure to report his change in his home address and his employment address for NARUS were moot because he subsequently reported the change in home address, and he was no longer employed by NARUS.

two months after he resumed work. Husband admitted that he understood that the support order required him to pay more than the amount withheld from his pay-checks. He provided no testimony or other evidence, however, that he attempted to pay any additional amount. The court found that, "clearly [Husband] had money during this time to pay the difference of the shortfall."

Despite Husband's intervening period of unemployment, the court, in "exercising its own independent review and discretion," noted that Husband "does have some assets" but "the amount of the assets are uncertain." Upon review of the Joint Statement of Marital Property filed on March 15, 2013, which listed Husband's various retirement and investment accounts valued in excess of $250,000, the court noted that Husband had "significant retirement accounts but the current value is unknown."

Husband's testimony on cross examination, however, conceded that he still had retirement accounts, and he had, in the past, withdrawn money from his retirement accounts:

> [WIFE]: Mr. Day - ... **do you have a retirement account?**
>
> [HUSBAND]: **I have retirement accounts.**
>
> [WIFE]: . . . Have you accessed your retirement accounts? **Have you withdrawn any money from your retirement accounts?**
>
> [HUSBAND]: **Over the course of my lifetime, I've accessed my retirement accounts.**
>
> [WIFE]: Have you accessed them to pay your child support balance and your alimony balance?
>
> [HUSBAND]: No.

> [WIFE]: Have you accessed them to pay your court ordered one half tuition [for your son]?
>
> [HUSBAND]: No.

(Emphasis added.)

The Joint Statement filed on March 15, 2013, listed the following accounts that were expressly identified as retirement accounts:

Roth Investment Account #32-13	$8,997.05
E-Trade Roth IRA #5447	$3,762.73
E-Trade Rollover IRA #7399	$25,839.90
ING-401(K) Bridgeport Networks, Inc.	$42,308.84
Smith Micro Software, Inc. 401(k)	$78,258.90
IBM Plus Plan 401(k) Rollover	$8,450.94

These accounts alone were valued at $167,618 as of March 2013.

With respect to Husband's retirement accounts, the court found that "[Husband] did have at the time of the [contempt] hearing access to his retirement accounts, whatever they were as of that date." Husband introduced no evidence to the contrary. Although it would have been easy for Husband to introduce statements for the accounts, Husband did not offer evidence that the accounts had been liquidated or were otherwise no longer available. The court did not err in finding that the funds in those accounts were lawfully available to Husband regardless of whether he would have had to incur a penalty for early withdrawal. If Husband's argument about the funds being unavailable because he would face a penalty for early withdrawal were accepted, any recalcitrant spouse could avoid support obligations by placing all liquid assets in certificates of deposit that imposed penalties for early withdrawal. We reject Husband's argument that his retirement

accounts could not be considered by the court as providing a source of funds for additional support payments, even though the exact amount available on the date of the contempt hearing was not established because Husband failed to provide documentation.

With respect to Husband's claim that he was unable to pay any more than the $37,094.34 that he paid during the contempt period due to his bankruptcy and subsequent unemployment, the court recognized that Husband had received a discharge in bankruptcy, but it found that the effect of that bankruptcy on Husband's assets or obligations was unknown. The magistrate asked Husband whether he was arguing that he should be excused from the support order because of his bankruptcy:

> THE COURT: Are you suggesting that your bankruptcy discharges your child support or your alimony obligation?
>
> [HUSBAND]: No, I'm not. I'm just submitting this, that I am officially bankrupt.

Husband claimed that he was under "the auspices of bankruptcy" for the duration of his employment with NARUS, but he failed to provide evidence of how the bankruptcy impeded his ability to make family support payments. We recognize that, typically, "obligations 'in the nature of child support' are excepted from discharge under federal bankruptcy law." *Goldberg v. Miller*, 371 Md. 591, 610 (2002) (citing 11 U.S.C.A. § 523 (a)(5)). Based on the information provided by Husband, the court acknowledged that his bankruptcy case was resolved in his favor on January 16, 2015, "and that was a week before [the hearing on the contempt petition]. And his [dischargeable] obligations, whatever they were, have been discharged." Accordingly,

the court found that Husband's bankruptcy was not a defense to his non-payment of support during the contempt period. We agree.

Despite the fact that Rule 15-207(e)(3) places the burden on the alleged contemnor to prove that he "made reasonable efforts to become or remain employed," Husband claims that the court erred in determining that the record was devoid of evidence regarding Husband's efforts to find employment following his termination from NARUS. He contends that the record "clearly establishes that Husband received unemployment benefits shortly after the termination, and that the [unemployment benefits] notice suggests that the continued benefits require weekly certification of job searches, as required by law." Although Husband provided conclusory evidence that he applied for and received unemployment benefits, he provided the court no evidence specifying the nature and extent of his employment search efforts. Consequently, it was not error for the court to accept the magistrate's finding that "there was no testimony to show the Defendant's efforts to obtain other employment even though he was laid off in December." As we have pointed out in other cases, it is very difficult for a party who bears the burden of persuasion on an issue --- as the appellant did in this case --- to convince an appellate court that the trier of fact erred by not being persuaded. In *Byers v. State*, 184 Md. App. 499, 531 (2009), Judge Charles E. Moylan, Jr., wrote for this Court that "it is nearly impossible for a verdict to be . . . legally in error when it is based not on a fact finder's being persuaded of something but only on the fact finder's being unpersuaded." (Citing *Starke v. Starke*, 134 Md. App. 663, 680-81 (2000)).

With respect to the question of Husband's alleged employment with Soul Tree, the magistrate found: "It is more likely than not that [Husband] has a financial interest in the company Soul Tree by way of ownership or employment." The magistrate also found that Husband "was less than forthcoming about his involvement with Soul Tree." As evidence of Husband's employment with Soul Tree, Wife introduced a Soul Tree business card with Husband's name on it. Husband acknowledged that Soul Tree was his domestic partner's business, but he denied being employed by Soul Tree. Husband admitted, however, to utilizing Soul Tree's business accounts to pay personal bills prior to the contempt period.

In accepting the magistrate's finding regarding Husband's relationship with Soul Tree, the court explained that "there was ample evidence for the Magistrate to conclude that the Defendant is serving as an employee of Soul Tree since he is listed on the materials as a Senior Officer, his business cards were found in the home and there was use of the company's business financial accounts. So clearly the magistrate was not clearly erroneous."

Given the court's negative assessment of the Husband's credibility as a witness, it was not unreasonable for the court to find that there was some sort of business relationship between Husband and Soul Tree based on the evidence of the business card and use of the Soul Tree bank account prior to the contempt period, even though it was error to also consider a document that was not admitted in evidence that represented Husband to be a Senior Officer of the company. That error, at most, was harmless error

because there was sufficient evidence of Husband's capacity to pay even without the finding of an employment relationship with Soul Tree, and the court did not attribute any particular financial value to the Soul Tree relationship. The evidence regarding Husband's employment income from NARUS, including his signing bonus and commission check, as well as the existence of his retirement accounts, was sufficient to support the court's finding that Husband failed to prove financial inability to pay more support than he had paid during the contempt period.

Accordingly, we are satisfied that the court did not make clearly erroneous findings regarding any material fact or abuse its discretion in ruling that Husband did not prove by a preponderance of the evidence that he was unable to pay more than $37,094.34 during the contempt period; nor did the court err in concluding that Husband failed to prove that he made reasonable efforts to become employed following the NARUS termination or otherwise lawfully obtain funds necessary to make payments of support. The court did not err in finding Husband in contempt.

II.

Purge

Husband contends that the court erred in setting a purge amount that Husband did not have the present ability to pay. The Court of Appeals recognized in *Arrington, supra*, 402 Md. at 102:

> [Rule 15-207] does not specify who has the burden of proof on that issue [*i.e.,* the defendant's ability to meet the purge condition required by Rule 15-207(e)(4)(C)]. Case law, however, establishes that the burden is on the contemnor to establish his or her inability to meet the purge. . . .That

> approach is consistent with the rule grounded in common sense that the burden of proving a fact is on the party who presumably has peculiar means of knowledge enabling him or her to establish the fact. . . . It is the defendant who best knows his or her immediate financial situation and has the best access to evidence establishing that status. Indeed, it was the inability of the petitioner to know the defendant's financial situation on the day of trial that led the Court to add § (e) to Rule 15–207.

(Citations and internal quotation marks omitted.)

In setting the purge amount at $10,000, the court explained:

> There is sufficient information that the Defendant is able to at least meet the purge amount [recommended by the magistrate] of $3500. He had been employed by NARUS and received $175,000 per year. Also he testified that he received a commission check, even though we don't know what it is, of at least one month. And he was waiting to negotiate his severance. So clearly he had money during this time to pay the difference of the shortfall. Therefore he had the financial ability.
>
> The Defendant also provided information to the Court that his bankruptcy case was resolved in his favor on January 16, 2015 and that was a week before this actual hearing. And his obligations, whatever they were, have been discharged. So he did have at the time of the hearing access to his retirement accounts whatever they were as of that date.

Wife argues that Husband's ability to pay support and purge is "enhanced" because there was evidence reflecting that some portion of his expenses are paid by others, namely his domestic partner and her business, Soul Tree. With respect to his expenses, Husband testified that his monthly rent is $3,300 per month for a home "large enough to house five children" that he shares with his domestic partner. But he did not specify what portion of the rent he pays. Husband provided no other evidence of his expenses (other than support obligations).

Husband cites *Bryant v. Howard County Dep't of Soc. Servs*., 387 Md. 30 (2005), and *Thrower v. State ex rel. Bureaus of Support Enforcement*, 358 Md. 146 (2000), in support of his contention that he, like the petitioners in *Bryant* and *Thrower*, is unable to meet the purge amount. Husband points out Bryant's income of $8.00 per hour was found by the Court of Appeals to be insufficient to meet a purge provision of $1,000 within nine (9) weeks. 387 Md. at 50 n.4. And in *Thrower*, the Court of Appeals reversed the contempt finding that required Thrower, who received "$69/week unemployment benefits *and with no other significant assets*," to pay $840 within a month. 358 Md. at 161 (emphasis added). Unlike the evidence of the financial resources of Bryant and Thrower, however, evidence was introduced in this case to establish that Husband has the present ability to meet the purge because he had other assets in addition to his unemployment benefits.

In determining Husband's ability to meet the relatively modest purge amount, the court relied on the evidence regarding Husband's previous six-figure income, commission, anticipated severance compensation, and retirement accounts (valued in 2013 near the beginning of the contempt period in excess of $167,000), and the lack of proof from Husband that all of those assets had been exhausted. Although, as the Court of Appeals noted in *Arrington*, it was Husband's burden to persuade the court that he had no ability to pay the purge amount of $10,000, Husband provided no evidence regarding a reduction in the value of his retirement accounts since 2013, and he failed to establish that the funds are no longer available.

Husband contends that the court cannot force him to "borrow against these [retirement] funds at the risk of an early withdrawal penalty." In this regard, Husband's reliance on *Rivera v. Zysk*, 136 Md. App. 607 (2001), is misplaced. In *Rivera,* this Court held that a finding of contempt based on "appellant's refusal to borrow $5,000 from a bank [on a line of credit] to pay his support obligations" was erroneous. *Id*. at 615. *Rivera* does not support the proposition that extant retirement accounts cannot be relied upon to support a finding of contempt and establish a purge amount. Withdrawing funds from one's own retirement accounts is not similar to incurring debt of the sort the Court held impermissible as a purge in *Rivera.* Moreover, the court did not order Husband to access his retirement funds to meet the purge. The court simply found that Husband failed to prove his *inability* to meet the purge in light of the evidence regarding his retirement accounts and other resources. *Cf. Schwartz v. Wagner*, 116 Md. App. 720, 730 (1997) (contemnor failed to establish her inability to purge contempt for failure to pay child support where she presented a bare affidavit which did not indicate her income, and she failed to rebut counter evidence as to her ability to pay the purge amount). The court did not abuse its discretion in setting the purge in the amount of $10,000 to be paid within thirty (30) days.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.