IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 7, 2015

ROBERT EMILIO CISNEROS V. LINDSEY DIANNA CISNEROS

Appeal from the Circuit Court for Lincoln County
No. C1100098 Franklin L. Russell, Judge

No. M2013-00213-COA-R3-CV – Filed November 25, 2015

This is a consolidated appeal from two separate actions arising from numerous competing petitions filed by the parents of two minor children. Due to the fact that the parents represented themselves during much of the trial court proceedings and at all times on appeal, the procedural history is muddled, the record is incomplete, and the briefs are of little assistance. The salient facts and procedural history are that a petition for divorce was filed in 2011 at which time both parties were represented by counsel. In December 2012, the trial court entered a final judgment whereby it declared the parties divorced, awarded Mother custody, and set child support. Father appealed, but soon thereafter he filed several petitions to modify custody and support. Mother answered and filed a petition for civil contempt against Father. The trial court found Father in civil contempt for failing to pay child support; he was incarcerated but released when the arrearage was paid. The court also entered a permanent injunction prohibiting Father from having contact with Mother. Father appealed several decisions in the second case. Based on post-judgment facts we agreed to consider, we are advised that Father filed an emergency petition in May 2015 to be granted custody due to Mother's drug problems. After a hearing, the trial court awarded Father temporary custody, and the children remain in Father's exclusive custody. Because Father has custody of the children, we are unable to provide Father meaningful relief with respect to this issue. The issues that are currently justiciable include: (1) whether the trial court is biased against Father; (2) the initial award of child support; (3) finding Father in civil contempt; (4) the injunction against Father; and (5) attorney's fees awarded Mother. We affirm the trial court in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Robert Emilio Cisneros, the appellant, Pro se.

Lindsey Dianna Cisneros, the appellee, Pro se.

OPINION

Robert Emilio Cisneros ("Father") and Lindsay Dianna Cisneros ("Mother") are the parents of two minor children. In July 2011, Father filed a divorce complaint. Mother answered, requesting to be designated the primary residential parent. Although the parties were able to stipulate as to the grounds for divorce, they were unable to agree about custody and support. The case was tried in July and October 2012.

At the July 2012 hearing, there was testimony that Mother had a substance abuse problem. Shortly thereafter, Mother was admitted to an outpatient drug treatment program. Mother successfully completed the program, was discharged, and continued to participate in the aftercare plan associated with the drug treatment program.

When the trial resumed in October 2012, Father testified that he was the sole employee of a limited liability company that performed remodeling and repair work on houses. Father testified that he made $19,000 in 2009 and nearly $28,000 in 2010. Father's W-2 form from 2011 stated that Father made over $39,000, but Father explained that his earnings were substantially higher in 2011 because he built a "whole house" for one of his clients. Father stated that he did not expect to perform any "whole house builds" in the future; therefore, his future income would not be as high as 2011.

At the end of the October 2012 hearing, the trial court made findings concerning custody and support. The trial court designated Mother as the primary residential parent and found that Father's 2011 W-2 form accurately reflected his income. Father filed a notice of appeal; however, the trial court had not yet entered a final order.

In December 2012, the trial court held a hearing at which both parties submitted proposed final orders. After making some changes, the trial court determined that the order submitted by Mother's attorney was an accurate reflection of its October 2012 rulings and entered the order submitted by Mother's attorney. The final judgment in the first case was entered in December 2012.

In February and March of 2013, Father commenced a second action by filing petitions in the trial court to modify child support and to modify custody. Mother filed an answer, and, in May 2013, she filed a "Petition for Civil Contempt of Court" based on Father's failure to pay child support as required by the December 2012 final judgment. The trial court held five separate hearings on the parties' numerous filings.

At the hearing that addressed Mother's petition for civil contempt, Father testified that he was paying child support as he could, but admitted that an arrearage of over

$3,000 had accrued. Father testified that he owned several guns, which he had not attempted to sell, and that he was making payments on a truck he owned. Father also testified that he owned a house with a mortgage of $61,000. At the end of the hearing, the trial court found that Father was in civil contempt of court and ordered him imprisoned until he paid the child support arrearage. Father paid the arrearage and was released.

The remaining issues were tried over several days. Mother testified that she had been afraid of Father throughout their marriage and that she was now more afraid than before. Mother testified that Father had become "obsessed" with her since the divorce, that he was following her, and that he regularly drove down her street and photographed her. She also stated that Father was recording his conversations with the children for use in court.

Father did not deny recording the children or photographing Mother; in fact, he played one of the recordings for the trial court and presented photographs of Mother and her house. Based on Mother's testimony and Father's behavior, the trial court entered a restraining order prohibiting Father from recording the children and from having contact with Mother. The trial court also ordered Father to participate in a domestic abuse prevention program.

Father participated in the program for about three weeks; however, he was uncooperative and disruptive, and the program facilitator discharged him before he could complete the program. At a hearing after Father had been expelled from the program, the program facilitator expressed concern about Father's behavior and Mother's safety.

Both Father and Mother also testified about Father's income and employment during the second case. Father presented his 2012 tax returns, which indicated that his gross income that year was $22,196. Father testified that his involvement in the case had not prevented him from working as much as before and that he reported all his cash income. Mother insisted that Father was not reporting all of his income, that he was paid in cash, and that she had seen Father with large amounts of cash when Father operated his business.

Father filed a notice of appeal in February 2014; however, the appeal could not proceed because the trial court had not yet entered a final order in the second case. In April 2014, Mother filed a motion asking the trial court to enter a final order and requesting that she be awarded attorney's fees. During a May 2014 hearing on Mother's motion, the trial court stated that it was reluctant to enter a final order because it did not want to create a permanent custody arrangement in which Father's visitation was

unnecessarily restricted; nevertheless, it agreed to do so.[1] The court went on to state that Father's construction of a whole house in 2011 "did exaggerate" his reported income; however, the court found that Father was underemployed because "of the amount of time dedicated to pursuing the litigation as opposed to being meaningfully employed" and that Father had underreported his income.

In June 2014, the trial court issued a final order and memorandum opinion containing findings of fact and conclusions of law.[2] The order states that Mother should remain the primary residential parent and that the "Restraining Order prohibiting [Father's] contact with [Mother] shall be converted into a Permanent injunction." The court awarded Mother over $15,000 in attorney's fees. Further, the order imputes income to Father because of his "chronic under-reporting and under-employment."

In June 2015, while the two appeals were pending, Father filed a Tenn. R. App. P. 14 motion with this court requesting that we consider post-judgment facts. Upon review of the motion, which we granted, we learned that Father had filed an "Emergency Petition for Modification" on May 13, 2015, which the trial court heard on the same date.[3] The proof at that hearing demonstrated that Mother had recently tested positive for drugs. The trial court appointed a guardian ad litem and granted temporary custody to Father's sister. Two days later, the trial court entered an amended emergency order awarding temporary custody to Father pending a May 27, 2015 hearing. Mother was not present or represented at the May 27 hearing. After the May 27 hearing, the trial court entered an order that, among other things, suspended Father's child support payments and designated him the primary residential parent "pending further orders of [the] Court."

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[1] At one point in the May 2014 hearing, the court stated: "There is nothing final in my opinion about this resolution with you having this restriction with your boys. . . . [The plan] restricts you far beyond what I think it needs to be."

[2] The order states that, pursuant to Rule 54.02, it is "declared to be a final order as to the interim parenting time and child support issues and other issues decided here." When an order does not dispose of all the claims between all the parties to a case, a trial court must make "an express determination that there is no just reason for delay " in order to certify that order as a final, appealable order for purposes of Tenn. R. App. P. 3. *See* Tenn. R. Civ. P. 54.02. Although the trial court's June 2014 order references Rule 54.02 and directs the entry of a final judgment, it does not include an express finding that there is no just reason for delay. The June 2014 order is not completely compliant with Rule 54.02, but, as we have stated in the past, we are not inclined to hold a trial court to "incantations." *See Cooper v. Powers*, No. E2011-01065-COA-R9-CV, 2011 WL 5925062, at *5 (Tenn. Ct. App. Nov. 29, 2011). Instead, we have required such orders to contain "something . . . to inform the reader that the trial court intends to treat what would otherwise be an interlocutory order as final under . . . Tenn. R. Civ. P. 54.02." *Id.* Here, the trial court's June 2014 order meets the minimum requirements under Tenn. R. Civ. P. 54.02.

[3] We may consider post-judgment facts under Tenn. R. App. P. 14 if they are capable of ready determination and affect the positions of the parties and subject matter of this appeal. *See* Tenn. R. App. P. 14(a). Exercising our discretion, we granted the motion and have considered the post judgment facts.

Because the emergency petition and resulting trial court order appeared to render many if not all of the issues on appeal moot, we issued an order requiring the parties to show cause why his appeal should not be dismissed. In his response, Father identified five issues that he insists are not moot: (1) the bias of the trial court; (2) child custody; (3) child support, including the trial court's finding of civil contempt based on Father's failure to pay child support; (4) the existence of a restraining order; and (5) the attorney's fees awarded Mother in the trial court. Mother did not file a response. Having considered Father's response, we have decided to address the issues identified immediately above.

STANDARD OF REVIEW

In cases such as this where the action is tried without a jury, we review a trial court's factual findings de novo, accompanied by a presumption of the correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *see Boarman v. Jaynes*, 109 S.W.3d 286, 289-90 (Tenn. 2003). The evidence preponderates against a trial court's finding of fact when it supports another factual finding with greater convincing effect. *Watson v. Watson*, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005). The presumption of correctness in Tenn. R. App. P. 13(d) applies only to findings of fact, not to conclusions of law. *See Blair v. Brownson*, 197 S.W.3d 681, 683-84 (Tenn. 2006). Accordingly, no presumption of correctness attaches to the trial court's conclusions of law, and our review is de novo. *Id.*

Several of the decisions that Father has challenged are reviewed under the deferential abuse of discretion standard. *See State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). This standard reflects the understanding that the decision being reviewed involved a choice among several acceptable alternatives. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). When reviewing these decisions, "we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative." *Vaughn*, 21 S.W.3d at 248. Instead, we review the trial court's discretionary decisions to determine "(1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court's decision was within the range of acceptable alternative dispositions." *Lee Med.*, 312 S.W.3d at 524.

ANALYSIS

The issues presented for our review arise from final judgments in two separate proceedings. The first case, the initial divorce action, concluded with a final judgment, entered on December 12, 2012, that resolved all of the issues then-pending before the trial court. The second case, which arises from several petitions filed by Father and one filed by Mother, concluded in an order entered on June 30, 2014, that was designated as a final judgment pursuant to Tenn. R. Civ. P. 54.02. Due to the procedural complexity of

this case, we will begin by discussing the issues in the first case and then discuss the issues in the second case.

ISSUES ARISING FROM THE FIRST CASE

Father presents two issues that arise from the first case. He contends the trial court judge was biased against him and should be disqualified. He also contends the initial award of child support was based on erroneous determinations of his income and Mother's income.

I. Bias of the Trial Court

Father contends that we should reverse the trial court's decisions because the trial judge is biased against him.

"[O]ne of the core tenets of our jurisprudence is that litigants have a right to have their cases heard by fair and impartial judges." *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001). Accordingly, at all times judges must conduct themselves "in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary . . . ." Tenn. R. Sup. Ct. 10, RJC 1.2. Judges are required to recuse themselves from any proceeding "in which [their] impartiality might reasonably be questioned . . . ." Tenn. R. Sup. Ct. 10, RJC 2.11(a). This is so even when no party has filed a motion for recusal. Tenn. R. Sup. Ct. 10, RJC 2.11 cmt. 2.

Tennessee Supreme Court Rule 10B requires a party seeking recusal or disqualification of a judge to "do so by a timely filed written motion" supported by an affidavit.[4] Tenn. Sup. Ct. R. 10B, § 1.01. Although the right to an unbiased judge is an essential part of our justice system, *see Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998), parties may lose the right to challenge a judge's impartiality when they fail to file a timely motion to recuse soon after they become aware of the facts giving rise to the motion. *Jerrolds v. Kelley*, No. W2003-00739-COA-R3-CV, 2004 WL 948743, at

[4] Tenn. Sup. Ct. R. 10B. Section 1. Motion Seeking Disqualification or Recusal of Trial Judge of Court of Record:

> 1.01. Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by a timely filed written motion. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials. The motion shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this Rule.

*4 (Tenn. Ct. App. Apr. 30, 2004). Parties will not be allowed "to gain procedural advantage by silently preserving a prejudicial event as an 'ace-in-the-hole' to be used in the event of an adverse decision." *Id.* (citing *Kinard*, 986 S.W.2d at 228). Consequently, the failure of a party to seek recusal of a judge in a timely manner results in waiver of the issue. *Eldridge v. Eldridge*, 137 S.W.3d 1, 8 (Tenn. Ct. App. 2002); *Kinard*, 986 S.W.2d at 228.

Father contends the trial judge was biased against him; however, he never filed a motion for recusal in the trial court as mandated by Tennessee Supreme Court Rule 10B. While conceding that he did not file a recusal motion in the trial court, Father insists he should be allowed to raise the issue on appeal because he was acting pro se during much of the trial court proceedings.

We find Father's pro se argument without merit because Father was represented by attorneys during relevant portions of the trial court proceedings. More importantly, in his appellate brief Father states that he "raised the issue of recusal" with two of his attorneys and no action was taken on behalf of Father to seek recusal of the trial court judge. Failing to comply with Rule 10B by filing a timely written motion in the trial court, Father has waived his right to challenge the impartiality of the trial judge in this appeal. *See Eldridge*, 137 S.W.3d at 8; *Kinard*, 986 S.W.2d at 228. Thus, we find no merit to this issue.

II. The Initial Child Support Award

Father contends the child support award in the first case was based on miscalculations of both parties' income levels. According to Father, the trial court should have averaged his income over several years and imputed income to Mother because she maintained a lifestyle that was unreasonable for her stated income.

Setting child support is a discretionary matter that this court reviews under the deferential abuse of discretion standard. *Vaughn*, 21 S.W.3d at 248.

A. Averaging Father's Income

Father contends the trial court erred when it failed to average his income over several years.

Income averaging is appropriate when a parent receives variable income. Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(b) ("Variable income . . . shall be averaged over a reasonable period of time consistent with the circumstances of the case[.]"); s*ee Grisham v. Grisham*, No. W2010-00618-COA-R3-CV, 2011 WL 607377, at *7 (Tenn. Ct. App. Feb. 22, 2011). The "variable income" that the guidelines contemplate includes "commissions, bonuses, overtime pay, [and] dividends . . . ." Tenn. Comp. R. & Regs.

1240-2-4-.04(3)(b). "Although [Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(b)] applies to variable components of income, the reasoning is just as applicable to situations where a parent is self-employed or whose total income is variable." *Smith v. Smith*, No. M2000-01094-COA-R3-CV, 2001 WL 459108, at *5 (Tenn. Ct. App. May 2, 2001).

Averaging is usually correct for calculating a party's fluctuating income, but it is not appropriate when "a spouse's income is steadily declining or increasing." *Hanselman v. Hanselman*, No. M1998-00919-COA-R3-CV, 2001 WL 252792, at *3 n.3 (Tenn. Ct. App. Mar. 15, 2001). In such circumstances, the obligor's income should be based on his or her current salary. *Id.* (citing *Price v. Price*, No. M1998-00840-COA-R3-CV, 2000 WL 192569, at *9 (Tenn. Ct. App. Feb. 18, 2000)).

Here, the evidence introduced at the hearings in July and October of 2012 demonstrated that Father's income was increasing each year. Father testified that he made just over $19,000 in 2009 and nearly $28,000 in 2010, and his W-2 form for 2011 indicated that he made over $39,000. Thus, the evidence before the trial court indicated that Father's income was increasing each year and that 2011 was the most recent year for which complete information was available. Accordingly, the trial court did not abuse its discretion when it determined that Father's income was best-reflected on his 2011 W-2 form.

B. Imputing Income to Mother

Father contends the trial court miscalculated Mother's monthly gross income.

During the first case, Mother testified that she made $9.50 an hour and usually worked less than 40 hours per week. She introduced a check stub that corroborated her testimony. Mother also submitted a sworn statement of income and expenses stating that her monthly income was $1,646.67. Father contends that Mother's testimony about her income was inconsistent with her statement of income and expenses. This argument is simply incorrect.[5] Mother's testimony and the documentation she submitted both show that her gross income was around $1,646 per month, and the trial court did not err by accepting this evidence.

Father also contends the trial court should have imputed income to Mother because Mother had a lifestyle that appeared unreasonable for the income she claimed. *See* Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(iii)(IV). According to the child support guidelines, courts may consider "[a] parent's extravagant lifestyle, including

[5] Reporting gross income of $1,646 per month is consistent with the testimony that Mother made $9.50 an hour. Assuming that Mother worked 40 hours per week for 52 weeks each year, her gross annual income was $19,760. Thus, her gross income each month was approximately $1,646.

ownership of valuable assets and resources (such as an expensive home or automobile), that appears inappropriate or unreasonable for the income claimed by the parent" when determining whether to impute income to a parent. *See id.*

In support of this argument, Father contends that, at the time of the first case, Mother was living in a house that "was only a year or two old" and that she was waiting to move into another house that was being built for her. Father photographed the exteriors of both houses and introduced the pictures into evidence. He contends the pictures demonstrate that Mother was maintaining an unreasonable lifestyle.

The trial court understandably found that the photographs of the exteriors of two houses in question had little relevance to Mother's income. Moreover, Father failed to provide any evidence that Mother was currently paying an unreasonable amount of rent or that she would begin paying such an amount once she moved into the new house. Instead, Mother's uncontradicted testimony was that she was not currently paying any rent and that she would pay "around 500 to 550 a month" when she moved into the new house. This amount appears reasonable given Mother's stated income. Thus, Father failed to provide relevant evidence to support his allegation that Mother maintained an unreasonable or inappropriate lifestyle. Accordingly, the trial court correctly declined to impute income to Mother.

Based on the foregoing, we find no error with the trial court's determination concerning both parties' incomes in the first case. Thus, we affirm the December 2012 child support award.

ISSUES ARISING FROM THE SECOND CASE

In the final order in the second case, the trial court ruled that Mother should remain the primary residential parent, established a permanent injunction prohibiting Father from having contact with Mother, imputed income to Father, and awarded Mother attorney's fees. Father contends that these decisions were erroneous. Father also appeals the trial court's finding of contempt based on his failure to pay child support.[6]

[6] Father also raised issues related to the motions to modify child support he filed in February 2013, contending the trial court never directly ruled on them. The trial court's June 2014 order was designated final under Tenn. R. Civ. P. 54.02 as to "the interim parenting time and child support issues and other issues decided here." The June 2014 order does not mention Father's February 2013 motions to modify and, to the extent the trial court did not decide them, no final judgment has been entered with respect to those motions. Thus, any issues related to those motions are not properly before this court on an appeal under Rule 3 of the Tennessee Rules of Appellate Procedure. *See* Tenn. R. App. P. 3. Accordingly, the trial court retains jurisdiction over the motions to modify, to the extent not mooted by this opinion.

I. Child Custody

The post-judgment facts reveal that Father has been the primary residential parent since May 27, 2015, and there is no indication this circumstance will change in the near future. Nevertheless, Father contends the issue of child custody is not moot because the May 2015 order is merely temporary.[7] We respectfully disagree because the May 2015 order, which named Father the primary residential parent with exclusive custody of the children, albeit temporarily, prevents this court from granting Father meaningful relief.

Cases must remain justiciable from the time they are filed until the moment of final appellate disposition. *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 203-04 (Tenn. 2009) ("*Lynch*"). A moot case has lost its justiciability because of a court decision, the acts of the parties, or some other reason occurring after its commencement. *Id.* at 204. A case is moot if it "no longer serves as a means to provide some sort of judicial relief to the prevailing party," *see id.*, or when it "seeks to get [. . .] a judgment on some matter which, when rendered, cannot, for any reason, have any practical legal effect upon a then existing controversy." *Boyce v. Williams*, 389 S.W.2d 272, 277 (Tenn. 1965) (quoting 1 C.J.S. Actions § 17, p. 1017) (alteration in original). Determining whether a case is moot is a question of law. *Alliance for Native Am. Indian Rights in Tennessee, Inc. v. Nicely*, 182 S.W.3d 333, 338 (Tenn. Ct. App. 2005).

As a result of the May 2015 custody order, which superseded the June 2014 order being appealed, Father has exclusive custody of the children. If we were to reverse the June 2014 order, our decision would not have any practical effect because Father would retain exclusive custody of the children under the May 2015 order. Conversely, if we were to affirm the June 2014 final judgment that designated Mother the primary residential parent, our decision would have no practical affect because Father would retain custody, again based on the May 2015 order. Because any judgment we might render regarding the June 2014 custody determination would have no practical effect, the custody issue is moot.

We are mindful that an exception to the mootness doctrine exists when the controversy that was previously at issue is "capable of repetition and of such short duration that it will evade judicial review." *See Lynch*, 301 S.W.3d at 204; *Alliance*, 182

[7] Permanent custody arrangements are preferred, but circumstances requiring temporary custody arrangements will inevitably arise. *See King v. King*, No. 01-A-019110PB00370, 1992 WL 301303, at *2 (Tenn. Ct. App. Oct. 23, 1992). Accordingly, trial courts have discretion to grant temporary custody arrangements in certain circumstances. *See id.*; *Warren v. Warren*, No. W1999-02108-COA-R3-CV, 2001 WL 277965, at *4 (Tenn. Ct. App. Mar. 12, 2001); *see also Keisling v. Keisling*, 196 S.W.3d 703, 719 (Tenn. Ct. App. 2005) (noting that "temporary custody orders may be entered after the entry of the final decree . . . .").

S.W.3d at 340-41. In the future, this controversy could recur if the trial court once again names Mother the primary residential parent. However, such an action would not "evade judicial review." If the trial court later determines that Mother should be the primary residential parent, Father will have ample opportunity to appeal that decision and secure adequate judicial review. As of this moment, however, there is no live controversy for which we can afford Father any practical relief.

II. The Permanent Injunction

Father challenges "the restraining order which was made permanent in the second case." There have been several restraining orders in this case, but the only one that fits this description is the permanent injunction described in the June 2014 order, which prohibits Father from having contact with Mother.[8]

"In domestic relations cases, restraining orders or injunctions may be issued upon such terms and conditions and remain in force for such time as shall seem just and proper to the judge to whom application therefor is made . . . ." Tenn. R. Civ. P. 65.07. Moreover, trial courts have "wide discretion when issuing restraining orders in domestic relations cases." *Duke v. Duke*, No. M2013-00624-COA-R3-CV, 2014 WL 4966902, at *28 (Tenn. Ct. App. Oct. 3, 2014), *perm. app. denied* (Tenn. Feb. 13, 2015). Nevertheless, this rule does not excuse trial courts from determining whether sufficient evidence exists to justify a restraining order. *Hogue v. Hogue*, 147 S.W.3d 245, 252 (Tenn. Ct. App. 2004).

During multiple hearings in the second case, Mother testified that she was afraid of Father. She stated that she had been afraid of Father throughout their marriage and she was more afraid now that they separated. Moreover, the trial court required Father to participate in a domestic abuse prevention program. The facilitator of that program testified that Father was expelled from the program, and she also expressed concern about Father's behavior and Mother's safety.

Based on this evidence, the trial court did not abuse its discretion when it issued a permanent injunction prohibiting Father from having contact with Mother. Accordingly, we affirm.

[8] Although Father was at one time enjoined from having contact with his children, it is clear that no injunction or restraining order currently prohibits Father from having contact with his children because the trial court's May 27, 2015 order designates Father as the primary residential parent. To the extent Father was seeking relief from an injunction prohibiting him from having contact with his children, the issue is now moot.

III. Civil Contempt

Father insists the trial court's finding of civil contempt based on his failure to pay child support should be reversed. He also contends that he was entitled to the procedural protections required for petitions for criminal contempt and that he lacked the ability to pay child support both when it was due and at the time of the contempt hearing.

A. Procedural Protections

Father contends the finding of civil contempt should be reversed because he was not afforded the procedural protections applicable to criminal contempt. According to Father, such protections were applicable in this case because Mother's petition for contempt requested both civil and criminal remedies.

All courts are empowered to punish for contempt. Tenn. Code Ann. § 16-1-103. This power, however, is limited to conduct delineated by the statute. Tenn. Code Ann. § 29-9-102; *see State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Trust*, 209 S.W.3d 602, 611 (Tenn. Ct. App. 2006) (citing *Black v. Blount*, 938 S.W.2d 394, 397 (Tenn. 1996)).

Contempts may be either civil or criminal. *Black*, 938 S.W.2d at 398. "In determining whether a finding of contempt is a finding of criminal contempt or a finding of civil contempt, this Court is to focus on the character and the purpose of the sanctions imposed." *State ex rel. Murphy v. Franks*, No. W2009-02368-COA-R3-JV, 2010 WL 1730024, at *4 (Tenn. Ct. App. Apr. 30, 2010); *see Robinson v. Fulliton*, 140 S.W.3d 304, 309 (Tenn. Ct. App. 2003). Sanctions for criminal contempt are "punitive and unconditional," and the purpose of such sanctions is to "preserve the power and vindicate the dignity and authority of the law, and the court as an organ of society." *State ex rel. Phillips v. Knox*, No. E2000-02988-COA-R3-JV, 2001 WL 1523347, at *7 (Tenn. Ct. App. Nov. 29, 2001) (quoting *Black*, 938 S.W.2d at 398).

In contrast, allegations of civil contempt are brought for the benefit of a private party rather than the public at large. *See id.* at *6; *Baker v. State*, 417 S.W.3d 428, 436 (Tenn. 2013). Sanctions for civil contempt are "remedial and coercive in nature, designed to compel the contemnor to comply with the court's order." *Baker*, 417 S.W.3d at 436. Imprisonment is a proper sanction for a finding of civil contempt. *Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000); *see* Tenn. Code Ann. § 29-9-104(a).

Generally, proceedings for criminal contempt must comply with Tenn. R. Crim. P. 42(b). *Long v. McAllister-Long*, 221 S.W.3d 1, 13 (Tenn. Ct. App. 2006). Under this rule, the defendant must be "given explicit notice that they are charged with criminal contempt and must also be informed of the facts giving rise to the charge." *Id.* In contrast, civil contempt only requires that the defendant be given notice of the allegation and an

opportunity to respond. *Brown v. Batey*, No. M2009-02020-COA-R3-JV, 2010 WL 3155189, at *2 (Tenn. Ct. App. Aug. 9, 2010). "Moreover, and significant to this issue, the safeguards afforded to one accused of criminal contempt are not available to one accused of civil contempt." *Flowers*, 209 S.W.3d at 611 (citing *Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 510 (Tenn. 2005)).

Here, Mother's petition expressly stated that it was for "civil contempt," and during the hearing on the matter, the trial court confirmed that it was treating the petition as one for "civil contempt." Further, the sanctions the trial court imposed were sanctions for civil contempt because their character and purpose was to compel compliance with a court order. *See Flowers*, 209 S.W.3d at 613. As a consequence, Father was not entitled to the safeguards afforded to one accused of criminal contempt. *Id*. at 611.

B. Finding of Civil Contempt

Father contends the trial court erred when it found him in civil contempt of court because he did not have the ability to pay support when it was due.

Decisions to hold a person in civil contempt are reviewed under the abuse of discretion standard. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *Phillips*, 2001 WL 1523347, at *4 ("A court's determination of contempt and its manner of dealing with contempt is subject to an abuse of discretion review.").

In order to find a party in civil contempt of an order, the trial court must make a threshold finding that the party violating the order engaged in willful conduct. *Flowers*, 209 S.W.3d at 612 (citing *Ahern*, 15 S.W.3d at 79; *Haynes v. Haynes*, 904 S.W.2d 118, 120 (Tenn. Ct. App. 1995)). "Willfulness" in the context of civil contempt does not require the same standard of culpability required by the penal code. *Id*. Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. *Id*.

Additionally, to hold a party in contempt for failure to pay child support, the court must also determine that the obligor had the ability to pay at the time the support was due. *Ahern*, 15 S.W.3d at 79. Although the party to be held in civil contempt must have the ability to perform the act it is ordered to perform, *Leonard v. Leonard*, 341 S.W.2d 740, 743 (Tenn. 1971), the burden of proof is on the contemnor to show the inability to pay. *Pirrie v. Pirrie*, 831 S.W.2d 296, 298 (Tenn. Ct. App. 1992); *Leonard*, 341 S.W.2d at 743-44; *Gossett v. Gossett*, 241 S.W.2d 934, 936 (Tenn. Ct. App. 1951).

> The ability to pay means precisely what it seems to mean. The individual must have the income or financial resources to pay the obligation at the time it is due. Spending money on other bills or obligations does not

> absolve the failure to pay court-ordered child support. In fact, having the means to meet other financial obligations evidences an ability to pay child support.

Buttrey v. Buttrey, No. M2007-00772-COA-R3-CV, 2008 WL 45525, at *2 (Tenn. Ct. App. Jan. 2, 2008).

The record reveals that Father is self-employed, healthy, and has been able to find work throughout the course of this litigation. He owns a house and a truck, and regularly makes payments for both. Father's ability to work and the fact that he is able to meet other obligations indicate that he was able to pay the support when it was due. *See id.* Moreover, Father has failed to establish that he was unable to make the several child support payments at issue when they were due. Thus, we find no abuse of discretion with the decision to hold Father in civil contempt for failing to pay child support when it was due.

C. Imprisonment

Father also contends the trial court erred by imprisoning him because he was not able to comply with the child support order at the time of the contempt hearing.

Once the court finds that the defendant is in contempt for failure to comply with a court order, it may imprison the defendant to compel compliance with the order in question. *See* Tenn. Code Ann. § 29-9-104(a); *Adhern*, 15 S.W.3d at 79. "[W]ith civil contempt, the one in contempt has the 'keys to the jail' and can purge the contempt by complying with the court's order." *Adhern*, 15 S.W.3d at 79. Thus, this remedy is only available when the defendant has the ability to comply with the order *at the time of the contempt hearing. Id.*

The contemnor bears the burden of proving that he is unable to comply with the court's order at the time of the hearing. *See Phillips*, 2001 WL 1523347, at *7. A contemnor should not be incarcerated for civil contempt when there is proof that he or she did not possess sufficient assets, was unemployed, or had only negligible employment. *See id.* at *9 (the defendant had no savings or assets and her income was derived from food stamps and Aid to Families with Dependent Children benefits); *Poole v. City of Chattanooga*, No. E1999-01965-COA-R3-CV, 2000 WL 310564, at *4-5 (Tenn. Ct. App. Mar. 27, 2000) (the defendant was indigent, had no savings or assets, held her last job several years prior to the contempt hearing, and her only income was derived from her work as a prostitute).[9]

[9] *See also State ex rel. Everson v. Gooch*, No. 89-130-II, 1990 WL 3976, at *2 (Tenn. Ct. App. Jan. 24, 1990) (neither defendant had the present ability to pay judgments of over $3,000 when they had (continued…)

In this case, Father failed to demonstrate that he was unable to pay the arrearage at the time of the contempt hearing. *See Phillips*, 2001 WL 1523347, at *7. At the time of the hearing, Father was gainfully employed, owned his own home, had a bank account, owned a truck, and was paying his other financial obligations. Additionally, Father testified that he owned several guns that he had not attempted to sell in order to fulfill his child support obligations. Thus, the record indicates that his assets and income were significantly greater than those of the defendants in prior cases involving the inability to comply with a court order. *See id.* at *9; *Poole*, 2000 WL 310564, at *4-5. Accordingly, the trial court did not abuse its discretion when it imprisoned Father until he complied with the child support order.

IV. Imputing Income to Father

In its June 2014 order, the trial court found that Father was underemployed and imputed annual income to him in the amount of $37,589, which represents the full-time, year-round worker's median gross income for men in Tennessee as stated in the American Community Survey of 2006 from the U.S. Census Bureau. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(iv)(I). Father contends this was error.

Although child support is to be established based on the obligor's actual income, courts are permitted to use an obligor's potential income, or earning capacity, if they find that the obligor is willfully or voluntarily underemployed. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(i); *Demers v. Demers*, 149 S.W.3d 61, 68-69 (Tenn. Ct. App. 2003). The guidelines do not presume that a parent is voluntarily underemployed. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii). Instead, the burden is on the custodial parent to prove that the obligor parent is willfully and voluntarily underemployed. *Demers*, 149 S.W.3d at 69.

The determination that a parent is willfully or voluntarily underemployed "may be based on any intentional choice or act that adversely affects a parent's income." Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii)(I). In making this determination, courts consider the parent's past and present employment as well as his or her education, training, and ability to work. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(iii). In addition, the reason for the obligor's decision to reduce income-producing activities is relevant. *Ralston v. Ralston*, No. 01A01-9804-CV-00222, 1999 WL 562719, at *3 (Tenn. Ct. App. Aug. 3, 1999).

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no assets and each held only part-time jobs paying less than $5.00 an hour); *State ex rel. Moore v. Owens*, No. 89-170-II, 1990 WL 8624, at *3 (Tenn. Ct. App. Feb. 7, 1990) (defendant had not had a regular job for three years, had no bank account, and the only property he owned was a 10-year-old car).

"Whether a parent is willfully or voluntarily underemployed is a question of fact, and the trial court has considerable discretion in its determination." *Eldridge*, 137 S.W.3d at 21. Therefore, we review the trial court's determination with a presumption of correctness. Tenn. R. App. P. 13(d).

Once a trial court finds that a parent is willfully underemployed, it must make a finding about that parent's earning capacity. *See Eatherly v. Eatherly*, No. M2000-00886-COA-R3-CV, 2001 WL 468665, at *11 (Tenn. Ct. App. May 4, 2001). This finding must have an evidentiary basis and take into consideration the parent's education, training, and past and present employment. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii)(II); *Eatherly*, 2001 WL 468665, at *11.

Here, the trial court found that Father was willfully or voluntarily underemployed because he had voluntarily reduced his income-producing activities in order to prepare for litigation in this case. Father testified that his involvement in this litigation had not prevented him from working. The trial court did not find this testimony credible. *See In re Sidney J.*, 313 S.W.3d 772, 777 (Tenn. 2010) ("We may infer the trial court's findings on issues of credibility and weight of testimony from the manner in which the trial court resolved conflicts in the testimony and decided the case."). This determination is entitled to "considerable deference" on appeal, *see id.*, and we find no error with this finding for the record indicates that Father had expended a great deal of time with this litigation.

Based on its finding of voluntary underemployment, the trial court imputed to Father an annual earning capacity of $37,589. Although Father's actual reported income from 2012 was $22,196, it is clear that he can earn more than this amount even when he is not building a house for a customer. In 2010, his income was nearly $28,000. Moreover, Father's 2011 income indicates that he can earn more than the amount the trial court imputed to him. Although Father's 2011 income was due to one big job that might not be repeated, the trial court took this testimony into account and imputed to Father less than $39,000 in annual income.

Based on the above, Father has failed to establish that the trial court abused its discretion by imputing income to Father in the amount of $37,589.

V. Attorney's Fees

Father contends the trial court erred when it awarded Mother attorney's fees in the second case.

The Tennessee Code permits former spouses to recover the reasonable attorney's fees incurred in enforcing child support orders or in regard to actions concerning the adjudication of custody. *See* Tenn. Code Ann. § 36-5-103(c). The trial court is vested with wide discretion when determining whether to award attorney's fees. *See id.*;

Threadgill v. Threadgill, 740 S.W.2d 419, 426 (Tenn. Ct. App.1987). We review a trial court's discretionary decision regarding attorney's fees pursuant to the abuse of discretion standard. *See Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995).

After reviewing the record, we have determined that the trial court did not abuse its discretion when it awarded Mother her attorney's fees. Accordingly, we affirm.

IN CONCLUSION

The judgment of the trial court is affirmed, and costs of appeal are assessed against Robert Emilio Cisneros.

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FRANK G. CLEMENT, JR., JUDGE