IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

BRADLEY T. PACE,

Appellant,

v.

Case Nos. 5D18-2343, 5D19-709, 5D19-2354

SHARESE M. PACE,

Appellee.

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Opinion filed May 1, 2020

Appeal from the Circuit Court
for Orange County,
Diana M. Tennis, Judge.

Gary S. Israel, of Gary Israel, P.A., Orlando,
for Appellant.

Chad A. Barr, and Olivia H. Miller, of Law Office of Chad A Barr, P.A., Altamonte Springs, for Appellee.

EDWARDS, J.

This opinion addresses three consolidated family law appeals brought by Bradley Pace (Appellant). In the first appeal, Appellant challenges aspects of the trial court's June 2018 final order granting dissolution of marriage. In the second and third appeals, Appellant challenges the court's orders of contempt issued against him for failing to pay the amounts due in child support, alimony, and attorney's fees that were awarded to his former wife, Sharese Pace (Appellee). As to the first appeal, we affirm as to all issues

without need for further discussion. We reverse the trial court's civil contempt orders to the extent that they conditioned his release from jail on payments that he is unable to personally make. Appellant's ability to occasionally borrow money from various friends to satisfy the purge orders is neither an appropriate consideration according to the law, nor an endless resource according to the evidence.

Appellant has repeatedly not paid his support obligations as ordered, which prompted Appellee to repeatedly move to hold Appellant in contempt, which motions have repeatedly been granted, and resulted in Appellant being threatened with jail on more than one occasion and actually being jailed once for not paying the purge amount in a timely fashion. Appellant testified that he had insufficient income or assets to pay his support obligations; thus, he argues that his failure to pay should not be deemed willful contempt of court. A trial court's determination that a party is in willful contempt of court must be based upon competent substantial evidence and is subject to an abuse of discretion standard of review. *Jaffe v. Jaffe*, 17 So. 3d 1251, 1253 (Fla. 5th DCA 2009) (citing *Fox v. Haislett*, 388 So. 2d 1261, 1265 (Fla. 2d DCA 1980)); *see, e.g.*, *Buchanan v. Buchanan*, 932 So. 2d 270, 271 (Fla. 2d DCA 2005).

"Pursuant to section 61.14(5)(a), Florida Statutes (2010), [the obligor] is presumed to have a continuing ability to pay the alimony award, and . . . [has] the burden at the contempt hearing of proving that he lacks the ability to pay." *Elliott v. Bradshaw*, 59 So. 3d 1182, 1184–85 (Fla. 4th DCA 2011) (citing *Flores v. Bieluch*, 814 So. 2d 448, 448 (Fla. 4th DCA 2001)). The trial court found here that Appellant failed to overcome this presumption and failed to carry his burden. In reaching this conclusion, the trial court noted that Appellant never seemed to have money to pay his support obligations or to make payments as ordered on Appellee's attorney's fees, but somehow managed to come up

with enough money to pay his own attorney, to have a car to drive, and to have a nice house in which to live. Furthermore, the court remarked that Appellant always claimed he could not pay whatever civil purge amount was ordered, yet he would still somehow get money from somebody so that he could either avoid or get released from jail.

However, the record evidence did not support that Appellant actually had the financial ability to comply with the court's orders. Appellant testified that he was not able to get a job in the financial domain, where he had been successfully employed in the past, because his credit scores were deemed unacceptable for a financial advisor. Furthermore, he testified that certain job prospects evaporated when the potential employers viewed his mugshot, which was taken when he was jailed for civil contempt based on non-payment. The employment he had secured was not yet generating sufficient income to satisfy his support obligations. He added during the later contempt hearing that he had secured a job selling luxury cars. Although he was working twenty-six or twenty-seven days a month, ten or eleven hours per day, he was only able to make partial support payments, which were being garnished from his wages. Appellant documented this testimony with pay records and timecards. Appellant testified that he was living in a nice house in Celebration, but his parents owned it and he was way behind in his rent payments. His electricity and water had been turned off repeatedly, and he had a car only because family or friends had made payments on his behalf. Appellant explained that a family friend had made payments towards Appellant's attorney's fees, but that was only done as a favor. He testified that he had avoided or been freed from jail on prior contempt charges only when friends lent him the money, which they could no longer do. Appellant presented the testimony of some of his friends who had lent him money before, who said they had not been repaid. Appellant and his friends testified that

the proverbial well had run dry. No contrary evidence was presented.

"A civil contempt order for nonpayment of support must include findings that the obligor willfully failed to comply with a prior court order for support while having the ability to make the established payments." *Nation v. Boling*, 206 So. 3d 810, 812 (Fla. 1st DCA 2016). The trial court must have competent substantial evidence as a basis for finding that the obligor has the ability to pay. *Buchanan*, 932 So. 2d at 271. However, "the payment of the purge amount does not establish that [a party has] the ability to pay under the applicable legal standard. [A] one-time payment does not establish the ability to pay the order on an ongoing basis." *Wendel v. Wendel*, 875 So. 2d 820, 823 (Fla. 2d DCA 2004) (citing *Sokol v. Sokol*, 441 So. 2d 682, 685 (Fla. 2d DCA 1983)). It is error for a court to conclude that a party has the ability to pay based on the fact that the party can borrow money from a third party to pay the judgment. *Kitchens v. Martin*, 186 So. 3d 24, 24 (Fla. 5th DCA 2016) (citing *Russell v. Russell*, 559 So. 2d 675, 676 (Fla. 3d DCA 1990) (holding it was error to base conclusion of ability to pay on finding that party may borrow money from relative)).

The trial court's reliance on *Sibley v. Sibley*, 833 So. 2d 847, 848–49 (Fla. 3d DCA 2002), is misplaced. In *Sibley*, the trial court found appellant in willful contempt of court where the evidence showed he could have, more likely than not, simply asked his wealthy parents to pay his domestic support obligation, as they had already given Sibley hundreds of thousands of dollars with all indications being they would continue to bankroll their son. *Id.* at 848–49. Here, unlike in *Sibley*, although there was evidence that Appellant's parents had provided financial support in the past in terms of his living expenses and his attorney's fees, there was no evidence that his parents had paid any of his court-ordered obligations, nor was there evidence of recent payments on Appellant's behalf from his parents. Finally,

a court's determination that a party is willfully refusing to seek out a kind of employment that would allow the party to meet its domestic support obligations is not sufficient to support a finding that the party has the present ability to pay a support obligation for contempt purposes. *LeNeve v. Navarro*, 565 So. 2d 836, 837 (Fla. 4th DCA 1990).

Because Appellant submitted undisputed evidence that he lacked the present ability to pay these purge amounts, we must reverse the trial court's finding that Appellant was in willful civil contempt of court, in the contempt orders dated March 5, 2019, and August 1, 2019, and we remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, REMANDED WITH INSTRUCTIONS

HARRIS and TRAVER, JJ., concur.