



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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December 13, 2016

### LETTER OPINION

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*RE: Linda P. Ebersole (Linda C. Belk) vs. Franklin P. Ebersole*  
Case Number CL-2008-10748

Dear Counsel and Mr. Ebersole,

Before the Court is Plaintiff's Motion to Reconsider. The motion asserts that "[T]he Court dismissed the rule to show cause filed by the Plaintiff and issued by the Court following its hearing held December 6, 2016, based upon its finding that willfulness is an element required to be proved by the Plaintiff in such a case." The Plaintiff argues that willfulness is not an element of civil contempt and, therefore, the Court should have found the Defendant in civil contempt and ordered sanctions. The Plaintiff further argues that "an assertion that the violation was unintentional is not a viable defense."

## OPINION LETTER

Controlling Virginia case law, however, clearly establishes that willfulness and intentionality are relevant in civil contempt proceedings. The principal appellate case on this issue is *Alexander v. Alexander*, 12 Va. App. 691 (1991), which reads in part as follows:

The mother contends that the trial court erred in failing to find the father in contempt for failing to pay past due child support. A trial court ‘has the authority to hold [an] offending party in contempt for acting in bad faith or for willful disobedience of its order.’ *Carswell v. Masterson*, 224 Va. 329, 332, 295 S.E.2d 899, 901 (1982). In a show cause hearing, the moving party need only prove that the offending party failed to comply with an order of the trial court. *Frazier v. Commonwealth*, 3 Va. App. 84, 87, 348 S.E.2d 405, 407 (1986). The offending party then has the burden of proving justification for his or her failure to comply. *Id.*

At the hearing on October 30, 1989, the wife testified that the husband last sent her a full child support payment (\$1,000) in January, 1989 and has paid no child support since May, 1989. The husband testified that since September, 1985, he has been the sole supporter of the children, having paid for all of their needs. The husband further testified that, from the time the wife filed the show cause motion and at the instruction of his attorney, he paid all of the child support payments into an escrow account controlled by his attorney. The trial court found that ‘the necessary willful failure...to justify a finding of contempt’ did not exist.

The trial court’s finding that the husband did not willfully violate the order is not plainly wrong and is not without evidence to support it. *See* Code Section 8.01-680. Therefore, the trial court did not err in declining to hold the husband in contempt.

*Id.* at 696–97. *Alexander* has been cited frequently in support of the same proposition. *See, e.g.*, the following cases:

- *Zedan v. Westheim*, 60 Va. App. 556, 574–75 (2012) (“Consistent with the requirement of knowledge, to hold a litigant in contempt, the litigant must be ‘acting in bad faith or [in] willful disobedience of [the court’s] order. ‘Willful’ means that the conduct is deliberate or intentional.”) (citations omitted).
- *Barrett v. Commonwealth*, 2011 Va. App. LEXIS 246, \*15– \*16 (July 26, 2011) (“In a show cause hearing, the moving party need only prove that the offending party failed to comply with an order of the trial court. The offending party then has the burden of proving justification for his or her

failure to comply.”) (citing *Alexander*, 12 Va. App. at 696). “In this case, appellee’s evidence established that appellant violated the court’s child support order, and appellant failed to demonstrate any justification for his failure to obey the order.” *Id.* at \*16.

- *Mooney v. Mooney*, 2007 Va. App. LEXIS 42, \*6–\*7 (Feb. 6, 2007)  
“Husband asserts that ‘the trial court’s contempt finding in this case is not supported by the evidence, which established that [his] failure to pay was not willful, but was based upon his financial inability to pay.’ . . . [T]he trial court disbelieved husband’s evidence regarding his income and financial circumstances. Because we find the court permissibly determined husband had not demonstrated an inability to pay, we also find the court’s conclusion that husband willfully failed to pay his support obligations is supported by the evidence.”
- *Campbell v. Campbell*, 2014 Va. App. LEXIS 274, \*22–\*23 (Aug. 5, 2014)  
 (“The litigant’s knowledge of the terms of the court’s order is a necessary component of a contempt analysis because, to uphold the finding of contempt, there must be sufficient evidence that the offending party acted ‘in bad faith or [in] willful disobedience of [the court’s] order.’”) (citing *Alexander*, 12 Va. App. at 696).

In sum, Virginia case law establishes that a Plaintiff, in order to make out a *prima facie* case for civil contempt, need only prove that the Defendant violated the Court’s order. However, that does not mean willfulness is irrelevant, for it certainly is not irrelevant to the law of civil contempt, as the foregoing cases clearly demonstrate. This is because the law affords the Defendant the opportunity to prove “justification” for his failure to comply with the Court’s order. And an inability to pay the full amount of court-ordered financial obligations is a cognizable form of “justification,” if proven by the Defendant. *See generally Mooney v. Mooney*, 2007 Va. App. LEXIS 274.

In other words, an individual is not in civil contempt for failure to meet a financial obligation if he proves that he is financially unable to comply with the court order. If it were otherwise, a contempt proceeding would simply be an arithmetic exercise. But it is not. A finding of civil contempt permits the Court to take a variety of actions to coerce compliance including, most significantly, incarceration. The frequently quoted maxim -- that a Defendant who is jailed for civil contempt holds the keys to the jail cell -- is rational and justified only if the court concludes that the defendant actually possesses that jailhouse key. Here, the defendant persuaded the court that he does not now possess that key.

It is certainly true that Plaintiff proved in her case in chief that the Defendant had not met all of his court-ordered financial obligations. But it is also true that the Defendant proved that his failure to meet all of his court-ordered financial obligations during the year in question was not

intentional, willful or in bad faith but, rather, was based on an inability to pay. The evidence before the Court included the following:

- Since the last Court order, the Defendant has made significant and substantial payments which indicate to the Court a genuine effort to comply with his court-ordered obligations. These payments are documented in Defendant's Exhibit 14, and the associated attachments, and consist of the following:<sup>1</sup>
  - August 28, 2015: \$2,674
  - September 30, 2015: \$1,200
  - October 7, 2015: \$1,474
  - October 30, 2015: \$1,500
  - October 30, 2015: \$2,674
  - November 19, 2015: \$500
  - November 30, 2015: \$2,674
  - December 11, 2015: \$400
  - December 12, 2015: \$400
  - December 30, 2015: \$600
  - January 15, 2016: \$2,205
  - February 16, 2016: \$2,674
  - March 9, 2016: \$2,674
  - March 31, 2016: \$1,774
  - June 10, 2016: \$1,774
  - July 5, 2016: \$2,674<sup>2</sup>
  - September 7, 2016: \$2,674
- According to Defendant's Exhibit 14, the total of payments made between August 1, 2015 and September 7, 2016 (the date the petition for the rule to show cause was filed) is: \$30,545. While this is not all the Defendant owed the Plaintiff, both in support and court-ordered attorney fees, the payments actually made by the Defendant is a factor the Court must consider and weigh in determining whether he is in contempt.

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<sup>1</sup> To be clear, the parties do not agree as to whether every one of these payments were for court-ordered support or for the Defendant's other financial obligations to the Plaintiff, including reimbursement of incurred medical expenses and arrearages. The point of citing the payments here is not to specifically attribute them to court-ordered support but, rather, as evidence of the Defendant's efforts to meet his financial obligations to Plaintiff.

<sup>2</sup> The Court could not locate documentation for this payment.

- Defendant is a professional cabinet maker. He introduced into evidence a list of 21 names of individuals he had contacted in an effort to secure work building cabinets. In total, he indicated that he had made over 100 phone calls seeking employment building cabinets. While Plaintiff's counsel suggested that he take a "W-2" job, the defendant presented un rebutted testimony that taking on such employment, instead of his current independent employment as a professional cabinet maker, would not improve his ability to meet his court-ordered financial obligations. Further, he indicated that he has cabinet making jobs in the pipeline that will net him \$28,000. Plaintiff asserts that Defendant's limited income constitutes "self-inflicted poverty," but the Court does not agree.
- The Defendant's financial resources are limited. According to Defense Exhibit 8, the Defendant's 2015 U.S. Individual Income Tax Return indicates a total income of \$40,445 and an Adjusted Gross Income of \$23,824. Further, according to Defense Exhibit 15, which is the Defendant's Monthly Income and Expense Statement, his average pay per month is \$3,000, which would work out to \$36,000 per year. This supports the Defendant's assertion that he has paid what he could pay in view of the evidence that the Defendant actually paid the Plaintiff \$30,545 during the 13 month period between August 2015 and September 2016.

The Plaintiff asserted that the Defendant does have an ability to pay as indicated principally by three circumstances: (1) the Defendant took a trip to Las Vegas during the past year; (2) the Defendant got remarried recently and his wedding was in Bethany Beach; and (3) the Defendant attended his daughter's wedding in North Carolina. With regard to the trip to Las Vegas, the Defendant testified that it was paid by his wife's company and his total spending on the trip amounted to about \$400. With regard to the remarriage, the Defendant testified that his wife paid for the wedding. With regard to attending his daughter's wedding in North Carolina, the Defendant testified that he stayed at an inexpensive motel and then at his daughter's residence and his total spending on the trip amounted to about \$500. The Court is not persuaded that any of these circumstances, individually or collectively, undermine the Defendant's assertion that he has been unable to fully comply with his court-ordered financial obligations.

The Plaintiff also argues that the history of the Defendant's prior contempts, and prior incarcerations for contempt, is relevant to the question of whether the Defendant is currently intentionally avoiding his court-ordered financial obligations. The Court has considered the Defendant's prior history, but the Court places greater weight on what has actually occurred during the year at issue -- August 2015 to September 2016 -- in terms of the Defendant's efforts to acquire paying work, his financial resources, and his actual payments to the Plaintiff during that time frame.

Finally, the Plaintiff expresses the concern that a finding that the Defendant is not in contempt would operate to free the Defendant from his court ordered obligations. Motion to Reconsider at 3. It does not. Finding that the Defendant is not in contempt in no way relieves the Defendant of his obligation to pay in compliance with the prior orders of this Court and it would

be a grave mistake for the defendant to conclude otherwise. Each of his financial obligations -- current and past due -- remain. All that occurred at this hearing is that the Court concluded, based on the evidence presented, that the Defendant was not in contempt at the present time.

The Plaintiff's motion to reconsider is DENIED. An Order in accordance with this Opinion shall issue today.

Sincerely,

A black rectangular redaction box covering the signature of Randy I. Bellows.

Randy I. Bellows  
Circuit Court Judge

**OPINION LETTER**

