STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1076

Carey A. Hirsch, petitioner,
Appellant,

vs.

Alexander B. Antzaras,
Respondent.

Filed May 5, 2009
Appeal dismissed
Peterson, Judge

Anoka County District Court
File No. 02-FX-04-011774

John G. Westrick, Rosalie M. Strommen, Westrick & McDowall-Nix, P.L.L.P., 450 Degree of Honor Building, 325 Cedar Street, St. Paul, MN 55101 (for appellant)

John M. Jerabek, Jade K. Johnson, Niemi, Barr & Jerabek, P.A., 510 Marquette Avenue, Suite 200, Minneapolis, MN 55402 (for respondent)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this child-support dispute, appellant argues that the district court erred by (1) finding her in contempt without holding a second-stage *Mahady* hearing,[1] (2) failing to support its contempt order with adequate findings, and (3) including attorney fees as a purge condition for the contempt. Because the contempt order is conditional, it is not appealable, and we dismiss the appeal.

FACTS

In a May 2006 order, the district court granted respondent Alex Antzaras sole physical and sole legal custody of the parties' minor child and granted appellant Carey Hirsch supervised visitation. The court also ordered appellant to make certain payments to respondent and others. Appellant failed to make the payments, and respondent filed a motion seeking an order holding appellant in contempt. The motion also requested that appellant (1) be required to carry life insurance in an amount that would guarantee payment of her child-support and daycare obligations and (2) provide proof of the insurance on respondent's request.

In an October 2007 order issued following a hearing on the contempt motion, the district court found that appellant willfully and contemptuously violated the May 2006

[1] *See Mahady v. Mahady*, 448 N.W.2d 888, 891 (Minn. App. 1989) (stating that, in a contempt proceeding, court may find obligor in conditional contempt and set conditions to allow obligor to purge contempt and, at second stage, determine whether obligor failed to comply with purge conditions without excuse).

order. The district court imposed sanctions, set purge conditions and, among other things, ordered appellant to

> obtain life insurance in an amount which shall fully cover her future child support obligations within 30 days of entry of this Order and shall supply proof of coverage, including its amount, to [respondent] within that time. If [appellant] claims that she is unable to obtain such life insurance, she shall supply copies of applications to three separate life insurance companies, their denials, and a copy of her medical file on which said denials are based to [respondent's] attorney within 60 days of entry of this Order.

In January 2008, respondent moved to hold appellant in contempt for not complying with provisions in the October 2007 order, including the provision that requires appellant to obtain life insurance. The district court issued an order to show cause, ordering appellant to appear on April 23, 2008, and show cause why she should not be found in contempt. At the April 23 hearing, the district court determined that appellant had failed to make a good-faith effort to comply with the October 2007 order.

In an order dated May 5, 2008, and filed on May 30, 2008, the district court found that appellant failed to obtain life insurance or provide proof that she was unable to do so and that appellant's actions "unnecessarily contributed to the length of this proceeding and increased costs to [respondent], justifying an award of additional attorney fees in the amount of $8,300." The court ordered appellant to serve 90 days in jail and permitted appellant to purge her contempt and avoid jail if she: (1) obtains life insurance in the amount of $145,000 and provides proof of the insurance to respondent or provides proof that she is unable to obtain the insurance; (2) pays respondent's counsel $4,150 by May 23, 2008; and (3) pays respondent's counsel an additional $4,150 by June 23, 2008. The

court ordered that "[i]f [appellant] fails to purge her contempt as set forth above, [respondent's] counsel shall submit an affidavit to that effect, and a warrant shall issue for [appellant's] arrest."

In a May 27, 2008, letter to the parties' counsel, the district court stated that: (1) on May 22, 2008, the court received a letter from appellant's attorney stating that all purge conditions were met with the exception that the first $4,150 installment of attorney fees had been placed in appellant's attorney's trust account, rather than paid to respondent's counsel; and (2) on May 23, 2008, respondent's attorney sent an affidavit and a request for a warrant to the court on the basis that appellant failed to pay the first $4,150 installment of attorney fees. In its letter, the court advised the parties that it was declining to issue a warrant, in part because appellant had complied with all of the conditions of the contempt order, except the requirement to pay the $4,150 in attorney fees directly to respondent's attorney, and appellant's decision to put that amount in her attorney's trust account was reasonable.

This appealed followed. Respondent moved to dismiss as moot the portion of the appeal regarding the purge condition relating to life insurance and to dismiss as premature the portion of the appeal regarding incarceration and purge conditions. In a September 16, 2008, special-term order of this court, the decision on the motion to dismiss was referred to this panel.

D E C I S I O N

For reasons independent of respondent's motion to dismiss, we conclude that this appeal is taken from a non-appealable order and, therefore, we dismiss the appeal.

> An order is not appealable when it is a preliminary and conditional one, directing the punishment of the party defendant in case he refuses to comply with its requirements. But a conditional order is distinguishable from an order finding a party guilty of civil contempt. If an order directly commits the party, it is final and not conditional.

In re Conservatorship of Gobernatz, 603 N.W.2d 357, 359 (Minn. App. 1999) (alteration omitted) (citations omitted), *review denied* (Minn. Feb. 15, 2000).

Appellant contends that because the May 30 contempt order holds appellant in contempt, establishes purge conditions, and effectively sets forth that appellant will be given no opportunity to show inability to comply with the order and a warrant will issue merely upon an affidavit from respondent's counsel, the contempt order is not a conditional order. Although the contempt order states that "[i]f [appellant] fails to purge her contempt as set forth above, [respondent's] counsel shall submit an affidavit to that effect, and a warrant shall issue for [appellant's] arrest," we are not persuaded that this means that appellant will not be given an opportunity to show her inability to comply with the order before being incarcerated.

In its May 27 letter to the parties' counsel, the district court stated that it was not issuing a warrant at that time, in part, because Minn. R. Gen. Pract. 309.03(a) prevented it from doing so. That rule provides:

> Where the court has entered an order for contempt with a stay of sentence and there has been a default in the performance of the condition(s) for the stay, before a writ of attachment or a bench warrant will be issued, an affidavit of non-compliance and request for writ of attachment must be served upon the person of the defaulting party . . . .

Minn. R. Gen. Pract. 309.03(a).

The district court quoted this portion of the rule in its letter and explained that, under the rule, a warrant could not be issued because the contempt order had not yet been entered and an affidavit of noncompliance had not been served on the defaulting party. This demonstrates that the district court intended to follow the requirements of rule 309.03 when issuing a warrant.

Under the plain language of the rule, before a warrant will be issued, a writ of attachment must be requested and then served on the defaulting party. Rule 309.03 goes on to state that "[t]he writ of attachment shall direct law enforcement officers to bring the defaulting party before the court for a hearing to show cause why the stay of sentence should not be revoked. A proposed order for writ of attachment shall be submitted to the court by the moving party." Minn. R. Gen. Pract. 309.03(b). Therefore, before a warrant is issued and appellant is incarcerated, respondent must obtain a writ of attachment that directs law-enforcement officers to bring appellant before the court for a hearing to show cause why the stay of her sentence for contempt should not be revoked. This hearing can be the second-stage *Mahady* hearing that appellant contends she has been denied.

Because the May 30 contempt order does not directly commit appellant to incarceration and respondent must obtain a warrant before appellant can be incarcerated, the contempt order is conditional. We will not assume that, before ordering appellant incarcerated for failing to purge her contempt, the district court will not conduct a hearing

at which appellant will be given an opportunity to show her inability to comply with the purge conditions in the contempt order. *Cf. Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (stating that appellate courts cannot assume district court error).

Appeal dismissed.