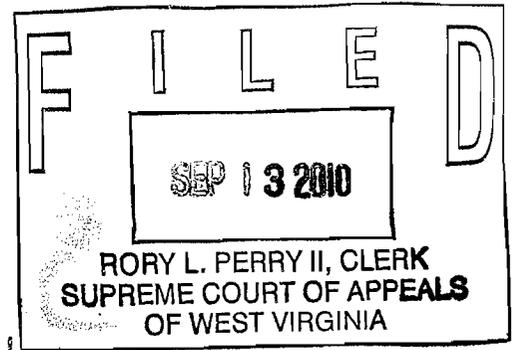


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 35631
=====



IN RE: The Marriage/Child of

CHARLES ARTHUR CARPENTER, JR.,

APPELLEE, Petitioner below,

and

BARBARA ANN CARPENTER,

APPELLANT, Respondent below.

REPLY BRIEF OF APPELLANT, BARBARA A. CARPENTER

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COMES NOW the Appellant, Barbara Carpenter, and briefly responds directly to the six arguments presented by the Appellee.

I. There Was No Evidence That Selling the Appellant's Separately Owned Home Would Be in the Best Interest of the Minor Child.

Simply put, there was zero evidence regarding the minor child's best interest. The interests of the minor child might have been called the "polar star" when the Family Law Court wrote the October 2009 Order, but those interests were not raised by the parties or the Court during the hearings in April of October 2009. It is clear, however, that the child's interests were affected, since the October 2009 Order required the sale of her home.

II. The Family Court Abused its Discretion by Not Requiring Mr. Carpenter to Show Loss or Harm.

West Virginia Code § 51-2a-9(b) specifically provides that a Family Court Judge "may enforce compliance with his or her lawful Orders with remedial or coercive sanctions designed to *compensate a complainant for loss sustained* and to coheres obedience *for the benefit of the complainant.*" (Emphasis added). Thus, remedial or coercive sanctions might have been appropriate in this case if Mr. Carpenter sustained some loss, or if he would have derived some legitimate benefit from the sanction. That it was Mr. Carpenter's burden to show harm was clearly noted by the Family Court during the April 14 hearing, and initially during the October 1, 2009 hearing. In April the Court stated that Mr. Carpenter "will have to show an adverse effect ... there's always, you know, a necessity of showing harm, and so forth. 4/14/09 DVT at 20:25. During the October 1 hearing the Family Court initially focused on the requirement for Mr.

Carpenter to show harm as well, stating to him “all you have to do is show me something where her behavior since then has” 10/1/09 DVT at 4:04. However, the Family Court was completely sidetracked by the demonstrably incorrect claim that Barbara Carpenter had lied during the April 14 hearing. So sidetracked, the Family Court abandoned its legitimate inquiry, and abused its discretion, by failing to require Mr. Carpenter to show loss or harm.

The Appellee correctly notes that West Virginia law provides that “the contemnor is free to present any evidence deemed relevant and is uninhibited in this regard by the lower court. *State ex rel. Zerkle v. Fox*, 510 S.E.2d 502, 507 (W.Va. 1998). However, in this case the contemnor was not afforded that freedom, but was completely thwarted by the Family Court. At the very end of the October 2009 hearing the Family Court made it clear that instead of requiring Mr. Carpenter “to show an adverse effect,” or enforcing “the necessity of [his] showing harm,” it was relieving him of any burden and imposing the burden of proving the negative on Barbara Carpenter:

Now if you want to present me with evidence that he has not been harmed – if you want to present the records that show me that, instead of just making bare allegations that your client’s violation of my Order did not cause any harm, PROVE IT!

10/1/09 DVT at 01:12. Clearly shown on the third section of the video transcript of that hearing, Barbara Carpenter’s counsel is preparing to present evidence to meet the burden the Family Court had shifted. The very second that the Family Court says “if you want to present the records that show me that,” counsel opens his file folder and begins pulling out discrete records, arranging them as counsel normally would when preparing to present evidence. *See* 10/01/09 DVT at 10:35. However, instead of allowing counsel to meet this shifted burden, the Family court simply declared: “The hearing is over. You didn’t present any proof.” *Id.*

III. The Family Court Did Not Allow Barbara Carpenter Any Opportunity to Purge Herself of Contempt.

The Appellee argues that the Court allowed Barbara Carpenter the required opportunity to purge herself of contempt by offering her “the option to be incarcerated until she could post adequate surety for future timely payments.” *Brief of Appellee* at 13. To be fair, this argument is taken directly, and accurately, from the language of the Family Court’s October 2009 Order. *See* 10/7/09 Order at para. 11.

However, the offer of incarceration was never made. To be perfectly clear on this point, the Family Court never made such an offer to Barbara Carpenter or her counsel. This is not a matter of semantics; it did not happen in any form. The Family Court made no offer or inquiry about incarceration or jail, there was no mention about posting bond or adequate surety, and counsel never stated or inferred that Barbara Carpenter would not prefer such an option. The **only** discussion in any way pertaining to incarceration were as follows:

SORRELLS: Given that [Barbara Carpenter’s home is] no longer marital property, I don’t believe the Court has jurisdiction to order it sold.

COURT: Okay. Well, I can, of course order that Ms. Carpenter go to jail – so that’s fine – for contempt of Court, but I’ll note your objection.

10/7/09 DVT (section 2) at 00:03 – 00:20.

COURT: If she continues to blow this Court’s Order off, you know, I’m just going to go ahead and lock her up then. You think I got jurisdiction to do that, Mr. Sorrells?

SORRELLS: I wouldn’t dispute that at all, Your Honor.

10/7/09 DVT (section 3) 1:01 – 1:10. Both of these exchanges occurred well after the Family Court summarily ordered the home sold. *Id.* (section 1) at 12:25.

IV. The Family Court Abused Its Discretion by Improperly Modifying the Parties' Agreement

The Appellee attempts to dodge this issue by asserting that it was waived because Barbara Carpenter did not appeal the April 2009 Order. However, an inherent aspect of that April 2009 Order was the burden of proof imposed upon Mr. Carpenter. As the Family Court Judge himself stated on April 14, 2009, Mr. Carpenter would be required “to show an adverse effect,” there would be a “necessity of showing harm, and so forth.” 4/14/09 DVT at 20:25.

There was no indication in the April 2009 Order that this burden would be subsequently waived, and in fact shifted, by the Family Law Court. It was known (and has never been disputed) that Mr. Carpenter would *not* suffer any adverse effect or harm as long as payments were not more than 30 late, as that is the first credit-reporting cutoff.¹ Accordingly, *if* Barbara Carpenter waived anything by not appealing the April 2009 Order, such waiver extended only to the requirement that payments not be made in a manner that would harm or have an adverse effect on Mr. Carpenter. In the face of the Family Court’s representation that there would always be “a necessity of showing harm,” Barbara Carpenter cannot be found to have waived her rights with respect to enforcement of the April 2009 Order in a manner that not only waived that burden of that necessity, but shifted it to her.

¹ Credit reporting agencies report late payments only as being “over 30,” “over 60,” “over 90,” days late, etc. There is no category that would encompass “late, but not over 30 days late.” With respect to this particular mortgage account, the lender stated in no uncertain terms that it does not report late payments “until the 35th day of delinquency.” See Exhibit A. In fact, there should actually be no credit reporting on this account at all, since the debt was discharged without reaffirmation on March 22, 2005 in the Carpenters’ Chapter 7 bankruptcy case. See Exhibit B. Instead, since April of 2005, the credit line should state only “DISCHARGED CH 7, W/O REAFF.”

V. **The Family Court Finding that Barbara Carpenter Lied and Flouted its Order Was Clearly Erroneous.**

In Section V of his brief, the Appellee completely misstates Barbara Carpenter's position. That position is fully stated in Section IV(F) of Barbara Carpenter's brief and need not be restated here. Simply put, Barbara Carpenter didn't lie to the Court at either the April 14 or the October 1, 2009 hearings. The Family Court jumped to this erroneous conclusion with an insufficient foundation and without allowing Barbara Carpenter any opportunity to defend herself.²

It is noteworthy, however, that the Appellee is plainly wrong in the assertion that from a "review of the record it is clear that the Family Court did not reference or acknowledge any grace period." Appellee's Brief at 15. The Family Court did reference and acknowledge the importance of the grace period. In fact, it did so in the same breath that it referenced and acknowledged Mr. Carpenter's burden of showing harm:

I'm not . . . you know, he will have to show an adverse effect There's always a, you know, necessity of showing harm and so forth. I'm not real big in Family Court on technicalities. Is it adversely affecting him? If the answer is yes, then we're going to have to stop it. If the answer is no, then, up to a certain extent I can live with it. But there are terms and conditions, you know, if this is what your deed of trust says and you aren't in compliance with your deed of trust, then, technically you're in default. It's not, they don't do the letter of default, they don't have to, *but whatever the grace period in there*, if you read through the 400 paragraphs

² In response to the unexpected assertion by the Family Court on October 1 that Barbara Carpenter had lied on April 14, counsel stated: "Your Honor, we're not prepared to address that today. That wasn't part of what the hearing was about today. I haven't seen or had a chance to review the transcript. I don't remember precisely what the testimony or questions were on April 14th." 10/1/09 DVT (first section) at 12:10. The Family Court didn't schedule a show-cause hearing or allow any opportunity for a reasoned response to a serious allegation and finding. Instead, it *immediately* found Barbara Carpenter to be "in willful and contumacious contempt" and stated "we will order that the property be sold." *Id.* at 12:42.

of fine print, they basically say that *once you're past your grace period you're in default.*

4/14/09 DVT at 20:20 to 21:27.

VI. The Motion for Disqualification Was Timely

It is now known that Mr. Carpenter began working as a Security Officer at the Putnam County Courthouse sometime in the summer of 2009 -- after the April 14 hearing and before the October 1 hearing. Barbara Carpenter did tell counsel sometime in September that her ex-husband had taken a job as a Courthouse Security Officer and asked if that would "have any affect." However, counsel incorrectly concluded that the Appellee had gone to work in the Kanawha County Courthouse, and stated that Mr. Carpenter's new job would not have any affect. There was no specific reason for counsel's conclusion other than a connection, in counsel's mind, between Charleston and the Appellee's work, since Mr. Carpenter had been a *Charleston* police officer until March of 2009. Counsel had known since 1990 that Mr. Carpenter was a police officer in *Charleston* and when he learned that he had become a Courthouse Security Officer, counsel assumed that work was in Charleston as well. This was obviously a mistake on counsel's part, but it was an honest mistake.

When counsel attended the hearing in on October 1, 2009, the Appellee was certainly not working the front door of the Courthouse. Instead, he appeared in the Court's waiting room (just as he had in April) wearing civilian clothes just like any other *pro se* party. Counsel did not learn of his mistake until after October 28 2009, when he first received the trifurcated recording

of the October 1 hearing.³ In the course of discussing details of the recordings with Barbara Carpenter, counsel realized for the first time that the Appellee actually worked at the *Putnam* County Courthouse, and not the *Kanawha* County Courthouse as he had believed. The Motion to Disqualify was filed on November 20, 2009, which was “within thirty (30) days after discovering the ground for disqualification,” as required by Rule 17(a) of the Trial Court Rules.

Although the Appellee was not at his post, or even working, when counsel was at the Putnam County Courthouse in 2009, there does seem to be general merit to his “offer that one cannot pass through the Putnam County Courthouse’s main entrance without passing by the Appellee.” Appellee’s Brief at 16. This “offer” doesn’t hold true for Barbara Carpenter’s counsel, because on the one and only day he was in the Putnam County Courthouse since Mr. Carpenter began his career in Courthouse Security, Mr. Carpenter wasn’t working. However, the offer surely must hold true for anyone who was in and out of the Putnam Courthouse on a regular and frequent basis, such as the Putnam County Family Court Judge. Accordingly, the Family Law Judge must have known of Mr. Carpenter’s position and disqualification, or at least disclosure, should have been made *sua sponte*.

CONCLUSION

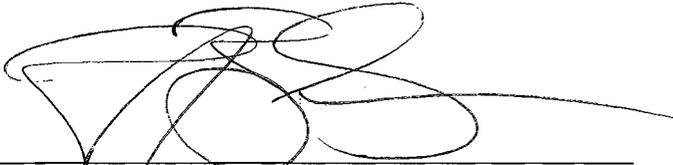
Barbara Carpenter faces a severe and irreversible sanction for the perceived offenses of lying to the Family Court and flouting its Order. Even if she was guilty of these offenses, the forced sale of her home would be an excessive and impermissible punishment. As previously

³ The recordings of the April hearing and the October hearing had been requested on October 7, but were not made available until October 27, 2009. They were picked up that day by a staff member who lives in Barboursville and delivered to counsel the next morning. See October 28, 2009 letter to Circuit Clerk.

explained, however, Barbara Carpenter is not guilty of these offenses. Moreover, because there has been no harm to Mr. Carpenter, his cry of “foul” should have been summarily rejected. For all of these reasons, the Family Court Order should be reversed.

Respectfully submitted,

BARBARA ANN CARPENTER
By counsel, *pro bono*

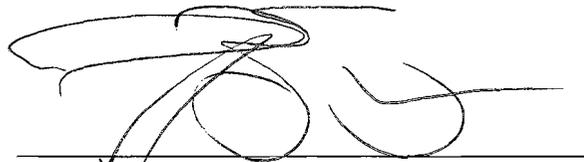
A handwritten signature in black ink, appearing to be 'W. Bradley Sorrells', written over a horizontal line.

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CERTIFICATE OF SERVICE

I, W. Bradley Sorrells, hereby certify that on this 10th day of September, 2010, I served the foregoing Brief by depositing a true and exact copy thereof in the regular United States Mail, postage fully paid, addressed as follows:

Keisha D. May
Cicarello, Del Giudice & Lafon
1219 Virginia Street East
Charleston, West Virginia 25301



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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE