

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

████████████████████)	
)	
Petitioner/Appellee,)	NO. ██████████
v.)	
)	
████████████████████)	TULSA COUNTY DISTRICT
)	COURT CASE NUMBER
Respondent/Appellant.)	████████████████████
)	

APPELLANT'S BRIEF IN SUPPORT

Respondent/Appellant's Petition in Error
For the Tulsa County Case No. ██████████
Fourteenth Judicial District, Tulsa County, Oklahoma
Honorable Tammy Bruce

Brian R. Swenson, OBA #30746
Carol L. Swenson, OBA # 8798
Swenson & Swenson, PLLC
Southbridge Office Park
1719 East 71st Street
Tulsa, Oklahoma 74136
Telephone (918) 481-5898
Attorneys for Respondent/Appellant

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QUESTIONS PRESENTED

- I. Where child support was paid by verifiable methods of “PayPal” and Money Orders as well as the non-verifiable method of cash by Appellant to Appellee, at Appellee’s repeated requests for cash payments, with poor record keeping of said payments and the subsequent finding of the trial court that Appellant was guilty of indirect contempt of court for failure to pay child support, was the trial court’s decision contrary to the evidence and an abuse its discretion in finding that the burden of proof of clear and convincing, *Hadley v. Hadley*, 1928 OK 111, had been met wherein evidence entered showed Appellee’s own handwritten “log of child support payments and initial summary spreadsheet were deficient given that verifiable “PayPal” and Money Order receipts of payments for child support by Appellant were not given credit as well as cash payments?

- II. Since the burden of proof for guilt of indirect contempt of court is clear and convincing, *Hadley supra.*, and given that Respondent’s liberty interest was subsequently at stake, was the trial court’s decision an abuse of discretion and contrary to the evidence in failing to calculate the arrearage judgment which did not include the specific dates out of the twenty-two (22) alleged by Appellee for which the trial court found Appellant guilty of contempt?

STATEMENT OF FACTS

The Respondent/Appellant's (hereinafter "Appellant") statement of the facts is as follows:

This case involves the issue of child support. Appellant was found guilty of indirect contempt of court for failure to pay child support "for 3 months" on January 6, 2017. *Court Docket*, Jan. 6, 2017, at 8, (Appendix Exhibit 1) In executing its sentence, the trial court did not give which specific dates Appellant was found in contempt of from the twenty-two (22) different dates alleged by Petitioner/Appellee (hereinafter "Appellee"). *Id.*; see also *Petitioner's Application for Citation for Contempt*, ¶ 4-5 at 1-2, filed Aug. 9, 2016 The Court sentenced Appellant "to 6 months in the Tulsa County Jail with purge fee in the amount of \$2,600 plus \$500 court fines." *Id.* (Appendix Exhibit 1)

Appellee alleged that Appellant did not make child support payments for the following dates, all of which fall on the Monday of any given week: September 14, 2015; October 5, 2015; October 12, 2015; October 26, 2015; November 30, 2015; December 29, 2015; January 4, 2016; January 18, 2016; February 1, 2016; February 15, 2016; April 11, 2016; April 25, 2016; May 2, 2016; June 6, 2016; June 20, 2016; and July 11, 2016. *Petitioner's Application for Citation for Contempt*, ¶ 4-5 at 1-2, filed Aug. 9, 2016 Appellee further alleged she received only partial payments on: September 28, 2015; November 23, 2015; and February 29, 2016; March 7, 2016; March 28, 2016; and April 18, 2016. *Id.* Appellee does not give the deficiency amounts for the partial payments received. *Id.*

All of the “due dates” in Appellee’s Application for Contempt designates Mondays as the day weekly child support is due despite there being no such day of the week ordered for same. *Id.* The Temporary Order for this case orders that “Respondent is the Obligor and is ordered to pay the sum of \$200 per week.” *Temporary Order Agreement*, filed Aug. 18, 2015, ¶ 3 at 1, (Appendix Exhibit 4)

Appellant testified that he paid child support in three (3) ways: (1) money orders, verifiable with receipt from same, (2) “PayPal,” verifiable with bank records, and (3) cash, which is very difficult to verify. *Appellant’s Narrative Statement*, ¶ 7 at 2, filed Jun. 9, 2017, (Appendix Exhibit 2a) Appellee testified to same. *Appellee’s Narrative Statement*, filed Jun. 13, 2017, ¶ 2, at 1, (Appendix Exhibit 2b)

Appellant testified that he lost his job at the end of November and was able to regain employment within a couple of weeks with a different company but did not initially get the same amount of shift hours. (Appendix Exhibits 2a, at 4 at 1 and Exhibit 12) Subsequently, Appellant filed a Motion to Modify Child Support. (Appendix Exhibit 1, at 5, filed Feb 17, 2016)

While Appellant now realizes paying child support with cash is a bad idea, he was trying to accommodate Petitioner/Appellee. (Appendix Exhibit 11a) Further, Appellee specifically requested and, at times, refused to accept child support payment be paid to by PayPal stating “PayPal would no longer be accepted.” (Appendix Exhibit 11b at 3, at bottom pf page, May 30, 2016)

The trial for the contempt was initially set for November 18, 2016. *Court Docket*, Nov. 18, 2017, at 8 The trial was then passed to December 16, 2016. *Id.* The request for continuance was made by Appellee’s Counsel after exchanging

exhibits. During the exchange, counsel for Appellant pointed out that Appellee's records consisting of the log and summary spreadsheet did not accurately accounted for money orders and PayPal payments.

Appellant, by and through counsel, received "a summary spreadsheet outlining child support payments kept by Appellee from a written log of all child support owed and received." *Appellee's Narrative Statement*, (Appendix Exhibit 2b) What is notable about the exhibit is what is missing from it – verifiable child support payments made to Appellee from Appellant. As noted earlier and testified to by both parties, two of the three methods of child support payments were verifiable and could be easily accounted for – the money orders, with verifiable receipts of payments, and "PayPal," which is accounted for in bank statements. Neither the hand written "log" of payments received, (Appendix Exhibit 9), nor the initially exchanged summary spreadsheet, (Appendix Exhibit 8), which were key pieces of Appellee's evidence of contempt, *included verifiable money orders and PayPal payments* for September 28, 2016, October 12, 2016, and May 2, 2017. *Id.*

After receiving the continuance from the November 18th trial date to the December 16th trial date, Appellee did, of course, then revise her "summary spreadsheet," (Appendix Exhibit 10), to include said missed child support payments, but did not update her "written log of all child support owed." (Appendix Exhibit 9) The written log was still entered as evidence along with the revised summary spreadsheet putting Appellee's own proof of missed payments in conflict with one another.

Both parties chose to deal in cash for child support payments. (Appendix Exhibits 2a, at ¶ 7 at 2 and 11a) At trial both parties proffered their respective evidence with corresponding testimony. However, while Appellee's own evidence of "written records" and "[revised] summary spreadsheets" are in conflict with one another, Appellant's evidence demonstrated a simple pattern of weekly ATM withdrawals for child support payments.

STANDARD OF REVIEW

"When reviewing a trial court's ruling, the appellate court defers to the trial court's factual findings . . . , unless those findings are clearly erroneous." *State v. Nelson*, 2015 OK CR 10, ¶ 1, 356 P.3d 1113, 1114. When a trial court's findings are clearly contrary to the weight of the evidence, that decision may be reversed on appeal. See *Chacon v. Chacon*, 2012 OK CIV APP 27, ¶ 1, 275 P.3d 943, 945. In the case at bar, the trial court's findings are clearly erroneous and contrary to the weight of the evidence as the undisputed evidence alone shows that the Appellant was not willful in his nonpayment of child support, if he was delinquent in his payments at all. Therefore, considering the error of the trial court, this court's standard of review of the case at bar is de novo, without deference to the trial court's decision.

ARGUMENT

I. PETITIONER/APPELLEE FAILED TO PROVE HER CASE BY CLEAR AND CONVINCING EVIDENCE

This case is very fact and evidence driven. While there is lack of a court record, Appellant will show by and through the respective Narrative Statements coupled with the corresponding facts and evidence submitted that Appellee did not meet her burden of proof of clear and convincing for the trial court to decide Appellant was in contempt of court and subsequently sentence him to *six months in the Tulsa County Jail, pay a \$500 court fine, purge “3 months” of child support payments*, and now pay down a judgment in excess of \$8,000.00 for attorney fees and costs for the single contempt trial. The evidence presented, in fact, shows that Appellant had a regular and routine pattern of conduct of paying his child support obligation generally at the beginning, either Monday or Tuesday, of almost every week. (Appendix Exhibit 5b); *see also* Listed Schedule of Payments Made *infra*.

Before sentencing someone to 6 months in jail, court fines, and attorney fees and costs, the evidence presented must be more than inaccurate records and he-said-she-said testimony. The process for conviction of Indirect Contempt for failure to pay child support *is very specific as to avoid unjust confinement of the accused*. *Sager & Sager*, 2010 OK CIV APP 130, ¶ 11, 249 P.3d 91, 94 (emphasis added). The only reliable records in this case were Appellant’s bank statements along with his testimony of payments. If Appellee is going to claim to have “proof” for her contempt which can and did cost Appellant his liberty, deficient evidence backed by testimony based from said deficient records should not and cannot be held to satisfy the clear and convincing burden of proof.

- a. **A routine pattern of conduct confirming testimony of verifiable ATM cash withdrawals matching cash child support payments is clear and convincing evidence**

Appellant testified that he “made each child support payment during the time period in question, and that [Appellee] had simply not credited him for cash payments.” (Appendix Exhibit 2b, ¶15 at 2) With use of aids for the trial court, (Appendix Exhibit 5a and 5b), taken from Appellant’s own bank statements, he testified to the following payments, on the following dates and corresponding days of the week, and for the following amounts:

<u>Date</u>	<u>Day of the Week</u>	<u>Amount of Withdrawal</u>	<u>CS Payment</u>	<u>Method</u>
9-1-15	Tuesday	\$300 (Exhibit 6a, at 3)	\$200	Cash
9-8-15	Tuesday	\$200 (Exhibit 6, at 4)	\$200	Cash
9-15-15	Tuesday	\$200 (Exhibit 6, at 4)	\$200	Cash
9-22-15	Tuesday	\$200 (Exhibit 7, at 1)	\$200	Money Order
<u>9-28-15</u>	<u>Monday</u>	<u>\$220 (Exhibit 7, at 1)</u>	<u>\$200</u>	<u>Money Order¹</u>
10-6-15	Tuesday	\$700 (Exhibit 6b, at 4)	\$200	Cash
<u>10-12-15</u>	<u>Tuesday</u>	<u>\$300 (Exhibit 7, at 1)</u>	<u>\$200</u>	<u>Money Order</u>
10-19-15	Monday	\$400 (Exhibit 7, at 1)	\$200	Money Order
10-27-15	Tuesday	\$200 (Exhibit 6c, at 3)	\$200	Cash
11-02-15	Monday	\$200 (Exhibit 6c, at 4)	\$200	Cash
11-10-15	Tuesday	\$260 (Exhibit 6c, at 5)	\$200	Cash
11-17-15	Tuesday	\$300 (Exhibit 6c, at 5)	\$200	Cash
11-24-15	Tuesday	\$300 (Exhibit 6d, at 3)	\$200	Cash
12-7-15	Monday	\$300 (Exhibit 6d, at 3)	\$200	Cash
12-11-15	Friday	\$303.25 (Exhibit 6d, at 4)	\$200	Cash
12-21-15	Monday	\$252.50 (Exhibit 6d, at 5)	\$200	Cash
12-28-15	Monday	\$250 (Exhibit 6e, at 3)	\$200	Cash
1-4-16	Monday	\$200 (Exhibit 6e, at 3)	\$200	Cash
1-12-16	Tuesday	\$200 (Exhibit 6e, at 4)	\$200	Cash
1-26-16	Tuesday	\$200 (Exhibit 6f, at 3)	\$200	Cash

¹ The underlined entries are verifiable child support payments made which Appellee did not account for in her records.

2-1-16	Monday	\$402 (Exhibit 6f, at 3)	\$400	Cash
2-22-16	Monday	\$202.50 (Exhibit 6e, at 5)	\$200	Cash
2-23-16	Tuesday	\$200 (Exhibit 6g, at 1)	\$200	Cash
2-29-16	Monday	\$300 (Exhibit 6g, at 3)	\$200	Cash
3-14-16	Monday	\$100.05 (Exhibit 6g, at 5)	\$100	Cash
3-23-16	Wednesday	\$200 (Exhibit 6h, at 1)	\$200	Cash
3-29-16	Monday	\$200 (Exhibit 6h, at 3)	\$200	Cash
4-5-16	Tuesday	\$180 (Exhibit 6h, at 4)	\$180	Cash
4-12-16	Tuesday	\$300 (Exhibit 6h, at 4)	\$200	Cash
4-18-16	Monday	\$200 (Exhibit 6h, at 5)	\$200	Cash
5-2-16	Monday	\$411.90 (Exhibit 6i, at 3) ²	\$400	PayPal
5-9-16	Monday	\$206.10 (Exhibit 6i, at 4)	\$200	PayPal
5-16-16	Monday	\$206.10 (Exhibit 6i, at 4)	\$200	PayPal
5-23-16	Monday	\$202.50 (Exhibit 6j, at 3)	\$200	Cash
5-31-16	Tuesday	\$206.10 (Exhibit 6j, at 4)	\$200	PayPal
6-6-16	Monday	\$200 (Exhibit 6j, at 5)	\$200	Cash
6-14-16	Tuesday	\$200 (Exhibit 6j, at 5)	\$200	Cash
6-21-16	Tuesday	\$300 (Exhibit 6j, at 6)	\$200	Cash
6-27-16	Monday	\$300 (Exhibit 6k, at 3)	\$200	Cash
7-5-16	Tuesday	\$200 (Exhibit 6k, at 4)	\$200	Cash
7-11-16	Monday	\$200 (Exhibit 6k, at 4)	\$200	Cash
7-18-16	Monday	\$200 (Exhibit 6k, at 4)	\$200	Cash

Of the forty-two (42) above-listed payments, all but two were made at the beginning of the week on either a Monday or Tuesday establishing a pattern of conduct for child support payments made by Appellant. Appellant purchased money orders, paid by PayPal, or withdrew cash from an ATM at the beginning of the week and used it to pay child support. Also, of the 14 different days listed in Appellee's December 16, 2016 revised summary spreadsheet, (Appendix Exhibit

² Appellant's Appendix Exhibit 6i shows a PayPal payment to "LTLREDMIAT" which is Appellee's PayPal account name of "Little Red Miata."

10), Appellant had ATM withdraws of at least the \$200 child support amount due *on the same day or the following day*. (Appendix Exhibits 10 and 6a-k)

Of the 42 listed withdrawals and payments, nineteen (19) are cash withdrawals of \$200 - the exact amount due for child support. (Appendix Exhibit 6a-k) This also does not count the four (4) verifiable payments made by PayPal in the amount of \$1,000.00 total, excluding fees for use of the PayPal method, which also included a \$400 dollar payment as a May 2, 2016 make-up payment which Appellee did not give Appellant credit for. (Appendix Exhibits 9 and 8) It also does not include the Money Order receipts, two (2) of which Appellee does not give Appellant credit for or gave him half (\$100) credit for. (Appendix Exhibits 7, 8, and 9)

b. Appellee did not meet her burden of proof of clear and convincing and the trial court's decision was contrary to the evidence and therefore an abuse of discretion

Proof for contempt of court must be clear and convincing. *Hadley v. Hadley*, 1928 OK 111, 280 P. 1097; see also *Whillock v. Whillock*, 1976 OK 51, 550 P.2d. 558. Case law provides that decisions of the trial court regarding child support “will not be reversed absent a showing of abuse of discretion or that the decision is clearly contrary to the weight of the evidence.” *Chacon v. Chacon*, 2012 OK CIV APP 27, ¶ 1, 275 P.3d 943, 945. The burden of persuasion in contempt proceedings is on the prosecution to prove by clear and convincing evidence that the accused is guilty. *Henry v. Schmidt*, 2004 OK 34, ¶ 1, 91 P.3d 651, 652. Evidence provided to the trial court by the Appellee was dismal, at best.

The process for conviction of Indirect Contempt for failure to pay child support is very specific as to avoid unjust confinement of the accused. See *Sager*

& Sager, 2010 OK CIV APP 130, ¶ 11, 249 P.3d 91, 94. Specific measures are in place via statute to ensure the protection and liberty interest of parties like the Appellant who has continually shown a pattern of paying child support, after being accused of failing to pay without convincing evidence to prove the accusation. By failing to adequately follow the guidelines regarding convicting an accused of Indirect Contempt for failure to pay child support, the trial court allowed Appellant's Liberty Interest to be violated when he was unduly arrested and confined by the Sheriff.

It was an abuse of discretion by the trial court to make a finding so contrary to the evidence and absent legal foundation which subjected the Appellant to incarceration and loss of equity, in violation of his Liberty Interest. The trial court's abuse of discretion resulted in the incarceration of a father who otherwise would have gone to work that day, making money and paying his child support as he had a habit of doing. Moreover, Appellant was actually sentenced to "6 months in the Tulsa County Jail." (Appendix Exhibit 1, at 8, Jan. 6, 2016)

Appellant would have spent significantly more time in jail but for the gap between the trial date of December 16, 2016, and the date of the trial court's decision on January 6, 2017. It was only by happenstance and the trial running long on December 16th that Appellant was able to "plan for the worst." Otherwise, he would not have had the chance to take a loan out on his vehicle, would have had to scramble for several days or even a week to come up with the purge fee and court fine, and would have missed enough work to likely cost Appellant his job.

The importance of Appellant's argument cannot be understated because the trial court's decision has broader implications. Oklahoma family courts have a voluminous amount of cases involving child support between the parties. And in those cases, others surely have the same issue with child support payments made in cash in poor accounting for same resulting in a he-said-she-said trial on whether payments were made. However, when additional evidence is offered in the form of "written logs of child support owed" which have been reduced to "summary spreadsheets" as proof of noncompliance, if the records are revealed to be inaccurate, the clear and convincing burden has not been met and the veracity of corresponding testimony on such records must also come into question and be given little to no weight.

Sentencing an obligor to 6 months in jail and the usual subsequent loss of job, mounting bills and everything else that comes along with state confinement cannot be found from faulty evidence of "records" kept by the accuser. In total in this case, Appellant's liberty was taken along with a \$500 fine, an arbitrary purge of "3 months," and an extremely high attorney fees and cost judgment in excess of \$8,000 was levied based on faulty records and testimony which should have been given little to no weight.

If Appellee could not properly account for verifiable payments, then the cash payments owed must also come into question and scrutiny by the trial court. In this case, when Appellee's "written log" and "summary spreadsheet" proved deficient, there was another logical place to find the answer and it was Appellant's bank statements and accompanying testimony as to his pattern of conduct each week of child support payments corroborated with said bank

statements. At the very least, simply comparing Appellant's evidence and testimony to Appellee's deficient records should have made it clear the Appellee's clear and convincing burden of proof had *not* been met. Therefore, the trial court's decision and order finding Appellant in indirect contempt of court should be reversed as an abuse of discretion and clearly against the weight of the evidence.

II. THE TRIAL COURT IMPROPERLY CALCULATED THE ARREARAGE JUDGMENT AMOUNT

The arrearage amount awarded by the trial court was arbitrarily entered rather than calculated

"[I]n setting a purge fee, 'it is material to know the extent of the pecuniary injury suffered by a party to an action in order to determine whether or not the [amount of payment] imposed by the court in an indirect contempt proceeding, instituted for the purpose of affording such party remedial relief, is excessive.'" *Rook v. Rook*, 2001 OK CIV APP 119, ¶ 9, 34 P.3d 660, 663. In our case, the Appellant was forced to borrow against his personal vehicle in order to come up with the funds necessary to purge his sentence and get out of jail.

The trial court's order indicated that the Appellant was in arrears for "three months" setting the amount of \$2,960 plus \$241.27 in interest for a total of \$3,201.27 in judgment due the Appellee. (Appendix Exhibit 3) However, Appellee alleged twenty-two (22) different dates of either missed or only partially paid child support. *Petitioner's Application for Citation for Contempt*, ¶ 4-5 at 1-2, filed Aug. 9, 2016 The trial court failed to indicate which weeks from the

“three months” Appellant was willfully in violation of the Temporary Order for child support owed.

Without taking into consideration the faulty calculation in acquiring the amount of arrearage and interest, the purge fee of \$2,600 plus a \$500 fee was unclear, seemingly erroneous, and contrary to the evidence of weekly-routine payments made by Appellant. The absence of detailed calculation including amounts and dates, and of discussion of the findings in the trial court’s order indicates that the trial court failed to look at all the evidence presented, including *the pecuniary injury suffered by the Appellant*, when determining the arbitrary purge fee.

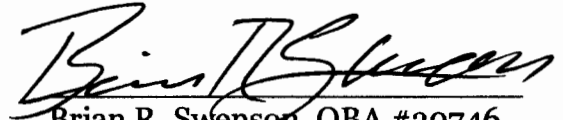
Further, the dollar amounts included in the trial court’s order for judgment and purge fee do not make sense and, absent a detailed finding of facts or purge table, appear to be random figures arbitrarily determined by the “three month” decision of the trial court. The trial court’s decision and subsequent order should be reversed as an abuse of discretion and contrary to the evidence presented as well as in violation of the standard set in *Rook*.

CONCLUSION

Review of the evidence juxtapose to the trial court’s decision will show that the ruling was contrary the weight of the evidence. The trial court’s failure to recognize Appellee’s deficient records and instead regard said deficient records as clear and convincing proof of contempt was an abuse of discretion by the Court. The trial court’s failure to properly weigh the evidence presented by Appellant, failure to follow statutory regulations and established case law, and the issuance of an arbitrary judgment in favor of the Appellee and against the Appellant was

an abuse of discretion which must be reconciled with a de novo review by the Appellate Court and a subsequent reversal of the trial court's decision finding Appellant guilty of contempt and reversal of the arbitrary judgment awarded Appellee.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read "Brian R. Swenson". The signature is written in a cursive style with a horizontal line underneath.

Brian R. Swenson, OBA #30746
Carol L. Swenson, OBA #8798
Swenson & Swenson, PLLC
Southbridge Office Park
1719 East 71st Street
Tulsa, Oklahoma 74136
Telephone (918) 481-5898
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, hereby certify that on this 3rd day of October 2017, a true and correct copy of the above and foregoing document was mailed by U.S. Mail, with proper postage thereon fully paid to:

N. Scott Johnson
Patrick H. McCord
N. Scott Johnson & Assoc.
302 East 10th Street
Tulsa, OK 74120


Brian R. Swenson