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IN RE INTEREST OF SAMANTHA L. AND JASMINE L., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT, V. KELLY L. AND WILLIAM H., APPELLEES.

824 N.W.2d 691

Filed December 14, 2012. No. S-12-150.

1. **Contempt: Appeal and Error.** When reviewing a contempt order, an appellate court reviews for abuse of discretion the trial court's determination of whether a party is in contempt and the appropriateness of the sanction it imposed.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Courts.** Nebraska courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice.
4. **Contempt: Courts.** The power to punish for contempt is incident to every judicial tribune.
5. ____: ____. The authority to punish for contempt is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.
6. **Juvenile Courts.** Separate juvenile courts and county courts sitting as juvenile courts are courts of record.
7. **Contempt: Courts: Notice.** Before a court can exercise its inherent contempt powers, the contemnor is entitled to reasonable notice and an opportunity to be heard.
8. **Contempt: Courts.** Contempts committed in the presence of the court, also known as direct contempts, give the court personal knowledge of the facts and do not require the court to inform itself of the contemptuous conduct through witnesses and evidence.
9. ____: ____. The events constituting indirect contempt occur outside the presence of the court, and the court must inform itself of the facts through witnesses or other evidence.
10. ____: ____. If the court must inform itself through witnesses or evidence of any material facts of contemptuous conduct, then summary punishment is inappropriate.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Vacated and remanded for further proceedings.

Jon Bruning, Attorney General, and John M. Baker, Special Assistant Attorney General, for appellant.

Molly Adair-Pearson for appellee Kelly L.

Matt Saathoff, of Saathoff Law Group, P.C., L.L.O., for appellee William H.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MCCORMACK, J.

NATURE OF CASE

The Nebraska Department of Health and Human Services (DHHS) appeals from an order of the juvenile court requiring DHHS to pay opposing counsel's costs. The court took judicial notice that for the third straight hearing, DHHS had failed to provide opposing counsel prior notice of the exhibits to be offered. DHHS appeals the order and asserts that the juvenile court lacked the statutory authority to require payment of costs.

BACKGROUND

On October 22, 2010, an amended petition was filed in the separate juvenile court of Douglas County alleging improper parental care of minor children Samantha L. and Jasmine L. A hearing was held on February 28, 2011, and a review and permanency planning hearing was scheduled for August 23. The court ordered that all reports to be submitted at the next hearing be provided to opposing counsel at least 3 business days before the hearing.

At the hearing on August 23, 2011, opposing counsel objected to reports offered by DHHS, because the reports had not been made available 3 days prior. The court continued the hearing for that reason.

At a hearing on October 27, 2011, DHHS again offered reports that were not previously provided to opposing counsel. The court sustained opposing counsel's objection and continued the hearing for a second time.

The third attempt at a review and permanency hearing was held on January 9, 2012. The court again sustained opposing counsel's objection to DHHS' offering reports without notice. In its order, the juvenile court noted that the continuances

prevented the court from making a dispositional order and that this had an adverse impact on the permanency planning for the children. The juvenile court then ordered opposing counsel's costs associated with the preparation and attendance of the January 9 hearing, as well as the next scheduled hearing, to be paid by DHHS.

ASSIGNMENT OF ERROR

DHHS assigns as error the juvenile court's January 9, 2012, order requiring DHHS to pay the costs associated with the January 9 hearing and the subsequent scheduled hearing, arguing that the order was beyond the juvenile court's statutory authority.

STANDARD OF REVIEW

[1,2] When reviewing a contempt order, an appellate court reviews for abuse of discretion the trial court's determination of whether a party is in contempt and the appropriateness of the sanction it imposed.[1] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[2]

ANALYSIS

The issues presented by this appeal have evolved since DHHS' brief was filed. DHHS argued in its brief that the juvenile code does not authorize a court to order payment of opposing counsel's costs. The appellees responded by characterizing the court's action as a contempt order and arguing that the juvenile court's contempt authority is derived independently of the juvenile code. DHHS' brief was silent on the issue of contempt.

At oral argument, the contempt issue was discussed at length. When pressed by the court, counsel for DHHS conceded, and we agree, that the order was for contempt. Because DHHS has now conceded that this order was for contempt,

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[1] See *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

[2] *Tyler v. Heywood*, 258 Neb. 901, 607 N.W.2d 186 (2000).

we will address this appeal as an appeal of a contempt finding and sanction.

[3-6] We have held that Nebraska courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice.[3] The authority includes the power to punish for contempt, which is incident to every judicial tribune.[4] It is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.[5] Separate juvenile courts and county courts sitting as juvenile courts are courts of record.[6] Therefore, the juvenile court does have the inherent authority to order DHHS to pay attorney fees and costs through contempt.

[7] But, as argued by counsel for DHHS, before a court can exercise its inherent contempt powers, the contemnor is entitled to reasonable notice and an opportunity to be heard.[7] Under Neb. Rev. Stat. § 25-2122 (Reissue 2008), "[c]ontempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense." The appellees argue that DHHS' failure to give notice 3 days prior to the hearing was done in the presence of the court and was subject to summary punishment. We disagree.

[8] Contempts committed in the presence of the court, also known as direct contempts, give the court personal knowledge of the facts and do not require the court to inform itself of the contemptuous conduct through witnesses and evidence.[8] The most basic form of direct contempt is when a party verbally abuses a judge during court.[9] Such direct

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[3] *Laschanzky v. Laschanzky*, 246 Neb. 705, 523 N.W.2d 29 (1994).

[4] *Tyler v. Heywood, supra* note 2.

[5] See, *id.*; Neb. Rev. Stat. § 25-2121 (Reissue 2008).

[6] See, e.g., *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011); *In re Interest of Tyler T.*, 279 Neb. 806, 781 N.W.2d 922 (2010); *In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996).

[7] See *In re Interest of Thomas M., supra* note 6.

[8] See *Tyler v. Heywood, supra* note 2.

[9] See *id.*

evidence of contempt allows the court to punish the offending party summarily.[10]

[9,10] In contrast, the events constituting indirect contempt occur outside the presence of the court and the court must inform itself of the facts through witnesses or other evidence.[11] Even in instances of direct contempt, if the court must inform itself through witnesses or evidence of any material facts of the contemptuous conduct, then summary punishment is inappropriate.[12]

Thus, in *In re Contempt of Potter*,[13] we held that summary punishment was inappropriate for an attorney who failed to arrive at the announced time for the resumption of judicial proceedings. Although the attorney's tardiness was witnessed by the court, a valid reason occurring outside the presence of the court might explain the attorney's tardiness. Therefore, the contemnor had the right to reasonable notice and an opportunity to be heard.[14] Likewise, in *In re Interest of Simon H.*,[15] the Nebraska Court of Appeals directed the juvenile court to vacate its contempt order that summarily required DHHS to pay a $1,000 fine for filing a case plan and court report late, because the contempt order was procedurally deficient. The lower court could not have known why the case plan and court report were not filed on time, because such excuses occurred outside the presence of the court.

Here, DHHS' failure to give notice to opposing counsel occurred outside the presence of the court. Unlike *In re Contempt of Potter* and *In re Contempt of Simon H.*, the juvenile court had no way of directly witnessing that notice had not been given to opposing counsel 3 days prior to the hearing. The

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[10] *Id.*

[11] See *id.*

[12] See, *In re Contempt of Potter*, 207 Neb. 769, 301 N.W.2d 560 (1981); *In re Interest of Simon H.*, 8 Neb. App. 225, 590 N.W.2d 421 (1999), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[13] *In re Contempt of Potter, supra* note 12.

[14] *Id.*

[15] *In re Interest of Simon H., supra* note 12.

court became aware of this fact only after opposing counsel raised an objection at the hearing. Furthermore, the juvenile court could not have known why notice was not given by DHHS, because the relevant interactions between the parties occurred outside the presence of the court.

Despite not having firsthand knowledge of the contemptuous conduct, the juvenile court summarily held DHHS in contempt. The juvenile court did not give DHHS prior notice of the contempt accusations, hold a civil contempt proceeding, or provide DHHS a reasonable time to make its defense.[16] Therefore, the juvenile court abused its discretion by summarily holding DHHS in contempt for conduct that occurred outside the presence of the court.

CONCLUSION

The juvenile court's inherent power to issue contempt orders is subject to the contemnor's receiving proper notice and an opportunity to be heard when the contempt is not committed in the presence of the court. In this instance, the juvenile court abused its discretion by summarily imposing a sanction for conduct that did not occur in its presence. We vacate the January 9, 2012, contempt order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

[16] See § 25-2122.

TIMOTHY L. PETERSON, APPELLANT, V. ROBERT P. HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, STATE OF NEBRASKA, APPELLEE.

824 N.W.2d 26

Filed December 14, 2012. No. S-12-242.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Constitutional Law: Judgments.** Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to