[Cite as *Hopson v. Hopson*, 2005-Ohio-6468.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dennis Hopson,	:	
Plaintiff-Appellant,	:	
		No. 04AP-1349
v.	:	(C.P.C. No. DR08-3286)
Tracie L. Hopson,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

O P I N I O N

Rendered on December 6, 2005

Matan, Geer & Wright, and *Christopher J. Geer*, for appellant.

Kemp, Schaeffer, Rowe & Lardiere Co., L.P.A., Harold R. Kemp, and *Jacqueline L. Kemp*, for appellee.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

SADLER, J.

{¶1} Plaintiff-appellant, Dennis Hopson ("appellant"), appeals a decision of the Franklin County Court of Common Pleas, Division of Domestic Relations, denying his motion for contempt against defendant-appellee Tracie L. Turner ("appellee"), and granting her motion for contempt against appellant. For the following reasons, we affirm the judgment of the trial court.

{¶2} Appellant and appellee were married on August 10, 1994. The marriage was terminated by an agreed judgment entry decree of divorce on April 24, 2002. Under the terms of the decree, the parties were required to divide the personal property pursuant to a specific list of items contained in the divorce decree, and appellant was required to pay the appellee $50,000 plus interest at a rate of four percent due on the sale of appellant's interest in 1227-1229 North High Street or by December 31, 2003, which ever occurred first. Additionally, appellant was required to sign a note and mortgage on the real estate securing sums of money that he was required to pay appellee for the North High Street property, as well as other real estate properties. At the effective date of the divorce degree, appellant was living with his parents in Delaware County, and appellee was living at the marital residence.

{¶3} On July 22, 2002, appellant filed a motion for contempt against appellee for failing to pay debts incurred in appellee's name, for removing personal property from the marital residence that was granted to appellant, and for damaging the marital residence. On September 19, 2002, appellant sold the real estate at 1227-1229 North High Street without executing a note and mortgage on that property, and without paying appellee $50,000 plus interest at a rate of four percent. On September 10, 2003, appellant obtained service upon appellee for his contempt motion. On October 9, 2003, appellee filed a motion for contempt against appellant for failing to execute the note and mortgage on 1227-1229 North High Street and for not paying her $50,000 plus four percent interest that was due upon the sale of the real estate.

{¶4} A show-cause hearing on the motions for contempt was held on October 31, on December 9 through 11, and on December 16, 2003. At the hearing, eight

witnesses testified, including appellant and appellee, and numerous exhibits were admitted into evidence. Although appellant admitted that he did not pay appellee the sum required by the decree, he argued that because he did not know the location of appellee, he was not able to pay her.

{¶5} The magistrate issued his decision on April 6, 2004 denying appellant's motion for contempt, granting appellee's motion for contempt, and denying both parties their request for attorneys' fees. The magistrate determined appellee, through her testimony at the show-cause hearing, admitted taking several items of personal property that had been awarded to appellant under the decree. Among the items appellee admitted to taking were a kidney-shaped sofa, sheets, a mattress pad, and a buffet table. Appellee additionally attempted to take a pool table and bar stools. The magistrate declined to recommend that appellee be held in contempt for several reasons. The magistrate did not find credible most of the testimony of appellant, appellee, or the personal property expert. However, the magistrate found that an extra-judicial agreement between appellant and appellee regarding some of the items taken was reached subsequent to the decree. Ultimately, the magistrate determined not to recommend holding appellee in contempt because even though appellee took several items of personal property not awarded to her by the decree, the apparent agreement between appellant and appellee negated that provision of the decree, and that the value of the items was not able to be determined.

{¶6} Appellant filed objections to the magistrate's decision, asserting that the magistrate erred in failing to find appellee in contempt when she admitted removing the personal property that was awarded to appellant pursuant to the decree. The trial court

noted that while it cannot modify the terms of the decree, the parties had unilaterally modified the decree, and it was unreasonable to expect the court to enforce its order, via the decree, when the parties had modified it without consent of the court. The trial court also determined that even though appellee specifically admitted to taking personal property in violation of the decree, it was within the discretion of the court as to whether or not to find her in contempt. The trial court determined that it was inappropriate to hold appellee in contempt because section four of the divorce decree relating to the division of personal property was unclear, and thus the trial court was unable to concretely determine exactly what each party received under the terms of the decree. The trial court overruled appellant's objections, adopted the magistrate's decision, and entered its judgment on November 19, 2004.

{¶7} Appellant timely filed the instant appeal, and asserted three assignments of error for our review:

> I. THE TRIAL COURT ERRED AS A MATTER OF FACT AND LAW BY FINDING, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE THAT APPELLEE DID NOT VIOLATE THE TERMS OF THE DECREE EVEN THOUGH THERE WAS A SPECIFIC FINDING THAT SHE ADMITTED "TAKING SEVERAL ITEMS OF PERSONAL PROPERTY THAT WERE AWARDED TO MR. HOPSON…"
>
> II. THE TRIAL COURT ERRED AS A MATTER OF FACT AND LAW BY FINDING, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE THAT BECAUSE HE FOUND THE TESTIMONY OF THE APPELLANT'S EXPERT TO NOT BE CREDIBLE, THAT THERE WAS NO VALUE TO THE PROPERTY WRONGFULLY TAKEN BY THE APPELLEE.
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> III. THE TRIAL COURT ERRED AS A MATTER OF FACT AND LAW BY FINDING, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE THAT THE APPELLANT WAS IN CONTEMPT FOR FAILING TO PAY TO THE APPELLEE

> THE SUM OF $50,000.00 DUE ON THE SALE OF HIS INTEREST IN 1227-1229 NORTH HIGH STREET, COLUMBUS, OHIO. THE TRIAL COURT FURTHER ERRED BY FINDING AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE THAT THE APPELLANT WAS IN CONTEMPT FOR FAILING TO SIGN "THE NOTES AND MORTGAGES."

{¶8} In his first assignment of error, appellant asserts that appellee violated the terms of the divorce decree by taking several items of personal property granted to appellant pursuant to the decree. Appellant asserts that appellee should have been held in contempt by the domestic relations court when she admitted taking the personal property during her testimony at the show-cause hearing.

{¶9} The determination of a court regarding contempt proceedings will not be reversed absent an abuse of discretion. *State ex. rel. Ventrone v. Birkel* (1980), 65 Ohio St.2d 10, 11, 417 N.E.2d 1249, 1250. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 450 N.E.2d 1140, 1142.

{¶10} The provision of the decree at issue in Appellant's contempt motion on appeal is the section regarding personal property, which states:

> 4. **Personal Property:** Each party shall retain all personal property and household goods currently in their possession free and clear of any claim of the other party, with the exception of the following:
>
> A. Defendant shall receive: all of her personal effects, an "ab-buster", ski training equipment, clothing and jewelry[,] den area rug (black, cream[,] and tan); two twin beds and mattress sets; three piece sectional soft (tan); black round kitchen table with four chairs; CD player with speakers; desktop computer; kid's desktop computer; the "new" set of dishes and pots and

> pans; the "Bow tie" silverware; all crystal; a vacuum cleaner; and one tan statue.
>
> B. Plaintiff shall receive all other furniture and personal property located in the marital residence or otherwise in his possession.

{¶11} The trial court determined that the terms of this provision were unclear. Specifically, it determined that the first sentence of section four was in conflict with paragraph B. The court held that since appellee lived in the martial residence at the time of the effective date of the divorce on April 22, 2002, the two provisions conflicted because although the provision permitted appellee to retain all personal property and household goods currently in her possession (i.e. personal property and household goods in the marital residence), it also permitted appellant to receive "all other furniture and personal property located in the marital residence" by operation of paragraph B. In entering its judgment, the trial court principally relied on this conflict in declining to hold appellee in contempt.

{¶12} Previously, we have determined that a trial court may decline to hold a party in contempt even when one party is definitively aggrieved by the disobedience of another party of an order of the court because contempt proceedings are primarily for the vindication of the dignity and sovereignty of the state in the exercise of its judicial power. *Lentz v. Lentz* (1924), 19 Ohio App. 329, 333. The Fourth District Court of Appeals has come to a similar conclusion, stating that, "even if abundant and uncontroverted evidence establishes that a person disobeyed the court's order, a trial court is not required to issue a contempt finding." *Burchett v. Burchett* (May 27, 2004), Scioto App. No. 03CA2900, 2004-Ohio-2831, at ¶23.

{¶13} Although we do not believe that a trial court has unfettered discretion to decline to hold a party in contempt when a party unequivocally admits disobedience to an order of the court, we do believe that given the inconsistency in the personal property provision of the divorce decree, the trial court did not abuse its discretion in declining to hold appellee in contempt. The effective date of the decree was April 22, 2002. The testimony of appellee from the show-cause hearing indicates that on the effective date of the divorce decree, she was living at the marital residence and that she had no other residence.

{¶14} The personal property provision is ambiguous in two ways. First, the trial court correctly determined that by reading the first sentence of section four with paragraph B together, the personal property, household goods, and furniture in the marital residence were simultaneously granted to both appellee and appellant. Second, reading the first sentence of section four with paragraph A, we note that the decree grants appellee personal property then in her possession at the effective date of the divorce, but then also limits her to specific items of personal property. Because of these inconsistencies, we find that the trial court did not abuse its discretion in not enforcing the personal property clause in the decree. The decision of the trial court in declining to hold appellee in contempt was proper. Accordingly, we overrule appellant's first assignment of error.

{¶15} In light of the disposition of the appellant's first assignment of error, we render moot appellant's second assignment of error. Because we have found that the trial court did not abuse its discretion in declining to grant appellant's motion for contempt against appellee, the value of the personal property taken by appellee is inconsequential.

{¶16} In his third assignment of error, appellant asserts that the trial court abused its discretion by finding him in contempt for failing to pay appellee $50,000 due on the sale of real estate on North High Street, and by finding appellant in contempt for failing to sign a note and mortgage on the sum due for the real estate. It is undisputed that the appellant did not pay appellee the sum required by the decree upon the sale of the real estate at 1227-1229 North High Street.

{¶17} The crucial issue before us in the third assignment of error is whether the trial court abused its discretion in holding appellant in contempt of court for failing to pay appellee $50,000 plus four percent interest. Pursuant to the divorce decree, appellant was required to pay the sum on 1227-1229 North High Street upon the sale of his interest in the property, or by December 31, 2003, which ever occurs first. Appellant argues that because it was impossible to locate appellee, he was not required to pay her the sum, and thus not in contempt of court. Essentially, appellant is asserting an impossibility defense to the finding of contempt.

{¶18} The trial court determined that though appellant may not have been able to locate appellee after the sale in order to pay her the sum, the fact that he invested the proceeds of the sale, instead of setting aside the $50,000 in trust for appellee cast doubt upon the intentions of appellant to pay appellee.[1] The trial court also found that the provision of the divorce decree that required payment of $50,000 upon the sale of the property was clear. The trial court determined that appellee demonstrated by clear and convincing evidence that appellant failed to pay $50,000 upon the sale of 1227-1229

[1] The only indication of appellant investing the proceeds from the sale of the real estate at 1227-1229 North High Street in the record appears in appellant's oral arguments to the trial court regarding his objections to the magistrate's decision.

North High Street to appellee. Based on these findings, the trial court found that appellant was in contempt for failing to pay the $50,000 to appellee.

{¶19} As discussed above, the determination of a trial court regarding a finding of contempt will not be reversed absent an abuse of discretion. *Ventrone*, supra. Additionally, in a civil contempt proceeding, the movant bears the initial burden of demonstrating by clear and convincing evidence that the other party has violated an order of the court. *Allen v. Allen*, Franklin App. No. 02AP-768, 2003-Ohio-954, at ¶16. (Citations omitted.) Once the movant has met her burden, the burden shifts to the other party to either rebut the showing of contempt or demonstrate an affirmative defense by a preponderance of the evidence. Id., citing *Pugh v. Pugh* (1984), 15 Ohio St.3d 136, 140, 472 N.E.2d 1085.

{¶20} Impossibility is a defense to a contempt of court order. See *State ex rel. Cook v. Cook* (1902), 66 Ohio St. 566, 570, 64 N.E. 567, 568. However, it is incumbent upon the party seeking to raise impossibility of compliance to prove the defense by a preponderance of the evidence. See, generally, *Olmstead Township v. Riolo* (1988), 49 Ohio App.3d 114, 117, 550 N.E.2d 507, 510, citing *Smedley v. State* (1916), 95 Ohio St. 141, 143, 115 N.E. 1022, 1023.

{¶21} In the case sub judice, the trial court determined that while appellant could not locate appellee, appellant could have effectively complied with the decree by placing the $50,000 in trust upon the sale of the real estate. We agree with the reasoning of the trial court that it was not impossible for appellant to comply with the court order. We therefore determine that the trial court did not abuse its discretion, and that its determination of finding appellant in contempt was proper.

{¶22} Because we have determined that the trial court properly found appellant in contempt for failure to pay the sum required by the decree upon the sale of the real estate at 1227-1229 North High Street, we decline to address the trial court's finding of contempt for appellant's failure to sign a note and mortgage on 1227-1229 North High Street. Accordingly, we overrule appellant's third assignment of error.

{¶23} Having overruled appellant's first and third assignments of error, and having rendered moot appellant's second assignment of error, we affirm the judgment of the Court of Common Pleas of Franklin County, Domestic Relations Division.

Judgment affirmed.

BRYANT and McCORMAC, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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