**[Cite as *Gueth v. Gueth,* 2009-Ohio-6666.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Diane Gueth, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 09AP-426 |
| v. | : | (C.P.C. No. 99DR06-2659) |
| Robert J. Gueth, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on December 17, 2009

*Andrea R. Yagoda*, for appellee.

*Vincent A. Dugan*, *Jr.*, and *Keith Golden*, for appellant.

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

SADLER, J.

**{¶1}** Defendant-appellant, Robert J. Gueth ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, in which that court found him in contempt of court for failing to comply with the court's October 20, 1999 agreed judgment entry – decree of divorce.

**{¶2}** The agreed judgment entry incorporated the parties' plan for shared allocation of parental rights and responsibilities of their child, set forth the disposition of all the marital assets and liabilities, and required the parties to take various specific actions related to some of those assets and to other financial obligations. On March 3, 2004, appellant filed a motion for contempt and for attorney fees, arguing that plaintiff-appellee, Diane M. Gueth (nka Focht) ("appellee"), had failed to comply with paragraph 29 of the agreed judgment entry – decree of divorce. On May 24, 2004, appellee filed her own motion for contempt, alleging that appellant had failed to comply with paragraphs 8, 17, 18, and 23 of the agreed judgment entry – decree of divorce, and with paragraphs two and four of the parties' shared parenting plan.

**{¶3}** The parties' motions were tried before a magistrate on November 8, 14, and 21, 2006, and on May 15 and 24, 2007. On June 14, 2007, the parties submitted written closing arguments to the magistrate. On March 26, 2008, the magistrate rendered a decision that denied appellant's motion for contempt, and granted appellee's motion as to paragraphs 8, 17, and 18 of the agreed judgment entry – decree of divorce, and as to paragraphs two and four of the parties' shared parenting plan. The magistrate also granted appellee attorney fees in the amount of $7,500 and professional fees in the amount of $15,400.

**{¶4}** On April 9, 2008, appellee filed a motion for clarification and/or for relief from judgment, and she filed objections to the magistrate's decision contingent upon the denial of her motion for clarification/relief from judgment. Also on that date, appellant filed objections to the magistrate's decision. On June 4, 2008, the magistrate granted appellee's motion for clarification, which rendered appellee's objections moot. On

July 17, 2008, appellant filed supplemental objections to the magistrate's decision, and on August 13, 2008, appellee filed a memorandum contra to appellant's objections. On March 31, 2009, the trial court overruled appellant's objections.

**{¶5}** On April 30, 2009, appellant timely appealed and advances two assignments of error for our review, as follows:

> FIRST ASSIGNMENT OF ERROR
>
> THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW BY FAILING TO EFFECTUATE THE LANGUAGE OF PARAGRAPH 29 OF THE PARTIES' DIVORCE DECREE.
>
> SECOND ASSIGNMENT OF ERROR
>
> THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN FINDING THE APPELLANT GUILTY OF CONTEMPT REGARDING THE ISSUES OF NON-PAYMENT OF CHILD SUPPORT AND MEDICAL EXPENSES.

**{¶6}** Both of appellant's assignments of error concern contempt motions. One who fails to comply with a lawful court order may be punished for contempt of court. *Harrison v. Harrison* (Apr. 15, 1999), 10th Dist. No. 98AP-560, citing R.C. 2705.02(A). Contempt has been classified as either direct or indirect. Direct contempt occurs in the presence of the court in its judicial function. R.C. 2705.01. Indirect contempt involves behavior that occurs outside the presence of the court and demonstrates a lack of respect for the court or its lawful orders. *State v. Drake* (1991), 73 Ohio App.3d 640, 643.

**{¶7}** Contempt is also classified as either civil or criminal. The distinction between civil and criminal contempt depends upon the character and purpose of the punishment imposed. *State ex rel. Johnson v. Perry Cty. Court* (1986), 25 Ohio St.3d 53,

55. Civil contempt is remedial or coercive in nature and will be imposed to benefit the complainant. *Pugh v. Pugh* (1984), 15 Ohio St.3d 136, 139. "Normally, contempt proceedings in domestic relations matters are civil in nature because their purpose is to coerce or encourage future compliance with the court's orders." *Byron v. Byron*, 10th Dist. No. 03AP-819, 2004-Ohio-2143, ¶12.

**{¶8}** A civil contempt finding must be supported by clear and convincing evidence. Id., citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 253. "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

**{¶9}** We will not reverse a trial court's finding of contempt absent an abuse of discretion. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 75. The term "abuse of discretion" indicates more than an error of law; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218.

**{¶10}** In his first assignment of error, appellant argues that the trial court erred in denying his motion for contempt. Appellant based his motion on paragraph 29 of the agreed judgment entry – decree of divorce, which provides:

> A. The parties shall cooperate and sign any requisite amended joint Federal, State and Local tax returns for 1998 as determined by accountant in order to facilitate payment of the remaining payments on the Promissory note due from Jay Murray. Any resulting refund shall be applied to taxes due in

1999 or thereafter for any payments received from Jay Murray or for other taxable revenue. Any additional taxes, interest or penalties shall be paid equally by the parties when due.

B. For 1999 there are additional taxes due and owed arising from the payments received from Jay Murray plus other taxable revenue in 1999 based on capital gains taxes or other taxes which will be reported only on Defendant's tax filings since the parties will be divorced on December 31, 1999 (joint return not possible). The parties shall pay the federal and state quarterly estimated taxes due to be paid in January, 2000 one-half (1/2) each as determined by accountant.

C. Based on the fact that the 1999 tax losses from Enable Communications (which Defendant is sharing equally with Plaintiff), are also planned to be utilized on Defendant's separate 1999 tax return, offsetting the capital gains, a proportionate adjustment/allocation shall be made under those circumstances by the accountant in order that the parties shall pay a net capital gains tax amount equal to one-half (1/2) of the overall total due for the 1999 tax year. Plaintiff shall include on her 1999 tax return the proportionate amounts in order to facilitate an equal division of the tax liability based on the fact that she received one-half (1/2) of the payments from Jay Murray plus other taxable revenue. The computation shall factor in the requisite proportionate share of the quarterly estimated federal and state taxes paid by the parties in April, June and September, 1999, and January, 2000.

D. The parties shall equally divide any additional taxes, interest or penalties due for 1999 in the event the quarterly estimated taxes are insufficient. Additionally, they shall receive one-half (1/2) each if there are any refunds attributable to the capital gains computation or excess payment of quarterly estimated taxes.

E. The parties shall further pay one-half (1/2) each of any taxes when due, including quarterly estimated taxes, which arise from the remaining two (2) payments due from Jay Murray upon the promissory note as of September 16, 1999 although they may not be received until later in 1999, 2000, or later.

> F. In order to insure that there are sufficient funds to pay the quarterly estimated federal and state taxes due in January, 2000 which are estimated to be $115,000 (53,000 fed/62,000 state) the $44,777 due to be paid by Defendant to Plaintiff previously set forth herein in paragraph 22 and an equal amount of Husband's funds shall be restrained in a separate joint interest bearing Merrill Lynch account until the taxes become due and payable in January, 2000. Any net proceeds realized from the sale of Fairfax Road, Balfoure Circle, Brazenhead, Ltd., Stock, and/or Coachman Motor Home shall be added to the interest bearing joint account until an amount equal to the taxes is reached. Any excess over the $115,000 shall be disbursed to the parties upon sale.

**{¶11}** In anticipation of the parties' post-decree receipt of income from certain investments through the year 2002, the parties included the foregoing provisions in the decree to specify how they would report that income and what steps they would take to ensure that they bore the tax consequences of that income equally. Some portions of paragraph 29 were inartfully drafted in that they appeared to recognize that only appellant could claim the income and losses (because he was the titled owner of the assets) but also made reference to both parties claiming the same income and losses on their tax returns, despite the fact that appellee was not the owner of any of the assets from which that income or loss flowed.

**{¶12}** Pursuant to paragraph 29A of the agreed judgment entry – decree of divorce, the parties filed their 1998 tax returns jointly, and the refunds from the parties' 1998 jointly filed tax returns were applied to appellant's 1999 tax returns because his was the first social security number listed on the 1998 returns. Pursuant to paragraph 29B, appellant was to report all of the income from note payments made by Jay Murray in 1999, and the parties were each responsible for one-half of any taxes due and owing

thereon, including quarterly estimated taxes. The record contains evidence that appellant had possession of all the documents relative to the 1999 Jay Murray payments.

**{¶13}** Pursuant to paragraph 29C, the parties' anticipated loss in 1999 on a Subchapter S corporation called Enable Communications, would be used to offset 1999 capital gains. The provision specified that the parties would share equally in the loss and each party would be responsible for one-half of the tax on the net taxable gains. An accountant was to determine the actual net gains realized after deducting the losses. Confusingly, paragraph 29C stated both that appellant would claim all of the income and losses on his 1999 tax returns (which is consistent with paragraph 29B), and that the parties would each report one-half of the net gains and receive credit for same on their estimated tax payments. Appellee's accountant, Dana Lavelle, testified that it would be illegal for appellee to claim income or losses associated with assets that were in appellant's name, so the second part of paragraph 29C could not legally have been accomplished. He testified that the procedure set forth elsewhere in paragraph 29C and in paragraph 29B was the legal method of dividing the taxes on capital gains – appellant would claim all of the income and losses, and the parties would each be responsible for one-half of whatever taxes appellant owed on the net income, as reflected on his tax returns.

**{¶14}** Paragraph 29F required that the parties establish a joint account in which they were required to deposit estimated quarterly taxes in order to satisfy their joint tax liability once appellant's 1999 tax returns were filed. The parties established a Merrill Lynch account in which they deposited estimated tax payments.

**{¶15}** Appellant contended that appellee was in contempt of court for failing to comply with paragraph 29 of the agreed judgment entry – decree of divorce because she had failed to pay her one-half share of taxes owed in 1999, 2000, 2001, and 2002, for income received on marital assets. He also argued that the purpose of paragraph 29 was primarily for the parties to cooperate to minimize the parties' tax liability, and that appellee was in contempt for failing to file her 1999 tax returns in such a way as to minimize the taxes owed. For example, he pointed out, appellee failed to report any of the income or capital gains from the marital property on her tax returns. He argued that paragraph 29 required the parties to cooperate to file their 1999 tax returns and that appellee impermissibly filed hers before he filed his.

**{¶16}** At the hearing before the magistrate on the parties' contempt motions, both parties testified. Appellee testified that when it was time to file her 1999 tax returns, in the spring of 2000, she attempted to obtain income information that appellant had in his possession, but to no avail. Finally, she filed her 1999 tax returns in December 2000 with the information she had. (Appellant did not file his 1999 tax return until much later.)

**{¶17}** Accountant Lavelle testified on behalf of appellee, and accountant Stephen Harris testified on behalf of appellant. Lavelle's testimony was offered to show that appellee's tax returns had been filed correctly and in accordance with the agreed judgment entry – decree of divorce, and that appellee had tendered all of her share of the parties' tax liability related to their marital assets. Harris' testimony, as supplemented with appellant's, was offered to show that appellee was in contempt of court for the manner in which she filed her tax returns and for failing to pay additional tax liabilities that appellant claimed he had incurred. Both experts agreed that the person in whose name a

statement of income (e.g., 1099, K-1, W-2) is generated is the person who must report that income.

**{¶18}** Both accountants used the same software program to prepare tax-related calculations, though they used different methods of calculation. The magistrate specifically found Lavelle to be more credible than Harris, and found that Lavelle's method of calculation was more reliable than Harris' method. The magistrate stated, in relevant part:

> In assessing the respective opinions of accountants Harris and Lavelle, the Court reviewed their depositions and accompanying exhibits. Harris had little recollection of the events surrounding the filing of Ms. Focht's returns. He remembered that he and Mr. Gueth met for several hours one evening to prepare an analysis of the tax issues and that Mr. Gueth instructed him on what figures to plug into which blanks. Mr. Harris offered no opinion to a professional degree of certainty regarding how the taxes should have been prepared. He specifically declined to offer any opinion regarding how to interpret the divorce decree. * * * In short, the analysis set forth in his letter was primarily established by Mr. Gueth – not accountant Harris.
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> The Defendant's proposed analysis is based on a 'piece meal' approach. He took individual items for each year and figured the tax on that particular item. He then plugged those figures back into the return. As pointed out by Mr. Lavelle, this approach does not account for many other factors that impact tax returns. As a result, Defendant's own calculations pursuant to this approach result in a tax liability almost thirty thousand dollars more than his actual 1999 tax returns reflect.
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> Plaintiff's Exhibit #6 sets forth the documentation relative to accountant Lavelle's analysis of the tax issues. Whereas accountant Harris' 'analysis' is scattered and based primarily on Mr. Gueth's interpretation of the decree, accountant Lavelle's analysis is based on a cohesive approach that includes the terms of the decree, as well as the overall 'spirit' of the parties' agreement. This is extremely important due to

> the potential for more than one interpretation of the terms of the decree.

(Citation omitted.) (Magistrate's Decision, 11-12.)

**{¶19}** The magistrate further found that appellant was the "primary reason for the delays" in the filing of the parties' tax returns. (Magistrate's Decision, 13.) The magistrate adopted Lavelle's analysis and, based thereon, found that appellee was not in contempt for failing to follow paragraph 29 of the agreed judgment entry – decree of divorce, and that appellant owed appellee $16,728 in order to resolve the tax issues between the parties.

**{¶20}** In his argument in support of his first assignment of error, appellant largely reiterates what happened in the trial court and that he disagrees with the court's conclusions. However, nothing in his brief, nor in our copious review of the record, demonstrates that the trial court abused its discretion. The court's decision to find that appellee was not in contempt of court is supported by competent, credible evidence and was well-reasoned. Accordingly, appellant's first assignment of error is not well-taken and the same is overruled.

**{¶21}** In his second assignment of error appellant argues that the trial court erred in finding him in contempt for failing to comply with the child support and medical expenses provisions of the shared parenting plan, which was incorporated by reference into the agreed judgment entry – decree of divorce.

**{¶22}** Appellant concedes that he was $890.96 in arrears on his child support obligations on May 24, 2004, the date upon which appellee filed her motion for contempt. However, appellant appears to argue that the trial court should not have found him in

contempt because he had brought his child support obligation current by the time the court held the trial on appellee's motion. Appellant cites no authority for this proposition and we are unaware of any such authority. We find the contention is not well-taken.

**{¶23}** As we noted earlier, in order to prevail on her motion, appellee had to demonstrate, by clear and convincing evidence, that appellant had failed or refused to comply with a prior court order of which he had notice. Appellant admits that he failed to stay current on his child support obligation, which was set forth in the agreed judgment entry – decree of divorce, and of which appellant not only had notice, but participated in drafting. This is clear and convincing evidence that appellant was in contempt of court for failing to comply with a court order of which he had notice. Accordingly, the trial court did not abuse its discretion in granting appellee's motion with respect to child support.

**{¶24}** Appellant also argues, curiously, both that the court impermissibly imposed a jail sentence without giving him the opportunity to purge his contempt, and that it gave him the opportunity to purge, but impermissibly used the purge as a method to control appellant's future behavior.

**{¶25}** In the magistrate's decision that the trial court adopted, in order to sanction appellant for his failure to keep his child support obligation current and to abide by paragraphs 8, 17, and 18 of the judgment entry – decree of divorce (relating to payment of proceeds from the sale of marital assets), appellant was "sentenced to three (3) days in the Franklin County Corrections Center. The days are suspended conditioned on his compliance with the payment requirements set forth herein; * * * Defendant is to pay all of the amounts set forth in [paragraph] #s 5 – 11 above within ninety (90) days of the

effective date of this Decision. His failure to pay these amounts will result in his incarceration pursuant to the terms above." (Magistrate's Decision, 17.)

**{¶26}** By the plain language of the court's order, it is clear that the court gave appellant an opportunity to purge his contempt by paying to appellee, within a specified amount of time, the amounts it had found that appellant owed to appellee, the non-payment of which had formed the basis for the court's finding of contempt. Moreover, the purge was not used to ensure appellant's future compliance with the court's judgment entry. Rather, it was used to properly ensure that appellant remediated his past contemptuous acts.

**{¶27}** Next appellant argues that the trial court abused its discretion in finding him in contempt for failing to pay certain uncovered medical expenses for the parties' child. He argues that the contempt finding is not supported by clear and convincing evidence because the parties' child was also covered by appellee's husband's medical insurance policy, and when appellant discovered that claims had been submitted under that second policy, he demanded but never received documentation of these claims. Appellant seems to be arguing, as he did in the trial court, that he was justified in not paying for certain uncovered medical expenses because appellee and her husband never proved wrong his theory that these expenses had already been paid by the second insurance carrier.

**{¶28}** As the trial court explained, however, appellee testified as to the amount of uncovered medical expenses incurred for the parties' child, and as to each parties' share of those expenses. She testified that appellant had not paid his share and she presented documentary evidence of the amounts she claimed he owed. Though appellee's

husband testified that he had submitted some claims for the child to his insurance carrier, he explained that they were not paid because there was a primary policy in place. The magistrate found appellee credible on the issue of uncovered medical expenses, and determinations of credibility and weight of the testimony are within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Upon our review of the record, we find no abuse of discretion in the trial court's finding that appellant was in contempt of court for failing to pay his share of certain uncovered medical expenses for the parties' child.

**{¶29}** For all of the foregoing reasons, appellant's second assignment of error is overruled.

**{¶30}** Having overruled both of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

*Judgment affirmed.*

TYACK and KLINE, JJ., concur.

KLINE, J., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District.

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