[Cite as *Ruben v. Ruben*, 2013-Ohio-3924.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Harlan G. Ruben,	:	
Plaintiff-Appellant,	:	
		No. 12AP-717
v.	:	(C.P.C. No. 03DR-2900)
Lisa M. Ruben,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 12, 2013

Eugene R. Butler Co., LPA, and *Eugene R. Butler*, for appellant.

Golden & Meizlish Co., LPA, and *Keith Golden*, for appellee.

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

TYACK, J.

{¶ 1} Plaintiff-appellant, Harlan G. Ruben, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, finding him in contempt of a March 9, 2005 Agreed Judgment Entry-Decree of Divorce for failure to pay spousal support to, and obtain life insurance benefiting, his former wife, Lisa M. Ruben. Because the trial court did not abuse its discretion in finding Harlan in contempt of court but abused its discretion in failing to provide Harlan with the opportunity to purge the contempt, we affirm in part and reverse in part.

Facts and Procedural History

{¶ 2} Harlan and Lisa divorced by an Agreed Judgment Entry-Decree of Divorce ("divorce decree") filed March 9, 2005. Under the terms of the parties' separation agreement, which the court incorporated into the divorce decree, Harlan agreed to a non-

modifiable obligation to pay Lisa $840,000 in spousal support over a 10-year period through 120 consecutive monthly installments of $7,000, commencing on April 15, 2005. Harlan further agreed, "[f]or so long as [Harlan] has a spousal support obligation to [Lisa]," to "maintain a life insurance policy designating [Lisa] as the beneficiary, in an amount equal to the after tax present value using a five percent (5%) discounted rate, of the spousal support that still exists." (R. 719: Separation Agreement, at ¶ 11.) Despite their initial agreement, the parties have been before the trial court regarding matters related to their spousal support arrangement on multiple occasions. Accordingly, this case has a long and voluminous procedural history, which we only briefly summarize.

{¶ 3} On May 20, 2009, Lisa filed a contempt motion alleging Harlan "failed and refused to pay his support obligation." (R. 1058-59.) After an August, 2009 hearing, the trial court filed a judgment entry on November 24, 2009, finding Harlan guilty of contempt for failing to pay spousal support as ordered in the divorce decree. In the meantime, on September 11, 2009, Lisa filed another contempt motion against Harlan, alleging he "continue[d] to willfully fail and refuse to pay his support obligation." (R. 1093-94.)

{¶ 4} On December 29, 2009, the trial court filed an Agreed Judgment Entry-Contempt, finding that Lisa and Harlan had "resolved the outstanding motions for contempt." (R. 1106: Dec. 29, 2009 Agreed Judgment Entry—Contempt, ¶ 1.) The contempt entry detailed provisions regarding Harlan's obligations and his payments over the prior 16-month period. The court concluded that "so long as [Harlan] pays the sum of $31,964.53, along with the January 2010 spousal support payment of $7,000.00, on or before January 5, 2010, [he] is and has been in substantial compliance with his obligation of spousal support," and upon these payments, "the pending motion for contempt shall be dismissed with prejudice and * * * the prior entry of contempt filed November 24, 2009 shall be set aside and vacated." (R. 1106 at ¶ 6-7.) The record indicates Harlan made the necessary payments.

{¶ 5} Lisa filed a new motion for contempt on August 20, 2010, alleging Harlan refused to pay the agreed spousal support. After a November 2010 hearing, the trial court filed a Judgment Entry on December 20, 2010, finding Harlan guilty of contempt for failing to pay spousal support. In a February 15, 2011 entry, the court found Harlan "paid

directly to [Lisa] the sum of $42,000 by check on Jan[.] 14, 2011. Said sum represents payment in full of all sums owed * * * through 12-31-10." (R. 1156.)

{¶ 6} Lisa filed yet another new motion for contempt against Harlan on September 16, 2011 for failure to pay spousal support. Lisa followed with the contempt motion with a motion filed February 13, 2012 to reduce Harlan's spousal support arrears to judgment. Lisa filed still an additional motion for contempt against Harlan on March 22, 2012, alleging he violated the divorce decree by failing to maintain a life insurance policy designating her as the beneficiary.

{¶ 7} The trial court held a hearing on Lisa's motions on April 9, 2012, found Harlan in contempt of court for failure to pay spousal support and for failure to maintain a life insurance policy collateralizing his spousal support obligation, and, on April 24, 2012, filed a judgment entry journalizing its hearing findings. The trial court sentenced Harlan to 30 days in jail for the 2 contempt convictions, but set the matter "for further hearing" on July 30, 2012. The court further granted judgment to Lisa for $75,652.78 plus interest and costs, based on the parties' April 19, 2012 "Stipulation as to Spousal Support Arrears." (R. 1228: Apr. 19, 2012 Stipulation as to Spousal Support Arrears.)

{¶ 8} Harlan did not take any action in response to the contempt convictions, and on July 30, 2012, the court issued a nunc pro tunc judgment entry substantially the same as the April 24, 2012 entry. The trial court certified the nunc pro tunc judgment entry as a final appealable order.

Assignments of Error

{¶ 9} Harlan appeals, assigning two errors:

> [I.] The Trial Court Erred as a Matter of Law in Failing to Include Purge Conditions for the Civil Contempt.
>
> [II.] The Trial Court Abused its Discretion in Failing to Find the Defense of Financial Impossibility was Proven.

Because a finding of contempt necessarily precedes a sanction for contempt, we first address Harlan's second assignment of error.

Second Assignment of Error—Affirmative Defense of Impossibility

{¶ 10} Harlan's second assignment of error asserts the trial court abused its discretion in holding him in contempt of court. Harlan does not dispute that he disobeyed

the March 9, 2005 divorce decree mandating he pay Lisa $7,000 a month in spousal support, but he asserts the trial court nevertheless erred in holding him in contempt because he established the affirmative defense of impossibility.

{¶ 11} Contempt of court "results when a party before a court disregards or disobeys an order or command of judicial authority," or otherwise acts in a way that "substantially disrupt[s] the judicial process in a particular case." *Byron v. Byron*, 10th Dist. No. 03AP-819, 2004-Ohio-2143, ¶ 11, citing *First Bank of Marietta v. Mascrete, Inc.*, 125 Ohio App.3d 257, 263 (4th Dist.1998); *In re Davis*, 77 Ohio App.3d 257, 273 (2d Dist.1991). "A prima facie case of contempt is established when the order is before the court along with proof of the contemnor's failure to comply with it." *DeMarco v. DeMarco*, 10th Dist. No. 09AP-405, 2010-Ohio-445, ¶ 25, citing *Dzina v. Dzina*, 8th Dist. No. 83148, 2004-Ohio-4497.

{¶ 12} Even so, "generally, impossibility of performance is a valid defense against a contempt charge." *McDade v. McDade*, 10th Dist. No. 89AP-991 (Sept. 27, 1990). *See also* 17 Ohio Jurisprudence 3d, Contempt, Section 62. "[I]t is incumbent upon the party seeking to raise impossibility of compliance to prove the defense by a preponderance of the evidence." *Rife v. Rife*, 10th Dist. No. 11AP–427, 2012–Ohio–949, ¶ 10, citing *Hopson v. Hopson*, 10th Dist. No. 04AP-1349, 2005-Ohio-6468, ¶ 9, citing *State ex rel. Cook v. Cook*, 66 Ohio St. 566, 570 (1902). When reviewing a finding of contempt, an appellate court applies an abuse of discretion standard and will not reverse absent a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *See State ex rel. Ventrone v. Birkel*, 65 Ohio St.2d 10 (1981).

{¶ 13} At the April 9, 2012 contempt hearing, Harlan testified that he made approximately $350,000 a year as an officer for his family's business, Plaza Properties, at the time of the March 9, 2005 divorce decree. Since his "termination as an officer" in August, 2005, he still works for Plaza, but now receives a $50,000 annual salary and an additional $1,000 a month "auto allowance" for his $210 monthly car payment and gas. Although he insisted that he does "consulting" for Plaza in exchange for his compensation by "giv[ing] information to questions they ask," Harlan also admitted that his current position does not require him to work on a regular basis or physically report to the Plaza offices, and he collects his monthly salary whether or not he does any consulting during

the month. (Tr. 56; 59.) According to Harlan, he spent less than 50 hours consulting for Plaza in 2011.

{¶ 14} Despite his flexible schedule, Harlan claimed he failed to comply with the trial court's previous instruction to obtain additional employment, if need be, because it was "impossible" for him to find a job. (Tr. 60.) Harlan asserted he "made close to 15 applications" in the two years preceding trial, but he "wasn't able to get work." (Tr. 60.) Although he has a Bachelor's of Science Degree in Business from Franklin University and has worked in the property management field since 1962, Harlan stated at the hearing that the present "tough * * * real estate market" prevents him from finding other employment. (Tr. 91.) Harlan additionally testified that he has ongoing health problems that prevent him from doing physically demanding labor.

{¶ 15} In addition to the money Plaza pays him, Harlan acknowledged that he has been supplementing his income with substantial sums of money "borrow[ed] * * * against his future inheritance from the Bernard R. Ruben Irrevocable Trust for Issue" ("the Trust"). Appellant's brief, at 2. The record indicates that Harlan's father Bernard, now deceased, created the Trust for the benefit of Harlan and his two siblings. The Trust "is the majority owner of the majority of [the] properties" Plaza Properties managed; additionally, the Trust owns "four, five life insurance policies * * * known as second to die policies" on Bernard and Florine C. Ruben, Harlan's mother, that will be payable upon Florine's death. (Tr. 85-86.)

{¶ 16} Pursuant to a May 17, 2006 "Master Loan Agreement," the Trust "may, from time to time, lend to **Harlan G. Ruben**, individually (the 'Borrower') certain sums of money." Plaintiff's hearing exhibit No. 5 (hereinafter "Exhibit No. 5, at ____.") The agreement allowed Harlan to withdraw $359,000 from the Trust in 2006, and up to $259,000 every year thereafter; each loan carries an interest rate comparable to the "applicable Federal short-term annual rate for the month in which such Loan is made," "compound[ed] on an annual basis," and "adjusted every three (3) years to reflect the applicable Federal short-term annual rate for the month in which such adjustments is to be made." Exhibit No. 5, at 1.2. The agreement stipulates that Harlan's loans, "together with all interest accrued thereunder," are "due and payable in full upon the first to occur

of (i) [Harlan's] death, (ii) the second death of Bernard R. Ruben and Florine C. Ruben, and (iii) fifteen (15) years from the date of this Agreement." Exhibit No. 5, at 4.2.

{¶ 17} Harlan testified he has withdrawn the maximum amount from the Trust "each and every year, which I have done since April five," because "I needed the money to live on." (Tr. 67; 102.) Although the record contains no promissory note for 2012, Harlan acknowledges having received the usual $259,000. (Tr. 120.) He explained that he generally executes a promissory note requesting the money in late December and receives a lump sum in early January; as of 2012, he had received "$1,420,900" from the Trust since 2006. (Tr. 103.)

{¶ 18} At the hearing's conclusion, the trial court determined that Harlan failed to prove the affirmative defense of impossibility. The trial court held it was "unacceptable" that Harlan claimed he "can't work" when he "put out, by his own admission, 15 applications in the last two years" and provided no evidence supporting his testimony, such as "any testimony from an expert witness who performed a vocational evaluation," or "documented evidence of any physical conditions." (Tr. 172-173.) In addition, the court noted that "when [Harlan] * * * got $259,000 three months ago and no payments were made, it is really hard for the Court to talk about an ability to pay. * * * [T]he fact of the matter is he testified that he has received that money every year." (Tr. 170-71.) Accordingly, the trial court held Harlan in contempt for failing to meet his spousal support obligations.

{¶ 19} On appeal, Harlan claims he demonstrated that his failure to pay his spousal support obligation is through no fault of his own, since "he has looked for employment over the last two years prior to the contempt hearing and had found no employment that would enable him to pay the $7,000 per month." Appellant's brief, at 6. As a consequence, he claims, he "was forced to continue borrowing money to pay the spousal support award," and "[w]here a party borrows money annually to keep current with his spousal support obligation, the defense of financial impossibility is present." Appellant's reply brief, at 5.

{¶ 20} The trial court did not abuse its discretion in concluding Harlan failed to prove the defense of impossibility. Even though Harlan testified finding additional employment to supplement his $50,000 annual Plaza salary was "impossible," the trial

court was "free to determine [his] credibility on the issue and assign weight to [his] testimony accordingly." *Frey v. Frey*, 197 Ohio App.3d 273, 2011-Ohio-6012, ¶ 26 (3d Dist.). Harlan's testimony did not persuade the trial court that his failure to find other employment was due to circumstances outside of his control, and the record supports the court's conclusion that Harlan made minimal efforts to obtain another job. *McEnery v. McEnery*, 10th Dist. No. 00AP-69 (Dec. 21, 2000) (concluding that the trial court acted within its authority in choosing to disbelieve the contemnor's testimony that he could not obtain a higher paying job).

{¶ 21} As the court noted, though Harlan blamed his lack of success on the "flat" real estate market, he admitted that he submitted less than 15 applications in the two-year period leading up to the April 2012 hearing. Moreover, although Harlan claimed his health prevented him from doing any job requiring "physically challenging" labor, he did not present evidence confirming his medical issues, nor did he offer any specific details regarding the types of work his health problems ruled out, beyond stating he cannot lift more than "15-pound weights," or explain how his health issues would impact his ability to perform the kind of management jobs "[i]n the commercial market and residential market" that have been the "focus[] of [his] job search efforts." Appellant's brief, at 6. (Tr. 113, 115.) *See In re: England v. England*, 10th Dist. No. 92AP-1749 (May 18, 1993) (holding contemnor failed to prove impossibility where she claimed she could not make support payments "due to physical disabilities and failure to find employment," but she admitted she could perform jobs that did not require certain specific physical actions and "she had made no attempt to obtain a job which would not require her to perform these actions"). Indeed, the trial court could view Harlan's claim that he cannot work because of his health problems as contradicting his claim that the money he receives from Plaza Properties is payment for work he does for the company. *See Blair v. Blair*, 10th Dist. No. 88AP-1091 (Mar. 13, 1990) (observing this court has "affirmed judgments based on internal consistencies in plaintiff's testimony on inability to work").

{¶ 22} Thus, despite Harlan's assertion that "the only source" of income available to him to pay Lisa's spousal support is the money from the Trust, competent, credible evidence suggests he did not seriously pursue additional employment and his inability to find another source of income was consequently due to circumstances within his control.

Appellant's brief, at 6. *See Frey* at ¶ 26 (determining trial court did not abuse its discretion where it rejected contemnor's affirmative defense of impossibility based on its conclusion that her underemployment was due to "circumstances within her control—i.e., that [she] was voluntarily underemployed"), citing *Piciacchia v. Piciacchia*, 5th Dist. No. 2006CA00286, 2007-Ohio-2328, ¶ 28 (holding trial court did not err in finding former husband voluntarily underemployed, which negated his affirmative defense of inability to pay, because the husband did not seek alternative employment during slow work periods).

{¶ 23} Likewise, the record does not support Harlan's assertion that the trial court abused its discretion in considering his Trust money as a viable source of support payments when it determined whether Harlan lacked the ability to pay his spousal support obligation. *See Farley v. Farley*, 10th Dist. No. 99AP-1103, 2005-Ohio-3994 (noting that a party's ability to pay spousal support is "determined by the trial court with reference to factors enumerated in R.C. 3105.18(C)," including R.C. 3105.18(C)(1)(a), "[t]he income of the parties, from all sources").

{¶ 24} Despite acknowledging that "his future inheritance" is the source of the Trust money he receives, Harlan insists that the loans are not merely advances on this inheritance. Appellant's brief, at 2, 6. He points to the Master Loan Agreement's terms obligating him to pay back, with interest, the money the Trust pays to him. Harlan asserts that, since the "money he is using to pay the support is borrowed money," the Second District Court of Appeals' decision in *Wagshul v. Wagshul*, 2d Dist. No. 23564, 2010-Ohio-3120 supports his position.

{¶ 25} In *Wagshul*, the appellant was a small business owner who had started struggling financially in the years following his divorce from his former wife. Eventually, the appellant stopped taking a salary for himself but continued to pay his spousal support obligation to his former wife for six more months, before ceasing to make payments because he had " 'no money to pay her.' " *Wagshul* at ¶ 40. When his former wife brought a motion for contempt, the appellant testified at the hearing that he had paid $75,000 in spousal support "since the time he stopped taking a salary" and "those payments were largely from borrowed monies." *Id.* The appellant and his certified public accountant both testified that he had "borrowed money from banks" and he could "borrow no more from

banks he owes, which now must be repaid." *Id.* at ¶ 5. Based on his evidence, *Wagshul* concluded the trial court erred when it found the appellant had not established an impossibility defense.

{¶ 26} Initially, despite Harlan's representations, nothing in *Wagshul's* holding suggests a categorical rule that borrowing money to pay a support obligation equates to financial impossibility. Instead, *Wagshul* concluded that "[o]n this record," the contemnor "established an impossibility defense with evidence that the gross revenues from his practice declined by forty percent between 2004 and 2007, and that even so he incurred debt and substantially exhausted his savings to continue to pay his support obligation." *Id.* at ¶ 41. The court further observed that, "[a]fter his financial situation became so dire that he could no longer take a salary from his practice," the contemnor "promptly sought relief from the court" and "nevertheless continued to pay support for over six months until he could no longer bear the burden." *Id.* at ¶ 41. Cf. *Monastra v. Monastra*, 8th Dist. No. 76633 (Oct. 5, 2000) (holding "[b]ecause appellant made no effort or inquiry about borrowing from any source to even partially satisfy his obligation, the trial court did not abuse its discretion by apparently discounting" the appellant's testimony regarding his inability to pay his arrearage); *Dudley v. Dudley*, 12th Dist. No. CA2012-04-074, 2013-Ohio-859, ¶ 19 (determining contemnor did not establish impossibility where he claimed "his bank would not loan him money" but "there is no indication in the record as to why the bank denied his request, or whether the bank had offered any other terms or alternate options").

{¶ 27} Moreover, although Harlan equates his borrowing from the Trust to Wagshul's borrowing from banks, the loans the Trust issues to Harlan are distinguishable from the bank loans in *Wagshul*. Initially, Harlan is not obligated to procure the money to pay back his loans from some external source. Accordingly, while Harlan claims the loans are not advances on his inheritance because he is supposed to "[p]ay it all back," the money Harlan borrows and does not pay back simply "go[es] against his share of the -- any proceeds of the Trust" rather than creating consumer debt like the Wagshul loans. (Tr. 99.) Indeed, Harlan admitted at the hearing that he has not "paid anything on any of the notes," including any of the accrued interest; when asked whether the money he has borrowed will be repaid before receiving his inheritance, Harlan replied: "It won't be

paid." (Tr. 121-22.) Accordingly, even accepting that Harlan's money from the Trust is "borrowed" and constitutes a "loan," Harlan's comparison of his own borrowing to Wagshul's borrowing is misplaced.

{¶ 28} In addition, while *Wagshul* determined its contemnor "incurred debt * * * to continue to pay his support obligation," the record does not support Harlan's assertions that his purpose for borrowing from the Trust is to keep current with his spousal support obligations. Instead, the evidence demonstrates Harlan withdraws the maximum amount he can from the Trust every year while consistently failing to pay his monthly spousal support obligation until Lisa files a motion for contempt. Notably, Harlan does not even attempt to argue that he would take out less money than the maximum allowed if he did not have to pay the spousal support. On the contrary, he asserts he "will continue to need borrowing money just to pay for his living expenses without any real potential to stop the borrowing in the foreseeable future." Appellant's brief, at 7. In this way, Harlan's argument vacillates between assertions that he is forced to borrow the money to pay his spousal support obligation and assertions that he cannot use the borrowed money to pay Lisa spousal support because he needs the full amount in order to live. In the end, the evidence does not support Harlan's impossibility defense under either approach.

{¶ 29} Harlan testified that in 2011 he used the $259,000 he received from the Trust to "pa[y] off numerous loans that I had; plus, I went ahead and had huge living expenses of about $18,000 a month." (Tr. 126.) Although Harlan explained he spent $2,500 a month on his mortgage and between $2,000 and $2,800 a month on food for his three children "and their friends," he also admitted to discretionary expenses such as $300 per month for membership in a country club that he uses "as a work-out facility, that's all." (Tr. 141.) *See Wehrle v. Wehrle*, 10th Dist. No. 12AP-386, 2012-Ohio-81, ¶ 31 (holding trial court did not abuse its discretion in rejecting defendant's impossibility defense where he " 'indulged in discretionary expenses' while he was under an obligation to pay spousal" support). Furthermore, the loans Harlan prioritized were from close friends and family, claiming he owed his mother $15,000, his sister $19,000, and a family friend $15,000. Although Harlan testified he paid them all in full, he did not pay spousal support to Lisa because he "had no money, actually, to pay her. I mean, it's just--it

just went away. I am a bad money manager." (Tr. 69.) He admitted that the only financial obligations he left unpaid in 2011 were Lisa's spousal support and the loan from the Trust itself.

{¶ 30} Likewise, in January 2012, Harlan received $259,000 from the Trust, but as of the April 9 hearing, he had not paid his monthly obligation to Lisa, beyond the amount automatically deducted from his Plaza paycheck, since May 2011. When asked if it would "be fair to say that you did have the money to give to her but you chose to give it to other people instead"? Harlan replied, "Yes." (Tr. 121.)

{¶ 31} Furthermore, a new arrangement between Harlan and his mother as to the 2012 Trust money refutes his assertion that he is forced to borrow the money from the Trust because of his support obligation. At the hearing, Harlan stated that he received his 2012 check for $259,000 as per usual, but he then "endorsed it over" to his mother. (Tr. 128.) Harlan explained that his mother deposited the money into an account under her exclusive control; he pays his bills and expenses by asking her to give him the needed funds. Harlan also stated that he "wish[es] [he] could" pay his arrearages, but his mother refused to give him the money to do so. (Tr. 127; 131.) Yet, when questioned whether it would "be fair and accurate to say the reason the money was put in your mother's account was specifically so you could sit here and tell the Judge what you are telling, my mom won't let me pay this to Lisa, she won't do it; isn't that why it's in her account"? Harlan replied, "Yes." (Tr. 131-32.) Harlan effectively admitted he and his mother devised a method by which he can receive the benefit of the Trust money while avoiding using that money to pay his support obligations.

{¶ 32} Because Harlan claims he cannot pay Lisa support because he manages money poorly or because he has transferred his money to his mother, the circumstances surrounding his inability to pay are of his own making. Impossibility of performance is not a valid defense where the contemnor created the impossibility by his own actions. *See McDade.* Indeed, "[t]o withhold justice from a wronged party due to the voluntary conduct of another is contrary to the principles of equity." *Wehrle* at ¶ 36, citing *Shanley v. Shanley*, 46 Ohio App.3d 100, 101-02 (8th Dist.1989) (concluding trial court did not abuse its discretion in denying obligor spouse's motion to reduce alimony since the obligor's alleged inability to pay arrearages resulted from his voluntary decision to incur

additional debt); *Haynie v. Haynie*, 19 Ohio App.3d 288 (8th Dist.1984). *See also Keeley v. Keeley*, 12th Dist. No. CA97-02-013 (July 21, 1997) (holding the "person who failed to comply must show his inability to 'be real and not self-imposed, nor due to fraud, sharp practices, or intentional avoidance' "), quoting *DeWitt v. DeWitt*, 2d Dist. No. 1386 (Mar. 22, 1996), and *Wagner v. Wagner*, 2d Dist. No. CA-10115 (July 10, 1987); *Patel v. Patel*, 4th Dist. No. 98CA29 (Mar. 23, 1999) (holding contemnor's "voluntary decision to assume additional debt" could not be used to justify an inability to pay).

{¶ 33} The record indicates Harlan has access to the resources to meet his obligation; consequently, Harlan bears responsibility for any inability to pay that is attributable to underemployment, misallocated funds, or some combination of both. Because Harlan failed to establish his affirmative defense of impossibility, the trial court did not abuse its discretion in finding him in contempt. Harlan's second assignment of error is overruled.

First Assignment of Error—Purge Conditions

{¶ 34} Harlan's first assignment of error challenges the trial court's contempt sanction, arguing that "[s]ince the [contempt] order issued by the trial court in this case does not contain any purge conditions, the order is void." Appellant's brief, at 4.

{¶ 35} Contempt proceedings can be described as primarily either civil or criminal, although the proceedings themselves are sui generis. *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 253 (1980). Courts distinguish the civil or criminal nature of contempt proceedings based on the purpose to be served by the sanction. *Wehrle* at ¶ 55. Although criminal contempt sanctions are punitive in nature and designed to vindicate the authority of the court, civil contempt sanctions are designed for remedial or coercive purposes and are often employed to compel obedience to a court order. *Id.*

{¶ 36} "The importance of classifying the nature of the contempt is the effect the classification has upon the contemnor's rights." *Geiser Durst v. Durst*, 3d Dist. No. 13-02-38, 2003-Ohio-2029, ¶ 16. *See also Harvey v. Harvey*, 9th Dist. No. 09CA0052, 2010-Ohio-4170, ¶ 5 (holding the appellate court "must classify the sanctions ordered by the trial court as either 'civil' or 'criminal' to determine whether it provided due process"). Since a civil contempt sanction's purpose is to compel obedience, if the contemnor fulfills

the contempt order's "purge conditions," the "purpose of the sanction is achieved and the sanction is discontinued." *In re Howard*, 12th Dist. No. CA2001-11-264, 2002-Ohio-5451, ¶ 16, citing *Cleveland v. Ramsey*, 56 Ohio App.3d 108, 110 (8th Dist.1988). In this way, a party convicted of civil contempt "is said to carry the keys of his prison in his own pocket * * * since he will be freed if he agrees to do as ordered." *Pugh v. Pugh*, 15 Ohio St.3d 136, 139 (1984), quoting *Brown* at 253. Judicial sanctions for civil contempt, "will not be reversed unless there has been an abuse of discretion." *McEnery* at 5, citing *Burchette v. Miller*, 123 Ohio App.3d 550, 552 (6th Dist.1997).

{¶ 37} Here, Harlan and Lisa agree that the trial court found Harlan guilty of civil contempt, as "contempt in the context of a hearing pursuant to R.C. § 2705.05 is essentially civil in nature." *Nichol v. Nichol*, 7th Dist. No. 97-CA-143 (May 8, 2000), citing *Brown* at 253. The trial court stated at the April 9, 2012 hearing that its intent in "suspend[ing] those days" was to "review this for compliance on July 30, 2012." (Tr. 173.) As a civil contempt order, the trial court's contempt sanction was required to afford Harlan an opportunity to purge himself of his contempt.

{¶ 38} The trial court's April 24, 2012 judgment entry sentences Harlan to 30 days in jail after finding Harlan guilty of contempt for non-payment of spousal support and for failure to maintain the agreed life insurance policy. The trial court then added that "[t]his matter shall come before the Court for further hearing on July 30, 2012 at 10:00 AM for purposes of review at which time the Court shall make a further finding relative to the imposition of the jail sentence." (R. 1232.) Notably absent from the court's order is any reference to an "opportunity to purge" or "purge conditions," and the lack of specific purge language parallels a general lack of guidance as to the court's expectations of Harlan. *See Mackowiak v. Mackowiak*, 12th Dist. No. CA2010-04-009, 2011-Ohio-3013, ¶ 47, 57 (holding a trial court's contempt order invalid where the order "stayed" the contemnor's ten-day jail sentence, but "contained no purge order").

{¶ 39} While suggesting Harlan's jail sentence is conditional on some yet-undefined factor, the court's language does not specify whether Harlan's actions will dictate that the court's order lacks "further finding relative to the imposition of the jail sentence," let alone providing him with concrete conditions to meet. (R. 1232.) The order lists the net amount of spousal support arrears and grants judgment in Lisa's favor

pursuant to her February 13, 2012 motion to reduce Harlan's spousal support arrears to judgment, but the court does not connect its judgment on the arrearage amount to Harlan's jail sentence, and it does not indicate that Harlan might purge himself of the contempt conviction and avoid jail by paying the arrearage. *See Frey* at ¶ 37; 33-34 (holding contempt order was invalid "in the absence of a clear opportunity to purge the contempt," since it was "unclear whether the trial court provided [the contemnor] with a valid and ascertainable opportunity to purge" where the trial court "did not use the word 'purge' or otherwise characterize its decision in terms of an opportunity to purge anywhere in its judgment entry" and the trial court was unclear whether the "ambiguous" conditions set forth were "an attempt to create an opportunity for [the contemnor] to purge the contempt"). Moreover, after finding Harlan in contempt for failure to procure the agreed life insurance, the order makes no further reference to the insurance at all.

{¶ 40} In response, Lisa argues that the contempt order's lack of explicit purge conditions does not render the order void because, "[w]hile the Nunc Pro Tunc Entry does not specifically state that the Appellant could purge by doing x, y or z," the court made comments at the hearing about Harlan's sentence "be[ing] suspended for compliance review." Appellee's brief, at 4.

{¶ 41} The trial court indeed commented at the hearing that Harlan's "sentence would be suspended for compliance review on July 30, 2012." Appellee's brief, 4. Although the court's statement indicates the contempt in question is civil in nature, as the contempt sanction's "character and purpose" was to obtain Harlan's compliance, such a statement provides no guidance on purge conditions. *Sansom v. Sansom*, 10th Dist. No. 05AP-645, 2006-Ohio-3909, ¶ 24. *See also McNeal v. McNeal*, 10th Dist. No. 84AP-87 (June 27, 1985) (holding a trial court's handwritten notation that " 'defendant may purge himself of contempt by compliance' * * * is inadequate as it gives no information as to what defendant is required to do to 'purge' himself" and the "words 'by compliance' are inadequate without further reference").

{¶ 42} Moreover, a "court speaks only through its judgment entries, that is, enters final orders through its judgment entries," so that "an oral pronouncement of a court is not a final order." *Lamberjack v. Gyde*, 6th Dist. No. 92-OT-034 (Nov. 19, 1993) citing *Brackmann Communications, Inc. v. Ritter*, 38 Ohio App.3d 107 (12th Dist.1987).

Accordingly, where the trial court was required to provide Harlan with the opportunity to purge, the court's remarks at Harlan's contempt hearing do not constitute an adequate method for instituting purge conditions or substitute for including language establishing an opportunity to purge in its written entry, especially since "until an entry is journalized, the court retains the right and discretion to review and reverse its previous findings." *State ex rel. Hansen v. Reed*, 63 Ohio St.3d 597, 599 (1992). *See also Schuman v. Cranford*, 4th Dist. No. 02CA571, 2003-Ohio-2117, ¶ 6-7 (concluding trial court had not given the contemnor a reasonable opportunity to purge his contempt because, although the court announced at the August 7, 2002 hearing "that it would stay [the contemnor's] sentence for thirty days in order to allow [him] to purge himself of the contempt" and then explicitly explained to the contemnor his purge conditions, "the court did not journalize an entry outlining these conditions until September 4, 2002" so a purge condition ordering compliance by September 9, 2002 effectively "ordered [the contemnor] to comply with all the conditions of purging within five days of the filing of the entry"); *Carroll v. Detty*, 113 Ohio App.3d 708, 712, fn. 2 (4th Dist.1996) (concluding trial court's order mandating an unconditional jail sentence for civil contempt was an abuse of discretion and rejecting appellee's contention that the order was valid since the trial court's statements at the hearing indicated it would consider allowing appellant to purge the contempt, as "a trial court speaks only through its journal entries and not by oral pronouncement"), citing *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 163 (1995); *State v. King*, 70 Ohio St.3d 158, 162 (1994); *In re Adoption of Gibson*, 23 Ohio St.3d 170, 173, fn. 3 (1986); *Carroll* at 712 (holding the trial court abused its discretion when it sanctioned contemnor with a jail sentence "[b]ecause the court order did not afford appellant a sufficient opportunity to purge himself of the contempt").

{¶ 43} Lisa also claims Harlan effectively waived any objection to the lack of purge language in the order because Harlan's counsel "participated in the drafting of the follow up Judgment Entry as indicated by his approval as to form only," and "[a]t no time does the record indicate that [Harlan's] counsel objected to the lack of specific purge language, that he requested that additional specific purge language be included or that he submitted his own proposed entry containing such terminology." Appellee's brief, at 4. Harlan

counters that his approval "as to form only" reserved his right to object to the content of the entry. Appellant's brief, at 2.

{¶ 44} Where the prevailing party is ordered to compose a judgment entry reflecting the trial court's decision, the opposing party is "obligated to 'approve' that form of decree unless it failed to conform to the relief that the court had granted in its decision." *Fischer v. Ramey*, 2d Dist. No. 16249 (Aug. 1, 1997). Accordingly, for "purposes of appeal, a signed 'approval' does not waive any substantive error that the court may have committed in granting relief on the claims presented in the action." Civ.R. 58(A)(2) provides that "[a]pproval of a judgment entry by counsel or a party indicates that the entry correctly sets forth the verdict, decision, or determination of the court and does not waive any objection or assignment of error for appeal." In the end, "it is the court that is ultimately responsible for the preparation of the judgment entry." *Heisler v. Heisler*, 4th Dist. No. 09CA12, 2010-Ohio-98, citing Civ.R. 58. *See also Coventry Group, Inc. v. J.L. Gottlieb Agency, Inc.*, 8th Dist. No. 94185, 2010-Ohio-4135, ¶ 42 (holding, "[w]ith regard to the contention that [contemnors] waived any objection" to the trial court's failure to provide purge conditions "by failing to appear or properly challenge the court's order, * * * the opportunity to purge the contempt is required"). Moreover, purge conditions serve Lisa's interests as well as Harlan's, and permitting Harlan to waive his right to an opportunity to purge his contempt sanction would compromise the contempt sanction's primary purpose as a means of motivating Harlan to fulfill the neglected obligations.

{¶ 45} Finally, Lisa asserts Harlan's experience purging past civil contempt convictions renders harmless any defect in the present contempt order. Harlan responds that his past experiences involved different circumstances, as "in both instances of paying the prior arrearages" the parties agreed "as to how [Harlan] [would] pay the arrearage" and he "paid in conformance with those agreements." Appellant's reply brief, at 3. Lisa cites no precedent for granting an exception to the trial court's responsibility to give the contemnor the opportunity to purge when the contemnor presumably understands the process of purging his contempt.

{¶ 46} Accordingly, the trial court erred in issuing its order finding Harlan in civil contempt without including in the order an opportunity for Harlan to purge the contempt.

Furthermore, because the purpose of the trial court's finding Harlan in civil contempt was not to punish Harlan but to obtain compliance with the underlying order and to compensate Lisa for losses sustained by Harlan's disobedience, the court wrongly imposed a sentence without providing a means by which Harlan can comply and avoid imprisonment. Although the record reflects that the parties discussed at the hearing how Harlan could comply, the final contempt order did not allow for the opportunity to purge his contempt. An order lacking an opportunity to purge "perpetuates litigation and only delays the collection of support by an obligee." *Nichol* at 5. Harlan's first assignment of error is sustained.

Disposition

{¶ 47} Having overruled Harlan's second assignment of error, but having sustained Harlan's first assignment of error, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, and remand for further proceedings consistent with this decision.

Judgment affirmed in part,
reversed in part, and cause remanded.

BROWN and DORRIAN, JJ., concur