

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

SHANNON M. SWEENEY n.k.a. Ryan,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-05-077
	:	
- vs -	:	<u>OPINION</u>
	:	3/2/2015
	:	
RONALD N. SWEENEY, JR.,	:	
Defendant-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 09 DR 33205

H. Charles Wagner, 424 Patterson Road, Dayton, Ohio 45419, for plaintiff-appellee

Freund, Freeze & Arnold, Matthew D. DiCicco, Fifth Third Center, Suite 1800, 1 South Main Street, Dayton, Ohio 45402, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Ronald N. Sweeney, Jr. (Father), appeals a decision of the Warren County Court of Common Pleas, Domestic Relations Division, finding him in contempt for violating the court's spousal support order, determining certain payments to him from his former employer represented bonuses, and awarding attorney fees to Shannon M. Ryan f.k.a. Sweeney (Mother). For the reasons that follow, we affirm the decision of the trial court as modified below.

{¶ 2} Father and Mother were divorced by decree on October 29, 2010. Pursuant to the terms of the decree, Father was required to pay spousal support in the amount of \$4,725 per month plus "33% of the gross amount of any bonuses he receives at any time while still under an obligation to pay spousal support." In addition, Father was to pay child support for the parties' three minor children in the amount of \$1,500 per month plus 9.125 percent of all bonuses.

{¶ 3} At the time of the divorce, Father was employed as an executive at Cincinnati Bell and made approximately \$258,000 annually. While employed, Cincinnati Bell issued three checks to Father in the following amounts: (1) \$5,831.67; (2) \$50,000; and (3) \$10,000.¹ The check for \$5,831.67 was designated as a "Management Team Incentive Award Bonus" and the other two checks were labeled as a "Special Bonus." Mother never received a percentage of these payments. In June 2012, through no fault of his own, Father was terminated from his position with Cincinnati Bell. As part of his termination, Father received a severance package which included one year's salary. Father promptly informed Mother of his termination with Cincinnati Bell. Father searched for comparable work, but was unable to obtain employment.

{¶ 4} In the fall of 2012, Father was presented with an opportunity to purchase an ownership interest in Coldwell Banker, a real estate brokerage firm, which would allow him to earn an annual salary of \$144,000. In order to purchase the ownership interest, Father used the remainder of his severance, liquidated several other assets, and also borrowed money from his father. Father officially purchased his ownership interest in Coldwell Banker on December 28, 2012.

{¶ 5} Beginning in October 2012 and continuing in 2013, Father's spousal support

1. The check for \$10,000 was issued in January 2011 and the other two checks for \$5,831.67 and \$50,000 were issued in February 2012.

payments became irregular. On March 6, 2013, Father filed a motion requesting a reduction of both his spousal and child support obligations, and an order modifying parenting time. On July 1, 2013, Mother filed a motion for contempt for Father's failure to pay spousal support and child support, a motion for contempt of summer parenting time order, and a motion for attorney fees. On February 12, 2014, the case proceeded to a hearing on the parties' respective motions. At the outset of the hearing, the parties placed on the record an agreed modification of the parties' shared parenting plan and an agreed modification of Father's spousal support and child support obligations. The matter then proceeded to a trial on the remaining issues. At the hearing, Mother, Father, and Dave Heinbach, the Chief Operating Officer (COO) of Cincinnati Bell, testified.

{¶ 6} After hearing the evidence, the magistrate issued a decision finding Father in contempt for failing to timely and fully pay his spousal support. The court also determined that Father failed to pay Mother her portion of the three payments from Cincinnati Bell which represented "bonuses" and that Father was obligated to pay Mother \$25,789.56 to satisfy his support obligations. The court further found that Mother was entitled to an award of attorney fees in the amount of \$500 based on Father's contempt.

{¶ 7} Both parties filed objections to the magistrate's decision. Mother objected to the magistrate's determination of the amount of spousal support owed to her, claiming that the magistrate erroneously stated she was to receive 30 percent of the bonus payments when the divorce decree provided that she was to receive 33 percent of all bonuses for spousal support.² Father objected to the magistrate's decision on the basis that he had a viable defense to the contempt motion, the evidence at the hearing demonstrated that the three payments were supplemental wages, and that an award of attorney fees was improper

2. The magistrate correctly stated that Mother was to receive 9.175 percent of the three payments as child support.

as Mother's counsel failed to comply with the local rules. The trial court overruled Father's objections, sustained Mother's objection, and modified the magistrate's decision to state, "Father shall pay Mother 33% of the three bonus checks." In all other respects, the trial court adopted the magistrate's decision as the order of the court. Father timely appealed, raising three assignments of error for this court's review.

{¶ 8} Assignment of Error No. 1:

{¶ 9} MR. SWEENEY ESTABLISHED A VIABLE DEFENSE TO PLAINTIFF'S CONTEMPT CHARGE.

{¶ 10} Father argues in his first assignment of error that the trial court erred in finding him in contempt. Father contends he demonstrated the defense of impossibility of performance as the involuntary termination of his employment with Cincinnati Bell rendered him unable to fulfill his total spousal support obligation. In addition, Father contends the trial court's decision was contrary to the evidence presented during the hearing, as the evidence demonstrated Father used the remainder of his severance pay to purchase an interest in Coldwell Banker to preserve an income stream so that he could pay comparable support to Mother. We find no merit to Father's arguments.

{¶ 11} "Disobedience to court orders may be punished by contempt." *Cottrell v. Cottrell*, 12th Dist. Warren No. CA2012-10-105, 2013-Ohio-2397, ¶ 11; R.C. 2705.02(A). To support a contempt finding, the moving party must establish by clear and convincing evidence that a valid court order exists, that the offending party had knowledge of the order, and that the offending party violated such order. *Hetterick v. Hetterick*, 12th Dist. Brown No. CA2012-02-002, 2013-Ohio-15, ¶ 35. In reviewing a trial court's finding of contempt, an appellate court will not reverse such a finding absent an abuse of discretion. *Grow v. Grow*, 12th Dist. Butler Nos. CA2010-08-209, CA2010-08-218, and CA2010-11-301, 2012-Ohio-1680, ¶ 73. An abuse of discretion means more than an error of judgment; it implies that the

trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 12} After a review of the record, it is clear that the evidence adduced at the hearing demonstrated that an order existed requiring Father to pay Mother monthly spousal support in the amount of \$4,725, Father was aware of this order, and Father violated the order by failing to timely and fully pay his spousal support obligation. Mother testified that beginning in October 2012, Father's spousal support payments became irregular and were not for the full amount ordered by the court. Father admitted at the hearing that he did fail to make the full spousal support payment starting in October 2012 and continuing into 2013. On this record, we find the trial court did not act unreasonably or arbitrarily in finding Father in contempt for failing to timely and fully pay his spousal support obligation.

{¶ 13} We are unpersuaded by Father's arguments that it was impossible for him to comply with the court order. Although the record indicates Father, at no fault of his own, lost his job in June 2012, the record equally reflects that Father received one year's salary as part of his severance package. Accordingly, and as found by the trial court, Father was capable of complying with the court's support order until approximately June 2013. Father only became unable to make the full spousal payment when he decided to invest his remaining funds from the severance package into the purchase of an ownership interest in Coldwell Banker. Despite Father's good intentions to obtain employment through this business venture and thereby continue to support the family, the fact remains that Father failed to comply with the terms of the decree. Father voluntarily chose to divert funds that could have been used to pay his spousal support obligation.

{¶ 14} On this record, we find the trial court did not abuse its discretion in finding Father in contempt for failing to timely and fully pay spousal support to Mother. Father's first assignment of error is overruled.

{¶ 15} Assignment of Error No. 2:

{¶ 16} THE DETERMINATION THAT PAYMENTS OF WAGES WERE BONUSES WAS CONTRARY TO THE DIRECT TESTIMONY OF MR. SWEENEY'S FORMER EMPLOYER.

{¶ 17} In Father's second assignment of error, he argues the trial court erred in determining that the payments he received for \$50,000 and \$10,000 from Cincinnati Bell constituted bonuses. Father asserts that the evidence presented during the hearing established that these payments represented supplemental wages for the additional job functions he assumed at the request of Heimbach. As such, Father claims the trial court's determination that these payments constituted bonuses that Mother was entitled to receive a percentage of as spousal support and child support was in error and contrary to the evidence.

{¶ 18} Pursuant to R.C. 3105.65(B), a trial court has full power to enforce a divorce decree. "[I]f there is good faith confusion over the interpretation to be given to a particular clause of a divorce decree, the trial court in enforcing that decree has the power to hear the matter, clarify the confusion, and resolve the dispute." *Jewett v. Jewett*, 12th Dist. Warren No. CA2013-11-110, 2014-Ohio-2343, ¶ 11, quoting *Flint v. Flint*, 5th Dist. Delaware No. 11 CAF 11 0102, 2012-Ohio-3379, ¶ 10. An interpretive decision by the trial court is reviewed on appeal for an abuse of discretion. *Id.*; *Keeley v. Keeley*, 12th Dist. Clermont No. CA97-02-013, 1997 WL 411607, *1 (July 21, 1997).

{¶ 19} In the present case, there was a dispute as to what payments qualified as bonuses under the divorce decree. The parties' divorce decree, in pertinent part, states: "[Father] shall be required to pay directly to [Mother] * * * as additional, or 'Level II' spousal support, a sum equal to 33% of the gross amount of any bonuses he receives at any time while still under an obligation to pay spousal support." The decree further provides that

spousal support did not terminate until October 31, 2014. Similarly, Father was required to pay "9.175% of the gross amount of any bonuses" as child support. Mother asserted that pursuant to these provisions in the divorce decree, she was entitled to a percentage of the three payments Father received from Cincinnati Bell. The parties agreed that Father never paid Mother any portion of these three checks.

{¶ 20} At the hearing, Father conceded that the first check for \$5,831.67 did in fact represent a bonus for which Mother was entitled to a percentage as spousal support and child support. Father also does not challenge on appeal the trial court's finding in this regard. As to the remaining two payments, Father contends the trial court erred as these were additional salary payments he received, and therefore Mother was not entitled to any portion of these payments. After a review of the record, we do not find the trial court abused its discretion in finding the \$10,000 and \$50,000 payments represented bonuses within the terms of the divorce decree for which Mother was entitled to a percentage.

{¶ 21} During the hearing, Father testified that the \$50,000 payment represented a "supplemental wage" to compensate him for certain day-to-day responsibilities in his position. Father provided little testimony regarding the \$10,000 payment. Both checks were designated as a "Special Bonus." Father testified that "Special Bonus" was simply a category in the payroll software at the company. Father also provided testimony that he did receive regular, quarterly bonuses, known as Management Team Incentive Award Bonus, during his time at Cincinnati Bell. However, according to Father these bonuses were performance-based and required you to reach certain "metrics" before the bonus was paid. Father further testified that the \$50,000 payment was not a Management Team Incentive Award Bonus.

{¶ 22} Father also presented the testimony from Heinback, Cincinnati Bell's COO, who similarly testified that the \$50,000 payment was neither a Management Team incentive

Award Bonus nor a performance bonus. Heinback explained that the payment was to compensate Father for the additional responsibilities he assumed at the company. According to Heinback, in 2011, he asked Father to take over the management responsibilities of the Small Office/Home Office Sales Group. At the time Father agreed to take on this new responsibility, Heinback stated the method of compensation had not been agreed to, but "effectively the conversation at that point was * * * we'll take care of you, we'll figure it out as we go * * *." Additionally, Heinback explained, that "[a]t the time[,] his boss did not want to give him a salary increase relative to that responsibility because we were unsure of the duration for which he would be serving in that capacity."

{¶ 23} Although there was evidence which arguably supports either position, there is certainly evidence to support the court's decision that the \$50,000 and \$10,000 checks were bonuses. The payments made to Father were one-time, lump sum payments. It is clear that the two payments were in addition to Father's normal salary. Furthermore, as noted by the trial court, the divorce decree did not restrict bonuses to only performance-based bonuses or even Management Team Incentive Award Bonuses. Rather, it is quite clear that Mother was entitled to a percentage of "all bonuses." Based on this record, we conclude the trial court did not abuse its discretion in determining that the two payments represented bonuses. Accordingly, we find Father's second assignment of error is not well-taken and it is therefore overruled.

{¶ 24} However, in resolving Father's assigned error, we discovered that the trial court failed to fully correct the magistrate's decision to reflect Mother's entitlement to 33 percent of the bonuses as spousal support. While the trial court correctly adjusted the percentage of the bonus for spousal support from 30 percent to 33 percent, the trial court failed to thereafter adjust the calculated amount Father owes Mother. Therefore, in order to reflect the correct 33 percent calculation of the bonus for spousal support, we modify the

magistrate's decision, as adopted by the trial court, to state the following:

{¶ 25} Therefore, Father owes Mother the following:

Check #1 [\$5,831.67]:	\$1924.45 in spousal support \$535.06 in child support
Check #2 [\$50,000]:	\$16,500 in spousal support \$4,587.50 in child support
Check #3 [\$10,000]:	\$3,300 in spousal support \$917.50 in child support
Total:	\$27,764.51

{¶ 26} Assignment of Error No. 3:

{¶ 27} THERE IS NO BASIS FOR THE MAGISTRATE'S ATTORNEY FEE AWARD.

{¶ 28} In his third and final assignment of error, Father argues that the trial court erred in awarding Mother attorney fees. Father asserts the attorney fee award was improper as he had a valid defense to Mother's contempt charge and thus should not have been found in contempt. In addition, Father claims the attorney fees award should be reversed as Mother's counsel failed to comply with Loc.R. 3.7 of the Warren County Court of Common Pleas, Division of Domestic Relations Court (Local Rules) when requesting attorney fees.

{¶ 29} An award of attorney fees is within the sound discretion of the trial court. *Casper v. Casper*, 12th Dist. Warren Nos. CA2012-12-128 and CA2012-12-129, 2013-Ohio-4329, ¶ 62. A trial court's decision to award attorney fees will be reversed only if it amounts to an abuse of discretion. *Foppe v. Foppe*, 12th Dist. Warren No. CA2010-06-056, 2011-Ohio-49, ¶ 34.

{¶ 30} For the reasons set forth above in our resolution of Father's first assignment of error, the trial court did not err in finding Father in contempt. Accordingly, we find no merit to Father's argument that the fee award was improper because he was not in contempt. However, Father also argues that the award should be reversed because Mother failed to comply with the court's Local Rule 3.7. Loc.R. 3.7 provides:

- (A) As an alternative to retaining an expert to testify at the final hearing on the issue of reasonableness and necessity of legal services, the party requesting fees may submit an affidavit to opposing counsel setting forth qualifications of the requesting party's attorney, the hourly rate of the attorney; and an itemized statement of the services rendered, with an estimate of the remaining preparation time and time required for attendance to the final hearing. The affidavit must be submitted to opposing counsel at least two days (2) before the final hearing.
- (B) The affidavit should be offered as an exhibit at the final hearing. The responding party may then indicate at the final hearing whether he or she will stipulate to the reasonableness and necessity of the requesting party's attorney fees. If there is no such stipulation, the court, upon request, will schedule a follow-up hearing at which time the issue of attorney fees will be litigated and the requesting party may present expert testimony on the issue of reasonableness and necessity of fees, including those fees incurred in preparing for and attending the follow-up hearing.

Father correctly points out that Mother's attorney failed to file an affidavit. However, as noted by the trial court in overruling Father's objection, under certain circumstances, the local rules do not require an affidavit for attorney fees when there is a finding of contempt. Rather, Loc.R. 3.4(D) states: "Upon a finding of contempt, the court may award a standard attorney fee up to \$500.00. If a higher award is sought, the attorney must request fees as part of the motion and comply with [Loc.R.] 3.7."

{¶ 31} In the present case, as the trial court found Father in contempt for failing to pay spousal support, the trial court was within its discretion to award Mother the standard attorney fee based on this contempt finding. See Loc.R. 3.4(D). Accordingly, we find the trial court did not abuse its discretion in awarding \$500 to Mother in attorney fees. Father's third and final assignment of error is therefore overruled.

{¶ 32} Judgment affirmed as modified.

M. POWELL, P.J., and RINGLAND, J., concur.