[Cite as *Goddard-Ebersole v. Ebersole*, 2009-Ohio-6581.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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JULIE GODDARD-EBERSOLE Plaintiff-Appellee	:	C.A. CASE NO. 23493
vs.	:	T.C. CASE NO. 2004-DR-459
	:	(Civil Appeal from
JOHN M. EBERSOLE Defendant-Appellant	:	Common Pleas Court)

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O P I N I O N

Rendered on the 11th day of December, 2009.

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GRADY, J.:

{¶ 1} Defendant, John Ebersole, appeals from a judgment modifying his spousal support obligation and finding him in contempt for failing to pay his child support and spousal support obligations.

{¶ 2} John Ebersole and Julie Goddard-Ebersole were married

on December 30, 1989, and have three children. John[1] and Julie were divorced by final decree on May 24, 2005. (Dkt. 58.) John was ordered to pay spousal support and child support. On August 30, 2007, John moved to modify his spousal support obligation. (Dkt. 74.) On February 1, 2008, Julie moved to find John in contempt for failing to pay child support or spousal support since December 19, 2007. Hearings on these motions were held before a magistrate on January 4, 2008 and February 11, 2008.

{¶ 3} On March 14, 2008, the magistrate filed a decision that granted John's motion to reduce his monthly spousal support obligation and granted Julie's motion to find John in contempt for failing to pay child support or spousal support since mid-December 2007. The magistrate reduced John's monthly spousal support obligation from $1,400.00 to $1,100.00, effective March 1, 2008, finding that Julie's additional income supports the reduction. (Dkt. 123.) The decision provided that John could purge his contempt by paying Julie $300.00 within 45 days of the filing of the magistrate's decision. John filed objections to the magistrate's decision. (Dkt. 132, 142.) On May 18, 2009, the trial court overruled John's objections and adopted the magistrate's decision. (Dkt. 148.) John filed a timely notice

[1] For clarity and convenience, the parties are identified by their first names.

of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 4} "THE TRIAL COURT ERRED WHEN IT FAILED TO MAKE THE MODIFICATION OF SPOUSAL SUPPORT RETROACTIVE TO THE DATE OF DEFENDANT'S MOTION."

{¶ 5} In reviewing matters concerning support, we apply an abuse of discretion standard. *Draiss v. Draiss* (1990), 70 Ohio App.3d 418, 420, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. "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, 219 (citations omitted).

{¶ 6} The magistrate reduced John's monthly spousal support obligation from $1,400.00 to $1,100.00, and ordered that "[t]he effective date of this reduction shall be March 1, 2008, the first day of the first month following a full hearing on the merits." (Dkt. 123, p. 8.) John argues that the modification of his spousal support obligation should have been made retroactive to August 30, 2007, the date on which he moved to modify spousal support.

{¶ 7} In *Quint v. Lomakoski*, 173 Ohio App.3d 146, 2007-Ohio-4722, at ¶49, we addressed whether a modification of child support should be applied retroactively to the date on which the motion to modify was filed:

{¶ 8} "If a court determines that a support order should be modified, it may make the modification order effective from the date the motion for modification was filed. *Murphy v. Murphy* (1984), 13 Ohio App.3d 388, 389, 469 N.E.2d 564. Indeed, '[a]bsent some special circumstance, an order of a trial court modifying child support should be retroactive to the date such modification was first requested.' *State ex rel. Draiss v. Draiss* (1990), 70 Ohio App.3d 418, 421, 591 N.E.2d 354. Any other holding might produce an inequitable result in view of the substantial time it frequently takes the trial court to dispose of motions to modify child-support obligations. *Murphy*, 13 Ohio App.3d at 389."

{¶ 9} Although *Quint* involved the modification of a child support order rather than a spousal support order, "[i]t is axiomatic that the same rule could apply to spousal support modifications, as the same underlying considerations apply; given the substantial amount of time that it frequently takes to dispose of motions to modify support obligations, whether they are for spousal support or child support, any rule that would preclude retroactive modification would risk producing an inequitable result." *Bowen v. Bowen*, (1999), 132 Ohio App.3d 616, 640. "However, the ability to order retroactive modification and a mandate to make such an order are not the same thing." *Flauto v. Flauto,* Mahoning App. No. 02-CA-12, 2002-Ohio-6430, at ¶32,

citing *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 640.

{¶ 10} The trial court made the modification of spousal support retroactive to March 1, 2008, rather than August 30, 2007. The trial court gave no reason for choosing the March 1, 2008 date. The trial court's selection of March 1, 2008, may have been out of a concern that the selection of the earlier date of August 30, 2007, when John's motion was filed, would have been inequitable, given John's undisputed failure to pay his child support and spousal support obligations since December 1, 2007. But that would be nothing more than speculation on our part inasmuch as the trial court stated no reason for its selection of March 1, 2008. Because the March 1, 2008, date "fails to coincide with any significant event in this litigation, we believe the trial court abused its discretion by arbitrarily assigning this date as the terminus for retroactive application of the modified support order." *Draiss*, 70 Ohio App.3d at 421.

{¶ 11} The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

{¶ 12} "THE TRIAL COURT ERRED BY HOLDING THE DEFENDANT IN CONTEMPT FOR FAILURE TO PAY SPOUSAL SUPPORT WHEN IT FAILED TO CONSIDER DEFENDANT'S ABILITY TO PAY DURING THE RELEVANT PERIOD."

{¶ 13} "An appellate court will not reverse a finding of contempt by a trial court unless that court abused its discretion."

Waggoner v. Waggoner, 2003-Ohio-4719, at ¶47, citing *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11.

{¶ 14} John concedes that beginning in December 2007 he failed to comply with the trial court's order to pay child support and spousal support. Pursuant to R.C. 2705.02(A), a person may be punished for contempt if he is guilty of "[d]isobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer." Failure to pay court-ordered spousal support is classified as a civil contempt. *Fisher v. Fisher*, Fairfield App. No. 2008 CA 00049, 2009-Ohio-4739, at ¶48, citing *Pugh v. Pugh* (1984), 15 Ohio St.3d 136, 139-40. "Because the nature of the contempt is civil, 'willful disobedience' (i.e.intent) is not a necessary element." Id.

{¶ 15} John argues that his failure to pay child support and spousal support should be excused because he did not have sufficient money to pay the ordered support, rendering his compliance with the court order impossible. "Impossibility to comply with a court order is a valid defense to an accusation of contempt. . . . Of course, it is no defense if the accused brings the inability upon himself." *Neff v. Neff* (Feb. 13, 1989), Montgomery App. No. 11058 (citations omitted). The alleged contemnor has the burden of proof in establishing the affirmative defense of impossibility. *Tippie v. Patnik*, Geauga App. No. 2005-G-2665, 2006-Ohio-6532, at ¶46

(citation omitted).

{¶ 16} John's claim arose from his purchase of the law firm that employed him, which imposed substantial financial obligations on him in the several months following the purchase. The magistrate did not specifically address John's impossibility defense in the section of the decision regarding contempt. (Dkt. 123, p. 8.) However, the magistrate did address, on pages 6-7 of his decision, evidence relating to John's income during 2007, which is relevant to John's impossibility defense. In particular, the magistrate found that:

{¶ 17} "From the bank records admitted into evidence, defendant has a steady stream of revenue into his personal checking and/or savings accounts . . . .

{¶ 18} "Evidence submitted supports the proposition that the firm's revenue will continue at or above current rates. . . .

{¶ 19} "From the evidence presented, this magistrate finds that while defendant has assumed additional short term debt since he purchased the law firm in 2007, the revenues for the firm have increased over the prior years. The fee structure for employees has not been altered. This magistrate finds that the firm's revenues have increase[d] over the past year and that there is no sign that the revenues will decrease or that expenses will increase." (Dkt. 123, p. 6-7.)

{¶ 20} The magistrate's findings regarding John's income are supported by the record. But John argues that any savings or income he had during the period he did not pay child support and spousal support was used to meet his employer's payroll and end of year tax obligations. According to John, this precludes a finding that his non-compliance with the court order was willful and establishes the defense of impossibility.

{¶ 21} We do not agree. A finding of willfulness is not required for a finding of contempt. *Fisher*, supra. Further, although John may have been in a difficult situation because of his decision to purchase a law practice, which he hopes will result in consistent income that will be used to pay child support and spousal support on a going forward basis, this difficult situation appears to at least be partially of his own making. Therefore, John has not proven the affirmative defense of impossibility.

{¶ 22} Finally, John argues that had the trial court made the reduction in his spousal support obligation retroactive to the date on which he filed his motion to modify, he would not have been in arrears and the finding of contempt would not be supported by the record. He cites Exhibit I from the February 11, 2008, hearing as support for his argument. Exhibit I shows a total arrearage of $3,466.52, which is well in excess of the amount for which John would receive credit had the $300.00 per month reduction

in spousal support been made retroactive to August 30, 2007. Therefore, the trial court did not abuse its discretion in finding John in contempt for failing to pay his child support and spousal support obligations since mid-December 2007.

{¶ 23} The second assignment of error is overruled. The judgment of the trial court will be affirmed in part and reversed in part, and the cause will be remanded for further proceedings consistent with this opinion.

FAIN, J. and FROELICH, J., concur.

Copies mailed to:

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