

[Cite as *Mackey v. Mackey*, 2010-Ohio-1332.]

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

SHERRY MACKEY

Plaintiff-Appellee

-vs-

RICHARD MACKEY

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2009 CA 00149

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common  
Pleas, Domestic Relations Division, Case  
No. 2006 DR 01390

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

March 29, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Wise, J.*

{¶1} Appellant Richard Mackey appeals from the decision of the Stark County Court of Common Pleas, Domestic Relations Division, which found appellant in contempt of court subsequent to a divorce between appellant and Appellee Sherry Mackey. The relevant facts leading to this appeal are as follows.

{¶2} Appellant and appellee were married on June 13, 1989. They had two children together, both of whom are now emancipated.

{¶3} Appellee filed a complaint for divorce on November 3, 2006. Appellant filed an answer and counterclaim on November 21, 2006.

{¶4} On November 27, 2006, a family court magistrate issued temporary orders, directing appellant, among other things, to pay appellee \$525.00 per month in temporary spousal support and to pay the mortgage, utilities, and telephone bills.

{¶5} On October 18, 2007, the case proceeded to an evidentiary hearing before another family court magistrate. The magistrate issued her decision on November 15, 2007.

{¶6} Both sides thereafter filed objections to the magistrate's decision. The objections were heard before the trial court judge on February 11, 2008. All objections were overruled by the court.

{¶7} The trial court issued a final decree of divorce on March 10, 2008, incorporating the decision of the magistrate. The court thus ordered, inter alia, that appellant was to pay spousal support to appellee, commencing November 1, 2007, in the amount of \$1,300.00 per month for seventy-two months, or until the death of either party or remarriage by appellee. "All support" was ordered to be paid through the Stark

County CSEA by wage withholding. Decision at paragraph 6. For additional spousal support, appellant was ordered to pay \$3,100.00 in attorney fees to appellee. The court also ordered as follows: “Within thirty (30) days of the final entry being filed, [Appellant] is ordered to repair the Ford Taurus to a safe and good working condition, or pay for the repairs to be done, and to turn this vehicle over to the [Appellee]. These repairs shall include, but are not limited to, the repair or replacement of the side view mirrors and four new tires.” Decision at paragraph 9.<sup>1</sup>

{¶8} On November 20, 2008, appellee filed a motion to show cause, alleging, inter alia, that appellant had failed to pay court-ordered attorney fees and spousal support, and had failed to complete the aforementioned repairs on the Ford Taurus and transfer title thereon. On February 24, 2009, the court found appellant guilty of willful contempt on the issue of failure to pay attorney fees. Sentencing and additional evidence on the remaining contempt issues (failure to pay spousal support and failure to repair the Ford Taurus) were set for an additional hearing on May 18, 2009.

{¶9} On May 19, 2009, the court found appellant had purged the contempt finding regarding attorney fees, but otherwise ruled as follows:

{¶10} “As to the remaining issues, the court does find that the defendant is GUILTY of WILLFUL CONTEMPT as alleged specifically in Paragraphs 4 and 5 in the 11-19-8 Affidavit of Sherry L. Mackey.

{¶11} “Richard Mackey is sentenced to the Stark County Jail for 30 days and fined \$250 + costs. Richard Mackey shall report to the jail on July 1, 2009 @ 9am and he’ll be released on July 30, 2009 @ 6pm.

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<sup>1</sup> The Taurus had recently been damaged in an accident involving the parties’ son.

{¶12} “The court will consider deferring this sentence or purging the contempt if prior to the Jail report date the defendant:

{¶13} “1. Pays the arrears of \$5,672.47 reflected on the plaintiff’s exhibit 1;

{¶14} “2. Pays partial attorney fees to Atty. Simpson of \$1,500; and

{¶15} “3. Pays the costs of this action;

{¶16} “4. Pays \$200 to the plaintiff for the scrap value of the Taurus.” Judgment Entry at 1.

{¶17} On June 16, 2009, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶18} “I. THE TRIAL COURT’S DECISION THAT PAYMENTS MADE DIRECTLY TO THE SPOUSE WERE A GIFT AND THEREFORE DID NOT REDUCE APPELLANT’S SPOUSAL SUPPORT OBLIGATION WAS CONTRARY TO LAW, CONSTITUTED AN ABUSE OF DISCRETION BY THE TRIAL COURT, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶19} “II. THE TRIAL COURT’S FINDING THAT APPELLANT WAS IN CONTEMPT OF COURT WITH REGARD TO THE FORD TAURUS CONSTITUTED AN ABUSE OF DISCRETION AS LATER EVENTS RENDERED THE COURT’S ORDER MOOT SINCE THE CAR BECAME INOPERABLE FOR UNRELATED REASONS AND WORTH LESS THAN THE COST OF REPAIRS.

{¶20} “III. THE TRIAL COURT’S FAILURE TO RULE ON APPELLANT’S MOTION FOR STAY PENDING APPEAL CONSTITUTES AN ABUSE OF DISCRETION AS A VALID COURT ORDER CURRENTLY REQUIRES APPELLANT TO SERVE THIRTY DAYS IN JAIL COMMENCING JULY, 2009 AND A WARRANT

FOR HIS ARREST COULD ISSUE FOR HIS FAILURE TO APPEAR DESPITE THE FACT THAT HIS APPEAL COTAINS (SIC) VIABLE QUESTIONS OF LAW AND FACT.”

I.

{¶21} In his First Assignment of Error, appellant contends the trial court abused its discretion in finding that certain direct payments made by appellant to appellee did not constitute spousal support payments applicable to the arrearage owed. We disagree.

{¶22} A trial court's decision concerning spousal support may only be altered if it constitutes an abuse of discretion. See *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83. Likewise, a trial court's ruling on spousal support arrearages is reviewed under an abuse of discretion standard. See, e.g., *Stychno v. Stychno*, Trumbull App.No. 2002-T-0083. 2003-Ohio-3064. An 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, 450 N.E.2d 1140.

{¶23} In the case sub judice, the court found that appellant owed spousal support arrearages in the amount of \$5,672.47, as reflected on appellee's hearing exhibit 1 (as of April 30, 2009). Judgment Entry, May 19, 2009, at 2. Appellant herein specifically challenges the court's decision not to credit to said arrearages the payments appellant made for the mortgage (totaling \$2,566.90), utilities (totaling \$536.86), and spousal support (totaling \$2,625.00), all of which were paid directly and not through the Stark County CSEA. Appellant points out that none of these amounts were disputed by appellee. See Tr. May 18, 2009, at 18-20, 26-27.

{¶24} Appellant directs us to R.C. 3121.45, which states as follows:

{¶25} “Any payment of money by the person responsible for the support payments under a support order to the person entitled to receive the support payments that is not made to the office of child support, or to the child support enforcement agency administering the support order under sections 3125.27 to 3125.30 of the Revised Code, shall not be considered a payment of support under the support order and, unless the payment is made to discharge an obligation other than support, shall be deemed to be a gift.”

{¶26} Appellant argues that the aforesaid statute encompasses child support only, and therefore direct spousal support payments need not be classified as “gifts.” Our review of some of the pertinent statutes suggests that both spousal support and child support are encompassed by the “gift” rule set forth in R.C. 3121.45, supra. For example, we note R.C. 3121.01 provides several definitions for Chapter 3121.; “court support order,” by cross-reference to R.C. 3119.01(C)(3), includes the support of a spouse or former spouse. We further note that “child support order” is separately defined under R.C. 3119.01(B)(2).

{¶27} In addition, the General Assembly has authorized the direct payment of spousal support in certain circumstances, subject to the trial court’s discretion. See R.C. 3121.441(A). Nonetheless, because in this instance the magistrate’s divorce decision, which was ultimately adopted by the trial court, clearly mandates that “[a]ll support herein, including the processing fees, shall be paid through the Child Support Enforcement Agency by wage withholding,” (Decision, November 15, 2007, at paragraph 6), we find it is not necessary to further explore the statutory question in the

present appeal.<sup>2</sup> Appellant testified at the contempt hearing that the direct temporary spousal support, mortgage, and utility payments in question were all made after the aforesaid magistrate's divorce decision. See Tr. at 26-27. We are aware of no clear authority in Ohio that would require a trial court to credit direct spousal support payments under a temporary order in these circumstances. Furthermore, as the trial judge accurately recognized on the record, the mortgage and utility payment obligations were not specifically set forth as spousal support in the original 2006 temporary orders. *Id.* at 7.

{¶28} Accordingly, we are unable to conclude the trial court's refusal to credit to appellant his various direct payments rose to the level of an abuse of discretion.

{¶29} Appellant's First Assignment of Error is overruled.

## II.

{¶30} In his Second Assignment of Error, appellant contends the trial court abused its discretion in finding him in contempt regarding the issue of repairing the Ford Taurus automobile. We disagree.

{¶31} Ohio courts have defined contempt of court as "conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815, paragraph one of the syllabus. Our standard of review regarding a finding of contempt is limited to a determination of whether the

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<sup>2</sup> Furthermore, we are wary of establishing precedent which might hinder the ability of domestic relations judges to fashion spousal support orders in the form of direct mortgage payments and the like. See, e.g., *Simonetti v. Simonetti*, Delaware App.No. 04CAF05039, 2004-Ohio-6754, ¶ 41; R.C. 3121.441(A), *supra*.

trial court abused its discretion. *Wadian v. Wadian*, Stark App.No. 2007CA00125, 2008-Ohio-5009, ¶ 12, citing *In re Mittas* (Aug. 6, 1994), Stark App.No.1994 CA 00053.

{¶32} At the evidentiary hearing on the objections, appellant presented evidence that the damage to the vehicle was discovered to be more extensive than initially apparent. Nonetheless, appellant's own testimony and that of his witness, Lloyd Dietz of Massillon Auto Salvage, established that appellant, in violation of the court's orders, failed to put four new tires on the Taurus, failed to bring the vehicle to good working condition, and further failed to transfer title to appellee. Tr., May 18, 2009, at 42-43, 53-54. Appellant points out that despite the contempt finding, the trial court reached the conclusion that the car ultimately only had a scrap value of \$200.00. See Judgment Entry at 1. Nonetheless, even though the vehicle in question had depreciated significantly as the case progressed, although through no fault of appellee, we hold appellant has not established the existence of an abuse of discretion in the trial court's contempt finding under the circumstances presented.

{¶33} Appellant's Second Assignment of Error is overruled.

### III.

{¶34} In his Third Assignment of Error, appellant contends the trial court abused its discretion in failing to rule on his request for a stay pending appeal. We disagree.

{¶35} App.R. 7(A) states in pertinent part: "Application for a stay of the judgment or order of a trial court pending appeal \*\*\* must ordinarily be made in the first instance in the trial court. A motion for such relief \*\*\* may be made to the court of appeals or to a judge thereof, but, except in cases of injunction pending appeal, the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial

court has, by journal entry, denied an application or failed to afford the relief which the applicant requested. \*\*\*.”

{¶36} We note that a party seeking a stay pending appeal is not required under App.R. 7(A) to file such a motion with this Court upon denial by the trial court; however, in this instance the trial court never ruled on the stay request at all. Nonetheless, if we were to sustain this assigned error, our only theoretical remedy would be to remand with directions to the trial court to issue a stay. However, at that point, the stay would be moot, as the appeal at this level would be complete, assuming neither side were to file a motion to reconsider under App.R. 26(A). As such, we are unconvinced that appellant has demonstrated prejudicial error as to the trial court's failure to rule on the stay under the circumstances of this case.

{¶37} Appellant's Third Assignment of Error is overruled.

{¶38} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Stark County, Ohio, is affirmed.

By: Wise, J.

Farmer, J., concurs.

Hoffman, P. J., concurs in part and dissents in part.

/S/ JOHN W. WISE

/S/ SHEILA G. FARMER

JUDGES

*Hoffman, P.J., concurring in part and dissenting in part*

{¶39} I concur in the majority's analysis and disposition of Appellant's second and third assignments of error.

{¶40} However, I respectfully dissent from the majority's disposition of Appellant's first assignment of error. My reasons follow.

{¶41} Civ.R. 53(D)(4)(e) provides:

{¶42} "(i) *Judgment*. The court may enter a judgment either during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered."

{¶43} The majority finds no abuse of discretion in the trial court's refusal to credit Appellant with the direct payments he made to Appellee, following the issuance of the magistrate's decision, but prior to the trial court's ruling on his objections thereto. The majority bases its conclusion on the fact the magistrate's decision clearly ordered Appellant to pay all support through CSEA, and such decision was ultimately adopted by the trial court.

{¶44} The Magistrate's Decision was issued on November 15, 2007. The trial court entered judgment on the same day. When Appellant subsequently filed his objections to the magistrate's decision, such filing operated as an automatic stay of execution of the judgment. Accordingly, the magistrate's decision was not in effect.

Rather, the temporary orders remained in effect. Although Appellant was required to pay spousal support, mortgage payments, and utilities under the temporary orders, the temporary orders did not indicate such items were to be paid through CSEA. The record reveals Appellant had been paying the amounts due directly to Appellee. Because Appellant paid these amounts pursuant to the temporary orders, I believe the trial court erred in finding him in contempt as to this prong of the contempt motion and considering the direct payments a gift.

{¶45} Accordingly, I would sustain Appellant's first assignment of error.

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HON. WILLIAM B. HOFFMAN

