

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

YAMANI GUNAWARDENA

Plaintiff-Appellee/Cross-Appellant

-VS-

SHAMANTHA GUNAWARDENA

Defendant-Appellant/Cross-Appellee

JUDGES:

Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Patricia A. Delaney, J.

Case No. 14 CAF 06 0035

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court
of Common Pleas, Domestic Relations
Division, Case No. 11 DR A 060356

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

June 24, 2015

APPEARANCES:

For Plaintiff-Appellee/Cross-Appellant:

For Defendant-Appellant/Cross-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant/Cross-Appellee Shamantha Gunawardena appeals the May 12, 2014 judgment entry of the Delaware County Court of Common Pleas, Domestic Relations Division. Plaintiff-Appellee/Cross-Appellant Yamani Gunawardena filed a cross-appeal of the May 12, 2014 judgment entry.

FACTS AND PROCEDURAL HISTORY

{¶2} Plaintiff-Appellee/Cross-Appellant Yamani Gunawardena ("Wife") filed a complaint for divorce on June 28, 2011. Defendant-Appellant/Cross-Appellee Shamantha Gunawardena ("Husband") filed an answer and counterclaim on July 29, 2011.

{¶3} A hearing was held on June 21, 2012, wherein Husband and Wife reached an agreement on spousal support, some property, and debt issues. The parties went on the record and presented the agreement to the trial court. Another hearing was held on September 28, 2012. A magistrate's decision was filed on October 5, 2012. Relevant to this appeal, the October 5, 2012 magistrate's decision stated Wife was awarded all the Ethan Allen furniture. Husband was order to pay Wife for a couch that was sold. There was no further mention of the allocation or award of marital property.

{¶4} On October 19, 2012, Wife filed objections to the October 5, 2012 magistrate's decision. Wife objected that the magistrate's decision did not allocate or award all of the marital property. She stated the decision provided that Wife be awarded all the Ethan Allen furniture; however, the trial court did not allocate or award the remaining disputed items of furniture, appliances, or personal property. Wife also filed

an extension of time to supplement her objection to allow time for the preparation of the transcript.

{¶5} On October 23, 2012, the trial court filed an "Agreed Judgment Entry/Decree Regarding Rights and Obligations to be Effective Immediately and also Included into Final Decree of Divorce." The agreed judgment entry stated,

The matter came on for the first of these hearing dates on June 21st of June, 2012 and the parties indicated to the court (in two occasions, under oath and on the record,[]) that they had reached agreements and settlements on differing issues, which they wanted to become part of the Order of this court in the final Order of divorce. The parties also indicated that the rights and obligations they agreed to on June 21st, 2012 were to be immediately binding on them and would go into effect as per their agreed terms. All terms of the agreements reached and agreed to under oath, by the parties on June 21st, 2012 have been set forth in this Agreed Judgment/Entry Decree by agreement of the parties, and the parties ask that the Court approve this Agreed Judgment Entry Decree making the terms an Order of the court.

The Agreed Judgment Decree addressed marital property and debt: "The Court finds that, excepting the division of marital furniture and other personal belongings (which issue is reserved for final trial herein) the parties have entered into an agreement providing for, allocation of their marital assets [and] * * * marital debts." Wife was awarded the marital home. The Agreed Judgment Decree ordered Husband, "to participate in and immediately execute, and immediately return any documents

necessary for [Wife] to refinance the indebtedness on this property. 'Participation' shall include appearing at any closings."

{¶6} A Shared Parenting Decree was also filed on October 23, 2012. Relevant to this appeal, it stated:

XXIV. PASSPORTS/RECORDS

Both parents shall have access to records of the children, including but not limited to birth certificates, passports, all documents. The parents will immediately cooperate and obtain new one(s) at any time necessary due to loss, expiration, etc. They shall also comply with providing written consent letters to travel with the children upon request.

{¶7} Wife filed supplemental objections to the October 5, 2012 magistrate's decision on November 28, 2012. Wife reiterated her objection to the failure of the magistrate's decision to allocate or award marital furniture and personal belongings. Wife argued evidence of marital property was presented at the September 28, 2012 hearing.

{¶8} On January 29, 2013, Wife gave notice of dismissal of her objections to the October 5, 2012 magistrate's decision. She noted there were no pending objections filed by Husband.

{¶9} On March 14, 2013, Husband filed a "Memorandum Concerning Order." In the memorandum, Husband proposed two options to resolving the distribution of the tangible personal property. Wife responded to the memorandum, arguing that Wife had attempted to resolve the personal property issues with Husband to no avail.

{¶10} Wife filed a Notice of Intent to Exercise Extended Parenting Time on May 9, 2013. Wife stated that she intended to take the parties' three children to Sri Lanka from June 25, 2013 to July 14, 2013. In order for the children to travel internationally, Husband was required to sign a travel letter and a form that would allow Wife to apply for a U.S. passport for one of the children.

{¶11} On June 6, 2013, Wife filed a "Motion for Orders, Pursuant to Ohio Civil Rule 70." Wife was awarded the marital home pursuant to the October 23, 2012 Agreed Judgment Decree. In her Civ.R. 70 motion, Wife stated she was attempting to refinance the home equity line of credit ("HELOC") on the marital home with PNC Bank. She had locked in an interest rate of 3.49% that expired on May 31, 2013. The original amount owed on the HELOC was \$80,989.21. In order to obtain refinancing of the HELOC, Husband was required to sign paperwork waiving his dower rights. The October 23, 2015 Agreed Judgment Decree ordered Husband to participate in, immediately execute, and immediately return any documents necessary for Wife to refinance the indebtedness on the marital home. Wife, counsel for Wife, and the PNC Bank representative contacted Husband to arrange a time for him to sign the paperwork releasing his dower rights. Husband refused to sign the paperwork before May 31, 2013 and the locked-in rate expired. Wife requested the trial court find Husband in contempt and award her damages and attorney's fees.

{¶12} On June 7, 2013, Wife filed a motion for contempt against Husband for his failure to execute a travel letter so Wife could travel internationally with the children on June 25, 2013.

{¶13} On July 30, 2013, the trial court filed the Final Decree of Divorce. The Final Decree incorporated the October 23, 2012 Agreed Judgment Decree and the Shared Parenting Decree. As to the disputed personal property, the Final Divorce Decree stated:

Excepting any property and debt division set forth in this ORDER the parties settled all other matters of property and debt per their Agreed Judgment Entry/Decree from the June proceedings herein. This included personal property * * * as well as property settlement payments between the parties.

The Decree also awarded the Ethan Allen furniture to Wife and Husband was required to pay Wife \$1145 for the couch that was sold.

{¶14} Neither Husband nor Wife appealed the July 30, 2013 Final Divorce Decree.

{¶15} After the filing of the Final Decree, Wife refinanced the HELOC on the marital home without requiring Husband's release of his dower rights. The interest rate for the HELOC was 4.99%.

{¶16} Wife filed a motion for order awarding attorney's fees, costs, and expenses on August 13, 2013.

{¶17} Wife filed a motion for reallocation of parental rights and responsibilities on September 27, 2013.

{¶18} Husband filed a "Memorandum Concerning Status of Case" on March 18, 2014. In the memorandum (which the trial court appears to convert to a motion), Husband argued the trial court failed to address items of tangible personal property in

the Final Decree. On March 24, 2014, Husband filed a motion requesting the trial court address the distribution of items of tangible personal property.

{¶19} A hearing on the pending motions was held on April 30 and May 2, 2014.

{¶20} On May 12, 2014, the trial court issued its judgment entry on the pending motions. Relevant to this appeal, the trial court first found the actions or inactions of Husband led to Wife incurring a higher interest rate on the refinancing of the HELOC. The original interest rate was 3.49% and the interest rate Wife obtained after the Final Decree was 4.99%. The trial court found Husband was responsible for the 1.5% increase. The trial court ordered Wife to provide Husband a monthly breakdown showing the additional 1.5% paid in interest on the original \$80,989.21 line of credit. Husband was to reimburse Wife for the 1.5% amount for as long as the HELOC remained open. The trial court also ordered Husband to reimburse Wife for attorney's fees in the amount of \$3,442.50. The trial court next granted Wife's motion for contempt regarding Husband's failure to sign the travel letter. Husband was required to pay Wife \$2,422.50 for attorney's fees incurred to resolve the travel issues. Finally, the trial court denied Husband's motion to distribute the tangible personal property. The trial court found Husband waived the issue because Husband failed to appeal Final Decree and did not file a proper Civ.R. 60(B) motion for relief from judgment.

{¶21} It is from this decision Husband and Wife now appeal.

APPELLANT'S ASSIGNMENTS OF ERROR

{¶22} Husband raises four Assignments of Error:

{¶23} "I. THE COURT ERRED IN CONCLUDING THAT THE ACTIONS AND/OR INACTIONS OF THE DEFENDANT-APPELLANT LEAD TO PLAINTIFF-

APPELLEE INCURRING A HIGHER INTEREST RATE UPON HER DECISION TO REFINANCE THE LINE OF CREDIT ON THE FORMER MARITAL HOME.

{¶24} "II. THE COURT ERRED IN CONCLUDING THAT THE ACTIONS OR INACTIONS OF THE DEFENDANT/APPELLANT IN THIS CASE CREATED ANY COGNIZABLE LOSS AS TO THE REFINANCE AS OUTLINED IN THE COURT'S JUDGMENT ENTRY.

{¶25} "III. THE COURT ERRED IN CONCLUDING THAT THE DEFENDANT-APPELLANT DID NOT COOPERATE TO ALLOW THE PLAINTIFF-APPELLEE TO TRAVEL WITH THE CHILDREN TO SRI LANKA.

{¶26} "IV. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT-APPELLANT TO PRESENT EVIDENCE ON HIS MOTION FOR THE DIVISION OF CERTAIN TANGIBLE PERSONAL PROPERTY IN THIS CASE INASMUCH AS THE COURT DID NOT DIVIDE OR ADDRESS ALL OF THE PROPERTY OF THE PARTIES."

CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

{¶27} Wife raises one Cross-Assignment of Error:

{¶28} "IN RELATION TO THE ORDER THAT DEFENDANT [SIC] - APPELLANT REIMBURSE PLAINTIFF FOR HER ADDITIONAL [SIC] 1.5% INTEREST CHARGE, CAUSED BY DEFENDANT-APPELLANT'S FAILURE TO FOLLOW A COURT ORDER, THE COURT ERRED IN NOT MAKING THE OBLIGATION OF DEFENDANT-APPELLANT EFFECTIVE AS OF OCTOBER 16, 2013 AND IN LIMITING DEFENDANT-APPELLANT'S OBLIGATION TO EXCESS INTEREST ONLY ON \$80,989.21."

ANALYSIS***Husband's Assignments of Error*****I. and II.**

{¶29} We consider Husband's first and second Assignments of Error together because they concern the trial court's decision to order Husband to reimburse Wife for the 1.5% difference in the interest rate between Wife's first and second HELOC application. Husband argues the trial court erred in finding that his actions or inactions led to Wife incurring a higher interest rate when she refinanced the HELOC on the marital home. We disagree.

{¶30} Wife initially raised her issues with Husband and the HELOC pursuant to a motion for orders pursuant to Civ.R. 70. Civ.R. 70 states:

If a judgment directs a party to execute a conveyance of land, to transfer title or possession of personal property, to deliver deeds or other documents, or to perform any other specific act, and the party fails to comply within the time specified, the court may, where necessary, direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within this state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it

in others, and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution upon application to the clerk.

Under Civ.R. 70, the trial court may adjudge the party in contempt. In its May 12, 2014 judgment entry, the trial court considered Wife's Civ.R. 70 motion and found the actions or inactions of Husband led to Wife incurring a higher interest rate on the HELOC. The trial court ordered Husband to reimburse Wife for the additional 1.5% paid in interest on the HELOC. Accordingly, the trial court found Husband in contempt and we will review Husband's arguments as such.

{¶31} A trial court's decision regarding contempt will not be reversed absent an abuse of discretion. *Beltz v. Beltz*, 5th Dist. Stark Nos. 2005CA00193, 2005CA09194, 2006–Ohio–1144. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶32} “Civil contempt is defined as that which exists in failing to do something ordered to be done by the court in a civil action for the benefit of the opposing party therein.” *McKinney v. McKinney*, 5th Dist. Stark No. 2014CA00118, 2015-Ohio-1114, ¶¶ 11-12 quoting *Beach v. Beach*, 99 Ohio App. 428, 431, 130 N.E.2d 164 (1955). “It is irrelevant that the transgressing party does not intend to violate the court order.” *Pedone v. Pedone*, 11 Ohio App.3d 164, 165, 463 N.E.2d 656 (8th Dist.1983). “If the dictates of the judicial decree are not followed, a contempt citation will result.” *Id.*

{¶33} On October 23, 2012, the trial court filed an "Agreed Judgment Entry/Decree Regarding Rights and Obligations to be Effective Immediately and also Included into Final Decree of Divorce." The Agreed Judgment Decree stated,

The matter came on for the first of these hearing dates on June 21st of June, 2012 and the parties indicated to the court (in two occasions, under oath and on the record,[]) that they had reached agreements and settlements on differing issues, which they wanted to become part of the Order of this court in the final Order of divorce. The parties also indicated that the rights and obligations they agreed to on June 21st, 2012 were to be immediately binding on them and would go into effect as per their agreed terms. All terms of the agreements reached and agreed to under oath, by the parties on June 21st, 2012 have been set forth in this Agreed Judgment/Entry Decree by agreement of the parties, and the parties ask that the Court approve this Agreed Judgment Entry Decree making the terms an Order of the court.

The Agreed Judgment Decree addressed martial property and debt: "The Court finds that, excepting the division of marital furniture and other personal belongings (which issue is reserved for final trial herein) the parties have entered into an agreement providing for, allocation of their marital assets [and] * * * marital debts." Wife was awarded the marital home. The Agreed Judgment Decree ordered Husband, "to participate in and immediately execute, and immediately return any documents necessary for [Wife] to refinance the indebtedness on this property. 'Participation' shall include appearing at any closings."

{¶34} The evidence at the hearing demonstrated Wife applied to refinance the HELOC on the marital home with PNC Bank. PNC Bank locked in an interest rate of 3.49%, but the rate expired on May 31, 2013. The HELOC was to be in Wife's name, but because the parties' divorce was not final, Wife required Husband to release his dower rights. Wife contacted Husband in early May 2013 to obtain his signature on the forms releasing his dower rights. A PNC Bank employee contacted Husband on May 14, 2013, May 20, 2013, and May 21, 2013 to coordinate a convenient time for Husband to sign the forms releasing his dower rights. Wife sent a letter to Husband's counsel on May 22, 2013 requesting Husband sign the forms to release his dower rights. On May 31, 2013, Husband sent a detailed email to the PNC Bank employee explaining why he would not sign the forms to release his dower rights. The rate lock expired on May 31, 2013.

{¶35} Wife refinanced the HELOC on October 16, 2013. The HELOC was refinanced without Husband's release of dower rights because it was entered into after the Final Decree. Wife obtained an interest rate of 4.99% on the HELOC.

{¶36} Husband argues there was no evidence that Husbands' actions or inactions caused Wife to obtain a higher interest rate when she refinanced the HELOC or suffered any cognizable financial loss. We have reviewed the evidence and find that pursuant to the October 23, 2012 Agreed Judgment Decree, Husband was obligated to "to participate in and immediately execute, and immediately return any documents necessary for [Wife] to refinance the indebtedness on this property. 'Participation' shall include appearing at any closings." The evidence shows that as to the refinancing of the HELOC, Husband did not immediately execute and return documents necessary for

Wife to refinance the indebtedness on the marital home. Husband's May 31, 2013 emailed response to the PNC Bank employee as to why he would not sign the forms to release his dower rights documented Husband's direct contravention of his obligations under the October 23, 2012 Agreed Judgment Decree.

{¶37} Husband's first and second Assignments of Error are overruled.

III.

{¶38} Husband argues in his third Assignment of Error that the trial court erred when it found that Husband did not cooperate to allow the children to travel to Sri Lanka with Wife. We disagree.

{¶39} Wife argued Husband delayed in providing Wife with a travel authorization letter for the children and signing a form to allow one child to obtain a passport. Because of Husband's delays, Wife retained an attorney who specialized in international divorces to assist her with obtaining the travel papers from Husband. Husband eventually cooperated and Wife was able to timely travel with the children.

{¶40} The trial court found Husband violated the October 23, 2012 Shared Parenting Decree as to cooperation with the children's passports and records. The trial court found that Husband's lack of cooperation resulted in Wife incurring additional attorney fees. The trial court ordered Husband to reimburse Wife for \$2,422.50 in attorney's fees.

{¶41} Wife originally raised the issue as a motion for contempt, but also filed a motion for attorney's fees pursuant to R.C. 3105.73(B). The trial court considered the motion pursuant to R.C. 3105.73(B). R.C. 3105.73(B) states as follows:

In any post-decree motion or proceeding that arises out of an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that motion or proceeding, the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets.

{¶42} An award of attorney's fees lies within the sound discretion of the trial court. *Rand v. Rand*, 18 Ohio St.3d 356, 481 N.E.2d 609 (1985). A court's decision on a request for attorney fees will not be reversed absent an attitude that is unreasonable, arbitrary, or unconscionable. *Dunbar v. Dunbar*, 68 Ohio St.3d 369, 371, 1994-Ohio-509, 627 N.E.2d 532.

{¶43} The evidence presented shows that Husband signed the forms to allow the children to travel internationally with Wife, but Husband only did so after Wife retained an attorney to assist her with the process. The October 23, 2012 Shared Parenting Decree ordered Husband and Wife to immediately cooperate if a child required a new passport. The record shows that Husband did not immediately cooperate.

{¶44} The trial court did not abuse its discretion when it awarded Wife attorney's fees.

{¶45} Husband's third Assignment of Error is overruled.

IV.

{¶46} Husband argues in his fourth Assignment of Error that the trial court erred in refusing to consider his motion to divide the parties' tangible personal property and disposing of all items of personal property.

{¶47} A hearing was held on June 21, 2012, wherein Husband and Wife reached an agreement on spousal support, some property, and debt issues. The parties went on the record and presented the agreement to the trial court. A magistrate's decision was filed on October 5, 2012. Relevant to this appeal, the October 5, 2012 magistrate's decision stated Wife was awarded all the Ethan Allen furniture. Husband was order to pay Wife for a couch that was sold. There was no further mention of the allocation or award of marital property.

{¶48} On October 19, 2012, Wife filed objections to the October 5, 2012 magistrate's decision. Wife objected that the magistrate's decision did not allocate or award all of the marital property. Husband did not file objections to the magistrate's decision.

{¶49} On October 23, 2012, the trial court filed an "Agreed Judgment Entry/Decree Regarding Rights and Obligations to be Effective Immediately and also Included into Final Decree of Divorce." The Agreed Judgment Decree memorialized the parties' June 21, 2012 settlement. The Agreed Judgment Decree distributed the Ethan Allan furniture to Wife. It also stated, "[t]he Court finds that, excepting the division of marital furniture and other personal belongings (which issue is reserved for final trial herein) the parties have entered into an agreement providing for, allocation of their marital assets [and] * * * marital debts."

{¶50} On January 29, 2013, Wife gave notice of dismissal of her objections to the October 5, 2012 magistrate's decision. She noted there were no pending objections filed by Husband.

{¶51} On March 14, 2013, Husband filed a "Memorandum Concerning Order." In the memorandum, Husband proposed two options to resolving the distribution of the tangible personal property. Wife responded to the memorandum, arguing that Wife had attempted to resolve the personal property issues with Husband to no avail.

{¶52} On July 30, 2013, the trial court filed the Final Decree of Divorce. The Final Decree incorporated the October 23, 2012 Agreed Judgment Decree and the Shared Parenting Decree. As to the disputed personal property, the Final Divorce Decree stated:

Excepting any property and debt division set forth in this ORDER the parties settled all other matters of property and debt per their Agreed Judgment Entry/Decree from the June proceedings herein. This included personal property * * * as well as property settlement payments between the parties.

The Decree also awarded the Ethan Allen furniture to Wife and Husband was required to pay Wife \$1145 for the couch that was sold.

{¶53} Neither Husband nor Wife appealed the July 30, 2013 Final Divorce Decree.

{¶54} Husband filed a "Memorandum Concerning Status of Case" on March 18, 2014. In the memorandum, Husband argued the trial court failed to address items of tangible personal property in the Final Decree. On March 24, 2014, Husband filed a

motion requesting the trial court address the distribution of items of tangible personal property.

{¶55} At the August 30, 2014 hearing on the pending motions, Husband proffered a four-page exhibit of the personal property. The trial court discussed the issue:

THE COURT: I guess my question, though, is if you didn't like the order, either side didn't like the order, why didn't either side appeal the order and say there's been no ruling regarding these tangible personal property? Why are we doing this a year later? Where have we been for a year? Seems to me it needs to be filed in 30 days. If he wants the items, where's my items. Why wasn't anything done then if it mattered to anybody, if it was that much of an issue, or unless they thought -- unless the other side now argues the issue was resolved, it just wasn't addressed and everybody's happy where everything's at. * * * If the appellate time means nothing and 30 days mean nothing and a year later means nothing, then maybe two years later means nothing if either side is interested in saying, yeah, well we never talked about the couch. What do we do then?

{¶56} In the trial court's May 12, 2014 judgment entry, the trial court denied Husband's March 2014 motions to allocate the tangible personal property. The trial court found the personal property was distributed through the July 30, 2013 Final Decree. Husband did not appeal that decision. The trial court also found that Husband did not file a proper Civ.R. 60(B) motion for relief from judgment to bring the issue within the purview of the trial court's jurisdiction.

{¶57} Husband argues it was error for the trial court to refuse to consider the matter of the personal property. In support of his argument, he presents the case of *Woody v. Woody*, 4th Dist. Athens No. 09CA34, 2010-Ohio-6049. In *Woody*, the appellant husband and the appellee wife presented evidence at the final hearing of the personal property found in the former marital residence. The magistrate's decision awarded each party his or her separate property and made specific awards of personal property to the appellant. *Id.* at ¶ 8. The appellant filed objections to the magistrate's decision arguing the magistrate failed to award an attached list of the personal property remaining in the former marital home. *Id.* at ¶ 11. The trial court partially sustained the appellant's objections and awarded the appellant certain personal property from the attached list, with the exception of eleven items. *Id.* at ¶ 14. The trial court granted the parties a divorce and adopted the magistrate's decision with modifications. *Id.* at ¶ 16.

{¶58} The appellant appealed. The appellant argued the trial court erred when it failed to enter an order as to the remaining items of personal property. He stated the trial court failed to independently review the magistrate's decision and the decision was contrary to the trial court's mandatory duty under R.C. 3105.171 to classify all of the parties' property as either marital or separate. *Id.* at ¶ 21.

{¶59} The Fourth District Court of Appeals acknowledged the trial court's divorce decree omitted any reference to the separate property the appellant claimed remained in the former marital residence. *Id.* at ¶ 25. However, the court noted the appellant did not present evidence at the final hearing as to the distribution of those items. *Id.* The trial court applied the invited error doctrine to find the appellant invited any error

regarding the magistrate's failure to award him those items. Upon review, the court of appeals stated:

The “invited error” doctrine prohibits a party who induces error in the trial court from taking advantage of the error on appeal. *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359, 626 N.E.2d 950; *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, 502 N.E.2d 590, paragraph one of the syllabus; *Woolridge v. Newman* (June 8, 2000), Pike App. No. 99CA635. It is a cardinal rule of appellate procedure that “an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected.” *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 210, 436 N.E.2d 1001; see, also, *State ex rel. V. Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 471, 692 N.E.2d 198. A party waives and may not raise on appeal any error that arises during the trial court proceedings if that party fails to bring the error to the court's attention, by objection or otherwise, at a time when the trial court could avoid or correct the error. *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099; *Stores Realty Co. v. City of Cleveland Bd. of Bldg. Standards and Bldg. Appeals* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629. In the absence of a proper objection, the party waives all but plain error. *State v. Jones*, 91 Ohio St.3d 335, 2001-Ohio-57, 744 N.E.2d 1163. In the civil context, the plain error doctrine applies only when an error “seriously affects the basic

fairness, integrity, or public reputation of the judicial process.” *Goldfuss*, 79 Ohio St.3d at 122-123, 679 N.E.2d 1099.

Our court has typically held that the invited error doctrine applies when a party fails to present evidence before a magistrate and then files objections to the magistrate's decision asserting that the magistrate failed to consider such evidence. We have reasoned that allowing a party to waive the presentation of evidence before a magistrate “ ‘and, after receiving an adverse decision from the magistrate, ask to present evidence would frustrate the orderly administration of justice. See *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 171, 522 N.E.2d 524, 527.’ “ *Melvin v. Martin*, Lawrence App. No. 05CA44, 2006-Ohio-5473, at ¶ 12, quoting *Nezhad v. Kilgore* (Dec. 18, 1998), Lawrence App. No. 98CA3.

In the case at bar, however, appellant's failure to request the magistrate to award him the separate property he left at the marital residence appears to be more of an oversight than an invited error. While we would ordinarily find that a party who fails to bring a matter to the magistrate's attention at the final hearing waives the right to raise the issue on appeal, under the circumstances present in the case at bar, we do not find that appellant's conduct merits application of the invited error doctrine. Once appellant realized that the magistrate's decision omitted any reference to the items, he timely filed an objection that requested the court award him the separate property he left in the marital residence.

Moreover, the trial court has an independent duty to review the magistrate's decision, and the trial court's divorce decree must dispose of all items of property. In the present case, the trial court's divorce decree fails to dispose of the items of property appellant claims constitute his separate property that he left in the former marital residence. Additionally, it appears that at least some of the items appellant claims he left at the former marital residence are of a personal nature which appellee should have no legitimate interest in keeping. Accordingly, we sustain appellant's first assignment of error and remand the matter to the trial court with instructions to determine whether the items constitute marital or separate property and to enter an appropriate order disposing of these items.⁴ See *Girton v. Girton*, Athens App. No. 08CA30, 2009-Ohio-4458.

Woody v. Woody, 4th Dist. Athens No. 09CA34, 2010-Ohio-6049, ¶¶ 25-29.

{¶60} The procedural history of the present case is different from that in *Woody*. In *Woody*, the appellant immediately brought the issue of the property division to the trial court's attention. He filed objections to the magistrate's decision as to the distribution of the personal property. The appellant then appealed the final divorce decree and raised the matter as an assignment of error.

{¶61} In the present case, the procedural history presents more than a mere "oversight" as was described in *Woody*. Husband did not file objections to the magistrate's decision of October 5, 2012. Wife filed objections and argued the trial court failed to divide the remaining personal property. On January 29, 2013, Wife withdrew her objections. On March 14, 2013, Husband filed a "memorandum concerning order"

as to the personal property. The trial court did not rule on the motion. The Final Decree was filed on July 30, 2013. Husband did not appeal the Final Decree. In March of 2014, Husband filed motions regarding the division of the personal property. Neither of the Husband's motions were Civ.R. 60(B) motions requesting relief from judgment.

{¶62} Based on the procedural history of the case sub judice, we do not find Woody supports Husband's argument. We find Husband waived the issue as to the personal property by failing to preserve the argument by timely filing either an objection to the magistrate's decision, an appeal of the final decree, or a motion for relief from judgment.

{¶63} Husband's fourth Assignment of Error is overruled.

Wife's Cross-Assignment of Error

I.

{¶64} Wife attempted to refinance the existing HELOC on the marital home in May 2013 at an interest rate of 3.49%. The application failed because Husband did not sign forms waiving his dower rights. Wife refinanced the HELOC on October 16, 2013 at an interest rate of 4.99%. In the trial court's May 12, 2014 judgment entry, the trial court ordered Husband to reimburse Wife for the additional 1.5% she paid in interest on the balance of the HELOC, \$80,989.21. The order to reimburse Wife was effective on the date of the judgment.

{¶65} Wife argues in her sole Cross-Assignment of Error that the trial court erred when it did not make the order to reimburse Wife effective as of October 16, 2013. Wife also alleges the trial court erred when it limited the line of credit amount on which Husband was to reimburse Wife to \$80,989.21. Wife argues the trial court should have

ordered Husband to pay Wife an additional 1.5% interest regardless of the amount of the line of credit.

{¶66} We review a trial judge's decision in a contempt matter under an abuse of discretion standard. The decision will not be determined to be an abuse of discretion unless it is unreasonable, arbitrary, or unconscionable. *State ex rel. The v. Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998). Based on the record before us, we do not find the trial court's decision to be an abuse of discretion.

{¶67} Wife's Cross-Assignment of Error is overruled.

CONCLUSION

{¶68} Husband's Assignments of Error and Wife's Cross-Assignment of Error are overruled.

{¶69} The judgment of the Delaware County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Delaney, J.,

And Farmer, J., concur,

Hoffman, P.J. concurs and dissents separately

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

{¶70} I concur in the majority's analysis and disposition of Appellant/Cross-Appellee's first, second and third assignments of errors. I further concur in the majority's analysis and disposition of Appellee/Cross-Appellant's cross-assignment of error.

{¶71} I respectfully dissent from the majority's disposition of Appellant/Cross-Appellee's fourth assignment of error.

{¶72} As noted by the majority, the parties reached an agreement [October 23, 2012 Agreed Judgment Entry] on spousal support, some property, and debt issues at the June 21, 2012 hearing. Another hearing was held before the magistrate on September 28, 2012. As to the property, Wife was awarded all the Ethan Allen furniture and Husband was ordered to pay Wife for a couch that had been sold. There was no further mention of the allocation or award of marital personal property.

{¶73} Wife noted the failure to allocate or award all of the marital property in her first objection to the magistrate's decision and again in her supplemental objections but later withdrew her objections.

{¶74} The Agreed Judgment Entry filed October 23, 2012, specifically reserved for final trial the division of marital furniture and other personal belongings.

{¶75} Husband brought to the attention of the trial court there were still personal property issues to be resolved in his Memorandum Concerning Order filed March 14, 2013.

{¶76} On July 30, 2013, the trial court filed the Final Decree of Divorce incorporating the October 23, 2012 Agreed Judgment Entry, which by reference,

reserved for final trial the division of marital furniture and other personal belongings. At the same time, the trial court noted the parties had settled all other matters of property and debt per their Agreed Judgment Entry, excepting any property and debt division set forth in the July 30, 2013 Final Divorce Decree.

{¶77} While neither party appealed the July 30, 2013 "Final Divorce Decree", I find such decree was not a final order because it failed to resolve all of the remaining marital property division issues.

{¶78} Husband again brought the failure to address the personal property issue to the trial court's attention on March 18, 2014 via his Memorandum Concerning Status of Case. On March 24, 2014, Husband filed a motion requesting distribution of personal property.

{¶79} The trial court denied Husband's motion because Husband failed to appeal the Final Divorce Decree and did not file a proper Civ.R. 60(B) motion for relief from judgment. Because I find the July 30, 2013 Final Divorce Decree was not a final appealable order, I find the trial court's reasoning unpersuasive.

{¶80} Unlike the majority, I do not find Husband waived the issue. Husband repeatedly brought the issue to the attention of the trial court, and the October 23, 2012 Agreed Judgment Entry, which was incorporated into the July 30, 2013 "Final Divorce Decree", specifically reserved the issue for final trial.

{¶81} I would sustain Husband's fourth assignment of error.