

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MICHELE Y. DOTTS

Plaintiff - Appellee

-VS-

TIMOTHY J. SCHAEFER

Defendant - Appellant

JUDGES:

Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Craig R. Baldwin, J.

Case No. 2014 AP 06 0022

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County
Court of Common Pleas, Case No.
2010 TC 02 0070

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

March 3, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

SCOTT J. MASTIN
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JOSEPH I. TRIPODI
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Baldwin, J.

{¶1} Appellant Timothy J. Schaefer appeals a judgment of the Tuscarawas County Common Pleas Court finding him in contempt of court. Appellee is Michele Y. Dotts.

STATEMENT OF FACTS AND CASE

{¶2} The parties were divorced in August of 2010, and agreed that appellee would be the residential parent of their minor son, Tyler. The decree of divorce required appellant to pay college room, board, books and tuition expenses for Tyler.

{¶3} On August 23, 2013, appellee filed a motion seeking to require appellant to pay Tyler's college expenses in accordance with the divorce decree. On November 27, 2013, the trial court ordered appellant to reimburse appellee for Tyler's books in the amount of \$763.19. The court further ordered appellant to pay directly to Ohio University the balance owed for tuition and/or room and board for the fall 2013 semester, and to pay all future college expenses related to tuition, room, board, and books in a prompt and timely fashion. By judgment entry filed December 20, 2013, the court ordered appellant to pay \$18,367.95 for derivative Social Security disability benefits which he wrongfully diverted from Tyler. No appeal was filed from either order. Appellant filed a 60(B) motion for relief from judgment from the December 20, 2013 entry, which was overruled by the court and is the subject of a separate appeal in Case No. 2014 AP 03 0012.

{¶4} Appellee filed a motion to show cause on January 31, 2014, alleging that appellant had failed to comply with the court order concerning payment of Tyler's college expenses. Following a hearing, a magistrate found that appellant was ordered

to reimburse appellee \$763.19 on November 27, 2013, but had only paid \$30.00. The magistrate further found that appellant had paid for the fall semester, but had not paid \$1,139.51 for the spring semester, which was past due. Further, the magistrate found that appellee paid a \$200.00 deposit for room and board in February, 2014, which appellant failed to pay. The magistrate found that appellant failed to comply with the court's order which required him to repay the wrongfully retained Social Security disability benefits at the rate of \$306.13 per month. Although appellant testified that he did not have income sufficient to pay as ordered, the magistrate found that he sent money directly to the child instead of making the court-ordered payments. The magistrate recommended that appellant be found in contempt and sentenced to 30 days incarceration, all of which would be suspended upon compliance with purge conditions. The purge conditions were to comply with the November 27, 2013 and December 20, 2013 judgments by paying as ordered, and to pay attorney fees of \$500.00 to appellee within 180 days of the judgment entry adopting or modifying the magistrate's decision.

{¶5} The trial court found that as of May 27, 2014, appellant had complied with the order to pay the balance owed Ohio University for the fall 2013 semester. The trial court ordered appellant to pay appellee on or before August 1, 2014, \$733.19 and \$200 as reimbursement for college costs she had paid for Tyler, all arrearages in the monthly payments of \$306.13 which were to have started on January 15, 2014, and \$500.00 in attorney fees. The court sentenced appellant to 30 days incarceration, suspended on compliance with the court's orders.

{¶6} Both the trial court and this Court overruled a motion for stay of the trial court's order. Appellant failed to purge and served 30 days in the Tuscarawas County Jail from August 18, 2014, to September 17, 2014.

{¶7} Appellant assigns four errors to this Court:

{¶8} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION IN ISSUING A JUDGMENT ON SUBJECT MATTERS WHICH SUBJECT MATTERS WERE WITHIN THE JURISDICTION OF THE FIFTH APPELLANT DISTRICT (TUSCARAWAS COUNTY, OHIO) WHEN THE TRIAL COURT ISSUED ITS JUDGMENT ON JUNE 6, 2014.

{¶9} "II. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION WHEN IT ORDERED ATTORNEY'S FEES TO APPELLEE'S COUNSEL IN ITS JUNE 6, 2014 ENTRY.

{¶10} "III. THE TRIAL COURT ABUSED ITS DISCRETION IN UPHOLDING A MAGISTRATE'S DECISION WHICH THE JUNE 6, 2014 JUDGMENT AFFIRMED AND STATED: 'FINDS THAT THE DEFENDANT'S AFFIRMATIVE DEFENSE OF IMPOSSIBILITY AND OR FINANCIAL INABILITY TO COMPLY WITH ORDERS OF THE COURT, IS UNPERSUASIVE AND SHOULD BE REJECTED.'

{¶11} "IV. THE TRIAL COURT LACKED JURISDICTION OVER THE REAL PARTY IN INTEREST IN THIS CAUSE AND COMMITTED ERROR IN ASSUMING JURISDCITION OVER ISSUES ON BEHALF OF APPELLEE WHO HAD NO LEGAL STANDING TO REPRESENT THE REAL PARTY IN INTEREST."

I.

{¶12} Appellant argues that the court erred in addressing his failure to comply with the order requiring repayment of Social Security derivative benefits because that issue was on appeal.

{¶13} When a case has been appealed, the trial court retains all jurisdiction not inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment. *Yee v. Erie County Sheriff's Department*, 51 Ohio St.3d 43, 44, 553 N.E.2d 1354, 1355 (1990).

{¶14} At the time the court issued its judgment finding appellant in contempt of court, including a finding that appellant failed to make payments as ordered concerning the derivative benefits, appellant had filed an appeal from the judgment overruling his Civ. R. 60(B) motion to vacate the judgment ordering him to repay derivative benefits. However, the judgment was not stayed, and appellant was therefore required to make monthly payments during the pendency of the appeal. The court's consideration of appellant's failure to make such payments in the contempt proceeding was not inconsistent with our jurisdiction to reverse, modify, or affirm the judgment overruling appellant's Civ. R. 60(B) motion. Further, the crux of the contempt finding related to appellant's failure to pay college expenses in accordance with the divorce decree, which was not an issue addressed in the judgment on appeal in this court and not related to the issue of repayment of the derivative benefits.

{¶15} The first assignment of error is overruled.

II.

{¶16} Appellant argues that the court erred in awarding attorney fees to appellee. He argues that the record does not demonstrate that attorney fees were calculated according to Ohio law.

{¶17} The resolution of a request for attorney fees is vested in the sound discretion of the trial court and will not be overturned upon review absent a showing of an abuse of discretion. *Bagnola v. Bagnola*, 5th Dist. Stark No. 2004CA00151, 2004-Ohio-7286, ¶36. While the trial court has discretion in determining the amount of attorney fees, the court must base its decision on evidence showing the reasonableness of the time spent on the matter and the hourly rate. *Id.* Where the amount of an attorney's time and work is evident to the trier of fact, an award of attorney fees, even in the absence of specific evidence to support the amount, is not an abuse of discretion. *Hawk v. Hawk*, 5th Dist. Tuscarawas No. 2002AP040024, 2002-Ohio-4384, ¶28.

{¶18} Appellee testified that she incurred attorney fees of \$1,495.00 in bringing the contempt motion in this case, and the bill was admitted into evidence. She testified that she believed the fees to be reasonable and fair. The magistrate recommended that appellant pay attorney fees in the amount of \$500.00, and the court entered judgment in accordance with this recommendation. The court was familiar with the history of the case and the issues raised in the contempt motion, and determined \$500.00 was a reasonable amount for the time and work required to litigate the contempt motion. We find no abuse of discretion in this finding.

{¶19} The second assignment of error is overruled.

III.

{¶20} In his third assignment of error, appellant argues that the trial court erred in rejecting his defense of impossibility to pay.

{¶21} An appeal from a finding of contempt becomes moot when the offender either purges himself of the contempt or serves the sentence. E.g., *Wesley v. Wesley*, 10th Dist. Franklin No. 07AP-206, 2007-Ohio-7006, ¶12; *Springfield v. Myers*, 43 Ohio App.3d 21, 538 N.E.2d 1091 (1988); *Faith C. v. Tim P.*, 6th Dist. Lucas No. L-05-1250, 2006-Ohio-3049; *Kimbler v. Kimbler*, 4th Dist. Scioto No. 05CA2994, 2006-Ohio-2695; *Bartkowiak v. Bartkowiak*, 4th Dist. Vinton No. 04CA596, 2005-Ohio-5017.

{¶22} Appellant failed to purge and served his 30-day jail sentence. Therefore, his appeal from the finding of contempt is moot, and his third assignment of error is overruled.

IV.

{¶23} Appellant argues that appellee is not the real party in interest because Tyler is now above the age of majority, and appellee therefore lacks standing to enforce the portions of the divorce decree relating to payment of college expenses.

{¶24} An express agreement between divorcing parents that they will provide for college education to their emancipated children may be enforced by a court. *Lehman v. Lehman*, 5th Dist. Fairfield No. 14 CA 30, 2015-Ohio-287, ¶20. The child is a third-party beneficiary to the agreement, while the parents are the parties to the agreement and therefore have standing to enforce the agreement. *Leonard v. Leonard*, 12th Dist. Butler No. CA91-08-143, 1992 WL 201099 (August 17, 1992).

{¶25} As a party to the agreement concerning payment of the child's college expenses, appellee had standing to enforce the agreement and the court had authority to enforce the agreement after Tyler reached the age of majority.

{¶26} The fourth assignment of error is overruled. The judgment of the Tuscarawas County Common Pleas Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Hoffman, P.J. and

Farmer, J. concur.