

[Cite as *Dureiko v. Dureiko*, 2010-Ohio-5599.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94393

MICHELLE M. DUREIKO

PLAINTIFF-APPELLEE

VS.

DARIN J. DUREIKO

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-290623

BEFORE: Stewart, J., Rocco, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: November 18, 2010

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Darin Dureiko, appeals the judgment of the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, granting in part his motion to show cause against plaintiff-appellee, Michelle Dureiko, but failing to find contempt or to award attorney fees. For the reasons stated below, we affirm.

{¶ 2} The parties divorced in December 2004 with the terms of the divorce provided through an in-court settlement agreement and a shared parenting plan. The provisions of the agreement pertinent to this appeal

provided that appellant receive the marital residence, but that appellee could reside there until January 31, 2005. While in residence, appellee was responsible for the mortgage, taxes, insurance, maintenance expenses, and any other expenses associated with the property. Appellant became responsible for these expenses effective February 1, 2005, or on the date he moved in, if sooner. Appellee agreed not to commit waste, damage, or destruction to the property while residing in the home.

{¶ 3} The parties also agreed to share equally in the marital debt. The judgment entry of divorce provided, “the parties shall equally pay the marital debts in the within matter, in the total amount of One Hundred Eighty-Seven Thousand Six Hundred Fifty-Six and ninety-eight-hundredths Dollars (\$187,656.98), as set forth in Court Exhibit Three(3).” The parties agreed to reduce the debt by liquidating certain assets and that any remaining indebtedness was to be paid by the parties, to the various creditors, on an equal basis. Appellee was “responsible for record-keeping as to the list of the various creditors,” and to pay her share of the remaining debt on a monthly basis; appellant was to provide “monthly statements to [appellee] and his payments of his fifty-percent share of the remaining indebtedness.” Finally, it was agreed that, “[t]he parties, respectively, may liquidate their one half (½) of the indebtedness at any time.”

{¶ 4} On May 5, 2006, appellant filed a motion to show cause and a motion for attorney fees in which he alleged that appellee had committed waste and damage to the marital residence in an amount in excess of \$10,378, and that she had failed to comply with prior court orders regarding payment of the marital debt.

{¶ 5} On October 26, 2006 and June 5, 2007, appellee filed motions to show cause and for attorney fees alleging that appellant failed to comply with prior court orders to pay his share of the children's medical and school expenses, to make monthly payments toward marital debt and to provide her with monthly statements, to hold her harmless on the expenses associated with the marital residence after February 1, 2005, and to refinance the property. The refinancing issue was resolved, and the remaining allegations were tried to the court.

{¶ 6} The trial court adopted the magistrate's decision in its entirety and granted judgment against appellee on her motions, finding that she presented insufficient evidence to support her claims. The court granted appellant's motion to show cause in part, awarding him \$1,113.60 for damage to the home and for unpaid utility bills incurred prior to his moving into the residence and ordering appellee to pay an additional \$6,352.69 toward marital debt for accrued interest. The court denied both parties' motions for attorney fees, finding each party responsible for the payment of attorney fees

incurred in prosecuting and defending the motions. Appellant timely appeals, raising six assignments of error for review.

{¶ 7} Appellant generally argues that the trial court erroneously failed to find appellee in contempt and incorrectly calculated the amount appellee owed relating to the marital debt and for damage to the marital residence. Appellant asserts that the court neglected to consider his payment of a Wells Fargo loan and failed to properly calculate appellee's share of the interest that had accrued on the marital debt. Appellant also challenges the trial court's denial of an award of attorney fees.

{¶ 8} Whether to hold a person in contempt is within the sound discretion of the trial court. See *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11, 417 N.E.2d 1249. In order to find an abuse of discretion, we must find that the trial court's decision was unreasonable, arbitrary, and unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 9} Contempt has been defined as the disobedience of a court order. *Denovchek v. Bd. of Trumbull Cty. Commrs.* (1988), 36 Ohio St.3d 14, 15, 520 N.E.2d 1362. "It is 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." *Id.*, quoting *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815, paragraph one of the syllabus. "An

indirect contempt of court is one committed outside the presence of the court but which also tends to obstruct the due and orderly administration of justice.” *In re Lands* (1946), 146 Ohio St. 589, 595, 67 N.E.2d 433. R.C. 2705.02, regarding indirect contempt, provides in relevant part, that “a person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to a lawful writ, process, order, rule, judgment, or command of a court or an officer.” Thus, the knowing failure to obey the lawful order of a court may be grounds for a finding of contempt. *Arthur Young & Co. v. Kelly* (1990), 68 Ohio App.3d 287, 588 N.E.2d 233.

{¶ 10} On a challenge to the manifest weight of the evidence in a civil case, we neither weigh the evidence nor judge the credibility of the witnesses. *Abernethy v. Abernethy*, 8th Dist. No. 92708, 2010-Ohio-435. Our role is to determine whether there exists competent and credible evidence in the record upon which the fact-finder could base its decision. We will not reverse a trial court’s decision if it is based upon competent and credible evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578.

Credit Card Debt

{¶ 11} Appellant argues that appellee must be found in contempt for failing to pay accrued interest on the marital debt and for failing to perform

record-keeping as ordered by the court. He further argues that the court erred in ordering her to pay only \$6,352.69 in accrued interest.

{¶ 12} The judgment decree stated the marital debt as a fixed dollar amount, \$187,657. It also provided both parties the option of liquidating their half of the indebtedness at any time. After deducting the \$94,758 proceeds from the liquidation of assets, appellee concluded that \$92,898 of marital debt remained. She calculated her half of the remaining debt as \$46,449. Between March and May of 2005, appellee liquidated \$46,449 in credit card debt by transferring that amount of debt to credit cards held in her name only. The court found that appellee's calculation of her half of the marital debt failed to take into consideration the interest that had accrued on that debt from the time of the in-court settlement agreement in September 2004 until appellee liquidated her half of the indebtedness in May 2005.

{¶ 13} Citing a "mish-mash of credit card statements, bank statements, and handwritten/typed documents" from both parties purporting to reflect the credit card debt, the magistrate nonetheless was able to calculate the amount of marital debt remaining in June 2005. Taking into account the Wells Fargo loan, accrued interest, and appellee's assumption of \$46,449 of the debt, the magistrate determined that there was \$18,198 in remaining marital debt for which the parties were responsible. After correcting that amount to

reflect a payment that had been misapplied in appellant's favor, appellee was determined to owe an additional \$6,353 of marital debt.

{¶ 14} The divorce decree does state that appellee was responsible for record-keeping as to the parties' creditors. The decree also states that appellant was to provide monthly statements to appellee and that both parties were to pay the credit card debt on a monthly basis. There was conflicting evidence on whether appellant provided all of the monthly statements to appellee as ordered and, the evidence clearly showed that neither party made the required monthly payments as ordered. Therefore, although appellee may technically be in indirect contempt under R.C. 2705.02 as a result of her failure to maintain record-keeping, we find that the trial court was not required to hold appellee in contempt and did not abuse its discretion in declining to do so. R.C. 2705.02 clearly specifies that a person guilty of disobedience of a court order "may" be punished for a contempt. Thus, there is no requirement that the trial court find appellant in contempt.

{¶ 15} Based upon both parties' failure to follow the terms of the court's order regarding credit card payments, and in consideration of appellee having exercised an express provision of the agreement to liquidate her half of the indebtedness, making such record-keeping unnecessary, we find that the trial court did not abuse its discretion in declining to hold appellee in contempt for

failing to maintain record-keeping as ordered. The trial court's decision was not arbitrary, unreasonable, or unconscionable.

{¶ 16} We also find that there was competent credible evidence to support the trial court's calculation of appellee's portion of the remaining marital debt.

Marital Residence

{¶ 17} Appellant argues that the court erred by not finding appellee in contempt for not paying utility bills and for the waste, damage, and destruction she caused to the marital residence. Appellant claims that the evidence reveals that appellee caused substantial destruction to the marital home prior to vacating it in November 2004 resulting in damages in excess of \$10,378. He further claims that because appellee turned off the utilities when she moved out in November 2004, he was forced to turn them back on to keep the pipes from freezing. As a result, he was required to pay the December and January bills that were appellee's responsibility under the divorce decree.

{¶ 18} The terms of the divorce decree allowed appellee to live in the residence through January 31, 2005. The agreement provided that she was responsible for the expenses of the property until then, unless she vacated the residence prior to January 31, 2005 *and* appellant moved in prior to January 31, 2005, and then he was responsible effective the date he moved in.

Appellee admitted at the hearing that according to these terms, even though she moved out in December 2004 and gave appellant the key, she was responsible for the utility bills until February 1, 2005. Therefore, the trial court properly awarded appellant the \$757 he was owed for utility bills that were appellee's responsibility.

{¶ 19} Most of appellant's damage claim is based on the fact that appellee brought cats into the home knowing he was allergic to them. He maintains that as a result he needed to replace the carpeting in the home and get a new recliner. He also contends that as a result of appellee's waste, damage, or destruction, he needed to get a new sod lawn in the front and back yards, a new dishwasher, and a new screen door.

{¶ 20} "Waste is defined as an abuse or destructive use of property by one in rightful possession." *Woodrick v. Wood* (May 26, 1994), 8th Dist. No. 65207, citing Black's Law Dictionary (5Ed. 1979). We first note that the settlement agreement between the parties does not prohibit animals in the residence or require appellee to notify appellant should she acquire any. Therefore, the mere presence of cats in the house, appellant's allergy notwithstanding, does not amount to waste or a violation of the divorce decree. There is also nothing in the record to support a claim that appellee's use of the home was abusive or destructive and not merely the result of the normal wear-and-tear of a family with four young children.

{¶ 21} The magistrate found that appellee was responsible for the replacement of the dishwasher. Appellee claimed the dishwasher was working when she vacated the premises, however she did not refute the claim that she allowed the children to use the door as a step-stool, resulting in its damage. There was evidence that it was not worth the cost to repair the door and, therefore, we find the evidence supported an award of \$356 to appellant for replacement of the dishwasher.

{¶ 22} We find that there was competent credible evidence to support the trial court's calculation of damage to the marital home. Again, while it may be possible to find appellee technically in contempt for failing to pay the utility bills, we find that the issue of the utility bills was a minor one and, therefore, the trial court did not abuse its discretion in refusing to make a finding of contempt.

Attorney Fees

{¶ 23} Generally, a prevailing party is not entitled to recover attorney fees in the absence of a statutory provision. *Granger v. Granger*, 8th Dist. No. 83909, 2004-Ohio-5601, citing *Sorin v. Bd. of Edn. of Warrensville Hts. School Dist.* (1976), 46 Ohio St.2d 177, 179, 347 N.E.2d 527.

{¶ 24} A trial court may award reasonable attorney fees in post divorce proceedings upon a finding of contempt. *McDaniel v. McDaniel* (1991), 74 Ohio App.3d 577, 599 N.E.2d 758, citing *Planned Parenthood Assn. of*

Cincinnati, Inc. v. Project Jericho (1990), 52 Ohio St.3d 56, 67, 556 N.E.2d 157.

{¶ 25} Additionally, R.C. 3105.73(B) provides: “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.

{¶ 26} Under either circumstance, we review the trial court’s decision whether to grant attorney fees under an abuse of discretion standard.

{¶ 27} The record reflects that the court considered the behavior of the parties and found that both parties failed to comply with the terms of the divorce decree. The court found that the attorney fees were due in part to a lack of effort on the part of both parties. The record also reflects that the court considered the parties’ income. Appellee is employed and her income is stated in the record. The court noted that appellee paid spousal support to appellant until March 2008. Appellant is self-employed as a contractor. He chose not to present evidence of his income except to state that due to the economy, business is not good. The trial court found that the facts as

presented did not lend themselves to an award of attorney fees. Upon review, we do not find that the court's decision is unreasonable, arbitrary, or unconscionable.

{¶ 28} Appellant's arguments being not well taken, we overrule the six assignments of error and affirm the judgment of the trial court granting in part appellant's motion to show cause and denying his motion for an award of attorney fees.

Judgment affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas — Domestic Relations Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR