

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

ERIC J. OLSON

C. A. No. 24755

Appellant

v.

SANDRA E. NEWHOUSE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2007-01-0286

Appellee

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

BELFANCE, Judge.

{¶1} Appellant, Eric Olson, has appealed the decision of the Summit County Common Pleas Court, Domestic Relations Division finding him in contempt. For the reasons that follow, we affirm.

I.

{¶2} Eric (“Husband”) and Sandra Olson (“Wife”) were married on June 22, 1996. Husband filed a complaint for divorce on January 30, 2007. The parties entered into a separation agreement on February 1, 2008 and the final judgment of divorce was filed on June 2, 2008, incorporating the separation agreement. Both parties have been represented by counsel during the course of this litigation.

{¶3} On November 7, 2008, Wife filed a motion to show cause contending that Husband had failed to comply with the terms of the separation agreement. Specifically, Wife alleged that Husband had never paid \$350 per month in spousal support as ordered and did not

tender a \$7,500 payment to Wife as provided in the separation agreement. The \$7,500 was comprised of a \$5,000 payment and a \$2,500 payment. Pursuant to separation agreement, Husband was to pay Wife \$5,000, which represented Wife's share of Husband's retirement fund. The agreement also provided that Husband was to immediately place \$2,500 in escrow with Husband's attorney. The \$2,500 would be paid to Wife upon her proof to Husband that she had maintained medical and dental insurance coverage for Husband through February 1, 2008 and a minor in their custody through August 2007 in conformance with the court's temporary order.

{¶4} An evidentiary hearing on Wife's motion was held before a magistrate. The magistrate found that Husband failed to pay spousal support and the \$7,500 in contravention of the divorce decree and thus found Husband in contempt of the court's order. With regard to the spousal support, the Magistrate found Husband had sufficient income to have paid much of his spousal support payment and that he had made a poor choice to pay other obligations in lieu of support. The magistrate also found that although Husband alleged that Wife had under-reported her income at the time of the divorce, the proper course of conduct would have been to file a Civ. R. 60(B) motion to argue the issue of fraud.

{¶5} With respect to the nonpayment of the \$5,000, the magistrate found the Wife's testimony to be credible and Husband's not credible, stating that Husband's testimony and exhibits were "at best, not credible, and at worst, potentially criminal." The magistrate also found that Husband's claims were "part and parcel of a pattern of deceit that stretches back to the very beginnings of this case." Similarly, with respect to the nonpayment of the \$2,500, the magistrate found Husband's testimony to be "nonsense."

{¶6} The magistrate sentenced Husband to 182 days in jail, but provided that Husband could purge his sentence by paying Wife \$7,500 within forty-five days, paying an extra \$60 per

month in spousal support until the arrearage was eliminated, and paying Wife's costs associated with the contempt action within forty-five days. The magistrate's decision was adopted by the trial court, pending any objections. Husband filed his objections to the magistrate's decision in which he took issue with several findings of fact and argued that his sentence and purge conditions were unreasonable.¹

{¶7} The trial court overruled all but one of Husband's objections. It upheld the finding of contempt with respect to Husband's failure to pay spousal support and the \$7,500 payment. The trial court sustained Husband's objections concerning the 182-day jail sentence and reduced Husband's jail sentence from 182 days to thirty days. However, the purge conditions remained the same: Husband was ordered to pay an extra \$60 per month for spousal support arrearages and tender the \$7,500 within forty-five days of the date of the filing of the court's order. Husband has appealed the decision of the trial court.

{¶8} On appeal, Husband has assigned the following errors: (1) the trial court erred by finding him in contempt of court because Husband was not able to pay and Wife under-reported her income; (2) the purge conditions were unreasonable and impossible to meet; (3) the trial court erred by finding him in contempt of court concerning the payment of \$2,500 because Wife did not fulfill the condition precedent to payment, and; (4) the trial court erred by finding him in contempt of court concerning the payment of \$5,000 because Husband demonstrated that he in

¹ The magistrate's initial decision was issued on January 28, 2009 and the trial court adopted the decision the same day, pending objections. Husband filed objections on February 11, 2009. However, the magistrate issued a nunc pro tunc on February 19, 2009 in which he corrected some references to "plaintiff" that should have been "defendant" and vice versa. The trial court adopted the nunc pro tunc decision the same day it was filed, pending any objections. On March 16, 2009, Husband again filed objections. The trial court reviewed the magistrate's nunc pro tunc decision in light of the objections filed on March 16.

fact made that payment to Wife. In order to facilitate our review, we will consider Husband's assignments of error out of their assigned order in his merit brief.

II.

{¶9} In this case, we are asked to review the trial court's action with respect to the magistrate's decision. Generally, absent an error of law, "the decision to adopt, reject, or modify a magistrate's decision lies within the discretion of the trial court and should not be reversed on appeal absent an abuse of discretion." *Barlow v. Barlow*, 9th Dist. No. 08CA0055, 2009-Ohio-3788, at ¶5. "In so doing, we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. We also review a trial court's decision finding contempt for an abuse of discretion. *Malson v. Berger*, 9th Dist. No. 22800, 2005-Ohio-6987, at ¶6, citing *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11. In addition, the error alleged must relate to the actions of the trial court, not the magistrate. (Citation omitted.) *Citibank (South Dakota) N. A. v. Masters*, 9th Dist. No. 07CA0073-M, 2008-Ohio-1323, at ¶9. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. A trial court commits an abuse of discretion if its order demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. In conducting our review, we cannot substitute our judgment for that of the trial court. *Blakemore*, 5 Ohio St.3d at 219.

Spousal Support

{¶10} In his first assignment of error, Husband argues that the trial court abused its discretion by finding that Husband was in contempt for failing to pay spousal support because he lacked the ability to pay and/or because Wife committed fraud in under-reporting her income at

the time of the divorce hearing. Notwithstanding the errors articulated in Husband's first assignment of error, in his merit brief Husband has focused solely on a legal argument, namely that the magistrate erred in stating Wife's purported fraud for nondisclosure of her income should be remedied by way of a Civ.R. 60(B) motion rather than in the context of a contempt hearing for nonpayment of support. Husband has not developed any argument concerning the manifest weight of the evidence regarding either his inability to pay the spousal support or the concealment of Wife's income, thus we will not consider that issue. See App.R. 16(A)(7).

{¶11} Although Husband argues that the *magistrate* was in error, our focus is upon the actions of the trial court, not the magistrate. (Citation omitted.) *Masters* at ¶9. In its judgment entry, the trial court acknowledged Husband's contention that Wife incorrectly stated her income at the time of the divorce. The trial court overruled Husband's objection regarding the alleged fraud and observed that Husband had not filed a Civ.R. 60(B) motion for relief from judgment. As we are presented with an issue of law, we will consider the trial court's action under a de novo standard of review. *Porter v. Porter*, 9th Dist. No. 21040, 2002-Ohio-6038, at ¶5.

{¶12} Husband contends that the trial court had the jurisdiction to "equitably remedy" Husband's alleged contempt and thus, the trial court could have eliminated that spousal support order in the face of the post-decree discovery of Wife's additional earnings and additional tax liability ensuing from the additional income. Husband has not provided any legal authority for the novel proposition that the trial court could modify its final decree in order to remedy an allegation of contempt. Husband has cited the case of *Dzina v. Dzina*, 8th Dist. Nos. 90936, 90937, 90938, 90939, 90940, 2009-Ohio-136. However, *Dzina* is not applicable to this case. In *Dzina*, the court of appeals considered an appeal from the trial court pursuant to a remand order which required the trial court to further consider the property division in a divorce case. *Id.* at

¶¶6-7. Husband had filed a separate civil action outside of the domestic relations court in which he alleged that wife committed financial misconduct. *Id.* at ¶30. The trial court in that matter determined that the domestic relations court could provide a remedy to the husband pursuant to R.C. 3105.171(E)(3). *Id.* Neither party appealed that decision and the *Dzina* court determined that this decision became the law of the case. *Id.* at ¶31. The *Dzina* court did not determine that a final judgment for spousal support may be altered as a remedy to a motion for contempt.

{¶13} We do not find any error in the trial court’s legal conclusion that Husband’s remedy for an alleged nondisclosure of income was to file a Civ.R. 60(B) motion. A court may not modify its final judgment due to alleged fraud absent the filing of a Civ.R. 60(B) motion or some other proper procedural device. See *Levin v. George Fraam & Sons, Inc.* (1990), 65 Ohio App.3d 841, 848 (“The Ohio Rules of Civil Procedure provide the exclusive method for vacating a judgment.”). In the instant matter, the decree of divorce incorporating the provision for spousal support was a final judgment. In the face of new evidence suggesting Wife’s concealment of her income, Husband’s remedy was to file a motion to vacate the judgment pursuant to Civ.R. 60(B). See *id.* Husband’s first assignment of error is overruled.

The \$5,000 Lump Sum Payment

{¶14} In his fourth assignment of error Husband contends that the trial court abused its discretion by finding him in contempt for nonpayment of the \$5,000 because Husband had already paid the \$5,000 to Wife. The trial court was required to find by clear and convincing evidence that Husband failed to pay. *Riley v. Riley*, 9th Dist. No. 22777, 2006-Ohio-656, at ¶25. A “court’s finding of contempt will not be disturbed on appeal absent an abuse of discretion.” *Doerfler v. Doerfler*, 9th Dist. No. 06CA0021, 2006-Ohio-6960, ¶15, citing *State ex rel. Delco Moraine Div., Gen. Motors Corp. v. Indus. Comm.* (1990), 48 Ohio St.3d 43, 44. But, see, *State*

v. Lavery (Nov. 1, 1995), 9th Dist. No. 17297, at *2. (applying civil manifest weight of the evidence standard to challenge to finding of civil contempt of court).

{¶15} Husband argues that the trial court's finding of contempt was error because at the hearing he provided the court with a document he prepared purporting to demonstrate that he gave Wife \$5,000 in cash on February 6, 2008. The document also contained a statement that Husband was delivering a separately ordered payment to Wife's attorney on the same day also in cash. The document was signed by Husband and Wife. Husband also offered a bank receipt dated January 7, 2008 evidencing a \$5,000 withdrawal. Conversely, Wife testified that she did not receive the \$5,000, that she had never seen the document offered by Husband, and that she did not sign the document. The magistrate did not find Husband's testimony to be credible.

{¶16} In overruling Husband's objection, the trial court determined that the magistrate's finding of credibility with regard to the \$5,000 payment was supported by the record. There was clear and convincing evidence to support the trial court's finding of contempt and, therefore, the trial court did not abuse its discretion in finding Husband in contempt. We therefore overrule Husband's fourth assignment of error.

The \$2,500 Payment

{¶17} In his third assignment of error, Husband argues that he was not in contempt for disregarding the court order to pay Wife \$2,500 because Wife failed to provide Husband with proof of the dental and medical insurance coverage and such proof was a condition precedent to Husband's payment. Thus, Husband claims, his duty to pay never arose. The trial court determined that Husband did not offer any proof of any dental claims being denied for lack of insurance and overruled Husband's objection.

{¶18} Paragraph 9 of the parties' separation agreement states in pertinent part:

“Upon Wife’s proof to Husband that she has maintained dental/medical coverage for [the minor child, T.] through August 2007 * * * and dental/medical coverage for Husband through February 1, 2008, Husband shall pay to Wife an additional Two Thousand Five Hundred Dollars (\$2,500) which monies shall immediately be placed in escrow with Husband’s counsel.”

{¶19} The magistrate found that Wife presented convincing evidence that she maintained medical and dental insurance for Husband and the child during the period of time she was required to have such coverage and that Husband had used the insurance. For his part, Husband did not produce evidence that the insurance company denied any claims for coverage.

{¶20} The transcript of the hearing demonstrates that Wife offered an exhibit at the magistrate’s hearing that Wife’s attorney sent a letter to Husband’s counsel evidencing that Wife had the insurance coverage required by the parties’ separation agreement and indicating that the effective date of the coverage was June 1, 2007. However, the exhibits offered at the hearing were not made part of the record on appeal. The record on appeal must contain the transcripts of proceedings held in the trial court as well as papers and exhibits filed below. App.R. 9(A). In the absence of portions of the record necessary for our review, we must presume regularity in the trial court’s proceedings and affirm its ruling. See *FirstMerit Bank, N.A. v. Wood*, 9th Dist. No. 09CA09586, 2009-Ohio-5889, at ¶5.

{¶21} Further, in examining the language contained in the divorce decree, we note that Husband had an immediate obligation to tender \$2,500 to his attorney. Wife was to be paid upon Wife’s proof to Husband of the requisite coverage. It is undisputed that Husband did not ever tender the \$2,500 to his attorney for placement in escrow. Accordingly, the trial court did not err in finding that Husband was in contempt for failure to tender the payment as required.

Unreasonable Purge Conditions

{¶22} Husband argues in his second assignment of error that the *magistrate* abused his discretion in ordering purge conditions that were unreasonable and impossible for him to meet in light of his current economic circumstances. The trial court sustained one of Husband's objections as to the 182-day sentence for contempt of court and overruled Husband's remaining objections concerning the purge conditions. Husband has failed to develop any argument concerning any error on the part of the trial court. As we previously stated, in considering an appeal from the trial judgment overruling objections to a magistrate's decision, we review the actions of the trial court, not the actions of the magistrate. (Citation omitted.) *Masters* at ¶9. Notwithstanding, upon careful review of the record, we find that the trial court's purge conditions requiring Husband to pay the requisite funds in forty-five days and an additional \$60 per month in spousal support were not unreasonable, arbitrary, or unconscionable.

III.

{¶23} In light of the above discussion, we overrule each of Husband's assignments of error. The decision of the Summit County Court of Common Pleas, Domestic Relations Division is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, P. J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶24} I concur in judgment only as to the second assignment of error. I disagree with the majority's assertion that Mr. Olson failed to develop his argument regarding alleged error by the trial court. I believe, however, that his argument confuses the distinct legal concepts concerning a defense to the underlying allegation of contempt and the unreasonableness of the purge conditions. Mr. Olson argues impossibility of payment, ostensibly within the context of the unreasonableness of the purge conditions, although he appears to be challenging the underlying finding of contempt. Mr. Olson never argues that the trial court has not granted him sufficient time to meet the purge conditions. Rather, he argues that he has been, and continues to be, unable to pay his financial obligations pursuant to the parties' separation agreement. Accordingly, his argument in effect challenges the finding of willful contempt on the basis of the defense of impossibility. Unfortunately, his express assignment of error concerns only the alleged unreasonableness of the purge conditions.

{¶25} I agree with the majority’s conclusion that the purge conditions are not unreasonable, arbitrary, or unconscionable. There was evidence presented at hearing that Mr. Olson had been paying other personal financial obligations, such as credit card debt, in lieu of his spousal support obligation. This Court has recognized the impropriety of an obligor’s choosing to pay debts over his support obligations. See *State ex rel. Thurman v. Thurman* (May 12, 1999), 9th Dist. No. 2765. In *Thurman*, we held that “an obligor is only excused from making [support] payments when his inability to pay is ‘due to circumstances beyond his own power.’” *Id.*, quoting *Anderson v. Anderson* (Dec. 1, 1998), 7th Dist. No. 96 CO 21. Mr. Olson’s payment of debts in lieu of spousal support and other obligations pursuant to the parties’ separation agreement indicates that his purported inability to meet the purge conditions was merely due to circumstances of his own making. In addition, in light of his failure to assert that he merely required additional time to purge his contempt, the purge conditions cannot be called unreasonable, arbitrary, or unconscionable.

{¶26} Moreover, I agree with the opinion expressed in the separate concurrence.

WHITMORE, J.

CONCURS IN JUDGMENT ONLY, SAYING:

{¶27} I concur in judgment only and write separately to note that, when reviewing on appeal a trial court’s ruling on objections to a magistrate’s decision, this Court applies an abuse of discretion standard. *Turner v. Turner*, 9th Dist. No. 07CA009187, 2008-Ohio-2601, at ¶10. “In so doing, we consider the trial court’s action with reference to the nature of the underlying matter.” *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. It follows then, because Husband has challenged the manifest weight of the trial court’s civil contempt finding, we review its decision to see if it is supported by some competent, credible

evidence. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24 (relying on its previous explanation in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, syllabus, to explain that civil “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence”). In order to withstand this review, Wife was required to meet her burden of proving Husband’s contempt by clear and convincing evidence. *ConTex, Inc. v. Consol. Technologies, Inc.* (1988), 40 Ohio App.3d 94, 95.

{¶28} With this framework in mind, I would conclude that trial court did not abuse its discretion by adopting the magistrate’s finding that a motion filed pursuant to Civ.R. 60(B) is the proper mechanism for a spouse to bring claims of fraud against an ex-spouse following the entry of the parties’ divorce decree. *Hoyt v. Hoyt* (Aug. 15, 2001), 9th Dist. No. 20411, at *1-2 (discussing the propriety of applying subsection (B)(3) instead of (B)(5) to a motion to vacate a divorce decree on the basis of fraud by an adverse party under Civ.R. 60(B)). Husband makes the unsupported assertion that there are statutory mechanisms which could serve the same purpose as a Civ.R. 60(B)(3) motion or permit a trial court to modify a final divorce decree upon a later finding of fraud against one of the parties. Husband is mistaken on this point of law. See *Hoyt*, at *2.

{¶29} I agree with the lead opinion that Husband’s assertion that he had previously paid Wife the \$5,000 lump sum he owed her from his retirement money rests solely on the basis of credibility. This Court has repeatedly stated that “as the trier of fact, the magistrate [is] best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Morris v. Morris*, 9th Dist. No. 24664, 2009-Ohio-5164, at ¶18, quoting *Truax v. Regal*, 9th Dist. No. 20902, 2002-Ohio-

4867, at ¶26. Additionally, the magistrate received evidence in the form of a letter sent from Wife's attorney to Husband's attorney indicating that she obtained health insurance for their daughter, and Husband did not rebut this evidence. Moreover, he failed to proffer any rationale as to why his reciprocal duty of escrowing \$2,500 with his attorney did not mature upon receipt of such letter. Consequently, I would conclude that the trial court did not abuse its discretion in determining that Husband was in contempt for failing to pay Wife \$5,000 in retirement benefits and to place \$2,500 into escrow for their daughter's health insurance benefits.

{¶30} Finally, to the extent that Husband has failed to develop his argument with respect to the purge conditions established by the court, I would not address it on the merits. App.R. 16(A)(7); *Owca v. Owca*, 9th Dist. No. 08CA0006-M, 2008-Ohio-6939, at ¶5. For these reasons, I concur in judgment only.

APPEARANCES:

RONALD T. GATTS, Attorney at Law, for Appellant.

DAVID LOONEY, Attorney at Law, for Appellee.