

[Cite as *Huffer v. Huffer*, 2010-Ohio-1223.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Cheryl L. Huffer, :  
 :  
 Plaintiff-Appellant, :  
 :  
 v. : No. 09AP-574  
 : (C.P.C. No. 06DR-11-4586)  
 Roy H. Huffer, III, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellee. :

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D E C I S I O N

Rendered on March 25, 2010

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*Stewart E. Roberts*, for appellant.

*Roy H. Huffer, III*, pro se.

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APPEAL from the Franklin County Court of Common Pleas,  
Division of Domestic Relations.

FRENCH, J.

{¶1} Plaintiff-appellant, Cheryl L. (Huffer) Swoyer ("Cheryl"), appeals the final judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, in her action for a divorce from defendant-appellee, Roy H. Huffer, III ("Roy"). For the following reasons, we affirm.

{¶2} Cheryl and Roy were married on July 14, 1983. Two children were born as issue of the marriage, and one child ("the minor child") was still a minor at the time of

the proceedings. Cheryl filed a complaint for divorce on November 14, 2006, alleging incompatibility, gross neglect of duty, and extreme cruelty. Along with his answer, Roy filed a counterclaim for divorce on December 7, 2006.

{¶3} On January 24, 2007, a magistrate issued temporary orders. The magistrate ordered a division of the parties' debts and obligations, ordered Roy to maintain current levels of medical and hospitalization insurance for Cheryl and the minor child, and ordered that Cheryl pay 25 percent and Roy pay 75 percent of the minor child's extraordinary, uncovered healthcare expenses. By agreement, the original temporary orders did not address child custody, child support or spousal support.

{¶4} The magistrate issued modified temporary orders on August 1, 2007. The modified temporary orders designated both Cheryl and Roy as temporary residential parents and legal custodians of the minor child, established Roy's parenting time, ordered Roy to pay temporary child support of \$398.29 per month plus processing charge, ordered Roy to pay temporary spousal support of \$600 per month plus processing charge, and ordered Roy to pay Cheryl \$1,000 for attorney fees and expenses within 45 days. The modified temporary orders amended the division of the parties' debts and obligations but maintained the prior orders with respect to health coverage and the division of the minor child's uncovered health expenses.

{¶5} On August 24, 2007, Roy filed a motion for modification of the temporary orders pursuant to Civ.R. 75.<sup>1</sup> On November 27, 2007, Cheryl filed a motion for

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<sup>1</sup> Civ.R. 75(N)(2) states, in part, that, "[u]pon request, in writing, after any temporary spousal support, child support, or order allocating parental rights and responsibilities for the care of children is journalized, the court shall grant the party so requesting an oral hearing within twenty-eight days to modify the temporary order."

contempt against Roy, based on his failure to comply with the August 1, 2007 modified temporary orders. After a hearing, the magistrate denied Roy's motion to modify the temporary orders on March 26, 2008, and granted Cheryl's motion for contempt on April 1, 2008. The magistrate found Roy in contempt of court for non-payment of child and spousal support and attorney fees and sentenced him to ten days in jail, suspended pending compliance with the court's purge order. To purge his contempt, the magistrate ordered Roy to pay, in addition to his ongoing support obligations, \$100 per month toward the \$3,642.58 arrearage as of December 31, 2007. The magistrate also ordered Roy to pay Cheryl the previously ordered \$1,000 attorney fee award within 15 days and to pay Cheryl additional attorney fees of \$750, relating to her motion for contempt, within 30 days.

{¶6} In April 2008, Roy filed objections to the magistrate's finding of contempt and a motion to set aside the magistrate's order denying his motion to modify the temporary orders. On October 22, 2008, the trial court granted Roy's motion to set aside. The court concluded that, in light of Roy's income and his child support obligations under the modified temporary orders, an award of temporary spousal support was unjust and inequitable. The court modified the August 1, 2007 temporary orders and vacated the temporary award of spousal support and the interim awards of attorney fees to Cheryl. The court ordered Roy to pay child support of \$353.92 per month plus processing charge, effective June 1, 2007, and to pay half of any extraordinary, uninsured healthcare expenses for the minor child. The court vacated the magistrate's finding of contempt "[i]n light of the grant of [Roy's] motion to set aside

the temporary orders issued by the magistrate on August 1, 2007 and the court's retroactive modification of those orders."

{¶7} On February 17, 2009, the trial court entered an Agreed Shared Parenting Decree, approving a Shared Parenting Plan executed by the parties, and an Agreed Judgment Entry [and] Final Decree of Divorce ("Agreed Entry"). The Shared Parenting Plan established Roy's child support obligation, and the Agreed Entry required Roy to pay spousal support in the amount of \$1 per year. The Agreed Entry further stated as follows:

**10. Preservation Of Temporary Orders.** This Court's Temporary Orders are hereby preserved and incorporated into this Final Decree of Divorce. Specifically, the Court finds that as of date of Decree of Divorce that there is an over payment in child/spousal support in the amount of \$9,575.00 which shall be satisfied from [Cheryl's portion of] the proceeds from the sale of the Markison Avenue property. This Court finds that as of February 17, 2009 the child/spousal support account shall be zeroed out and that the Franklin County Child Support Enforcement Agency's (CSEA) records shall reflect the same.

The Agreed Entry resolved every issue before the trial court except the parties' entitlement to attorney fees.

{¶8} The trial court held a hearing on the issue of attorney fees on April 20, 2009. At the hearing, Cheryl submitted documents, including her attorney's time log, in support of her request for attorney fees, and she and her attorney testified. Although Roy filed a motion for attorney fees and costs on April 8, 2009, he withdrew his motion at the April 20, 2009 hearing and presented no evidence. Roy's counsel argued, however, that the facts and circumstances of this case did not justify an award of attorney fees in favor of Cheryl. On May 14, 2009, the trial court entered its final

judgment, denying attorney fees. The court concluded that an award of attorney fees to either party would be inequitable and ordered Cheryl to pay Roy \$1,750 as reimbursement for interim attorney fees he paid pursuant to the August 1, 2007 modified temporary orders subsequently vacated by the court.

{¶9} In her timely appeal, Cheryl sets forth the following four assignments of error:

I. The Trial Court committed error prejudicial to [Cheryl], abusing its discretion, by sustaining, against the manifest weight of the evidence, [Roy's] Objections to the Magistrate's Decision of March 26, 2008.

II. The Trial Court committed error prejudicial to [Cheryl], abusing its discretion, by vacating the Magistrate's April 1, 2008 finding of contempt against [Roy].

III. The Trial Court committed error prejudicial to [Cheryl], abusing its discretion, against the manifest weight of the evidence, by vacating / modifying the Temporary Orders issued by the Magistrate on August 1, 2007.

IV. The Trial Court committed error prejudicial to [Cheryl], abusing its discretion, against the manifest weight of the evidence, in deciding and holding that [Cheryl] was not entitled to an award of attorney's fees pursuant to O.R.C. Section 3105.73(A).

{¶10} Cheryl has also filed a motion to strike Roy's appellate brief based on non-compliance with App.R. 16 and its reliance on allegations not contained in the certified record from the trial court. Because Cheryl has not demonstrated prejudice arising from Roy's technical deviation from App.R. 16, we deny her motion to strike Roy's brief. Nevertheless, to the extent that Roy's arguments rely on evidence or allegations outside the record, we disregard those arguments.

{¶11} Cheryl's first and third assignments of error stem from the trial court's October 22, 2008 decision and judgment entry, which sustained Roy's objections to the March 26, 2008 magistrate's decision and modified the August 1, 2007 temporary orders. By her first assignment of error, Cheryl maintains that the trial court erred by sustaining Roy's objections to the magistrate's denial of his Civ.R. 75(N) motion to modify the August 1, 2007 temporary orders. By her third assignment of error, Cheryl maintains that the trial court erred by modifying the August 1, 2007 temporary orders. In essence, Cheryl contends that there was no credible evidence upon which the court could have based a modification and that the trial court erred in crediting Roy's evidence that his income was less than the amount utilized by the magistrate to calculate the temporary support obligations. In light of the Agreed Entry resolving this case, however, we conclude that Cheryl's first and third assignments of error are moot.

{¶12} Temporary orders allocating custody between parents or requiring temporary child or spousal support are interlocutory orders, not final judgments. See *State ex rel. Thompson v. Spon*, 83 Ohio St.3d 551, 554, 1998-Ohio-298; *Brooks v. Brooks* (Apr. 30, 1998), 10th Dist. No. 97APF10-1323. Thus, both the August 1, 2007 modified temporary orders and the October 22, 2008 judgment entry again modifying the temporary orders were interlocutory. The Supreme Court of Ohio has held that, "[i]n a domestic relations action, interlocutory orders are merged within the final decree, and the right to enforce such interlocutory orders does not extend beyond the decree, unless they have been reduced to a separate judgment or they have been considered by the trial court and specifically referred to within the decree." *Colom v. Colom* (1979), 58 Ohio St.2d 245, syllabus. Thus, the modified temporary orders merged into the final

Agreed Entry, and any possible error contained in the modified temporary orders is now moot. See *In re J.L.R.*, 4th Dist. No. 08CA17, 2009-Ohio-5812, ¶29.

{¶13} Not only does the existence of a final order render moot any argument regarding the temporary orders based on the doctrine of merger, but, here, Cheryl expressly agreed to incorporate the temporary orders, as modified on October 22, 2008, into the Agreed Entry. Thus, even to the extent that any argument regarding the substance of the temporary orders remained viable, Cheryl waived any such argument by agreeing to incorporate the modifications into the Agreed Entry. For these reasons, we render moot Cheryl's first and third assignments of error.

{¶14} By her second assignment of error, Cheryl argues that the trial court erred by vacating the magistrate's finding that Roy was in contempt of court based on his failure to pay child support and spousal support under the August 1, 2007 modified temporary orders.

{¶15} Contempt may be defined, in general terms, as disobedience of a court order. *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001-Ohio-15. Courts distinguish between civil and criminal contempt proceedings, based on the purpose to be served by the sanction. *Id.* Civil contempt is characterized as a violation against the party for whose benefit the order was made, and sanctions for civil contempt are designed to compel obedience with the court order. *Id.* at 555. By contrast, criminal contempt is characterized as an offense against the dignity or process of the court, and sanctions for criminal contempt are punitive and designed to vindicate the court's authority. *Id.* Criminal contempt is usually sanctioned with an unconditional prison sentence with no opportunity for the contemnor to purge himself or herself of the

contempt. *Sansom v. Sansom*, 10th Dist. No. 05AP-645, 2006-Ohio-3909, ¶25, citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 254.

{¶16} Here, the magistrate found Roy in contempt of court for failing to pay child support, spousal support, and attorney fees, as ordered in the August 1, 2007 modified temporary orders. The magistrate afforded Roy the opportunity to purge the contempt by making established payments toward the support arrearages and paying the ordered attorney fee award to Cheryl. The failure to pay court-ordered support is a basis for civil contempt. *Williams v. Williams* (May 22, 1986), 10th Dist. No. 86AP-65; *DeMarco v. DeMarco*, 10th Dist. No. 09AP-405, 2010-Ohio-445, ¶25, citing *Pugh v. Pugh* (1984), 15 Ohio St.3d 136, 139-40. The magistrate's finding of contempt here was clearly civil in nature, with the purpose of urging Roy's compliance with the modified temporary orders.

{¶17} It is well-established that the settlement of a case that gave rise to a civil contempt sanction renders the contempt proceeding moot because the case has come to an end. *Corn* at 555, citing *Gompers v. Buck's Stove & Range Co.* (1911), 221 U.S. 418, 451-52, 31 S.Ct. 492, 502. Additionally, when compliance with the court's order has become moot, a contempt proceeding based on non-compliance with that order is likewise moot. *Alessio v. Alessio*, 10th Dist. No. 05AP-988, 2006-Ohio-2447, ¶37, citing *Natl. Equity Title Agency, Inc. v. Rivera*, 147 Ohio App.3d 246, 2001-Ohio-7095, ¶13, and *Corn* at 555. Here, the parties settled their divorce action by executing the Agreed Entry, thus rendering moot the question of enforcing the contempt finding, even had the trial court not vacated the contempt finding. Furthermore, it is undisputed that Roy, in fact, paid the arrearage that formed the basis of the magistrate's finding of contempt. In fact, in the Agreed Entry, Cheryl agreed that there was an overpayment in child and

spousal support in the amount of \$9,575. Because the purpose of civil contempt is to urge or compel the offending party to make a court-ordered payment, the issues regarding the contempt become moot when the payment is made. *Williamson v. Cooke*, 10th Dist. No. 05AP-936, 2007-Ohio-493, ¶12. See also *Sherman v. Sherman*, 10th Dist. No. 05AP-757, 2006-Ohio-2309, ¶23 ("[s]ince compliance with the temporary orders is moot, the contempt proceeding is also moot"). For these reasons, Cheryl's argument that the trial court erred by vacating the magistrate's finding of contempt against Roy is moot. Thus, as with her first and third assignments of error, we render as moot Cheryl's second assignment of error.

{¶18} By her fourth and final assignment of error, Cheryl contends that the trial court erred by denying her request for attorney fees, pursuant to R.C. 3105.73(A), which states that, "[i]n an action for divorce, \* \* \* a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable." Cheryl based her request for attorney fees primarily on allegations of egregious conduct by Roy. Cheryl claimed that Roy's conduct throughout the litigation caused her to incur approximately 50 hours of additional attorney fees, for which she was entitled to reimbursement.

{¶19} To determine whether an award of attorney fees is equitable, "the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate." R.C. 3105.73(A). An award of attorney fees under R.C. 3105.73 lies within the trial court's sound discretion, and an appellate court may not reverse a decision regarding attorney fees absent an abuse of that discretion. See *Parker v.*

*Parker*, 10th Dist. No. 05AP-1171, 2006-Ohio-4110, ¶36. Thus, an appellate court must affirm unless the trial court's decision is unreasonable, arbitrary or unconscionable. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218.

{¶20} In its decision and judgment entry denying Cheryl's request for fees, the trial court reviewed many of the instances of conduct upon which Cheryl relied. The court considered Cheryl's allegations regarding Roy's failure to pay temporary support, which formed the basis of the magistrate's finding of contempt, later vacated by the trial court. The court also considered Cheryl's allegations regarding the parties' negotiations for an agreement permitting Roy to sell certain stocks, when Roy had already sold the stocks without court approval or Cheryl's knowledge. The court noted, however, that the agreement for Roy to sell the stocks ultimately benefited Cheryl because the proceeds from the stock sale were used to cure Roy's support arrearages. The court further considered Cheryl's contention that she incurred additional attorney fees as a result of Roy's filing of documents without his counsel's knowledge, Roy's failure to appear for a court date due to alleged illness, and Roy's delay in executing a quit claim deed for the marital residence after the Agreed Entry. The court ultimately concluded, however, that, upon consideration of the totality of the facts and circumstances, "an award of attorney fees to *either* party would not be equitable." (Emphasis sic.) The trial court's finding was not unreasonable, arbitrary or unconscionable.

{¶21} Even had the trial court believed the testimony presented that certain, identifiable portions of Cheryl's attorney fees were the direct result of Roy's conduct, the court was not required to grant an award of attorney fees if it otherwise concluded that an award was not equitable. In considering Cheryl's arguments, the court noted that

this case was vigorously contested by both parties, with a great deal of interpersonal conflict. Separate from Cheryl's allegations of egregious conduct by Roy, the court found that Cheryl's own actions and positions separately contributed to the length of the litigation. The court noted Cheryl's ongoing pursuit of spousal support despite her admission that the award she sought was unlikely to be granted and her admission that the final property settlement in the Agreed Entry differed only slightly from proposals offered by Roy as much as ten months earlier. Although Cheryl requested an award of only those fees she claimed were the result of Roy's allegedly egregious conduct, the court was entitled to consider any relevant factors it deemed appropriate in determining whether an award of fees was equitable. See R.C. 3105.73(A). Upon review, we discern no abuse of discretion in the trial court's denial of Cheryl's request for attorney fees, and we overrule Cheryl's fourth assignment of error.

{¶22} Having rendered moot Cheryl's first, second, and third assignments of error, and overruled her fourth assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

*Motion to strike denied;  
judgment affirmed.*

TYACK, P.J., and SADLER, J., concur.

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