

[Cite as *Simpson v. Simpson*, 2024-Ohio-4.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

NANCY JANE SIMPSON,	:	APPEAL NO. C-230079
	:	TRIAL NO. DR9902814
Plaintiff-Appellant,	:	
vs.	:	<i>OPINION.</i>
JAMES EDWARD SIMPSON,	:	
Defendant-Appellee.	:	

Appeal From: Hamilton County Court of Common Pleas, Domestic Relations
Division

Judgment Appealed From Is: Vacated

Date of Judgment Entry on Appeal: January 3, 2024

Stagnaro Hannigan Koop, Co., LPA, and Michaela M. Stagnaro, for Plaintiff-Appellant.

KINSLEY, Judge.

{¶1} Plaintiff-appellant Nancy Simpson appeals the decision of the Hamilton County Court of Common Pleas, Domestic Relations Division modifying the conditions under which her former husband, defendant-appellee James Simpson, could purge his contempt for failing to pay spousal support. Because James presented uncontroverted evidence that he had not been served with the contempt motion, we hold that the trial court lacked jurisdiction to find him in civil contempt. As a result, the trial court's orders in this case were entered without jurisdiction and are void. We therefore vacate the trial court's finding of contempt without prejudice to Nancy's refiling of a motion for contempt.

Factual and Procedural History

{¶2} After a nine-year marriage, James and Nancy Simpson divorced in 1999. As part of their divorce, the parties agreed that James would make escalating monthly spousal support payments to Nancy, beginning at \$500 and increasing to \$1,500 per month. Further, James agreed to pay Nancy spousal support for the duration of her life so long as she did not remarry or cohabitate with a nonfamily member of the opposite sex, which she never has. The trial court called this arrangement "inequitable, unjust, and, quite frankly, shocking to the conscience."

{¶3} Over the past 24 years, James has repeatedly struggled to make the agreed-upon spousal support payments. In 2001, shortly after their divorce, Nancy filed a contempt motion, arguing that James had failed to pay the required spousal support. James was held in contempt, sentenced to 30 days in jail, and served a weekend before paying the arrearage. In 2018, Nancy again filed for contempt based on nonpayment. This time, the parties negotiated a resolution that increased James's

monthly spousal support payments from \$1,500 to \$2,000. The additional \$500 per month was intended to address the arrearage James owed. An additional monthly amount was added to the \$2,000 monthly payment to account for Nancy's attorney fees in seeking the contempt.

{¶4} In 2023, James, now in his 80s, again found himself the subject of a contempt motion filed by Nancy. This third motion alleged that James owed \$14,502.89 in unpaid spousal support payments and administrative fees.

{¶5} Exhibits submitted by Nancy at the third contempt proceeding show that Nancy's counsel attempted to resolve the matter with James prior to filing the third contempt motion. She reached out to James by email to discuss his nonpayment, but received no response. After several days passed, she inquired about where to serve James with the contempt motion she planned to file. She received the following unsigned response: "Mr. SIMPSON IS IN A SENIORS HOME AND MAY NOT SURVIVE."

{¶6} Nancy then filed her contempt motion. A copy of the motion was sent to James by certified mail to 1964 Huckfinn Lane in Fort Mitchell, Kentucky. However, postal service records filed with the court indicate the certified mail was not received by James. Instead, the certified mail receipt was hand-delivered to "J. Rusdanbader" at an address beginning with 2319 rather than the Huckfinn address to which service was directed. The street name is not entirely legible on the certified mail return receipt.

{¶7} The contempt motion was set for an evidentiary hearing before a magistrate on September 16, 2022. James did not appear, nor did an attorney on his behalf. At the contempt hearing, the magistrate inquired as to whether James had

received service, and Nancy's counsel responded that he had. The certified mail receipt was not made an exhibit at the hearing, nor does the record reflect that the magistrate reviewed it to determine whether James had in fact been served.

{¶8} The contempt hearing proceeded in the absence of James and without his legal interests being represented. Nancy, who was 72 years old at the time of the hearing, was the sole witness. She testified to the divorce agreement, to James's nonpayment, and to the outstanding amount he owed her. She testified that not receiving James's payments imposed a financial hardship on her and that she could not pay her mortgage or utility bills without spousal support.

{¶9} On September 22, 2022, the magistrate found James in contempt and sentenced him to 60 days in jail and a \$500 fine. The magistrate gave James until November 22, 2022, to purge the contempt finding by paying \$14,502.89.

{¶10} The parties all appeared in court before the trial court judge on December 13, 2022, for a hearing as to whether James had purged the contempt or should instead be sentenced. At that time, James had not purged the contempt by making the required payment. But he appeared in court to contest the contempt finding.

{¶11} The purge hearing began with the trial court explaining to James that he had a right to an attorney and could ask for a continuance to obtain one if he did not already have one. James indicated that he could not afford an attorney and would therefore represent himself. At the trial court's request, he signed a waiver of counsel.

{¶12} Nancy's attorney then averred that James had not made payments towards the purge amount following the September 22, 2022 contempt finding. When given an opportunity to address the court, James indicated that the contempt finding

was based on “false assumptions.” The trial court then explained that the sole issue before it was whether to sentence James to the 60 days in jail, not whether the contempt finding was valid.

{¶13} The trial court inquired as to whether James was present at the contempt hearing to raise his concerns, and James said he was not. He wanted to explain why he was not, and the trial court afforded him that opportunity.

{¶14} James then indicated that he had not been served with the contempt motion in advance of the September 16, 2022 hearing. He explained that he had moved to a new address around the time of the hearing, that his online change of address form did not go through, and that his ex-wife¹ had not been providing the mail that came to his old address to him during this period of time. He indicated that, if the contempt motion was delivered to his house, he never received it. This evidence was uncontroverted by Nancy.

{¶15} The court then asked the clerk to verify the address on file for James. It did not match his current address. The clerk updated James’s service records in the courtroom during the hearing.

{¶16} James continued to explain that he was unable to pay the purge amount. His sole sources of income are social security and a small pension of approximately \$700 per month from his employer.

{¶17} Nancy also testified. She testified that James tried to broker a deal where he would live with her after his most recent ex-wife demanded that he leave their house. He told Nancy that she would not see her spousal support payments unless she agreed to this living arrangement. Nancy also explained that the escalating

¹ James has been married more than once. When he referred to his ex-wife at the purge hearing, he meant the woman he married after Nancy.

spousal support plan the parties agreed to in 1999 was to account for her equity in the parties' home that James kept. James disputed this testimony.

{¶18} The trial court took the matter under advisement. It later issued a decision modifying the purge condition. Its order gave James until July 11, 2023, to pay \$100 or face imposition of the magistrate's 60-day jail sentence and \$500 fine.

{¶19} It is from this order modifying the purge condition that Nancy now appeals. She raises a single assignment of error: whether the trial court abused its discretion in reducing the purge amount rather than ordering James to jail.

Legal Standards

{¶20} We begin our analysis by summarizing the legal standards applicable to civil contempt cases and appeals of civil contempt findings.

{¶21} Civil contempt of court may be either direct or indirect. *In re Purola*, 73 Ohio App.3d 306, 310, 596 N.E.2d 1140 (3d Dist.1991). Direct contempt is misbehavior committed in the presence of the court that undermines the administration of justice, while indirect contempt is committed outside the court with similar effect. *Id.* Because the judge observes direct contempt, due process does not require a hearing. *Id.* at 312. However, when the contempt is indirect in nature, the contemnor must be given the opportunity to challenge the contempt finding at a hearing before being punished. *Id.*

{¶22} Civil contempt is considered remedial in nature and is intended to benefit the complainant. *Troja v. Pleatman*, 1st Dist. Hamilton No. C-150746, 2016-Ohio-5294, ¶ 11. As a result, any term of incarceration is conditional in order to obtain the contemnor's compliance with the court's order. *Id.* The subject of the civil contempt order must therefore be given an opportunity to purge the contempt prior

to the imposition of any period of incarceration. *In re W.F.*, 12th Dist. Fayette No. CA2010-10-029, 2011-Ohio-3012, ¶ 12.

{¶23} Due process protections also attach to an indirect contempt proceeding. For one, the subject of such a contempt motion is entitled to at least 30 days' notice in advance of a contempt hearing. *See Poptic v. Poptic*, 12th Dist. Butler No. CA2005-06-145, 2006-Ohio-2713, ¶ 9. For another, a person who is the subject of a civil contempt motion has a right to counsel at the contempt stage. *Id.* at ¶ 15-16. This includes the appointment of an attorney if the alleged contemnor lacks the financial means to afford legal representation. *See* R.C. 2705.031(C)(2) (requiring notice to alleged contemnor of the right to appointed counsel in child and spousal support contempt proceedings if the contemnor is indigent).

{¶24} Civil contempt filings are further subject to the Ohio Rules of Civil Procedure regarding service of process. *Johnson v. Johnson*, 2d Dist. Greene No. 2020-CA-7, 2020-Ohio-5275, ¶ 21. The plaintiff bears the burden of obtaining proper service on a defendant. *Cincinnati Ins. Co. v. Emge*, 124 Ohio App.3d 61, 63, 705 N.E.2d 408 (1st Dist.1997). Where the plaintiff follows one of the methods outlined in the Civil Rules for service, courts presume the service was proper unless the defendant rebuts the presumption with sufficient evidence of nonservice. *Mitchell v. Babickas*, 8th Dist. Cuyahoga No. 105294, 2018-Ohio-383, ¶ 10. To rebut the presumption, the defendant must produce evidentiary-quality, uncontroverted information demonstrating a lack of proper service. *Id.* at ¶ 10. It is reversible error for a trial court to disregard unchallenged testimony that a person did not receive service. *Rafalski v. Oates*, 17 Ohio App.3d 65, 67, 477 N.E.2d 1212 (8th Dist.1984).

{¶25} Upon receiving service, the subject of a contempt motion related to spousal support may defend against the contempt by demonstrating an inability to pay. *DeMarco v. DeMarco*, 10th Dist. Franklin No. 09AP-405, 2010-Ohio-445, ¶ 25. The party asserting an inability to pay bears the burden of proving the defense. *Id.*

{¶26} Lastly, with respect to appeals, trial court orders that find a contemnor in civil contempt and impose a purge condition are final and appealable as to the contempt finding even though the purge condition has not yet occurred. *See Docks Venture, LLC v. Dashing Pacific Group, Ltd.*, 141 Ohio St.3d 107, 2014-Ohio-4254, 22 N.E.3d 1035, ¶ 23 (“[A] court order finding a party in contempt and imposing a sentence conditioned on the failure to purge is a final, appealable order on the issue whether the party is in contempt of court.”). “[A] contemnor may have an additional appeal on the question whether the purge conditions have been met following execution of sentence on the failure to purge.” *Id.*

Service

{¶27} Because it implicates jurisdiction, we address the question of whether James was sufficiently served with Nancy’s contempt motion.

{¶28} To invoke the continuing jurisdiction of the trial court in a divorce action after the divorce has concluded, Civ.R. 75(J) requires the filing of a motion and service by one of the methods specified in Civ.R. 4 to 4.6. As this court has observed, a contempt proceeding “is essentially a new and independent proceeding in that it involves new issues,” and, as such, it “must be initiated by the issuance and service of new process.” *Hansen v. Hansen*, 132 Ohio App.3d 795, 799, 726 N.E.2d 557 (1st Dist.1999). The failure to effectuate service using one of the requisite methods in the Civil Rules invalidates the trial court’s continuing jurisdiction under Civ.R. 75(J). *See,*

e.g., Farley v. Farley, 10th Dist. Franklin Nos. 99AP-1103 and 99AP-1282, 2000 Ohio App. LEXIS 3902, 16 (Aug. 31, 2000).

{¶29} We review a trial court's finding that service of process was accomplished for an abuse of discretion. *Belisle Constr. Inc. v. Perry*, 3d Dist. Crawford No. 3-17-11, 2022-Ohio-239, ¶ 22.

{¶30} Here, the trial court abused its discretion by ignoring the uncontroverted evidence that James had not been properly served with Nancy's contempt motion. In fact, the court below made no specific factual findings as to service. Rather, the magistrate merely accepted the assertion of Nancy's counsel that service had been made without reviewing the certified mail receipt in the record that reflected receipt by a person other than James. That would have been of no moment, given that service is presumed to be adequate if the plaintiff uses a method authorized by Civ.R. 4. *See Mitchell*, 8th Dist. Cuyahoga No. 105294, 2018-Ohio-383, at ¶ 10. But James subsequently rebutted the presumption by testifying that he did not receive the motion due to a change of address. And this was buttressed by the discrepancies on the certified mail form between both the address of delivery and the address of receipt and the name "J. Rusdanbader," who is clearly not James. Once this information was in the record, the trial court was obligated to assess jurisdiction under Civ.R. 75(J), a step it failed to take at the purge hearing. *See, e.g., Farley* at 16. It failed to make such an inquiry, instead ignoring the service question altogether.

{¶31} Disregarding unchallenged evidence that a person did not receive service is reversible error. *See Rafalski*, 17 Ohio App.3d at 67, 477 N.E.2d 1212. Rather, such evidence implicates the continuing jurisdiction of the trial court under Civ.R. 75(J). *See, e.g., Farley*, 10th Dist. Franklin Nos. 99AP-1103 and 99AP-1282,

2000 Ohio App. LEXIS 3902, at 16. In light of James’s testimony and the certified mail receipt, we therefore hold that the trial court erred in exercising continuing jurisdiction in this case.

Conclusion

{¶32} For the reasons set forth in this opinion, we conclude that James rebutted the presumption of proper service by presenting uncontroverted evidence that he did not receive the contempt motion in advance of the contempt hearing. The trial court accordingly lacked continuing jurisdiction under Civ.R. 75(J) to find him in indirect civil contempt. The judgment of the trial court is vacated without prejudice to refile of the contempt motion by Nancy.

Judgment vacated.

BOCK, J., concurs.

ZAYAS, P.J., dissents.

ZAYAS, P.J., dissenting.

{¶33} Because I would hold that the order appealed from is not a final, appealable order, I respectfully dissent.

{¶34} In *Docks Venture, L.L.C. v. Dashing Pacific Group, LTD*, 141 Ohio St.3d 107, 2014-Ohio-4254, 22 N.E.3d 1035, ¶ 21, the Ohio Supreme Court recognized the two circumstances constituting appellate consideration in a civil contempt case. The first instance is the order deriving from the contempt hearing, which addresses “whether at the time of the finding of contempt and the imposition of sentence the trial court considered the actions of the alleged contemnor and followed the law in its findings and sentence.” *Id.* The second instance is the order deriving from the purge hearing, which addresses “whether at the time of the hearing on compliance with

purge conditions the court considered whether the contemnor met the conditions *or was prevented from doing so.*” (Emphasis added.) *Id.*

{¶35} Recognizing that it would be inherently unfair to force a party found in contempt to either comply with a potentially illegal or improper contempt order or submit to a sanction in an effort to obtain appellate review of an order deriving from the first circumstance, the Ohio Supreme Court ultimately held that “a court order finding a party in contempt and imposing a sentence conditioned upon the failure to purge is a final, appealable order on the issue of whether the party is in contempt of court.” *Id.* at ¶ 23. It further recognized that a contemnor may have an additional appeal on the question of whether the purge conditions have been met *following execution of sentence on the failure to purge.* *Id.*

{¶36} Here, the order appealed from does not ultimately derive from either circumstance. The initial contempt order—which found James in contempt and sentenced him to 60 days in jail conditioned upon his failure to meet the offered purge condition—was entered on September 21, 2022, and no appeal was taken from this order.

{¶37} Rather, the order at issue here derived from a later purge hearing at which the trial court was considering whether to execute the sentence already imposed by the initial contempt order. After hearing argument from James at the hearing pertaining to his financial circumstances, the trial court ultimately concluded that the initial purge condition did not provide James with a true “opportunity” to purge the contempt and therefore issued a new purge condition to provide James a further opportunity to purge the contempt before executing the already imposed sentence. The questions presented by this appeal concern only the trial court’s authority to issue

the new purge condition at the purge hearing rather than executing the previously imposed sentence.²

{¶38} However, while the order at issue implicates the second circumstance laid out by the Ohio Supreme Court—as the trial court was considering whether James was prevented from meeting the purge condition—the order is ultimately not a final, appealable order in this regard as the order contemplates further action before the trial court enters final judgment on whether to execute the previously-imposed sentence for the failure to purge. *See, e.g., Fries v. Greg G. Wright & Sons, LLC*, 2018-Ohio-3785, 120 N.E.3d 426, ¶ 13 (1st Dist.), quoting *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, 516 N.E.2d 597, ¶ 4 (“ ‘A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order.’ ”); *Mill Creek Metro. Park Dist. Bd. of Commrs. v. Less*, 172 Ohio St.3d 24, 2023-Ohio-2332, 221 N.E.3d 813, ¶ 8, quoting *VIL Laser Sys., L.L.C. v. Shiloh Industries, Inc.*, 119 Ohio St.3d 354, 2008-Ohio-3920, 894 N.E.2d 303, ¶ 8 (“Generally, an order ‘that leaves issues unresolved and contemplates further action is not a final, appealable order.’”).

{¶39} Because the second circumstance warranting appellate consideration described by the Ohio Supreme Court arrives only *upon execution of the sentence*, I would hold that the order at issue is an interlocutory order, and this court accordingly lacks jurisdiction to consider this appeal. Therefore, I would dismiss the appeal.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

² Notably, James has not appeared before this court. He did not file a brief in this matter. Thus, he has not challenged the original contempt order, the order now before this court on appeal, or improper service.