IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK M. SPARKS,[1]	§	
	§	No. 350, 2013
Respondent Below,	§	
Appellant,	§	Court Below: Family Court of
	§	the State of Delaware, in and for
v.	§	Sussex County
	§	
PAULA D. MATTHEWS,	§	C.A. No. CS09-02122
	§	
Petitioner Below,	§	
Appellee.	§	

Submitted: October 16, 2013
Decided: December 31, 2013

Before **HOLLAND**, **BERGER,** and **JACOBS**, Justices.

O R D E R

This 31st day of December 2013, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. This case arises out of the divorce of Derrick Sparks ("Sparks") and Paula Matthews ("Matthews"). Sparks appeals from two Family Court orders. The first order found Sparks in contempt of a Decision and Order on Ancillary Matters, and required Sparks to list the former marital home for sale, to divide the sale proceeds, and to pay Matthews alimony on a monthly basis. The second order

[1] This Court *sua sponte* assigned pseudonyms to the parties by Order dated July 3, 2013, pursuant to Supreme Court Rule 7(d).

denied Sparks' motion for new trial and re-argument. We find that Sparks' claims lack merit, and, therefore, affirm both Family Court orders.

2. Derrick Sparks and Paula Matthews were married in 1986. After 23 years, a final decree of divorce ended their marriage in 2009. On June 22, 2011, the Family Court entered a Decision and Order on Ancillary Matters (the "June 2011 Order"), awarding Matthews 50% of the marital property—consisting of the marital home valued at $55,000 and a truck valued at $5,400—plus monthly alimony payments. More specifically, the order allowed Sparks to retain possession of the marital home, but required him to pay Matthews $30,200 (one-half the value of the marital property) within 120 days, and if he did not, to (i) list the home for sale immediately and pay Matthews one-half of the net sale proceeds, and (ii) pay Matthews $2,700 (one-half the value of the truck). The order also directed Sparks to pay Matthews $1,100.83 in monthly alimony, beginning on July 15, 2011.[2] This Court affirmed the June 2011 Order on January 19, 2012.[3]

3. By his own admission, at least as of September 4, 2012 Sparks has not paid Matthews $30,200 or sold the house. Nor has he paid Matthews the full amount of alimony due. On August 30, 2011, Matthews filed a petition for a rule to show cause and specific performance, claiming that Sparks had failed to make

[2] The court determined that Sparks received an annual income of approximately $42,000, while Matthews received an annual income of $17,736.

[3] *Samson v. Mack*, 38 A.3d 1255 (Del. 2012) (TABLE).

alimony payments as the June 2011 Order required.[4] On September 4, 2012, the Family Court held a hearing on the petition that addressed Sparks' failure to make the required alimony payments and to pay Mathews $30,200 or take steps to sell the marital home. Sparks testified that he had signed an agreement with a realtor to list the marital home for $39,900 at the end of August 2012. Sparks also testified that he had made thirteen payments of $300 and one payment of $250 to Matthews, but that many of his monthly expenses had "gone up" since the June 2011 Order, thereby preventing him from making the full monthly alimony payment. Sparks' girlfriend testified from memory about Sparks' monthly expenses.[5] Matthews testified that it was she (Matthews) who had spoken to a realtor and initiated the listing of the marital home in August 2012. Matthews also testified that she had received only eleven payments of $300, plus one payment of $250 from Sparks.

4. In a November 2, 2012 order (the "November 2012 Order"), the Family Court found that Sparks was in contempt of the June 2011 Order.[6] Specifically, the

[4] Matthews also claimed that Sparks failed to pay $200 in fees awarded by a May 2010 order, but that claim was dropped during the proceedings.

[5] During her testimony, Sparks' girlfriend at times had her memory "refreshed" by expense lists she had prepared in contemplation of the hearing. She also testified that she did not know whether Sparks' expenses had increased since he had filed the documents upon which the June 2011 Order was based.

[6] The court applied the criteria set forth in *Watson v. Givens* for a finding of contempt. "Three criteria must be met to support a finding of contempt: 1) there must exist a valid . . . order; 2) the [respondent] must have had the ability to abide by the valid . . . order; and, 3) the [respondent]

court found that (i) the June 2011 Order required Sparks to list the marital home for sale immediately after October 22, 2011;[7] (ii) Sparks violated that order by failing to list the home until August 2012; (iii) Sparks is responsible for any depreciation in value of the marital home and must pay Matthews one-half of the difference between $55,000 and the ultimate sale price of the home; and (iv) Sparks did not show that it was or would have been impossible for him to pay the full alimony award. The court ordered Sparks to pay $10,460.79 in arrears,[8] plus $627.65 in interest.

5. On November 13, 2012, Sparks moved for a new trial and re-argument.[9] He advanced four grounds in support of his motion. First, he argued that under the June 2011 Order he was not solely responsible for listing the home, and that, as a matter of law, he could not list the marital home for sale without Matthews' cooperation. Second, he offered new evidence to demonstrate that he had made

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must have, in fact, disobeyed the . . . order. . . . [The petitioner] must show a violation . . . by clear and convincing evidence." *Watson v. Givens*, 758 A.2d 510, 512 (Del. Fam. 1999) (citations omitted). The court noted that inability to pay may be a defense, but that the respondent has the burden of proving his inability to pay.

[7] This is the date calculated by the Family Court.

[8] Because the parties asserted that different amounts had been paid by Sparks towards his alimony obligations, the court "split the difference" between the two amounts and awarded Sparks a credit of $3,850 for alimony already paid.

[9] On November 30, 2012, Sparks also appealed from the November 2012 Order to this Court. We denied that appeal as interlocutory, because the trial court had not yet ruled on Matthews' application for attorney's fees. *Sparks v. Matthews*, 2013 WL 1044680 (Del. Mar. 13, 2013).

efforts to list the home and that Matthews had failed to cooperate.[10] Third, he claimed that there was no evidence that the home had depreciated in value or that he was responsible for any depreciation. Finally, regarding the alimony, he claimed that the court prevented him from submitting evidence regarding his expenses and, thus, had erroneously denied his "impossibility" defense.

6. By letter and order dated June 17, 2013 ("June 2013 Order"), the Family Court denied Sparks' motion for new trial and re-argument. The court addressed each of Sparks' claims in turn. Regarding Sparks' obligation under the June 2011 Order to sell the marital home, the court clarified that although Matthews' participation was required to sell the home, Sparks was primarily responsible for facilitating that sale. The court reasoned as follows: The June 2011 Order stated that "[i]n the event [Sparks] is unable to pay [Matthews $30,200] within the required period, the real estate shall be immediately listed for sale. Once sold, [Sparks] shall pay to [Matthews] one-half of the net proceeds from the sale." Accordingly, that order imposed the duty to list the former marital residence on Sparks. Because Sparks was in possession of the home, the language of the June 2011 Order enabled him to decide whether to keep the home or to sell it. Moreover, the order directed Sparks to pay Matthews after the property was sold, a

[10] He asserted that his attorney made three phone calls (on November 21, 2011, February 14, 2012, and June 21, 2012) to Matthews' attorney in an attempt to list the home. Sparks, Sparks' attorney, and Sparks' girlfriend submitted affidavits attesting to these phone calls.

fact further supporting the conclusion that Sparks bore the responsibility of facilitating the sale.[11]

7. Next, the court concluded that it could not consider new evidence that had not been submitted at trial. Alternatively, even if the court could consider the new evidence, that evidence would not alter the finding of contempt. The date of the first alleged phone call (November 21, 2011) was thirty-two days after the expiration of the 120 day period set forth in the June 2011 Order. Thus, even had the call taken place, Sparks would still have been in violation of that order.

8. The Family Court also found Sparks' claim regarding the depreciation of the home to be without merit. The home was listed for $15,100 less than the stipulated value incorporated into the June 2011 Order. The court reasoned that because Sparks was the sole occupant of the home, the loss in value was attributable to Sparks, regardless of whether that loss was caused by disrepair or market fluctuations.

9. Finally, the court reiterated its conclusion that Sparks had failed to prove his inability to make the full alimony payments, even though during the hearing the court had given Sparks great latitude in presenting his evidence. The court had weighed the evidence presented, and found that the documentary

[11] The court noted that had Sparks sought to comply with the June 2011 Order and had Matthews refused to cooperate, he could have petitioned the Court for enforcement.

evidence was insufficient and that his and Sparks' girlfriend's testimony was "wholly ineffective."[12] The court further noted that, before the hearing, Sparks had not attempted to modify the alimony obligation.

10. Sparks timely appealed to this Court. On appeal from a Family Court decision, this Court reviews both the facts and the law, as well as inferences and deductions made by the trial judge.[13] We must review the sufficiency of the evidence and test the propriety of the findings.[14] This Court will not substitute its own judgment for the inferences and deductions made by the trial judge if they are supported by the record and are the product of an orderly and logical reasoning process.[15] We review issues of law *de novo*, and will not disturb findings of fact unless they are clearly erroneous.[16]

11. Sparks advances four claims, three of which were raised in his motion for new trial and re-argument. Regarding the listing and sale of the marital home, Sparks first (re-)argues that, under the June 2011 Order, he was not solely

[12] In addition to the testimony, Sparks had entered a tax bill from September 2012 and a medication list into evidence.

[13] *Clark v. Clark*, 2012 WL 6597798, at *2 (Del. Dec. 17, 2012) (Ridgely, J.) (citing *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983)).

[14] *Id.* (citing Wife (J. F. V.) v. Husband (O. W. V., Jr.), 402 A.2d 1202, 1204 (Del. 1979)).

[15] *Walton v. Walton*, 2003 WL 22992210, at *2 (Del. Dec. 17, 2003) (citing *Solis*, 468 A.2d at 1279).

[16] *Id.* (citing *Solis*, 468 A.2d at 1279-80).

responsible for listing the property, and that he was legally incapable of listing the property without Matthews' cooperation. This claim lacks merit. The Family Court's reasoning—that the June 2011 Order required Sparks to facilitate the listing and sale of the property—is logical, supported by the record, and free from legal error. Sparks provides insufficient support for his subsidiary claim that, as a matter of law, he alone cannot list the property.[17] The Family Court acknowledged that Matthews' cooperation was required to sell the property, but observed that had Sparks sought to comply with the June 2011 Order and had Matthews refused to cooperate, at that time, then Sparks could have petitioned the Court for enforcement.

12. Second, Sparks claims that the Family Court erred by not considering the new evidence offered on his motion for new trial and re-argument. This claim rests on his argument that Matthews' initial petition did not provide notice that the listing and sale of the marital home would be addressed during the trial proceedings. Sparks is correct that Matthews' petition, filed in August 2011, did

[17] Sparks cites two cases, the first of which states, *inter alia*, that upon divorce, a tenancy by the entirety is converted to a tenancy in common. *Townsend v. Townsend*, 168 A. 67, 68-69 (Del. Super. Ct. 1933). The second case involved a divorced spouse who refused to sign a deed as required for the sale and division of marital property. *Klein v. Klein*, 2010 WL 5274048, at *1 (Del. Dec. 16, 2010). Beyond those cases, Sparks relies on his bare assertion during the hearing that he could not list the property alone.

not raise any issues related to the marital property division.[18] Nonetheless, Sparks failed to raise the issue of inadequate notice at the September 2012 hearing, in his closing submissions, or in his motion for new trial and re-argument. Therefore, Sparks has waived this claim.[19] Because the Family Court properly declined to consider the new evidence, we affirm the court's finding that Sparks failed to meet his obligations to list the marital property.

13. Sparks next objects to the Family Court's determination that the depreciation of the marital property must be attributed to him. He claims that that finding is unsupported by the record. First, Sparks argues, the list price does not necessarily reflect the value of the marital home, but only the price that was set in order to sell the home quickly. This argument fails, because Sparks offers no reasonable explanation why a realtor would list a home for an amount below its market value. Sparks next argues that the property could have declined in value well before the expiration of the 120 day period. Even if that were true, had Sparks taken steps to list the home immediately after the 120 day deadline, there

[18] The record reflects that a teleconference with the parties and the presiding judge was held approximately three months before the hearing. However, the record available to this Court does not contain a transcript of, or a summary of issues discussed, during the teleconference.

[19] *See Christiana Town Ctr., LLC v. New Castle Cnty.*, 2004 WL 2921830, at *3 (Del. Dec. 16, 2004) ("[T]he record shows that Christiana voluntarily, knowing and intelligently waived its due process rights to adequate notice of the RTC hearing by failing to object to the inadequate notice at the actual hearing."); *Preston v. Bd. of Adjustment of New Castle Cnty.*, 2002 WL 254150, at *5 (Del. Super. Ct. Feb. 21, 2002) *aff'd*, 804 A.2d 1067 (Del. 2002) ("Regardless of whether the Prestons received the notice mandated by the UDC, the fact is that the Prestons attended the hearing and did not object to the alleged inadequate notice at the hearing.").

would be no concern that any loss in value was caused by his delay. Essentially, the Family Court found that by violating the June 2011 Order, Sparks assumed the risk that the property would sell for less than its stipulated value. Given its conclusion that Sparks violated the June 2011 Order and failed to take action to list the property for approximately eight months, the Family Court's determination is reasonable and supported by the record.

14. Finally, Sparks claims that the Family Court erred by limiting testimony regarding his expenses, because he had not filed a petition to modify alimony. As the court noted in its June 2013 Order, Sparks was given great latitude in presenting evidence of his expenses. Indeed, the testimony of Sparks' girlfriend constitutes approximately one-quarter of the hearing transcript. Nor does the record show that Sparks was precluded from submitting any additional documentary evidence. The court made a factual determination that the documentary evidence (consisting of a tax bill and a medication list) was insufficient, and that the girlfriend's testimony, together with Sparks' bare assertions that his expenses had "gone up," were unpersuasive. As a factual matter, that determination was not clearly erroneous, and as a legal matter, it was correct. 13 *Del. C.* § 1519 provides that an alimony award may be modified or

terminated "*only* upon a showing of real and substantial change of circumstances."[20] Sparks' claim, therefore, lacks merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[20] 13 *Del. C.* § 1519(a)(4) (emphasis added).