

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION I

CA07-1116

May 14, 2008

LEONARD TERRAL
APPELLANT

AN APPEAL FROM SEBASTIAN COUNTY
CIRCUIT COURT
[NO. DR2005-404(II)]

v.

BETTY TERRAL
APPELLEE

HONORABLE HARRY FOLTZ,
JUDGE

AFFIRMED

Appellant Leonard Terral appeals from an order denying his petition to terminate alimony and awarding damages to appellee Betty Terral for Leonard's contempt of the parties' divorce decree. *We affirm.*

Leonard and Betty were divorced on December 30, 2005. Their marital property included gas and mineral rights on several acres of land; a "home place" that contained the couple's marital dwelling; various vehicles; household furnishings and garage tools; and stock, retirement, and bank accounts. The decree divided this property equally for the most part and gave the parties ninety days to "mutually sell and dispose" of it or petition for a public sale. Betty received possession of the marital home until it sold and alimony for life in the form of gas and mineral royalties.

After the divorce hearing, Betty asked the court to hold Leonard in contempt. She alleged that, while she was away receiving treatment for cancer, Leonard broke into the marital home, removed items from the house and garage, placed a “For Rent” sign on the house, and placed a “For Sale” sign on the parties’ truck. Leonard responded that he offered the house for rent in order to keep it insured after Betty “removed herself” from the property. He admitted taking some of his “personal items” out of the garage and stated that he was selling the truck because its \$9000 indebtedness needed to be satisfied.

In February 2006, the parties addressed some of their property disputes in a handwritten contract. They agreed, among other things, that they would meet at Farmers Bank on March 16, 2006, to divide accounts and, after meeting at Farmers, would divide accounts at other financial institutions; that neither would make further sales of property identified in the decree without a court order or written agreement; and that the circuit clerk would begin the process of holding a public sale of their personalty. Thereafter, most of the parties’ real and personal property was sold and the proceeds distributed by order dated December 8, 2006.

On December 21, 2006, Leonard filed a motion to terminate Betty’s alimony citing changed circumstances. He claimed that Betty had started receiving Social Security disability payments and that the royalties constituting her alimony had increased from \$1600 per month to about \$2200 per month. Betty responded that circumstances had not changed because the trial judge knew at the divorce hearing that she would receive Social Security payments and that the royalties would fluctuate. She also asserted that Leonard

refused to divide an IRA account, refused to divide the proceeds from the house rental and truck sale, and removed items from the garage that were scheduled to be sold.

Following a hearing, the court denied Leonard's petition to terminate alimony and held him in contempt for removing items from the garage and failing to divide proceeds from the IRA, house rental, and truck sale. The court criticized Leonard's "cavalier disregard" of its orders, declared that Leonard's actions "have caused considerable inconvenience to [Betty]," and stated that Leonard "sometimes appeared to intentionally cause [Betty] as much anguish and inconvenience as possible." The court made the following awards to Betty as damages for Leonard's contempt: 1) \$1750 as half the IRA account; 2) \$1437 for the items taken from the garage; 3) \$2325 as half the house-rental proceeds; 4) \$1355 as half the truck-sale proceeds. The court also denied Leonard's motion to terminate alimony. Leonard appeals from each of these rulings.

I. Contempt

Contempt may be used to effect civil remedies, the result of which is to make the innocent party whole from the consequences of contemptuous conduct. *Wakefield v. Wakefield*, 64 Ark. App. 147, 984 S.W.2d 32 (1998). In cases of civil contempt, the objective is the enforcement of the rights of the private parties to litigation. *Id.* Punishment for civil contempt will be upheld on appeal unless the trial court's order is arbitrary or against the weight of the evidence. *Id.*

A. IRA account

Betty and Leonard met at Farmers Bank on March 16, 2006, to divide accounts pursuant to their handwritten agreement. Afterwards, Betty and her attorney prepared to

go to Arvest Bank to divide a \$3500 IRA there. Leonard refused to do so. The court held Leonard in contempt, ruling that the decree was “crystal clear” that all IRAs were to be divided equally.

Leonard contends on appeal that the court divided the Arvest IRA twice because he purchased it with funds that he and Betty split when they separated in 2005. Leonard is essentially arguing that he bought the IRA with his own funds. However, he did not claim the Arvest IRA as his separate property in the divorce. Rather, the decree provided that *all* IRAs were marital property to be divided equally. Leonard was therefore bound, under the terms of the decree, to divide the Arvest IRA with Betty. Further, Leonard acknowledged at the contempt hearing that the handwritten agreement’s reference to dividing accounts at other institutions could only have meant an Arvest account. Under these circumstances, the trial court did not err in holding Leonard in contempt for disobeying the decree.

B. Property taken from the garage

The divorce decree awarded Betty the contents of the home place and provided that the garage tools and other personalty would be sold and the proceeds divided evenly. Betty testified that, when Leonard broke into the residence, he took several items from the garage, including a chain saw, car parts, a Christmas tree, lamp, VCR, and television, with a total value of \$1437.50. The court awarded Betty \$1437 for Leonard’s contempt in taking the property.

Leonard argues on appeal that the court should have awarded Betty half the \$1437 because, under the decree, the garage items were to be divided equally. However, the

court found that the articles taken from the garage may have included Betty's non-marital property and household furnishings, which were awarded to her separately. Moreover, the court was not bound in this contempt proceeding to make an equal division of marital property. The court could reasonably have awarded damages to Betty not only for the value of the purloined items but as compensation for the inconvenience she suffered when the items were taken.

C. Rental payments

After Leonard broke into the house while Betty was receiving cancer treatment in Texas, he rented the house and received \$4650. He paid none of it to Betty, claiming he spent more than that to repair and refurbish the house for rental. The court awarded Betty \$2325 as half the rents, ruling that the repairs were not authorized and that Leonard made them "at his peril." We find no error. Leonard not only gained unauthorized possession of the house but took it upon himself to rent the house and make repairs. He did not receive permission from the court or Betty's consent before proceeding, which prevented Betty from having input on the necessity of the rental and repairs. One who officiously confers a benefit upon another is not entitled to restitution therefor. *See Childs v. Adams*, 322 Ark. 424, 909 S.W.2d 641 (1995).

D. Truck-sale proceeds

The decree stated that the parties "have an indebtedness on the 2000 GMC vehicle, and [Leonard] will continue to make the payments on the GMC, pending the sale. After the debt has been paid, the proceeds of sale shall be equally divided." Leonard made payments of \$2398 on the truck, then sold it. Afterwards, he paid off the debt and was left

with \$2710. He refused to share the full amount with Betty, claiming that he should first be reimbursed for the payments he made pending the sale. The court ruled that Leonard sold the truck in violation of the decree, which specified a mutually agreeable sale, and that Leonard was not entitled to a set-off because the decree was silent on his recouping any truck payments made prior to sale. The court awarded Betty \$1355 as half the sale proceeds.

We agree with the court's ruling. The divorce decree ordered Leonard to make the truck payments and contained no provision for their reimbursement. Had Leonard wanted credit for the payments, he could have ensured that the decree so provided. Instead, the decree simply stated that, after Leonard made the payments and the truck was sold, the proceeds would be divided equally after the debt was paid. When Leonard refused to divide the net proceeds after the sale, he disregarded the decree, and the court was within its authority to compel his obedience. *See Johnson v. Johnson*, 343 Ark. 186, 33 S.W.3d 492 (2000).

Leonard argues that the decree was not silent on his receiving credit for the truck payments, citing an exhibit that states, "each to pay one-half" of certain debts, including the truck. We disagree that this phrase changes the decree's language expressly giving Leonard the responsibility for making the pre-sale truck payments.

II. Petition to terminate alimony

Modification of alimony must be based on a change in the circumstances of the parties. *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003). The burden of showing a change in circumstances is always upon the party seeking modification. *Id.* A court's ruling

regarding a change in circumstances is a finding of fact that will not be reversed unless clearly erroneous. *See id.*

Betty testified at the September 2005 divorce hearing that the previous month's gas and mineral royalties on the couple's properties totaled \$1600. She asked the court to award her full rights to future royalties in lieu of a monthly dollar amount of alimony, and the court did so, taking into account Betty's poor health, the length of the marriage, and the disparity in the parties' incomes. Betty also testified that her doctors told her she would qualify for Social Security disability payments. The court ordered Leonard to pay Betty's health insurance premiums until she obtained Social Security benefits.

In December 2006, Leonard moved to terminate alimony because the royalty payments had increased and Betty was receiving Social Security benefits. A trial exhibit showed that several royalty payments in 2006 and 2007 were much greater than \$1600, though others were comparable or even less. The court ruled that circumstances had not changed because it awarded royalties to Betty "knowing full well that the royalties could be expected to fluctuate." Further, the court found that, considering all the reasons alimony was awarded in the first place, there was no reason to terminate it.

We cannot say that the trial court clearly erred. If the court knew when it awarded alimony in the form of royalty payments that the royalties would fluctuate, such fluctuation would not constitute a material change in circumstances or a fact not known at the time of the initial order. *See generally Meins v. Meins*, 93 Ark. App. 292, 218 S.W.3d 366 (2005). Moreover, the court ruled that the same factors that merited an award of

alimony to Betty in the initial decree — poor health, length of marriage, disparity in earnings — still held true.

Leonard argues that the court's refusal to terminate alimony was a punitive measure. Our review of the record reveals no evidence of this. The court considered the traditional factors in making its ruling.

III. Attorney fees

Leonard argues for the first time in his reply brief that the court's award to Betty of \$6500 in attorney fees was excessive. We do not address arguments raised for the first time in a reply brief. *Rolling Pines v. City of Little Rock*, 73 Ark. App. 97, 40 S.W.3d 828 (2001).

Affirmed.

HEFFLEY, J., agrees.

HART, J., concurs.

HART, J., concurring. I concur but write separately to note that the circuit court simply distributed the property in question as contemplated by the divorce decree. First, the division of the IRA was provided for by the decree, and the circuit court divided it accordingly. Second, as for the rental payments, since the decree placed appellee in possession of the residence, she was entitled to—at a minimum—half the rents. Appellant's act of entering the home in appellee's absence and voluntarily expending funds to repair the home did not entitle him to any reimbursement, as he was at best a volunteer and at worst a trespasser. Third, the truck-sale proceeds were also distributed in accordance with the decree, and the decree did not provide appellant with a setoff for truck payments.

Fourth, the court determined that the property taken from the garage belonged to appellee and awarded the value agreed upon by the parties. The only “sanction” imposed by the court was the \$150 it awarded because appellant took a washer and dryer, which appellant does not appeal. Accordingly, I would affirm for reasons other than those given by the majority.