

RENDERED: DECEMBER 5, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001929-MR

CHARLES MELVIN ADAMS

APPELLANT

v.

APPEAL FROM OLDHAM FAMILY COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 09-CI-00095

SHANNON MARIE ADAMS,
NOW BRINGHURST

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND
REMANDING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND JONES, JUDGES.

DIXON, JUDGE: Charles Melvin Adams appeals from an order of the Oldham Circuit Court imposing contempt sanctions for his failure to comply with the terms of an order regarding payment of a debt to his ex-wife, Shannon Marie Adams, now Bringhurst. Charles also appeals the court's ruling that Shannon's child

support arrearage would be deducted from the total amount Charles owed Shannon on the unpaid debt. We affirm in part, reverse in part, and remand.

In November 2009, the circuit court entered a limited decree dissolving the marriage of Charles and Shannon, reserving issues regarding the parties' child and division of marital property. Following a trial on the contested issues, the court rendered its findings of fact and conclusions of law in June 2010. The court determined the parties' equity in the marital home was \$118,915.00, and awarded the home to Charles. The court determined Shannon was entitled to half of the home's equity and ordered Charles to refinance the mortgage to facilitate a buy-out of Shannon's interest. The court also ordered Shannon to pay \$327.00 per month in child support to Charles, as the parties' child resided primarily with him.

Charles did not refinance the mortgage; in fact, he stopped making mortgage payments and moved out in September 2010, leaving the home vacant. In August 2011, the court addressed Charles's failure to abide by its prior judgment and ordered Charles to list the home for sale. The court also granted Shannon a judgment in the amount of \$56,992.33, which encompassed her interest in the marital residence plus interest. Shortly thereafter, Shannon filed a motion to hold Charles in contempt, as he still had not complied with any of the court's prior orders. Following a hearing, the court rendered an order on December 21, 2011, finding Charles had failed to refinance the home, he had stopped paying the mortgage, and that he had not paid Shannon any of her marital interest in the home. The court ordered Charles to begin paying Shannon \$750.00 per month toward the

debt or risk being in contempt of court. Charles did not appeal the court's order; furthermore, he did not comply with the court's order by paying Shannon the monthly obligation ordered by the court. Charles filed a petition for bankruptcy on February 6, 2012. Although Charles sought to discharge the debt he owed to Shannon for the marital home, the bankruptcy court determined the debt was not subject to discharge pursuant to 11 U.S.C. § 523(a)(15).

In August 2012, the court held a hearing to address contempt motions filed by both parties. Shannon argued Charles had failed to abide by the order to pay \$750.00 per month, while Charles argued that Shannon had not paid her child support obligation in the preceding months. During the hearing, each party admitted they had not complied with orders of the court; consequently, the court determined that both parties were in contempt. The court sentenced Charles and Shannon to ten days in jail, but delayed execution of those sentences as long as the parties did not further violate the court's orders. The court also concluded that it would offset the child support arrearage owed by Shannon against the marital debt owed by Charles. Thereafter, Charles filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 59.01(f) and CR 60.02(f) to vacate the court's order holding him in contempt. The court denied the motion, and this appeal followed.

Charles challenges the contempt power of the circuit court. He asserts that the court granted Shannon a lump sum judgment; consequently, he believes he was not obligated to make payments to her and that the court lacked the power to hold him in contempt.

Our review indicates that Charles's arguments address issues relating to whether the court properly granted a judgment to Shannon and ordered Charles to make monthly payments. Those issues were addressed in the court's orders of August 2011 and December 2011. Charles failed to appeal from the earlier court orders; consequently, those orders were final and enforceable by the circuit court. *See* CR 73.02. It is well-settled that "[a]n appellate court is without authority to review issues not raised in or decided by the trial court." *Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006). Here, the order from which Charles appeals concerns the trial court's finding of contempt; consequently, we will not address Charles's arguments attacking the propriety of the court's previous orders.

As to the finding of contempt, Charles asserts the court abused its discretion by failing to consider that he lacked the ability to pay and that Shannon failed to mitigate her damages.

In *Lanham v. Lanham*, 336 S.W.3d 123, 128 (Ky. App. 2011), this Court explained:

The trial courts are afforded wide latitude in the use of their contempt powers to enforce their judgments and remove any obstructions to such enforcement. *Akers v. Stephenson*, 469 S.W.2d 704, 706 (Ky. 1970). Indeed, trial courts have almost unlimited discretion in exercising their contempt powers and we will not disturb a trial court's exercise of its contempt powers on appeal absent an abuse of that discretion. *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007).

In this case, the court held Charles in contempt due to his failure to comply with the court's orders. Charles failed to make any payments to Shannon for her

half of the equity in the marital home; instead, he abandoned the home and stopped paying the mortgage. The bankruptcy court denied Charles's attempt to discharge the debt he owed to Shannon. At the contempt hearing, Charles offered Shannon a quitclaim deed for the house, which had been vacant for approximately two years. Charles testified he received \$2873.00 per month in VA disability benefits, that he paid rent and utilities for his apartment, and that he spent \$700.00 per month on gasoline.

Whether civil or criminal, a party cannot be punished for contempt for [his] failure to perform an act which is impossible. The inability to comply must be shown clearly and categorically by the defendant, and the defendant must prove he took all reasonable steps within [his] power to insure compliance with the court's order.

Crowder v. Rearden, 296 S.W.3d 445, 450-51 (Ky. App. 2009) (internal citations omitted).

We are not persuaded that Charles clearly established that it was impossible for him to comply with the orders of the court. Charles failed to refinance the mortgage to buy out Shannon's marital equity. He failed to list the property for sale and maintain the property so it could be shown to prospective buyers. The trial court had the opportunity to consider the testimony regarding Charles's income and expenses, along with his assertion that he could not afford to pay Shannon \$750.00 per month. Based upon our review of the record, we conclude

Charles clearly disregarded the court's orders; consequently, the court did not abuse its discretion by finding him in contempt.¹

Charles also contends he was not in contempt because Shannon could have mitigated her damages by accepting the quitclaim deed to the property, which Charles offered her during the contempt hearing. The trial court concluded Shannon was not required to accept the quitclaim deed, reiterating that Charles was the party in violation of the court's order to pay Shannon \$750.00 per month. The record reveals Charles essentially abandoned the marital home and disregarded the court's orders relating to the property. Under the circumstances presented here, we conclude Shannon was not obligated to mitigate damages so that Charles could avoid being found in contempt. *See id.* at 452.

Finally, we address the court's decision to offset the child support arrearage owed by Shannon against the marital debt owed by Charles. The court's order stated, in relevant part,

Recognizing that [Charles] has failed to pay the minimum payment of \$750.00 a month as previously ordered by the Court, the Court will allow the unpaid child support which [Shannon] owed to [Charles] through the end of August 2012 to be a credit against the total judgment amount payable from [Charles] to [Shannon] pursuant to the Court's previous order.

¹ Charles also asserts the court erred by denying his motion pursuant to CR 59.01(f) and CR 60.02(f). This contention is without merit. We agree with the trial court's conclusion that the motion was an improper attempt to relitigate previously decided issues relating to the distribution of marital property. The court did not abuse its discretion by denying the motion. *Louisville Mall Associates, LP v. Wood Center Properties, LLC*, 361 S.W.3d 323, 336 (Ky. App. 2012).

Charles cites *Price v. Price*, 912 S.W.2d 44 (Ky. 1995), for the proposition that the court lacked authority to offset Shannon's arrearage. Shannon did not address this argument in her appellate brief.

In *Price, supra*, the Kentucky Supreme Court explained,

Once a court has issued an order for the payment of child support, neither parent can unilaterally decide upon a different course of action. In issuing this order, the court, along with the legislature, has made a determination as to what is best for the child. It is unfortunate that divorcing parents are often unable to make these decisions, but divorce by its nature is a time of conflict. We have recognized that many parents do agree, without the aid of the courts, as to modifications of custody and child support. In those instances, a court has the power to recognize the modification of the child support obligation and reduce the arrearages accordingly.

.....

Furthermore, the decision in *Whicker [v. Whicker]*, 711 S.W.2d 857 (Ky. App. 1986), reinforces the fundamental concept that child support can only be modified prospectively. This Court has long understood 'that unpaid periodical payments for maintenance of children, . . . , become vested when due.' *Dalton v. Dalton*, 367 S.W.2d 840, 842 (Ky. 1963). As a result and '[a]s a matter of fact, each installment of child support becomes a lump sum judgment, *unchangeable by the trial court* when it becomes due and is unpaid.' *Stewart v. Raikes*, 627 S.W.2d 586, 589 (Ky. 1982) (emphasis added). Accordingly, 'the courts are without authority to 'forgive' vested rights in accrued maintenance.' *Mauk [v. Mauk]*, 873 S.W.2d [213], 216 [(Ky. App. 1994)]. In the case before us, it is undisputed that there was no agreement between the parents as to a modification of child support. We will not reach into this dispute and find an implicit agreement.

Id. at 46.

Shannon unilaterally decided to withhold payment of her child support obligation for several months prior to the contempt hearing. The trial court allowed an offset of the arrearage due to Charles's failure to make the monthly debt payments. We find *Price, supra*, applicable to the circumstances presented here and conclude the court exceeded its authority by offsetting Shannon's child support arrearage against Charles's marital debt obligation. For these reasons, we reverse that portion of the court's order relating to child support and remand for further proceedings. We affirm the court's order finding Charles in contempt.

For the reasons stated herein, the order of the Oldham Circuit Court is affirmed in part, reversed in part, and remanded.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jonathan O. Wells
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Alissa M. Domine
Laura P. Russell
Louisville, Kentucky