[Cite as *Miller v. Miller*, 2020-Ohio-5262.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

KAREN MILLER, :

Plaintiff-Appellee, :

No. 109125

v. :

DAVID MILLER, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: November 12, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-13-349594

Appearances:

John V. Heutsche Co., L.P.A., and John V. Heutsche *for appellee*.

Stafford Law Co., L.P.A., Joseph G. Stafford, and Nicole A. Cruz, *for appellant*.

SEAN C. GALLAGHER, P.J.:

{¶ 1} David Miller ("David") appeals a post-dispositive order in which he was held in contempt for the failure to pay his nonmodifiable spousal support payments and also in which he was found liable for $34,381.50 of Karen Miller's

(now known as Karen Michael, "Karen" herein) attorney fees incurred in prosecuting the motion to show cause that led to the contempt finding.

{¶ 2} David and Karen were divorced in January 2015. As part of the decree of divorce, the parties agreed that David would pay spousal support in the amount of $15,000 per month for a period of 240 months beginning the month before the divorce was finalized. The parties' agreement did not include a provision providing the trial court with a retention of jurisdiction to consider modification of the spousal support award under R.C. 3105.18(E). *Morris v. Morris*, 148 Ohio St.3d 138, 2016-Ohio-5002, 69 N.E.3d 664, ¶ 63. Sometime in 2017, the parties entered an agreed judgment entry regarding outstanding spousal support payments, but the compliance was short lived. By March 2018, Karen filed a motion to show cause in which it was asserted that David failed to comply with the spousal support obligation after the 2017 agreement. There is no dispute with respect to David's failure to make the spousal support payments — most of the testimony was focused on his inability to make the spousal support payments in light of significant limitations on his yearly earnings starting in 2015. Beginning in 2015, David's annual adjusted gross income was demonstrated to be below $100,000. David paid approximately $427,830 between 2015 and the parties' agreement in 2017 with respect to the arrearages, a value well exceeding his yearly income for those three years. David claims he borrowed money from his parents to meet the ongoing obligation but is unable to secure any additional financing moving forward.

{¶ 3} The magistrate concluded that the trial court lacked jurisdiction to modify the spousal support award and that David was in contempt for the failure to abide by the terms of the divorce agreement. The magistrate placed little to no weight on David's claim that his ability to finance the enormous spousal support obligation was at an end, and that he could only rely on his yearly stated income. The magistrate granted Karen attorney fees in the amount of $15,000. It was concluded, however, that David could purge the contempt, the sixth finding against David for nonpayment of the support obligation, by paying $30,959.45 toward the arrearages and the attorney fees within 30 days of the journalization of the magistrate's decision. David did not file objections to the magistrate's decision, but Karen did.

{¶ 4} In those objections, as is pertinent to this appeal, Karen objected to the $15,000 award of attorney fees and the lack of an ongoing payment toward the arrearages. Karen requested over $50,000 in attorney fees and asked for the trial court to order a monthly payment toward the arrearages in addition to the monthly support payment. The trial court modified the attorney fees award after expressly recognizing that Karen's evidence in support of the attorney fees was limited to fee bills unaccompanied with any explanation or evidence of reasonableness. In addition, the trial court modified the magistrate's decision to include a $3,000 monthly payment toward the arrearages and modified the purge condition to require David to pay $30,000 toward the arrearages within 30 days of the trial court's decision modifying the magistrate's decision.

{¶ 5} It is from this decision that David appeals. As a preliminary matter, Karen argues that David has waived all but plain error in this appeal with respect to the trial court's modification of the magistrate's decision. According to Karen, David failed to object to the magistrate's decision, and therefore, under Civ.R. 53(D)(3)(b)(iv), David cannot challenge the trial court's decision. That rule, however, provides that "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's *adoption* of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion * * *." (Emphasis added.) *Id.* In light of the fact that David is appealing the trial court's modifications of the magistrate's decision, Civ.R. 53(D)(3)(b)(iv) is inapplicable — the plain error rule applies only to appeals from an order adopting a magistrate's decision. *See, e.g., State ex rel. Neguse v. McIntosh*, Slip Opinion No. 2020-Ohio-3533, ¶ 9 (applying the plain error rule to the trial court's decision adopting the magistrate's decision); *Hoppel v. Hoppel*, 7th Dist. Columbiana No. 06 CO 31, 2007-Ohio-5246, ¶ 32 (plain error rule does not apply as against appellate arguments challenging the trial court's process independent of the magistrate's decision). Thus, the standard of review with respect to the trial court's modifications of the magistrate's decision has not been altered based on David's failure to file objections to the magistrate's decision — the crux of this appeal focuses on the trial court's modifications, not its adoption of any findings of fact or conclusions of law as contained in the magistrate's decision.

{¶ 6} In the first two assignments of error, David claims that the trial court abused its discretion in modifying the magistrate's decision to include a purge

condition of paying $30,000 toward the arrearages in order for David to avoid the jail sentence and also erred by imposing a $3,000 monthly payment in addition to the $15,000 monthly spousal support obligation.

{¶ 7} "[P]unishment for violation of divorce decree provisions does not impinge upon the constitutional prohibition against imprisonment for debts." *Branden v. Branden*, 8th Dist. Cuyahoga No. 104523, 2017-Ohio-7477, ¶ 14, quoting *Pugh v. Pugh*, 15 Ohio St.3d 136, 142, 472 N.E.2d 1085 (1984), and *Harris v. Harris*, 58 Ohio St.2d 303, 390 N.E.2d 789 (1979). It is therefore appropriate to use contempt proceedings to enforce compliance with support obligations in a divorce decree. Civil contempt must be established by clear and convincing evidence; in other words, the trier of fact must have a firm conviction or belief that the facts alleged are true. *Phelps v. Saffian*, 8th Dist. Cuyahoga No. 106475, 2018-Ohio-4329, ¶ 53; *Hissa v. Hissa*, 8th Dist. Cuyahoga Nos. 99498 and 100229, 2014-Ohio-1508, ¶ 19, citing *Flowers v. Flowers*, 10th Dist. Franklin No. 10AP-1176, 2011-Ohio-5972, ¶ 9; *In re Contempt of Tracy Digney*, 2015-Ohio-4278, 45 N.E.3d 650, ¶ 8 (8th Dist.). Appellate courts review a civil contempt finding under an abuse of discretion standard. *Hissa* at ¶ 21.

{¶ 8} It is well settled that a "sanction for civil contempt must allow the contemnor the opportunity to purge himself or herself of contempt." *Guy v. Shorey*, 8th Dist. Cuyahoga No. 106923, 2019-Ohio-977, ¶ 14, citing *In re Purola*, 73 Ohio App.3d 306, 312, 596 N.E.2d 1140 (3d Dist.1991). It is considered to be an abuse of discretion to order purge conditions that are unreasonable or where compliance is

impossible. *Id.*, citing *Purola* at 313. The party held in contempt "bears the burden of presenting sufficient evidence at the contempt hearing to establish that the trial court's purge conditions are unreasonable or impossible for him to satisfy." *Id.*, citing *Marx v. Marx*, 8th Dist. Cuyahoga No. 82021, 2003-Ohio-3536.

{¶ 9} In this case, David primarily relies on his stated yearly income as a proof of the impossibility of satisfying the purge condition and the additional monthly remittance toward the substantial arrearages. According to the undisputed evidence, however, David's yearly income has never been sufficient to satisfy the spousal support to which he agreed, much less the purge condition at issue in this appeal. There has been no change in David's status upon which it can be concluded that the trial court abused its discretion in ordering a purge condition that represented 10 percent of the arrearages. "Placing the burden of showing inability to pay on the party charged with contempt is not unreasonable." *Liming v. Damos*, 133 Ohio St.3d 509, 2012-Ohio-4783, 979 N.E.2d 297, ¶ 20. In light of the fact that David has never had an adjusted gross income from which the spousal support obligation could be met, and because the trial court provided little weight to his testimony regarding an ability to finance the yearly obligation, we are unable to conclude that the trial court abused its discretion in ordering a $30,000 purge condition representing roughly 10 percent of his current arrearages. In addition, David has not provided any legal basis demonstrating error with respect to the trial court's decision to order an additional monthly obligation of $3,000 to pay off his

outstanding obligation. App.R. 16(A)(7). The first two assignments of error are overruled.

{¶ 10} We note, however, that our conclusion should not be interpreted as foreclosing the possibility that David may prove the unreasonableness of a purge condition in a future contempt proceeding. Our review is solely limited to the contempt order at issue in this case, which was limited to David's attempt to prove his inability to finance the ongoing spousal support obligation in its entirety instead of demonstrating his inability to pay the purge condition itself. The ongoing obligation is not capable of being modified, and therefore, his ability to pay the overall obligation is a matter independent of his ability to pay, or the reasonableness of, the purge condition itself. It is conceivable, given the undisputed fact of David's current annual income, that his ability to pay a purge condition on an ongoing basis may become compromised. His ability to finance the spousal support obligation is irrelevant to that discussion, such that any focus on the spousal support obligation itself in a future contempt hearing may be misplaced — the issue for contempt is solely limited to the reasonableness and the ability to pay the purge condition, not the non-modifiable spousal support.

{¶ 11} Notwithstanding, there are several other issues that are becoming intertwined within the contempt proceedings. In the companion case, 8th Dist. Cuyahoga No. 109121, David's son is appealing Karen's attempt to impose a lien on the entire value of the spousal support obligation against a company with which David has an interest. The resolution of that claim may very well impact future

contempt proceedings in that Karen may have other avenues of recourse to secure her spousal support award based on her allegations of financial misconduct against David and his son, which we do not accept as true for any reason — we are merely summarizing the scope of the other proceedings for the benefit of clarity within the context of these contempt proceedings. Karen is concurrently alleging that the father and son conspired to divest David of his interest in the corporation securing the lien on Karen's spousal support award in order to prevent Karen from pursuing collection efforts against the pledged interest. Regardless, these issues are not currently before us in this particular appeal but are simply noted for the sake of referencing the complete picture of the parties' disputes.

{¶ 12} In the final assignment of error, David claims that the trial court abused its discretion in awarding attorney fees in the amount of $34,381.50 solely based on the trial court "ferreting out" the amount attributed to the contempt issue from fee bills submitted without any corresponding evidence demonstrating the relation of the particular fee to the contempt issue or the reasonableness of the charges in general. According to David, there are several line items within the awarded damages that are expressly unrelated to the contempt issue, demonstrating that the award of fees is not entirely born from the contempt proceedings as contemplated under R.C. 3105.18.

{¶ 13} Under R.C. 3105.18(G), if any person is found in contempt for the failure to make spousal support payments, the court "shall assess all court costs arising out of the contempt proceeding against the person and shall require the

person to pay any reasonable attorney's fees of any adverse party * * *." Thus, although attorney fees are required, the trial court must still determine the reasonableness of any such fees and whether the fees are related to the contempt proceedings — the trial court is not required to rubber-stamp any request for fees submitted by the adverse party.

{¶ 14} In this case, the trial court expressly concluded that Karen requested attorney fees under R.C. 3105.18(G), but did not "articulate what that amount is. She did submit fee bills for attorneys John Heutsche and Edgar Boles, leaving it to the Court to ferret out the amount." After conducting its own review of the fee bills, the trial court disagreed with the magistrate's conclusion that only $15,000 in fees were reasonable and related to the contempt proceeding. Accordingly, the trial court modified the order to include all of Attorney Heutsche's fees and expenses. However, in this appeal, David argues that approximately a third of the fees contained in the submitted billing for Attorney Heutsche were expressly unrelated to the contempt issue. Karen does not challenge David's argument other than providing a terse response that "[w]hile David attempts to argue certain charges do not relate to the contempt issue, the trial court specifically found '* * * that the full amount of Attorney Heutsche's fees and expenses are directly related to the show cause motion and should be awarded to Plaintiff.'" This argument misses the point.

{¶ 15} The party seeking an award of attorney fees must demonstrate the reasonableness of the requested fees. *Calypso Asset Mgt., L.L.C. v. 180 Industries, L.L.C.*, 2019-Ohio-2, 127 N.E.3d 507, ¶ 29 (10th Dist.), citing *O'Neill v. Tanoukhi*,

7th Dist. Mahoning No. 10-MA-45, 2011-Ohio-2626, ¶ 20; *Jubilee Ltd. Partnership v. Hosp. Properties, Inc.*, 10th Dist. Franklin No. 09AP-1145, 2010-Ohio-5550, ¶ 52; *Foland v. Englewood*, 2d Dist. Montgomery No. 22940, 2010-Ohio-1905, ¶ 83-84; *TCF Natl. Bank FBO Aeon Fin., L.L.C. v. Cunningham*, 5th Dist. Stark No. 2009 CA 00159, 2010-Ohio-1032, ¶ 9-10; *Turner v. Progressive Corp.*, 140 Ohio App.3d 112, 116-17, 746 N.E.2d 702 (8th Dist.2000). Although "[t]here is no steadfast rule that the 'reasonableness' of attorney's hours or hourly rate must be established by expert testimony[,]" it has been concluded that the submission of an attorney's itemized bill, standing alone, is insufficient to establish the reasonableness of the charges contained therein. *Cruz v. English Nanny & Governess School*, 8th Dist. Cuyahoga No. 108767, 2020-Ohio-4216, ¶ 41, citing *Cleveland v. CapitalSource Bank*, 8th Dist. Cuyahoga No. 103231, 2016-Ohio-3172, ¶ 13, Jo*seph G. Stafford & Assocs. v. Skinner*, 8th Dist. Cuyahoga No. 68597, 1996 Ohio App. LEXIS 4803, 23 (Oct. 31, 1996), *Bolek v. Miller-McNeal*, 8th Dist. Cuyahoga No. 103320, 2016-Ohio-1383, ¶ 12, and *United Assn. of Journeyman & Apprentices of the Plumbing & Pipe Fitting Industry, Local Union No. 776 v. Jack's Heating, Air Conditioning & Plumbing, Inc.*, 3d Dist. Hardin No. 6-12-06, 2013-Ohio-144, ¶ 25.

{¶ 16} The trial court's independent review of the fee bill without any evidence presented by Karen to demonstrate the reasonableness of the fees or the relation of the fees to the contempt issue is in error. In order to satisfy her burden in support of claims for attorney fees, the adverse party in a contempt proceeding under R.C. 3105.18(G) must present evidence of both the reasonableness of the fees

and their relation to the contempt proceedings. Submitting the fee bills alone is not sufficient to sustain the adverse party's burden of proof. In such cases, the matter must be remanded for the trial court to conduct analysis as to whether the fees requested by Attorney Heutsche were both reasonable and related to the contempt proceedings based on the evidence presented, not its own independent review of the submitted fee bills.[1] *Cruz* at ¶ 60; R.C. 3105.18(G). The trial court's independent review of the fee bills deprived David of any opportunity to meaningfully respond to the specific line items that were included in the attorney fees awarded under R.C. 3105.18(G). It is for this reason that the burden falls on the party seeking the fees to demonstrate both the reasonableness of the fees and their relation to the particular issue upon which the award is based. The third and final assignment of error is sustained.

{¶ 17} In light of the foregoing, we affirm in part, reverse in part, and remand for further proceedings to determine whether Attorney Heutsche's fees are reasonable and related to the contempt proceedings.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, domestic relations division, to carry this judgment into execution.

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[1] In light of the fact that Karen has not appealed the trial court's decision denying her request for Attorney Boles's fees, any issues with respect to those fees are final and cannot be revisited upon the remand.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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SEAN C. GALLAGHER, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
EILEEN A. GALLAGHER, J., CONCUR