

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

LOUISE L. O'GRADY,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2012-T-0004
JOSEPH A. O'GRADY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 2007 DR 404.

Judgment: Affirmed.

Jeffrey V. Goodman and John E. Fowler, II, Fowler & Goodman L.P.A., Inc., 119 West Market Street, Warren, OH 44481 (For Plaintiff-Appellant).

James E. Sanders, Turner, May & Shepherd, 185 High Street, N.E., Warren, OH 44481 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} Louise L. O'Grady appeals from a post-decree judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, which found her in contempt for selling certain personal property in violation of a court order. Because the record contains clear and convincing evidence Mrs. O'Grady failed to disclose a material fact to the court on several occasions and blatantly violated a court order by disposing of the items that were the subject matter of ongoing court proceedings, we

find no abuse of discretion in the contempt finding and sanction; thus we affirm the trial court's judgment

Substantive Facts and Procedural History

{¶2} This appeal concerns the ownership of a piano and pool table after Mrs. O'Grady's divorce from her ex-husband, Joseph A. O'Grady. In 2008, Mrs. O'Grady filed a complaint for divorce. In a September 2008 pre-decree proceeding, the parties read into the record the following stipulation concerning the distribution of their personal property:

{¶3} "Mr. O'Grady will retain the 1995 Chevrolet van; 1997 Harley Davidson motorcycle; coin collection; magazine collection; slot machine; his personal effects and documents; some bar accessories; posters; Playboy memorabilia; bicycle; fuse ball table; Coco-cola memorabilia. The remaining personal property shall remain the property of the plaintiff."

{¶4} The piano and pool table were not specifically mentioned among the items distributed to Mr. O'Grady. However, the divorce decree, issued in February 2009, awarded them to Mr. O'Grady. The relevant portion of the divorce decree states the following:

{¶5} "The Defendant [Mr. O'Grady] shall retain the 1995 Chevrolet Van, the 1997 Harley Davidson Motorcycle; his coin collection, his Playboy Magazine Collection, his bedroom suit, pool table, pin ball machine, slot machine, piano, recliner, office desk and gray filing cabinet, bar accessories, Playboy memorabilia, shot glasses, police memorabilia, family room furniture, fuse ball table, Coca-Cola memorabilia, bicycle, his personal clothing, personal documents, and the like."

{¶6} It is unclear from the record why the discrepancy exists. The divorce decree also designated Mrs. O'Grady as the residential parent of the couple's two minor children; ordered Mr. O'Grady to pay \$923 monthly in child support; awarded Mrs. O'Grady the marital residence; and ordered Mr. O'Grady to pay a sum of \$32,000 as a property settlement. These provisions are not disputed. However, because the divorce decree deviates from the stipulations regarding the list of personal property to be retained by Mr. O'Grady, the parties have since engaged in prolonged litigation regarding the piano and pool table.

{¶7} Mr. O'Grady believed he was awarded these items, and, after attempting to retrieve the piano and the pool table from the marital home without success, he filed, in June 2010, a motion to show cause why Mrs. O'Grady should not be held in contempt for failing to turn over these two items

{¶8} After a July hearing before the magistrate, the trial court held the motion to show cause in abeyance, ordering Mrs. O'Grady to submit a proposal to purchase these two items within 30 days. If no agreement to purchase could be reached within 30 days, Mr. O'Grady was permitted to make arrangements to retrieve those two items from Mrs. O'Grady within 30 days.

{¶9} Mr. O'Grady's attempt to retrieve the items was unsuccessful. On November 1, 2010, the magistrate held another hearing, and issued a decision allowing Mr. O'Grady to pick up the piano and pool table on November 6, 2010 from the marital residence.

{¶10} The trial court approved of the decision. Instead of filing objections to the magistrate's decision, however, Mrs. O'Grady filed a motion styled as "Motion to Vacate

per Civil Rule 60(B) and Motion to Stay.” Although the motion was styled as a 60(B) motion, in the body of the motion, she asked the court to vacate or modify the magistrate’s decision. For the first time, and more than a year and a half after the final decree, she claimed the items belonged to her, attaching as an exhibit a portion of the pre-decree in-court stipulations. Mr. O’Grady filed a response, contending that the 60(B) motion was not filed within a reasonable time from the date of the decree.¹

{¶11} On November 6, 2010, Mr. O’Grady appeared at the marital residence, but was not permitted to retrieve the items. As a result, he filed another motion to show cause, asking the court to find Mrs. O’Grady in contempt for refusing to comply with the court order permitting him to retrieve the items.

{¶12} On November 23, 2010, the trial court held a hearing on the various motions regarding these disputed items, and, on December 10, 2010, issued a judgment entry. The court found that the parties appeared in court on September 8, 2008, and read into the record their stipulations, which were silent regarding the piano and pool table. In the final decree prepared by Mr. O’Grady’s counsel, however, these items were to be retained by Mr. O’Grady.

{¶13} The court resolved the conflict by ordering each party to submit sealed bids to the court within 14 days indicating their highest offer to purchase the items from the other. The party submitting the highest bid on each item was required to purchase the other party’s one-half interest in that item, based on the bid price, by payment to the other of the other’s one-half of the bid price. Payment was to be made within 30 days of notification from the court regarding the bid status. In the event that payment was not

1. Although the motion was styled as a 60(B) motion, it was in essence an objection to the magistrate’s decision issued after the November 1, 2010 hearing, and the trial court construed and treated it as such.

made within the 30-day period, the items would be sold and the parties would equally divide the proceeds.

{¶14} After the hearing, Mr. O'Grady put in a bid of \$200 for the piano and \$50 for the pool table. Mrs. O'Grady did not submit a bid. Based on Mr. O'Grady's bid, the trial court issued a judgment on January 3, 2011, awarding these items to Mr. O'Grady, and ordering him to pay \$125 to Mrs. O'Grady, which represented her one-half interest in the items.

{¶15} Unbeknown to either Mr. O'Grady or the trial court, Mrs. O'Grady had already sold these two items to a third party sometime in November 2010, before the November 23rd hearing.

{¶16} After four attempts to obtain the items from Mrs. O'Grady in exchange for his payment without success, Mr. O'Grady filed another motion to show cause in February, 2011, and a hearing on that motion was conducted by the magistrate in July, 2011. To the magistrate's surprise, Mrs. O'Grady revealed that she already sold the piano and the pool table to a third party, for \$450 dollars. She was unable to give an exact date but testified it was sometime in November 2010, *before* the November 23, 2010 hearing. She testified that she sold these items because she believed the items belonged to her, based on the in-court stipulations, and because Mr. O'Grady still owed her \$3,200 of the property settlement, which created financial hardship, forcing her to sell the items to help pay for the children's expenses.

{¶17} Mr. O'Grady presented a receipt at the hearing showing the purchase price of the piano was \$5,718.58. Regarding the pool table, he estimated its replacement value at \$1,200.

{¶18} The magistrate issued a decision in September, finding Mrs. O'Grady in contempt of the court for selling the piano and pool table in the midst of an ongoing litigation regarding the distribution of the property. She was sentenced to ten days in jail, but was allowed to purge the contempt by returning the items to Mr. O'Grady by November 1, 2011, or by paying him \$3,450, his one-half share of the property, by December 21, 2011. She was also to pay his attorney fees of \$500 and the cost of filing the various motions. The court adopted the magistrate's decision on the same day it was issued, but subsequently issued a nunc pro tunc order setting forth essentially the same terms.

{¶19} Mrs. O'Grady filed objections to the magistrate's decision, maintaining that the contempt order was improper, because she relied on the stipulations in believing that she owned the disputed items, and because she was forced to sell the personal property to help support their children due to Mr. O'Grady's failure to pay the property settlement and child support timely.

{¶20} On December 27, 2010, the trial court issued a judgment entry which modified the magistrate's decision. The court found Mrs. O'Grady in contempt for selling the property while there was ongoing litigation regarding the property, and finding that she owed Mr. O'Grady \$3,450, his share of the property. The court ordered her to pay Mr. O'Grady \$3,450 plus \$250 in attorney fees. Moreover, the court allowed her to purge the contempt, stating,

{¶21} "Plaintiff is given this opportunity to purge this contempt by payment of \$3,700 to Husband by 1/31/12. If she has not paid the \$3,700 by 1/31/12, Husband's child support obligation shall be reduced by \$205 per months effective 2/1/12, until

6/31/12, the date the parties' minor children are expected to emancipate. In the event that the \$3,700 is not paid by 1/31/12 counsel shall notify the Trumbull County Child Support Enforcement Agency to effectuate this Order."

{¶22} It is from this judgment that Mrs. O'Grady now appeals. She raises three assignments of error, which we address together.² They state:

{¶23} "[1.] the trial court erred in upholding the Magistrate's finding of contempt against plaintiff-appellant."

{¶24} "[2.] The trial court erred in finding plaintiff-appellant in contempt following her showing of just cause of non-compliance."

{¶25} "[3.] The trial court erred in reducing defendant-appellee's child support obligation to penalize plaintiff-appellant for contempt."

Contempt

{¶26} The contempt process was instituted to uphold and ensure the effective administration of justice, to secure the dignity of the court, and to affirm the supremacy of law. *Cramer v. Petrie*, 70 Ohio St.3d 131, 133 (1994). "Contempt is generally understood as a disregard for judicial authority. Contempt may be either direct or indirect. Direct contempt involves actions occurring in the presence of the court, while indirect contempt occurs outside its immediate presence. Furthermore, contempt proceedings may be either criminal or civil in nature. Criminal and civil contempt serve different purposes in the judicial system and are governed by different rules. Civil contempt is pursued for the benefit of a complainant and is therefore remedial in nature. Alternatively, criminal contempt is usually characterized by unconditional fines or prison

2. Mr. O'Grady did not file an appellee's brief.

sentences. One charged and found guilty of civil contempt must be allowed to purge him/herself of the contempt by showing compliance with the court's order he/she is charged with violating." (Citations omitted.) *In re Guardianship of Hards*, 11th Dist. No. 2007-L-150, 2009-Ohio-1002, ¶23.

{¶27} R.C. 2705.02, the contempt statute, provides in part:

{¶28} "A person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer[.]"

{¶29} R.C. 2705.05 states:

{¶30} "(A) In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge. If the accused is found guilty, the court may impose any of the following penalties:

{¶31} "(1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both[.]"

{¶32} "A court may punish disobedience of its order, pursuant to R.C. 2705.02 (A) or the court's inherent power to enforce its authority." *State ex rel. Adkins v. Sobb*, 39 Ohio St.3d 34, 35 (1988), citing *Zakany v. Zakany*, 9 Ohio St.3d 192 (1984).

{¶33} "A finding of civil contempt requires clear and convincing evidence that the alleged contemnor has failed to comply with the court's prior orders." *Willoughby v. Masseria*, 11th Dist. No. 2002-G-2437, 2003-Ohio-2368, ¶25, citing *Moraine v. Steger Motors, Inc.*, 111 Ohio App.3d 265, 268 (1996). "In order to be clear and convincing,

evidence must leave the trier of fact with the firm conviction or belief that the allegations involved are true.” *Id.* quoting *Moraine* at 268, citing *Cross v. Ledford*, 161 Ohio St. 469 (1954).

{¶34} We note, initially, that the order from which Mrs. O’Grady appealed is a final appealable order. “[C]ontempt of court consists of two elements. The first is a finding of contempt, and the second is the imposition of a penalty or sanction. Until both have been made, there is no final order.” *Nelson v. Nelson*, 11th Dist. No. 2006-G-2696, 2006-Ohio-4944, ¶6, quoting *Boltauzer v. Boltauzer*, 11th Dist. No. 94-L-155, 1995 Ohio App. LEXIS 6119 (Feb. 3, 1995). A review of the court’s order here indicates that the court actually did not impose a penalty of jail term or fine pursuant to R.C. 2705.05, but merely ordered Mrs. O’Grady to pay Mr. O’Grady his share of the personal property, and permitted her to purge the contempt by making the payment. Instead of a penalty, the court imposed a sanction in the event of Mrs. O’Grady’s failure to pay: Mrs. O’Grady’s child support will be reduced by \$205 until June 30, 2013. Thus, a review of the court order indicates that there was (1) a finding of contempt, and (2) an imposition of a sanction, rendering the order a final appealable order.

Standard of Review

{¶35} A reviewing court will not reverse the decision of the court below in a contempt proceeding in the absence of a showing of an abuse of discretion. *State, ex rel. Ventrone, v. Birkel*, 65 Ohio St.2d 10,11 (1981). The term “abuse of discretion” is one of art, “connoting judgment exercised by a court, which does not comport with reason or the record.” *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second

Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. When an appellate court is reviewing a pure issue of law, "the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Id.* at ¶67.

{¶36} Reviewing the court's judgment in this case, we do not find an abuse of discretion. If Mrs. O'Grady believed the piano and the pool table belonged to her, in reliance on the parties' stipulations, she could have brought the discrepancy to the court's attention at the two hearings before the magistrate, which were held specifically over these disputed items, on July 20, 2010, and November 1, 2010. It was not until November 3, 2010, that she advised the court, belatedly, that she believed the items belonged to her based on the in-court stipulations. Moreover, while the court's November 2, 2010 order permitting Mr. O'Grady to retrieve the items was still in effect, she disposed of the items by selling them to a third party. Even more egregiously, when the trial court held another hearing over these items on November 23, 2010, she neglected to inform the court that she no longer possessed them. Unaware of this material fact, the trial court ordered the parties to submit bids to the court, and subsequently awarded the items to Mr. O'Grady based on his bid, pursuant to its

December 10, 2010 judgment. It was not until July 6, 2011, that Mrs. O’Grady finally disclosed to the court that she had sold the items to a third party.

{¶37} The record contains clear and convincing evidence that Mrs. O’Grady failed to disclose a material fact to the court on several occasions, and blatantly violated a pending court order by disposing of the items that were the subject matter of ongoing court proceedings. Therefore, we find no abuse of discretion in the court’s finding her in contempt and ordering her to pay Mr. O’Grady his share of the items, calculating their value based on a purchase receipt and Mr. O’Grady’s estimation.

{¶38} Furthermore, Mrs. O’Grady contends the trial court could not “modify” child support, unless there was (1) a determination regarding whether there has been a substantial change in circumstances, and (2) a re-determination of the amount of child support in accordance with the statutory guidelines. Mrs. O’Grady is correct about the law, except here the trial court did not *modify* the child support; the reduction in child support payment acts as a setoff of the amount Mrs. O’Grady owes her ex-husband, in the event she fails to pay that amount. “A trial court’s authority to set off one judgment against another involving the same parties is a well-established equitable principle”; a decision to set off the parties’ judgments is within the court’s discretion and will not be disturbed on appeal absent an abuse of discretion. *Krause v. Krause*, 35 Ohio App.3d 18, 19 (12th Dist.1987), citing *Barbour v. National Exchange Bank*, 50 Ohio St. 90, 98 (1893). We do not find the court abused its discretion in this case in fashioning the appropriate sanction, i.e., reducing Mrs. O’Grady’s monthly child support by \$205 to offset the amount she owes Mr. O’Grady, based on Mrs. O’Grady’s repeated refusals to comply with the court order in the past.

{¶39} Mrs. O’Grady cites a single case to support her claim that such setoff is not permitted. In *Allen Co. Child Enforcement Agency v. Baker (In re Baker)*, 294 B.R. 281 (Bankr.N.D.Ohio 2002), the father overpaid his child support obligations. When the mother filed for bankruptcy, the issue arose as to whether the overpayment of the child support was a dischargeable debt. Section of 523(a)(5) of the Bankruptcy Code excepts from discharge any debt “to a spouse, former spouse, * * * or support of such spouse or child * * * .” The bankruptcy court, interpreting the statute, determined that the overpayment of the child support would be a nondischargeable debt. We fail to see how this bankruptcy case has any relevancy to the instant matter.

{¶40} Mrs. O’Grady’s first, second, and third assignments are without merit. The judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.