

[Cite as *Porter v. Porter*, 2010-Ohio-454.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MICHELLE E. PORTER
Plaintiff-Appellee

-vs-

DAVID L. PORTER
Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 09CA77

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Domestic Relations Division, Case No.
2008DR00710

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

February 3, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Farmer, J.

{¶1} On July 16, 1998, appellant, David Porter, and appellee, Michelle Porter, were married. On May 23, 2008, appellee filed a complaint for divorce.

{¶2} Temporary orders were filed on August 18, 2008. On October 14, 2008, appellee filed a contempt motion against appellant for failure to abide by the temporary orders.

{¶3} A final hearing was held on March 3, 2009. By judgment decree of divorce filed April 29, 2009, the trial court found appellant in contempt and sentenced him to thirty days in jail and awarded appellee \$5,000 for attorney fees. The trial court offered appellant the opportunity to purge the contempt by complying with all orders of the trial court under the judgment decree of divorce and reimbursing appellee for her attorney fees.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE COURT ABUSED ITS DISCRETION IN FINDING DEFENDANT GUILTY OF CONTEMPT FOR COMMITTING ACTS NOT RAISED IN PLAINTIFF'S CONTEMPT MOTION."

II

{¶6} "THE COURT ABUSED ITS DISCRETION IN FINDING DEFENDANT GUILTY OF CONTEMPT FOR FAILING TO PAY MONTHLY EXPENSES."

III

{¶7} "THE PURGE ORDER IS CONDITIONED UPON FUTURE CONDUCT AND IS THUS VOID."

IV

{¶8} "THE AWARD OF ATTORNEY FEES IS ARBITRARY, UNREASONABLE, AND UNCONSCIONABLE."

I

{¶9} Appellant claims the trial court erred in finding him in contempt based upon claims not raised in appellee's contempt motion. We disagree.

{¶10} In her contempt motion filed October 14, 2008, appellee claimed appellant knowingly and willingly violated the trial court's May 27, 2008 restraining order which restrained appellant from "disposing of, selling, secreting, destroying, removing, or encumbering any of the property or assets of the parties, during the pendency of this action." Appellee claimed appellant violated the restraining order by "destroying and/or disposing of assets following his receipt of the Complaint for Divorce and Orders of the Court. Most importantly, he has damaged and for the most part, destroyed the plaintiff's piano that she received when her grandmother passed away." Appellant also alleged that appellant violated the trial court's temporary orders by failing to pay child support to the Child Support Enforcement Agency thereby causing an arrearage, failing to pay on the mortgage and marital debts, and failing to provide a "written accounting detailing the disposition of all of the funds that he withdrew from his 401(k) account."

{¶11} In its judgment decree of divorce filed April 29, 2009, the trial court determined the following:

{¶12} "The Court finds that based upon the overall credible, competent and relevant evidence admitted into the record that the defendant has willfully and intentionally failed to comply with the order of this Court with respect to the withdrawal and expenditure of funds from this Limited Brands, Inc., Savings and Retirement Plan, and, by reason thereof, plaintiff's motion is partially sustained and this Court enters a finding of contempt against the defendant.

{¶13} "****

{¶14} "The Court finds that the defendant has a vested interest in the Limited Brands, Inc. Savings and Retirement Plan from which he removed funds and expended those funds since the Court's Restraining Order as noted above. The Court finds that the defendant removed \$10,432.89 on or about May 29, 2008, and made a second withdrawal from that account of some \$15,785.64 in November of 2008. The removal of these funds was accomplished by the defendant without the permission of the Court or notice to the plaintiff. By all accounts, the defendant was unable to account for these funds and the Court can only conclude that the defendant utilized these funds for his own personal expenses and not for any particular marital purpose.

{¶15} "The Court further notes that defendant made the second withdrawal of funds after the Court's temporary hearing of August 4, 2008. That is significant for the reason that the defendant was afforded 30 days from the date of the Order (August 18, 2008) to provide plaintiff's attorney with a written accounting detailing what he did with the funds he first removed back in May of 2008. The Court finds that not only did the defendant not timely provide plaintiff's attorney with this accounting but also, he did not provide a detailed explanation of what he spent those funds on, nor did he provide any

receipts or documentation. The defendant testified that he used some of the money to pay for the parties' oldest daughter's college expenses, which was verified by Sarah Porter who attends Ohio University."

{¶16} The trial court also found that appellant failed to pay the mortgage and other debts pursuant to the temporary orders.

{¶17} Upon review, we find the trial court did not abuse its discretion in finding appellant guilty of contempt, and the detailed contempt motion was more than adequate to put appellant on notice of the allegations against him to wit, his willful failure to abide by the trial court's restraining order and temporary orders.

{¶18} Assignment of Error I is denied.

II

{¶19} Appellant claims the trial court erred in finding him in contempt for failing to pay the mortgage and other debts pursuant to the temporary orders.

{¶20} Based upon our decision in Assignment of Error I affirming the contempt relative to the retirement account, we find this issue to be moot.

III

{¶21} Appellant claims the purge order conditioned upon future conduct is void. We disagree.

{¶22} In *Tucker v. Tucker* (1983), 10 Ohio App.3d 251, the Supreme Court of Ohio held the following at paragraphs three and four of the syllabus:

{¶23} "Violations which are primarily offenses against the party for whose benefit the order was made, and where the primary purpose of punishment is remedial or

coercive and for the benefit of the complainant, are civil contempts. The sanction must afford the contemnor an opportunity to purge himself of his contempt.***

{¶24} "A civil contempt order suspending punishment on condition that the contemnor comply in the future with the terms of a pre-existing child support order does not properly allow for purging." (Citations omitted.)

{¶25} In its judgment decree of divorce, the trial court ordered the following:

{¶26} "6. The defendant is found to be in contempt and is sentenced to thirty (30) days incarceration in the Licking County Justice Center. Imposition of this sentence shall be suspended and the defendant shall have the opportunity to purge this contempt by fully complying with all orders of this Court entered under the Judgment Decree of Divorce and specifically, reimbursing the plaintiff for her reasonable and necessary attorney fees and litigation expenses to the extent allowed below."

{¶27} We fail to find that the purge order violates the dictates of *Tucker*. The order is a new order that requires payment of attorney fees and the following of the orders contained in the judgment decree of divorce. With the specific inclusion of paying attorney fees in the contempt sentence, we find the purge order to be appropriate.

{¶28} Assignment of Error III is denied.

IV

{¶29} Appellant claims the award of attorney fees is arbitrary, unreasonable, and unconscionable. We disagree.

{¶30} R.C. 3105.73 governs the award of attorney fees and litigation expenses in domestic relations cases. Subsection (A) states the following:

{¶31} "In an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate."

{¶32} In determining reasonableness, a good starting point is the computation of the "lodestar" figure. *Blum v. Stenson* (1984), 465 U.S. 886. The lodestar is the number of hours expended multiplied by a reasonable hourly rate. *Id.* Once the trial court calculates the lodestar figure, the court may modify that calculation based upon equitable factors.

{¶33} The awarding of attorney fees is within the trial court's sound discretion. *Howell v. Howell*, 167 Ohio App.3d 431, 2006-Ohio-3038. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶34} In the judgment decree of divorce, the trial court determined the following:

{¶35} "18. The plaintiff is awarded a judgment in her favor against the defendant in the amount of \$5,000.00 for her attorney fees and expenses. In making this award, the Court finds that as of the final hearing, the plaintiff had incurred attorney fees and expenses of \$9,216.31. Plaintiff's attorney charges \$175.00 per hour for all regular services and \$200.00 per hour for all in-Court services which this Court finds to be reasonable and customary with other attorneys practicing Domestic Relations in the

Licking County, Ohio area. The Court further finds that plaintiff's counsel prepared for and attended the final hearing that was in excess of 8 hours and it is anticipated that the plaintiff's attorney will incur further charges to prepare the proposed judgment decree of divorce.

{¶36} "The defendant shall satisfy this judgment by paying to the plaintiff monthly installments of \$500.00 per month commencing the first day of the first month following the filing of the Judgment Decree of Divorce until such times as the principal and interest have been paid in full."

{¶37} Given the breadth of appellant's failure to abide by the trial court's temporary orders and the disparity in the parties' income, we find no abuse of discretion in the award of partial attorney fees.

{¶38} Assignment of Error IV is denied.

{¶39} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ John W. Wise

JUDGES

