

[Cite as *Schaefer v. Schaefer*, 2004-Ohio-2956.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

ETHEL M. SCHAEFER :

Plaintiff-Appellee : C.A. CASE NO. 03CA0085

vs. : T.C. CASE NO. 01CV3598

CARL C. SCHAEFER : (Civil Appeal from
Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 4th day of June, 2004.

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GRADY, J.

{¶1} Defendant, Carl C. Schaefer, appeals from a judgment of the domestic relations division of the court of common pleas finding him in contempt of temporary orders the court had issued.

{¶2} Plaintiff, Ethel M. Schaefer, commenced the underlying action for divorce against Carl C. Schaefer on February 12, 2003. The matter was referred to the court's magistrate. After a hearing, the magistrate recommended several temporary orders which the trial court adopted on

April 16, 2003.

{¶3} With respect to the parties' marital residence, Carl¹ was "Ordered to vacate the premises Immediately" and Ethel was "granted exclusive use of the marital residence." (Paragraph 6).

{¶4} With respect to temporary spousal support, the following two orders issued:

{¶5} "3. TEMPORARY SPOUSAL SUPPORT

{¶6} "DEFENDANT shall pay for temporary spousal support to the PLAINTIFF the amount of \$1,000 per month plus processing fee, beginning 4/1/03, and totaling \$1,020 per month, including processing fee, plus necessary medical expenses.

{¶7} "DEFENDANT to pay \$250 partial attorney fees within 90 days.

{¶8} "4. PAYMENT OF CHILD AND SPOUSAL SUPPORT

{¶9} "Child support and spousal support shall be paid by payroll deduction order (if Payor is employed) or by financial institution deduction order (only if Payor is self-employed) and shall be paid in equal installments corresponding to the Payor's pay periods to the Greene County Child Support Enforcement Agency (CSEA), P.O. Box 9, Xenia, Ohio 45385.

{¶10} "Deduction order shall be prepared by the CSEA. To be deducted from Provident Bank, Acct. #6119-412,

¹For convenience and clarity, the parties will be identified by their first names.

Beavercreek OH.”

{¶11} Ethel filed charges in contempt on May 5, 2003, alleging that Carl had failed to comply with the court’s temporary orders. Hearings were held before the magistrate, who on June 25, 2003, recommended that Carl be found in contempt for failing to pay spousal support, as ordered. The magistrate recommended that Carl be ordered to pay the \$3,000 in temporary support then in arrears, and that he be sentenced to serve ten days in jail on the contempt, to be suspended if spousal support was brought current. The magistrate also recommended that Carl be found in contempt for failing to vacate the marital residence, as ordered, but recommended no penalty because he had since left. The magistrate also recommended that Ethel be awarded \$500 as and for attorney fees.

{¶12} Carl filed objections to the magistrate’s decision. The court overruled the objections on October 16, 2003. Carl filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶13} “THE COURT ERRED AND ABUSED ITS DISCRETION BY HOLDING APPELLANT IN CONTEMPT FOR VIOLATION OF A SPOUSAL SUPPORT COURT ORDER THAT DID NOT EXIST.”

SECOND ASSIGNMENT OF ERROR

{¶14} “THE COURT’S JUDGMENT OF HOLDING APPELLANT IN CONTEMPT OF COURT FOR FAILURE TO PAY SPOUSAL SUPPORT IS AN ABUSE OF DISCRETION AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶15} THE EVIDENCE PRESENTED ONLY SUPPORTS THE CONCLUSION THAT APPELLANT DID NOT INTERFERE WITH THE TEMPORARY COURT ORDER BY INTENTIONALLY OR WILLFULLY DENYING SPOUSAL SUPPORT TO APPELLEE.

{¶16} THE EVIDENCE PROVED THAT APPELLANT DID NOT DISSIPATE MARITAL FUNDS TO PREPARE LIVING QUARTERS FOR HIMSELF TO DEFEAT SPOUSAL SUPPORT."

{¶17} A trial court's finding of contempt will not be disturbed on appeal absent an abuse of discretion. *State ex rel. Delco Moraine Div, Gen. Motors Corp. v. Indus. Comm.* (1990), 48 Ohio St.3d 43, 44. Abuse of discretion connotes more than a mere error of law; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶18} Contempt lies only when it is within the contemnor's power to perform the act prescribed by the court order and he fails to do so. *Wilson v. Columbia Gas Co.* (1928), 118 Ohio St. 319, 328-329. The order must dispose of the matters at issue with sufficient clarity to allow the persons affected to determine, with reasonable certainty, the duties which have been imposed. *Hardin v. Hardin* (1952), 65 Ohio Law Abs. 538 quoting 23 Ohio Jurisprudence , Sec 153, p. 621.

{¶19} The temporary order imposed a spousal support obligation on Carl. However, the order also provided that the support would be paid out of funds in a specific bank

account pursuant to a deduction order prepared by the Child Support Enforcement Agency ("CSEA"). The payments were not made because CSEA neglected to prepare the order. The magistrate found that, nevertheless, Carl was "fully aware that spousal support was to be effective April 1, 2003 . . . (but) . . . made no effort what so ever to pay the spousal support and was just sitting back and waiting for it to be deducted from his Provident Bank account."

{¶20} In recent years, and largely in response to the requirements attached to federal funding, legislation has been enacted which enhances the role and authority of child support enforcement agencies, to a point where they operate almost independently of judicial control. CSEAs may prepare, file, serve and enforce child support orders, as the CSEA was directed to do in the present case. See Sowald/Morganstern, Baldwin's Domestic Relations Law (Fourth Ed.) Chapter 22. Courts have come to employ the CSEAs as well in matters of spousal support, as the court here did.

{¶21} Carl may, as the magistrate found, have just sat back and waited for the CSEA to act, but the court's temporary order imposed no duty on him to do otherwise with respect to payment of his support obligation. Had he paid the amounts directly, CSEA's records would not reflect the payment. Indeed a double payment might result, and/or Carl's own efforts could have drained the account, preventing payment pursuant to a CSEA deduction order.

{¶22} The trial court rejected Carl's objections to the

magistrate's contempt recommendation, noting that Carl didn't file objections to the temporary order. However, the objections for which Civ.R. 53(E)(3) provides that may be taken from a magistrate's ultimate decision on a matter referred don't apply to temporary support orders a magistrate issues, and in this instance would have been a vain act.

{¶23} Magistrates are authorized by Civ.R. 75(N) and Civ.R. 53(C)(3)(a) to issue temporary support orders without judicial approval. An appeal may be taken to the court within ten days. Civ.R. 53(C)(3)(b). Here, however, the temporary support orders the magistrate issued on April 15, 2003 were adopted by the court the following day, on April 16, and then filed. Carl might have asked the court to reconsider, but no Civ.R. 53(C)(3)(a) appeal was feasible. In any event, it is unclear just what Carl might have appealed vis-a-vis the contempt the magistrate and the court later found.

{¶24} The temporary order imposed a duty on CSEA, not on Carl, to prepare the deduction order by which the temporary support the court ordered Carl to provide Ethel would be paid. CSEA's failure to act does not support a finding that Carl wilfully violated the court's support order. Therefore, the court abused its discretion when it found Carl in contempt on that account.

{¶25} The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

{¶26} "THE COURT'S JUDGMENT IN HOLDING APPELLANT IN CONTEMPT OF COURT FOR WILLFULLY AND INTENTIONALLY FAILING TO VACATE THE MARITAL PREMISES IS AN ABUSE OF DISCRETION."

FOURTH ASSIGNMENT OF ERROR

{¶27} "THE COURT ABUSED ITS DISCRETION BY HOLDING APPELLANT IN CONTEMPT FOR NOT VACATING THE MARITAL PREMISES IN A MORE IMMEDIATE MANNER."

{¶28} Failure to comply with a court order to vacate is contempt when, among other things, the contemnor fails to show cause for not leaving the premises, *See E.g. Krepfl v. Krepfl* (March 6, 1992), Lake App. Nos. 91-L-014, 91-L-015. The fact that the contemnor did not intend to disobey the court order or that he acted in good faith is not a defense to civil contempt. *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 58; *State ex. rel Adams v. Sobb* (1988), 39 Ohio St.3d 34, 36.

{¶29} The temporary order that issued on April 16, 2003 required Carl to leave the marital residence "immediately." Evidence offered at the hearing on the contempt charges shows that Carl didn't vacate the residence until June 16, two months later and only two days before the contempt hearing.

{¶30} Carl attributed the delay to the need to improve a run-down rental property he owned in order to make it

habitable. Carl offered photos of the property and the testimony of Cynthia Burchette, whom he hired to remove debris, to show that the property was full of trash, infested with animals, had a badly damaged roof, and lacked windows, lockable doors, and potable water. Carl testified that he spent \$10,650 to make the property habitable, and then moved there after vacating the marital residence.

{¶31} The magistrate found that the condition of that particular property, bad as it was, didn't prevent Carl from moving from the marital residence to a different location while the repairs took place. She suggested that Carl might have lodged with his grown children, who were willing to take him in. Carl rejected that alternative. He said that he had wanted possession of a motor home the parties owned to use as his residence, but the magistrate denied him that.

{¶32} The trial court likewise rejected Carl's objections, finding that Carl had failed to show that he was unable to find living quarters apart from the marital residence.

{¶33} Carl doesn't deny that he was fully aware of the requirements of the temporary order that he vacate the marital residence immediately. If he had \$10,650 with which to improve the property to which he later moved, he had the resources to rent other quarters for the time the repairs took. That option was available to him. Carl's failure to employ it supports a finding of contempt.

{¶34} The third and fourth assignments of error are

overruled.

FIFTH ASSIGNMENT OF ERROR

{¶35} "THE COURT ABUSED ITS DISCRETION BY AWARDING THE APPELLEE ATTORNEY FEES WITHOUT A REASONABLE BASIS FOR DOING SO."

{¶36} The magistrate recommended that Ethel be awarded \$500 as and for attorney fees because she was required to prosecute charges in contempt. The trial court rejected Carl's objection to the recommendation, noting that "[t]he fees would not have been incurred if the Defendant had complied with the temporary order."

{¶37} A spousal support obligee may initiate a contempt action for failure to pay the support. R.C. 2705.031(B)(1). The court may properly award attorneys fees as costs in the action. *Fry v. Fry* (1989), 64 Ohio App.3d 519. That authority is largely inapplicable when no contempt is found or, as here, the finding is reversed for an abuse of discretion.

{¶38} Neither the magistrate nor the court related the attorneys fees award exclusively to the spousal support issue, however. Carl's failure to move from the marital residence as ordered constitutes contempt of the court's temporary order. The court could reasonably find that Ethel required the award in order to protect her interest as the party who was granted exclusive use of the marital residence. R.C. 3105.18(H). We have held that the section authorizes an award of attorneys fees in a proceeding to

enforce a court's order. *Donese v. Donese* (Sept. 9, 2000), Greene App. No. 2000-CA-17.

{¶39} Carl argues that, nevertheless, the court abused its discretion when it ordered him to pay \$500 as and for attorney fees because Ethel offered no evidence that the amount of fees was reasonable, or even incurred. It is surely likely that some fee was incurred. Also, where the fee is nominal in amount, no showing of reasonableness is required. *Wolech v. Foster* (1994), 98 Ohio App.3d 806. A fee award in the amount of \$500 has been held to be nominal. *Beadle v. Beadle* (March 15, 2004), Scioto App. No. 03CA2911, 2004-Ohio-1400.

{¶40} The fifth assignment of error is overruled.

Conclusion

{¶41} Having sustained the first and second assignments of error, we will reverse and vacate the trial court's judgment of contempt for failure to pay temporary spousal support and the jail sentence imposed thereon. Otherwise, the judgment from which the appeal was taken will be affirmed.

BROGAN, J. and YOUNG, J., concur.

Copies mailed to:

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Hon. Steven L. Hurley

