

[Cite as *Welch v. Muir*, 2009-Ohio-3575.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

DOROTHY JANE (MUIR) WELCH,

Plaintiff-Appellant,

vs.

DONALD JOSEPH MUIR,

Defendant-Appellee.

:

Case No. 08CA32

:

:

DECISION AND JUDGMENT ENTRY

:

APPEARANCES:

COUNSEL FOR APPELLANT: William L. Burton, Burton & Baumgartel, 312 Putnam Street, P.O. Box 1, Marietta, Ohio 45750

COUNSEL FOR APPELLEE: Gregg M. Emrick, McCauley, Webster & Emrick, 1710 Washington Boulevard, P.O. Box 196, Belpre, Ohio 45714

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 7-16-09

ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court judgment that found Dorothy Jane (Muir) Welch, plaintiff below and appellant herein, in contempt of court for the failure to abide by an agreed property settlement that was part of a decree that granted her a divorce from Donald Joseph Muir, defendant below and appellee herein.

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY REWRITING AN ORAL SEPARATION AGREEMENT IN A CONTEMPT PROCEEDING."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED, ABUSED ITS DISCRETION, AND AGAINST THE WEIGHT OF THE EVIDENCE, FASHIONED ITS OWN DIVORCE DECREE, DESTROYING ALL THE EQUITIES IN THE CASE."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT'S FINDING OF CONTEMPT WAS AN ERROR, A SERIOUS ABUSE OF DISCRETION, AND CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE."

{¶ 3} The parties married on December 14, 1991. No children were born as issue of that marriage. Appellant's divorce complaint alleged, inter alia, incompatibility. Although appellee denied those allegations, he and appellant later agreed to resolve the matter. Pursuant to their agreement, the trial court granted the divorce and divided their property, in pertinent part, as follows:

- (1) A boat was distributed to appellee with appellant to pay-off a \$64,000 mortgage.
- (2) A TIAA_CREF was distributed to appellant, but she would pay appellee \$18,000 for his interest.
- (3) All brokerage accounts were distributed to appellant, but she would pay appellee \$29,000 for his share.
- (4) The couples retirement accounts were to be divided "fifty-fifty" with the appropriate Qualified Domestic Relations Order(s) to issue to accomplish that division.

{¶ 4} On October 31, 2007, appellee filed an amended motion for an order to show cause why appellant should not be held in contempt for her failure to comply with

the terms of the property settlement.¹ Appellant filed a memorandum contra and the matter came on for a protracted hearing that lasted over several days. At the hearing the evidence revealed that the mortgage on the couple's boat had been satisfied, but the remaining financial obligations had not been satisfied. Appellant and her financial advisor both justified the delay for the reason that it took time to review her assets and to consider all tax ramifications before she could liquidate her assets to meet those obligations.

{¶ 5} The trial court was apparently unswayed by appellant's explanation. The court held appellant in contempt of court, ordered her to serve fifteen days in jail unless she purged that contempt by compliance with the remaining terms of the property settlement, and ordered her to pay \$2,601.20 for appellee's attorney fees. This appeal followed.

{¶ 6} We jointly consider all three assignments of error because they raise related issues. Appellant asserts that the trial court erred by holding her in contempt of court.

{¶ 7} Our analysis begins with the recognition that "contempt of court" is the disobedience or disregard of a court order or a command of judicial authority. Daniels v. Adkins (June 3, 1994), Ross App. No. 93CA1988; Johnson v. Morris (Dec. 19, 1993), Ross App. No. 93CA1969. It involves conduct that engenders disrespect for the administration of justice or which tends to embarrass,

¹ This motion was filed to amend an earlier, similar motion that appellee filed pro se.

impede or disturb a court in the performance of its function. Denovchek v. Trumbull Cty. Bd. of Commrs. (1988), 36 Ohio St.3d 14, 15, 520 N.E.2d 1362; Windham Bank v. Tomaszczyk (1971), 27 Ohio St.2d 55, 271 N.E.2d 815, at paragraph one of the syllabus. Proceedings in contempt are intended to uphold and ensure the effective administration of justice, secure the dignity of the court and affirm the supremacy of law. See Cramer v. Petrie (1994), 70 Ohio St.3d 131, 133, 637 N.E.2d 882. The power of the common pleas courts to punish contemptuous conduct derives from its inherent authority, Burt v. Dodge (1992), 65 Ohio St.3d 34, 35, 599 N.E.2d 693; Zakany v. Zakany (1984), 9 Ohio St.3d 192, 459 N.E.2d 870, syllabus, as well as statute. See e.g. R.C. 2705.01 and 2705.02.

{¶8} A distinction exists between criminal and civil contempt. Criminal contempt proceedings vindicate the authority of the legal system and punish the party who offends the court. Scherer v. Scherer (1991), 72 Ohio App.3d 211, 214, 594 N.E.2d 150; In re Skinner (Mar. 22, 1994), Adams App. No. 93CA547. The sanction imposed for criminal contempt operates as a punishment for the completed act of disobedience. Brown v. Executive 200, Inc. (1980), 64 Ohio St.2d 250, 254, 416 N.E.2d 610. ConTex, Inc. v. Consol. Technologies, Inc. (1988), 40 Ohio App.3d 94, 95, 531 N.E.2d 1353; Schrader v. Huff (1983), 8 Ohio App.3d 111, 112, 456 N.E.2d 587.

{¶9} Civil contempt exists when a party fails to do something ordered by a court for the benefit of an opposing

party. Pedone v. Pedone (1983), 11 Ohio App.3d 164, 165, 463 N.E.2d 656; Beach v. Beach (1955), 99 Ohio App. 428, 431, 134 N.E.2d 162. The punishment is remedial, or coercive, in civil contempt. State ex rel. Henneke v. Davis (1993), 66 Ohio St.3d 119, 120, 609 N.E.2d 544. In other words, civil contempt is intended to enforce compliance with a court's orders. A finding of civil contempt must be supported by clear and convincing evidence. See Brown v. Executive 200, Inc. (1980), 64 Ohio St.2d 250, 253, 416 N.E.2d 610; also see Carroll v. Detty (1996), 113 Ohio App.3d 708, 711, 681 N.E.2d 1383.

{¶ 10} The decision to hold a person in contempt lies within the sound discretion of the trial court. State ex rel. Ventrone v. Birkel (1981) 65 Ohio St.2d 10, 11, 417 N.E.2d 1249. Appellate courts will not reverse a trial court's decision on a contempt of court matter unless the court abused its discretion. Carroll, supra at 711; In re C.M., Summit App. No. 21720, 2004-Ohio-1984 at ¶10; In re Howard, Butler App. Nos. CA2001-11-264, CA2001-12-281 & CA2001-12-282, 2002-Ohio-5451 at ¶11. Generally, an abuse of discretion means more than just an error of law or judgment; rather it implies the court's attitude was unreasonable, arbitrary or unconscionable. Landis v. Grange Mut. Ins. Co. (1998), 82 Ohio St.3d 339, 342, 695 N.E.2d 1140; Malone v. Courtyard by Marriott L.P. (1996), 74 Ohio St.3d 440, 448, 659 N.E.2d 1242. In reviewing for an abuse of discretion, appellate courts must not simply substitute their judgment for that of a trial court. See State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 732, 654 N.E.2d 1254; In re Jane Doe 1 (1991), 57 Ohio

St.3d 135, 137-138, 566 N.E.2d 1181. Indeed, to establish an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, and not the exercise of reason but instead passion or bias. Nakoff v. Fairview Gen. Hosp. (1996), 75 Ohio St.3d 254, 256, 662 N.E.2d 1; also see Bragg v. Hatfield, Vinton App. No. 02CA567, 2003-Ohio-1441, ¶22. With these principles in mind, we turn our attention to the proceedings in the case sub judice.

{¶ 11} Appellant conceded during her testimony that appellee had not been paid the \$18,000 "equalization payment" on the TIAA-CREF account, nor had he been paid \$29,000 for his share of the brokerage accounts. Although a little less clear, the testimony also indicates a refusal to sign the necessary QDROs to implement a division of retirement accounts. This evidence is sufficient to establish that appellant failed to comply with the terms of the divorce settlement. Thus, we find no error in the trial court's conclusion to hold appellant in contempt of court.

{¶ 12} As to appellant's contention that the trial court "re-wrote" the settlement so as to find her in contempt, we have some difficulty with the precise nature of this argument. The trial court's August 5, 2008 contempt judgment simply repeats the same language set forth in the agreed divorce decree from the previous year.

{¶ 13} To the extent appellant claims that she misunderstood the specific terms within the agreed property settlement, she

nevertheless testified that she required her trial counsel to forward all documents to her for her personal approval.

Obviously, appellant consented to the language of the agreed entry and her attorney signed the entry as well. If the terms of the entry were not those to which appellant agreed, appellant should have raised that issue in the divorce proceeding. Here the record reveals that appellant agreed to the terms that the trial court ultimately adopted and set forth in its judgment.

{¶ 14} For these reasons, appellant is bound by the terms of the settlement and we see nothing in the record to suggest that the trial court somehow "re-wrote" the terms of the agreed property settlement so as to find her in contempt of court. Accordingly, we hereby overrule appellant's three assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Kline, P.J., concurring.

{¶ 15} Muir (the husband) contends that Welch (the wife) should be held in contempt of court based on her dilatory conduct related to the settlement on four different issues: (1) the boat, (2) an \$18,000 payment related to the TIAA-CREF plan, (3) a transfer of \$29,000 related to brokerage accounts, and (4) the retirement

accounts. I concur in judgment and opinion but write separately to explain why I think that the trial court did not abuse its discretion in its contempt finding against Welch as it relates to the fourth issue, i.e., the retirement accounts.

{¶ 16} Welch and Muir disagree on the construction of the consent decree that settled their divorce case. Specifically, Welch contends that the retirement accounts are pre-marital assets and fall under ¶7. She claims that, under ¶7, the accounts are "the sole and exclusive accounts of [Welch], free and clear of any interest in [Muir]." However, Muir argues that the same accounts are marital assets and fall under ¶10. He asserts that, under ¶10, these accounts "shall be divided fifty-fifty[.]"

{¶ 17} The trial court disagreed with Welch's interpretation of the consent decree. It considered ¶7, which stated that the non-marital accounts "have been identified by the parties[.]" However, the trial court determined that "specific IRAs were not identified as being [Welch's] separate property prior to the agreement and that the value of [Welch's] premarital and separate propert[ies] were taken into account in the division of the accounts[.]"

{¶ 18} As a result, I cannot say that the trial court abused its discretion. The trial court concluded that ¶7 required Welch to identify the pre-marital assets before the agreement became effective. This conclusion is a reasonable reading of the language of the agreed entry. And the evidence presented at the hearing supported the trial court's conclusion that no such identification took place. In effect, the trial court found that Muir had no reason to know Welch thought the retirement accounts were covered by ¶7, and also found that Welch should have known Muir believed the retirement

accounts were covered by ¶10. See *La Conte Ent. v. Cuyahoga Cty.* (2001), 145 Ohio App.3d 806, 811, citing Restatement of the Law 2d, Contracts (1979), Section 201.

{¶ 19} Accordingly, in the context of the above explanation, I concur in judgment and opinion.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant 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 Washington County Common Pleas Court to carry this judgment into execution.

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

Kline, P.J.: Concur in Judgment & Opinion with Opinion

Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.