

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

MARY MARGARET JENKINS,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-09-238
- vs -	:	<u>OPINION</u>
	:	1/9/2012
CHESTER M. JENKINS,	:	
Defendant-Appellant.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR07-07-0926

Fred S. Miller, Baden & Jones Bldg., 246 High Street, Hamilton, Ohio 45011, for plaintiff-appellee

J. Gregory Howard, 110 Main Street, Hamilton, Ohio 45011, for defendant-appellant

PIPER, J.

{¶1} Defendant-appellant, Chester Jenkins (Husband), appeals the decision of the Butler County Court of Common Pleas, Division of Domestic Relations, denying his motions to find his former spouse, Mary Margaret Jenkins (Wife), in contempt. We affirm the decision of the trial court.

{¶2} The parties were married in 1995, and had two children born issue of the

marriage. Wife filed for divorce in 2007, and a final decree was first entered on April 3, 2008. The trial court issued an amended judgment entry and final decree on April 9, 2008, and an additional amendment to the previous decree through a nunc pro tunc entry on April 7, 2009. These amendments do not pertain to the issues now before us on appeal.

{¶3} Within the decree, the trial court ordered that Husband "retain" the marital residence, and pay Wife her share of the equity, \$42,858.55. The trial court gave Husband 30 days to refinance the home, and ordered that Wife move from the residence 45 days after Husband paid her share of the equity as ordered. However, Husband was unable to secure refinancing, and Wife and the children remained in the marital residence until she moved out in July 2009.

{¶4} The decree also set forth the terms of personal property distribution by awarding Wife her and the children's "personal belongings," and awarding Husband "everything else." The trial court ordered that the property distribution occur within 90 days, and that any motions for contempt or to compel the division or exchange of property had to be filed within 60 days after the expiration of the 90-day distribution period.

{¶5} The trial court addressed the parties' vehicles, and awarded Wife a 2001 Ford Excursion, and Husband a 2004 Ford F-350, 1991 Ford F-250, 1973 Chevrolet pickup truck, 1967 Chevrolet pickup truck, 2007 Harley Davidson FLTX, and a 1984 Chevrolet Monte Carlo SS. At the time of the divorce proceedings, Husband stored the 1984 Monte Carlo in the garage of the marital residence.

{¶6} The record indicates that the 2007 divorce proceedings and the aftermath of the 2009 decree have been contentious, and that the parties' relationship has been antagonistic. Although Husband lived across the street from the marital residence, he was not permitted in the marital residence, and the parties often exchanged the children for visitation at the police department. Once Wife moved from the marital residence, she did not

inform Husband of her address, and the trial court granted Wife's motion to keep the address confidential. Husband has filed multiple contempt motions against Wife, and Wife has been held in contempt for violating Husband's visitation with the children.

{¶7} Most recently, Husband filed motions for contempt, alleging that Wife failed to maintain the marital residence, that Wife removed and essentially lost his personal property, and that Wife removed and destroyed his 1984 Monte Carlo. The trial court held a two-day hearing, and later issued a decision denying Husband's motions. Husband now appeals the decision of the trial court, raising three assignments of error:

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN NOT FINDING AN IMPLIED PROVISION THAT PLAINTIFF-APPELLEE MAINTAIN THE SUBJECT REAL ESTATE IN GOOD WORKING CONDITION DURING HER OCCUPANCY."

{¶10} Husband argues in his first assignment of error that the trial court erred in denying his motion to find Wife in contempt for committing waste during her occupancy of the marital home.

{¶11} Contempt is the disobedience of a court order. *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, paragraph one of the syllabus. An appellate court reviews a trial court's decision regarding contempt proceedings for an abuse of discretion. *Sparks v. Sparks*, Warren App. No. CA2010-10-096, 2011-Ohio-5746. An "'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. While a trial court does not have jurisdiction to modify the division of property in a properly-filed divorce decree, it may enforce its orders set forth in the decree. *Schuster v. Schuster*, Wyandot App. No. 16-08-22, 2009-Ohio-1736.

{¶12} Husband's motion asked the trial court to hold Wife in contempt because she

failed to abide by the terms of the decree. Husband argued that the decree placed a duty on Wife to maintain the home in good working order while she resided there. To demonstrate Wife's contempt, Husband testified that Wife removed several doors from the inside of the home, tore off laminate from the kitchen countertops, screwed windows shut, and allowed water to warp the wood floors. Wife testified that she maintained the property while she and the children resided there by doing regular maintenance such as cutting the grass, cleaning out the gutters, and attending to plumbing problems.

{¶13} The trial court reviewed the decree, and found that it did not contain any orders requiring Wife to maintain the home or orders placing any restrictions on her use of the property while she resided there. The pertinent provision of the decree states, "[Husband] shall retain the real estate * * *. [Husband] has thirty (30) days to refinance the property after the Final Decree has been filed and shall pay [Wife] her share of the equity, which was \$42,858.55 at that time. [Wife] shall move forty five (45) days after receiving the payment from [Husband] for her equity in the property."

{¶14} The trial court did not find that an ambiguity existed in the decree because there is no provision ordering Wife to maintain the home, nor does the decree make any reference to Wife's responsibilities while living in the home. As repugnant as Wife's conduct might be, the trial court was correct in denying Husband's motion for contempt, as there was no language in the decree even remotely suggesting Wife had a responsibility pursuant to the decree to perform upkeep or maintenance on the property, nor was there any language requiring Wife to fix or correct any condition beyond acceptable "wear and tear."

{¶15} We agree with the trial court that the divorce decree did not contain any express or implied orders to maintain the home. Therefore, the trial court's decision to deny Husband's motion for contempt strictly arising from the decree was not abuse of discretion. Nonetheless, we do *not* suggest that Wife was permitted to commit intentional waste just

because of a lack of appropriate language in the divorce decree. Misconduct of a party can always be brought before the court for consideration. A contempt motion is not the sole method to raise Husband's claim that Wife's actions have caused a diminution in the value of the home, or that she is liable for the replacement, repair, or restoration of the home.

{¶16} We specifically reject Wife's arguments that because Husband was incapable of refinancing the home Husband had "unclean hands" that somehow relieved Wife from any responsibility arising from her conduct. However, the trial court did not abuse its discretion by not finding Wife in contempt of its previous order, as the decree placed no responsibilities upon Wife while she occupied the home.¹ Our holding today does not stand for the proposition that a party in possession of property has no duty to maintain or preserve such property. We have only been asked to determine whether Wife was in disobedience of a court order, and whether the parties' divorce decree contained language ordering her to maintain the home in any particular manner. It did not, and under the facts of this specific case, contempt is not the proper method to seek redress. Husband's first assignment of error is overruled.

{¶17} Assignment of Error No. 2:

{¶18} "THE TRIAL COURT ERRED IN NOT FINDING PLAINTIFF-APPELLEE IN CONTEMPT FOR THE LOSS AND/OR DESTRUCTION OF THE MONTE CARLO."

{¶19} Husband argues in his second assignment of error that the trial court erred by not finding Wife in contempt for destroying the 1984 Monte Carlo awarded to him in the divorce decree.

{¶20} The divorce decree awarded Husband the 1984 Monte Carlo, but did not place

1. We note that in cases which discuss holding a party responsible for committing waste and destruction, there is at least some language in the decree referencing the need to maintain or preserve the real estate while in occupancy. See *Jones v. Jones*, 179 Ohio App.3d 618, 2008-Ohio-6069. No such language existed in the parties' decree.

upon Wife any duty to store or maintain the car in any particular place or condition. Husband testified that he stored the Monte Carlo in the garage of the marital residence, and Wife testified that she moved the car from the garage into the driveway so that she could utilize the garage. Wife also testified that she moved the car from the driveway to the back yard, with the help of her father, when she had repair work done on the driveway. Husband testified that he knew the car was moved from the garage into the driveway, then to the backyard, because he resided across the street from the marital residence and was able to see where the car was located. Husband also testified that when the car was in the back yard, he was aware that windows were broken and that the car was in disrepair. At some point, the car was no longer located in the back yard, and neither party claims knowledge of its current whereabouts. From the day of the divorce decree forward, Husband never made any attempts to retrieve the car, or to move it from the marital property once he saw that it was removed from the garage. Even if Husband believed he could not go onto the premises, we note that no motions were filed, nor was authorization or permission sought, to inspect or acquire possession of the vehicle once it had been exposed to the elements.

{¶21} Husband argues that Wife was in contempt because she moved the car from the garage and then into the back yard, and because the car is now missing. However, the decree did not place any responsibility on Wife regarding the Monte Carlo, nor did the decree order her to continue to store the car in a particular place or manner. The decree simply states that Husband "shall retain" the Monte Carlo, and that he would do so free and clear of any claims of Wife. After the date of the final decree, Husband could have moved the Monte Carlo from the garage, from the driveway, or from the backyard and Wife would have had no claim to stop him. However he did not.

{¶22} Wife did not disobey an order of the court by moving the car from the garage or into the backyard. The record does not contain any evidence to attribute the car's

disappearance or destruction to Wife. Any damage or theft of the car could have been avoided had Husband moved the car or taken possession thereof, which was his right under the divorce decree. Husband's second assignment of error is overruled.

{¶23} Assignment of Error No. 3:

{¶24} "THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO FIND THE PLAINTIFF-APPELLEE IN CONTEMPT OF COURT FOR HER REMOVAL AND DESTRUCTION OF HOUSEHOLD GOODS, FURNISHINGS, AND PERSONAL PROPERTY."

{¶25} Husband argues in his final assignment of error that the trial court erred in failing to find Wife in contempt for her destruction or removal of household goods, furnishings, and personal property.

{¶26} The divorce decree is clear that Wife was to retain her personal property, and that of the children. Husband was awarded "everything else." The trial court included the following order in the divorce decree. "The parties shall exchange and divide all personal property no later than ninety (90) days after the filing date of the final decree. If the parties cannot agree upon a date to conduct this division and exchange, the date for the division and exchange of personal property shall be at 12:00 noon on the 90th day following the filing of the decree. If either party fails to abide by the terms of the final decree regarding the division and exchange of personal property, the court shall entertain a motion for contempt or a motion to compel the division or exchange of personal property. The court will only entertain these motions if filed by a party on or before the 60th day after the expiration of the 90-day period."

{¶27} The record is clear that Husband failed to file a contempt motion or a motion to compel the division or exchange of the property within the time frame set forth in the decree. Husband claims that he was unable to enter the marital home in order to procure his

personal property and that he was unable to discover missing or destroyed items of personal property because Wife did not vacate the home until July 2009. However, the record is clear that Wife was not required to vacate the home until she was paid her portion of the equity, which never occurred because of Husband's failure to secure refinancing. Moreover, a motion to compel or a contempt motion properly filed within the time frame set forth in the decree could have permitted Husband to enter the marital residence, even with Wife still residing there, in order to take possession of his personal property.

{¶28} We also note that testimony from Husband and Wife demonstrates that Husband removed between two to three pick-up truck loads of his personal property at one point when Wife was still residing in the marital home. It is undisputed that, in the presence of a police officer, Husband took several of his own items from the home. However, Husband was not able to offer a reasonable explanation as to why the other items of his personal property remained in the home other than the fact that Wife was still there and did not want him in the marital residence.

{¶29} Husband also contends that Wife is in contempt because she removed or destroyed his personal property. Husband argues that his property, which comprised the "everything else" awarded him in the settlement, should have remained in the home during the time after the decree that Wife resided in the marital home. However, the trial court heard testimony from Wife that the items she removed from the home were either hers or were broken and placed on the "burn pile" in the back yard.

{¶30} Wife removed appliances/home furnishings from the home that her father purchased for her while she stayed in the marital home. Wife also testified that she moved other items onto a burn pile because they were broken or destroyed. These items included a broken couch, a broken lamp, and an inflatable pool liner that had a hole in it. While these items may have belonged to Husband, the trial court was within its discretion to find that the

items were not destroyed maliciously, or otherwise had de minimus value, and that Wife had not committed a misdeed by placing broken furniture or a destroyed pool liner on a burn pile.

{¶31} Husband did not make any attempt to recover these items of personal property, and did not file any motions with the trial court within the time frame set forth in the decree. If Husband had real concerns regarding items left behind, at a minimum, he could have requested an extension of the 90-day deadline. Parties cannot sit on their hands only to later claim an unfair disadvantage. *Wolford v. Sanchez*, Lorain App. No. 05CA008674, 2005-Ohio-6992.

{¶32} The trial court did not abuse its discretion by denying Husband's motion for contempt when it had not ordered Wife to store or maintain Husband's personal property. Husband's third assignment of error is overruled.

{¶33} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.