

[Cite as *Wagshul v. Wagshul*, 2010-Ohio-3120.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

FRED A. WAGSHUL	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23564
vs.	:	T.C. CASE NO. 03DR299
SHELLEY H. WAGSHUL	:	(Civil Appeal from
Defendant-Appellee	:	Common Appeals Court)

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O P I N I O N

Rendered on the 2<sup>nd</sup> day of July, 2010.

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GRADY, J.:

{¶ 1} This is an appeal from a final order of the domestic relations division of the court of common pleas that modified a spousal support obligation in a prior decree of divorce.

{¶ 2} Fred and Shelley Wagshul were divorced in 2003, following

twenty-seven years of marriage. Fred<sup>1</sup> is a physician, and through the years of the marriage has enjoyed a substantial income from his medical practice. Shelley, who holds a masters degree in education, has not worked outside the home since 1983.

{¶3} The agreed judgment and decree of divorce imposed substantial spousal support obligations on Fred. He was ordered to pay periodic spousal support of \$7,500 per month to Shelley for a term of nine years, until September of 2012. He was ordered to pay the annual real estate tax and insurance costs of \$12,000 for the marital residence Shelley was awarded, for a term of five years, as and for spousal support. Fred was also ordered to pay Shelley's annual health insurance premiums of \$3,000, until she is sixty-five, as and for spousal support. Shelley will be age sixty-five in 2015. Fred was ordered to pay college expenses of up to \$30,000 per year for each of the parties' two daughters.

{¶4} On May 2, 2007, Fred moved to suspend or reduce his spousal support obligations, on which the court had retained jurisdiction. Fred offered evidence showing that between 2004 and 2007 the gross receipts of his medical practice, which does business as a professional corporation, declined from \$1,036,221 to \$627,730. Fred and his CPA and his financial advisor attributed

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<sup>1</sup>For clarity and convenience, the parties are identified by their first names.

the decline to reduced reimbursements from insurance coverage and medicare for the services he provides, and to a decline in his hospital hours since hospitals have begun to employ their own physicians. During those same years Fred's professional corporation continued to pay him an annual salary of \$300,000, an amount necessary to meet his support obligations. To do that, Fred withdrew monies from his savings accounts and borrowed money from banks that he paid into his professional corporation to sustain its revenues.

{¶5} Fred's CPA, David Sproule, and his financial planner, Paige Henry, testified that Fred owns no more personal funds he can apply to his medical practice, and can borrow no more from banks he owes, which now must be repaid. They testified that Fred had not been paid a salary by his professional corporation the past seven months. Though Fred was able to realize modest savings in the expenses of his medical practice, both witnesses testified that the continued anticipated decline in its gross receipts, coupled with loans Fred must now repay, will allow him to take a salary of no more than \$80,000 per year.

{¶6} Fred terminated his support payments to Shelley on November 18, 2007, more than six months after his motion was filed. Fred testified that he needed the funds to maintain his practice. Shelley filed charges in contempt for Fred's failure to pay the

support she was owed.

{¶ 7} Fred testified that he and Shelley each received approximately \$700,000 in financial assets in their divorce. Fred testified that he used monies from his share to pay off the mortgage balance on the marital residence that was awarded to Shelley, which he was ordered to pay. The decree of divorce indicates the balance then due on the mortgage was \$167,154. The property was valued at \$450,000 at the time of the divorce in 2003.

{¶ 8} Evidence showed that Shelley's financial assets have appreciated since the divorce. She testified that she has been able to save approximately \$50,000 per year from the \$90,000 in annual spousal support she received. Shelley now has \$600,000 in savings and/or invested funds, and an IRA account with a balance of \$560,000.

{¶ 9} Shelley's house remains free of any mortgage obligation. She testified that the house is now worth less than in 2003, due to a decline in real estate values. She is reluctant to sell it for that reason. Shelley continues to reside there, with a man who does not contribute to maintaining the cost of the property. Shelley also owns a condominium in Hilton Head, South Carolina, which she bought for \$230,000. Shelley testified that the mortgage balance owed on the condo now exceeds its market value.

{¶ 10} The evidence showed that the parties' two daughters are

in college and law school, and each has a trust fund worth between \$70,000 and \$80,000 that can be used to pay their remaining higher education expenses. For that reason, the trial court terminated Fred's obligation under the decree of divorce to pay any of his two daughters' further education costs.

{¶ 11} The court adopted the opinion testimony of Fred's two witnesses that he can expect to take a salary from his professional corporation of no more than \$80,000 per year. The court nevertheless imputed an annual income of \$130,000 to Fred. The court found that Fred "ignores the fact that he receives, by his own testimony, approximately \$8,000 per month from rental of the facility that is paid to his LLC. Further, plaintiff testified that he recovers a 'vast majority' of his accounts receivable. He acknowledged that there is currently an excess of \$250,000 worth of accounts receivable. If a fraction, 20%, of the accounts receivable were recovered, that would equate to a \$50,000 recovery.

By his own testimony plaintiff infers that he would recognize a significantly better recovery of those accounts." (Dkt. 127, p. 3).

{¶ 12} Based on its finding, the court continued Fred's spousal support obligations, but reduced the periodic monthly spousal support he is required to pay Shelley from \$7,500 to \$3,500.

{¶ 13} Shelley testified that she is unable to find gainful

employment due to her age and lack of work experience. Fred argued that the court should impute an income to Shelley based on the financial assets she owns. The court declined to do so, stating that it "finds that no testimony was presented to support (Fred's) argument."

{¶ 14} The court found Fred in contempt for failing to pay the spousal support he had not paid. The court sentenced Fred to three days in jail, allowing him to purge his contempt by bringing his unpaid support obligations current within ninety days.

{¶ 15} Fred filed a notice of appeal from the domestic relations court's final order.

#### FIRST ASSIGNMENT OF ERROR

{¶ 16} "THE TRIAL COURT ERRED BY ONLY MODIFYING AND NOT SUSPENDING APPELLANT'S SPOUSAL SUPPORT OBLIGATION BASED UPON THE TRIAL COURT'S IMPROPER ASSIGNMENT OF INCOME TO APPELLANT IN THE AMOUNT OF \$130,000 AND BY FAILING TO IMPUTE INCOME TO APPELLEE."

{¶ 17} R.C. 3105.18 (C) (1) provides that in determining whether spousal support is appropriate and reasonable, and in determining the amount and terms of payment, "the court shall consider . . . (a) [t]he income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code."

{¶ 18} The court, after adopting the testimony of Fred's witnesses that he can take a salary of no more than \$80,000 per year from his professional corporation, imputed an annual income of \$130,000 to Fred. He argues that the record does not support the finding the court necessarily made, that he will receive an income of \$50,000 from another source or sources.

{¶ 19} The court, in its finding, made reference to an \$8,000 monthly rental income that Fred receives. The record demonstrates that a limited liability corporation that Fred owns, and which he was awarded in the decree of divorce, owns the building in which his medical practice is located. Fred's practice is owned by and conducted through his professional corporation, which pays Fred's LLC a monthly rental of \$8,000, for an annual rent of \$96,000.

{¶ 20} Fred's financial planner, Paige Henry, testified that Fred's mortgage payments for his building total \$89,148 per year, leaving but \$6,852 in net rental income. (T. Vol. I, p. 84). David Sproule, Fred's CPA, testified that Fred's mortgage interest deduction on his individual tax return attributable to those payments is \$47,206. (T. Vol. I, p. 11). Sproule also testified that Fred realizes a rental income from the building after an offset for depreciation. (T. Vol. I, p. 10). Fred's personal income tax returns for 2004, 2005, and 2006 (Plaintiff's Exhibits 2, 4 and 6), show an average annual rental income from the building

of \$28,146, as well as an offset for depreciation averaging \$26,786 per year during that period.

{¶ 21} The figures shown on a party's income tax return are preferred to a party's oral representations in determining what constitutes the party's "income" for purposes of R.C. 3105.18(C)(1)(a). *Freeland v. Freeland*, Jackson App. No. 02CA18, 2003-Ohio-5272. Further, we have generally held that the income a party derives from a business asset the party owns is the net income of the business, after operating expenses are deducted from the gross income the business realizes.

{¶ 22} Depreciation is not an actual operating expense that diminishes the amount of gross income an asset produces. Rather, it is an offset from the income produced by a capital asset, allowed according to a prescribed mathematical formula, to compensate its owner for the decline in the asset's value due to wear, tear, and/or obsolescence. Though depreciation is treated as an expense for purposes of taxation of the income the asset produces, the amount deducted for depreciation nevertheless remains available to the owner of the asset.

{¶ 23} R.C. 3105.18(C)(1)(a) neither defines nor limits income.

A domestic relations court therefore has discretion in determining what constitutes income. Fred's personal income tax returns for the years 2004, 2005, and 2006 show that the net rental income

from the building his separate corporation owns averaged \$28,149.

The depreciation expense for the building that Fred claimed on his tax returns during that same period averaged \$26,786. Combined, those two figures from Fred's tax returns exceeds the additional \$50,000, over and above Fred's \$80,000 salary from his professional corporation, which the court found Fred will earn when it attributed an annual income of \$130,000 to him for purposes of his spousal support obligation.

{¶ 24} "Where there exists competent and credible evidence supporting the findings and conclusions of the trial court, deference to such findings and conclusions must be given by the reviewing court." 5 Ohio Jurisprudence 3d, Appellate Review, Section 517. There is competent, credible evidence to support the trial court's finding that Fred will continue to enjoy an annual income of \$130,000. Therefore, the trial court did not abuse its discretion when it only modified instead of suspending Fred's obligation to pay spousal support.

{¶ 25} Fred also complains that the court abused its discretion when it failed to impute an income to Shelley from assets she owns, on a finding that "no testimony was presented to support (Fred's) argument" that the court should impute an income to Shelley. An abuse of discretion will result in a decision that is unreasonable.

*Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83. "A

decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157.

{¶ 26} Paige Henry, Fred's financial planner and a CPA, testified concerning the income that Shelley could realize from her savings and IRA accounts at different rates of return. Those same rates may not be available today, but some rate of return is available. Therefore, testimony that could permit the court to impute an income to Shelley was offered.

{¶ 27} The evidence demonstrates that Shelley's financial assets are worth \$1.16 million. Some of that may include assets she was awarded in the division of marital property. The court must consider income available from such property when awarding spousal support. R.C. 3105.18(C)(1).

{¶ 28} Shelley testified that she has been able to save approximately \$50,000 per year from the \$90,000 in support Fred was ordered to pay. R.C. 3105.18(C)(1)(i) requires the court to consider "[t]he relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties," when ordering spousal support.

{¶ 29} Shelley testified that she would be unable to meet her expenses, many of which are paid to maintain her house, if Fred is ordered to pay but \$3,500 in monthly support. Shelley said,

however, that she wishes to sell the home, which is "very big" but wants a greater price than the \$400,000 the property might currently bring. We note that under the terms of the divorce decree, Shelley must sell the residence within five years after September 1, 2003.

{¶ 30} The court reduced Fred's periodic spousal support obligation to Shelley from \$7,500 per month, or \$90,000 annually, to \$3,500 per month, or \$42,000 annually. The annual difference of \$48,000 approximates the amount Shelley saved each year from the \$7,500 monthly support Fred paid since their divorce.

{¶ 31} Shelley offered evidence of her monthly expenses (Defendant's Exhibit C), which on an annualized basis total \$64,464. Fred's reduced annual spousal support obligation of \$42,000 leaves a difference of \$22,464. The court did not expressly find that Shelley must be responsible for the difference from the assets she owns. Nevertheless, on this record, no alternative is available to her.

{¶ 32} Notwithstanding its mistaken pronouncement that Fred offered "no testimony" to support his argument that the court should impute an income to Shelley from assets she owns, it is clear that the court "imputed" an income to Shelley by making her responsible for the \$22,464 difference between her expenses and the support Fred was ordered to pay. No abuse of discretion is demonstrated.

{¶ 33} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 34} "THE TRIAL COURT ERRED BY FINDING APPELLANT IN CONTEMPT OF COURT FOR HIS FAILURE TO PAY SPOUSAL SUPPORT TO APPELLEE BECAUSE APPELLANT DEMONSTRATED A FINANCIAL INABILITY TO COMPLY WITH THE SPOUSAL SUPPORT ORDER."

{¶ 35} Disobedience of, or resistance to, a lawful judgment of a court is conduct that may be punished as for a contempt. R.C. 2705.02(A). The essential element of a contempt proceeding is that the person facing contempt charges has obstructed the administration of justice in some manner. *Martin v. Martin*, 179 Ohio App.3d 805, 2008-Ohio-6336. "As a general rule, the inability of the contemnor to comply with a judgment or order, without fault on the contemnor's part, is a good defense in a contempt proceeding for disobedience of the order. However, a person who seeks to satisfy the court that his or her failure to obey an order or judgment was entirely due to the person's inability to render obedience carries the burden of establishing that fact." 17 Ohio Jurisprudence 3d, Contempt, Section 62.

{¶ 36} The domestic relations court found Fred in contempt, stating:

{¶ 37} "Plaintiff testified that he willfully suspended all payments for spousal support in November 2007 so that he could

remain current on all of his business loans. Plaintiff's voluntary suspension of all spousal support payments demonstrates that he willfully disobeyed a court order and is therefore properly found in contempt. Plaintiff's objection to the finding of contempt is without merit and is overruled." (Dkt. 127, p. 4-5). The court imposed a three-day jail sentence, but ordered it suspended if Fred brings his support obligations current within ninety days.

{¶ 38} The trial court rejected Fred's defense of impossibility on a finding that he acted willfully. However, willfulness is not an essential element in a civil contempt proceeding. *In re Temple* (N.D. Ohio 1998), 228 B.R. 896.

{¶ 39} Fred filed a motion to suspend and/or modify his spousal support obligations on May 2, 2007. He took no salary from his practice beginning in March 2007, but continued making his support payments until November 18, 2007, when he stopped making any payments. Fred testified that since the time he stopped taking a salary he had paid \$75,000 in support to Shelley. He also testified that those payments were largely from borrowed monies.

{¶ 40} Fred testified that he stopped making support payments to Shelley because "[t]here is no money to pay her." (T. Vol. II, p. 34). Fred testified that he was unable to pay support to Shelley and at the same time maintain the expenses of his practice as well as repay the debts he incurred. Fred testified that if

he failed to make the monthly mortgage payment on the building where his practice is located, "[w]e would go into foreclosure.

The bank would come and lock the doors of the practice, [it] would not have a home to be in, the practice would not exist and there would be no incoming funds, nothing." (T. Vol. II, p. 79).

{¶ 41} Unsubstantiated claims of financial difficulties do not establish an impossibility defense to a contempt charge. *Bishop v. Bishop* (April 15, 2002), Stark App. No. 2001CA00319. On this record, Fred established an impossibility defense with evidence that the gross revenues from his practice declined by forty percent between 2004 and 2007, and that even so he incurred debt and substantially exhausted his savings to continue to pay his support obligation. After his financial situation became so dire that he could no longer take a salary from his practice, Fred promptly sought relief from the court. He nevertheless continued to pay support for over six months until he could no longer bear the burden.

{¶ 42} The trial court's finding of contempt is against the manifest weight of the evidence. Instead, having reduced Fred's monthly support obligation from \$7,500 to \$3,500, the court should have made the award retroactive to the date Fred's motion to suspend or modify support was filed, May 2, 2007, allowing him a credit of monies he paid after that date as periodic spousal support against any arrearage owed. Shelley has a right to have any

remaining balance owed her reduced to a judgment on which execution may issue.

{¶ 43} The second assignment of error is sustained.

{¶ 44} Having sustained the second assignment of error, we will reverse the judgment of the trial court finding Fred in contempt and remand the case to the domestic relations court to determine any arrearage in Fred's support obligation that remains outstanding, and to grant Shelley relief on the arrearage she is owed, consistent with this opinion. The judgment of the trial court will otherwise be affirmed.

FAIN, J. And FROELICH, J., concur.

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