

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA**

<b>SAM,</b>	:	<b>No. 11-20, 065</b>
<b>Plaintiff</b>	:	
	:	
<b>vs.</b>	:	<b>CIVIL ACTION - LAW</b>
	:	
<b>KSM,</b>	:	
<b>Defendant</b>	:	

***Date: May 30, 2017***

**OPINION IN SUPPORT OF THE  
ORDER OF MARCH 7, 2017, IN COMPLIANCE WITH  
RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Appellant SAM (hereinafter referred to as "Husband") has appealed this Court's March 7, 2017, Order finding him in contempt for his failure to comply with the Court Order of June 9, 2014.

Husband's appeal should be denied and the Court's Order of March 7, 2017, affirmed. The court will rely on its Opinion and Order dated March 7, 2017, and further addresses its reasoning in the foregoing opinion.

In Husband's Concise Statement of Matters Complained of on Appeal, filed on April 5, 2017, SAM raised several issues:

1. The Trial Court erred in finding Husband in contempt and awarding attorney's fees.
2. The Trial Court erred in ordering Husband to pay Wife an equitable distribution sum that was derived directly from monies Wife elected to include in Husband's

income to calculate child support, APL and a mortgage contribution and in holding this was not a precluded double-dipping of an asset.

3. The Trial Court erred in ordering Husband to make direct payments when the concise language of the June 9, 2014, order specifically required direct payments to Wife only if the pension income was reduced in any way. In fact, the pension was not reduced at all and full payment was available to Wife via QDRO, but was not distributed due to Wife's recalcitrance.
4. The Trial Court erred in not considering the tax consequences on the lump sum and monthly payments.
5. The Trial Court erred in not requiring Wife's payment from Husband's retirement to be distributed by QDRO as was the agreement of the parties and the court order.
6. The Trial Court erred in not giving Husband a credit toward the lump sum payment for amounts he had paid in child support, APL and mortgage contribution based off his full retirement pay.
7. The Trial Court erred in utilizing June 9, 2014, as the retroactive date under the order.

### **I. FACTS AND PROCEDURAL HISTORY**

The relevant facts and procedural history leading up to the filing of the Petition for Contempt on September 23, 2016, and subsequent Order which is the subject of this appeal were recited in this Court's Order of March 7, 2017, and are incorporated herein. The primary issue raised by Wife in her Petition for Contempt involves the monthly payment Husband owes to Wife representing Wife's equitable distribution portion of the

marital estate. Pursuant to the Order of June 9, 2014, Wife was awarded the sum of \$567,201.26, payable by Husband in monthly increments of a minimum of \$911.11, plus consideration of the associated COLAs, from his disposable retirement income. A QDRO was directed to be prepared by counsel for Wife, to effectuate these payments, but until the QDRO was implemented the Order indicated that Husband was to pay the minimum of \$911.11 monthly to Wife. As Husband was afforded the opportunity to make monthly payments to Wife in satisfaction of her share of the marital estate, in lieu of being required to pay it in a lump sum, the Court added an additional protection for Wife in the form of an indemnification clause. The Court Order indicated that if Husband's disposable retirement income from his Navy Pension is reduced in any way which reduces the amount or share of retirement pay to which Wife is entitled, such as the receipt of disability pay, then Husband shall make direct payments to Wife, from his additional income or separate assets, to indemnify and hold her harmless from any reduction, costs, or damages which she may occur. Husband appealed this Order, specifically the indemnification clause. In an opinion entered on June 26, 2015, the Superior Court affirmed this Court's Order of June 9, 2014.

Wife filed her Petition for Contempt on September 23, 2016, alleging that Husband and his attorney have been uncooperative since September 2015 in providing additional information requested by Wife's actuarial consultant, and therefore the QDRO had not been prepared. Wife further alleges that Husband had not made any payments of the \$911.11 minimum to which she was entitled under the Order of June 9, 2014. A hearing was held on January 9, 2017. At that time, Husband argued that the \$911.11 minimum monthly payment obligation did not commence until the QDRO was in place

and distributed directly to Wife from his Navy Retirement pay. He further argued that the full amount of his Navy Retirement pay is included in his income for child support and spousal support calculation purposes and, therefore, it would be considered impermissible “double-dipping” for Wife if she were to receive her payments directly from Husband prior to the QDRO being implemented. This Court remained unconvinced by this argument, indicating that since June of 2014 Husband had, and continues to have, the right to file a petition for modification of his child support obligation in light of the final Order regarding the equitable distribution.

By Order dated March 7, 2017, this Court found Husband in contempt for his failure to follow the Order of June 9, 2014. Husband was ordered to make a lump sum payment to Wife in the amount of \$31,888.85 (representing monthly payments of \$911.11 from June 2014 through March 2017) by May 31, 2017. The Order, again, specifically stated that commencing in April 2017, Husband was to make a monthly payment of \$911.11, either through his Navy Retirement pay or directly from Husband. Finally, Husband was ordered to pay \$750.00 in counsel fees to Wife’s attorney. However, this obligation was to be suspended upon Husband making the required lump sum payment to Wife by May 31, 2017.

Husband filed a Motion for Stay of the Order on April 5, 2017, and an Amended Motion for Stay of the Order on April 19 2017. A hearing was held on May 5, 2017, regarding the Motions. By Order dated May 8, 2017, Husband’s request for a stay of the monthly payment to Wife in the amount of \$911.11 commencing in April 2017, was denied. Husband’s request for a stay with regard to the lump sum payment in the amount of \$31,888.85 on or before May 31, 2017, was granted. The Court found that

there were reasonable grounds for a difference of opinion as to whether or not the lump sum payment ordered by the Court in its March 7, 2017, Order was appropriate.

Pursuant to Pa.R.A.P. 1731(b), Husband was directed to pay a bond in the amount of \$31,888.85 in cash or property with the Prothonotary of Lycoming County on or before May 31, 2017. Husband's request for a stay of the required payment of \$750.00 in counsel fees, which would have been suspended upon payment of the lump sum amount on or before May 31, 2017, was granted, and the payment was stayed pending a decision from the Superior Court on the lump sum payment.

## **II. DISCUSSION**

An appellate court reviews a trial court's finding of contempt, and sanctions it imposes, for a misapplication of the law or clear abuse of discretion. *MacDougall v. MacDougall*, 49 A.3d 890, 892 (Pa.Super. 2012). The burden of proof rests with the complaining party to demonstrate that a party is in contempt of a court order. *Id.* In its Order of March 7, 2017, this Court found that Wife successfully proved that Husband intentionally withheld payments to her that he was required to make in satisfaction of his obligation under the Court's Order of June 9, 2014, regarding equitable distribution.

Husband has relied heavily on the notion that this Court's Order impermissibly allowed Wife to "double-dip" by ordering him to pay her an equitable distribution sum that was derived from monies Wife elected to include in Husband's income to calculate child support, APL, and a mortgage contribution. Husband cites *Cerny v. Cerny*, 656 A.2d 507 (Pa.Super. 1995), where the Superior Court held that the trial court erred if it characterized a lump-sum payment received from husband's employer upon his termination as income available in calculating husband's support obligation while at the

same time characterizing the lump-sum payment as a marital asset subject to equitable distribution. Husband further cites the case of *Rohrer v. Rohrer*, 715 A.2d 463 (Pa.Super. 1998), which held that “money included in an individual's income for the purpose of calculating support payments may not also be labelled as a marital asset subject to equitable distribution.” The reverse is true as well – money labeled as an asset and subject to equitable distribution cannot also be included in an individual's income for the purpose of calculating support payments. *Miller v. Miller*, 783 A.2d 832, 835 (Pa.Super. 2001).

Initially, we note that the second issue raised in Husband's Concise Statement alleges that this Court erred in ordering Husband to pay Wife an equitable distribution sum that was derived directly from monies Wife elected to include in Husband's income to calculate child support, APL and a mortgage contribution. Husband appears to be attempting to re-litigate an issue that has already been decided. The Court's award of equitable distribution was issued on June 9, 2014, affirmed by the Superior Court on June 26, 2015, and made final 30 days later after the time for filing a petition for allowance of appeal to the Pennsylvania Supreme Court was exhausted. When this Court's Order was entered, Husband's military retirement pay became an asset.

With respect to Husband's claim that the result of this Order is that Wife is impermissibly double-dipping, this Court does not dispute that Wife should not be permitted to double-dip, and does not condone said double-dipping. At the time the equitable distribution Order was entered, Husband could and should have immediately filed a motion to modify his child support obligation based on the changed circumstances. The parties' support matter is handled in Centre County. There was

some testimony that Husband went to the domestic relations office and requested that they remove his retirement pay from his income for support calculation purposes, but was told that Wife would have to be the one to request a modification. The law is clear that either party may petition to modify a support order. When modification of a child support order is sought, the "moving party has the burden of proving by competent evidence that a material and substantial change of circumstances has occurred since the entry of the original or modified order." *Commonwealth ex rel. Sladek v. Sladek*, 563 A.2d 172, 173 (Pa.Super. 1989). Husband's disposable retirement pay being characterized as an asset subject to equitable distribution would certainly constitute a change in circumstances. "[M]odification of a support order is to be retroactive to the date when modification initially was sought unless the court sets forth reasons for failing to do so on the record." *Kelleher v. Bush*, 832 A.2d 483, 485 (Pa.Super. 2003).

What is clear that Husband should not have done, however, is withhold the minimum monthly payments that he was Court ordered to make to Wife in satisfaction of his equitable distribution obligation. Husband, in violation of the Court's Order which was affirmed by the Superior Court, made zero minimum monthly payments of \$911.11 from June 9, 2014, through March of 2017. Husband's justification for doing so is two-fold. First, he argues that the language of the June 9, 2014, Order specifically required direct payments to Wife *only if* his disposable retirement pay was reduced in any way, and that his payment was not reduced at all and therefore fully available to Wife via QDRO, and in fact was not distributed solely due to Wife's recalcitrance. Second, he argues that this Court erred in not requiring Wife's payment to be distributed by QDRO as was the agreement of the parties and the Court Order.

Husband is of the opinion that the monthly minimum payments were not to begin until the QDRO was in place. He further argues that this Court erred in utilizing June 9, 2014, as the retroactive date under the contempt Order, presumably because there was no QDRO in effect on that date. This Court's Order of June 9, 2014, although it states that a QDRO shall be prepared and submitted by Husband's attorney within 30 days of the date of the Order, does not state that Wife's minimum monthly payments were contingent on the QDRO being in place. The Order stated that "the minimum payment which Wife shall receive either directly from the Navy Pension and/or through direct payment from Husband is \$911.11 per month plus applicable COLAs." As stated in this Court's Order of March 7, 2017, Husband's retirement payments were intended to be used for the monthly payment to Wife, but not mandated. The Order indicated that a minimum monthly payment of \$911.11 was to be made to Wife. The Court's June 9, 2014, Order permitted Husband to satisfy his equitable distribution obligation over time rather than in a lump sum, which was a benefit to Husband. The amount and the frequency of the payment was Ordered by the Court. The source of the payment or the method by which it was received was not. An Order requiring direct payment to Wife would certainly promote efficiency, but was not required prior to the payment obligation commencing.

Husband argues that this Court erred in not giving Husband a credit towards the lump sum payment for amounts he had paid in child support, APL and mortgage contribution based off his full retirement pay. As discussed at length, Husband made no payments for 35 months towards his equitable distribution obligation. Husband complains that he should not have to pay nearly \$32,000 "up front," plus \$911.11 per



month going forward, plus additional amounts from his Centre County, Pennsylvania, support Order. The lump sum payment ordered by the Court on March 7, 2017, is not an “up front” payment. It is the total of 35 months of payments that Husband, in violation of a Court Order, did not make. This Court did not err in declining to award a credit to Husband for payments he made on a separate support obligation which he could have petitioned to modify at the time the equitable distribution Order was entered.

Additionally, this Court did not err in awarding counsel fees to Wife. The Divorce Code grants trial courts broad power to enforce equitable distribution orders and to provide remedies in the event of failure to comply with orders of equitable distribution. *Prol v. Prol*, 935 A.2d 547, 553 (Pa.Super. 2007). This Court found Husband in contempt for his failure to pay to Wife, for 35 consecutive months, the monthly minimum amount required of him under the June 9, 2014, Order. Attorneys' fees and other disbursements necessitated by the contemnor's noncompliance may be recovered by the aggrieved party in a civil contempt case. *Rhoads v. Pryce*, 874 A.2d 148, 152 (Pa.Super. 2005). Because an award of counsel fees is “intended to reimburse an innocent litigant for expenses made necessary by the conduct of an opponent, it is coercive and compensatory, and not punitive. . . .” *Id.* Counsel fees are a proper element of a civil contempt order. *Id.* In reviewing an award of counsel fees, an appellate court will not disturb the decision below absent a clear abuse of discretion. *Id.* This Court’s award of \$750.00 to Wife in counsel fees to is reasonable considering she had to expend time and money to enforce an Order on which she received no payments for more than two years at the time of the filing of the petition. Furthermore, this Court initially permitted Husband to avoid the payment of counsel fees if he paid the entire

lump sum owed to Wife by May 31, 2017, and subsequently, by Order dated May 8, 2017, stayed the requirement that Husband pay counsel fees until a decision is rendered by the Superior Court regarding the lump sum payment. Husband's argument regarding the award of counsel fees is without merit.

### **III. CONCLUSION**

This Court believes that the Order of June 9, 2014 should be affirmed as no abuse of discretion by a misapplication of the law or failure to follow proper legal procedure occurred.

BY THE COURT,

Joy Reynolds McCoy, Judge