

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001211-MR

WILLIAM CHARLES WOLEJSZA

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE O. REED RHORER, JUDGE  
ACTION NO. 04-CI-01622

PATTIE MARIE WOLEJSZA; AND HON.  
REED RHORER, JUDGE, FRANKLIN  
COUNTY FAMILY COURT

APPELLEES

### OPINION VACATING AND REMANDING

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BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

VANMETER, JUDGE: William Charles Wolejsza appeals from an order entered by the Franklin Circuit Court regarding the division of marital assets in a dissolution proceeding. For the reasons stated hereafter, we vacate and remand for further proceedings.

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<sup>1</sup> Senior Judge Daniel T. Guidugli, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

William and Pattie Marie Wolejsza married in 1976 and separated in 2004. In 2005 the circuit court entered a dissolution decree reserving various property issues for further resolution. Then, after directing that the marital property should be equally divided, the court entered an order on March 27, 2006 which, consistent with the parties' agreement, provided that William would pay Pattie \$85,505.54 in exchange for her one-half interest in the equity in the marital residence. The order also addressed William's intent to retire and to exercise a retirement benefits option which would provide a lump sum payment of \$181,614.60, plus a monthly retirement benefit of \$2,793.99 attributable to the 377 months of the parties' marriage, with no survivor benefits. The court directed William to pay Pattie half of those benefits, i.e., a lump sum of \$90,807.30 plus \$1,397.00 per month. Several other property matters were taken under submission. On March 31 the court entered an agreed order noting that William was retiring effective that day, and dividing retirement benefits as described above.

Unfortunately, on March 31 William in fact selected a retirement benefits option other than that contemplated by the parties' agreement and the court's order. Rather than choosing an option which immediately provided a large lump sum payment, William selected an option which provided only monthly benefits, the marital interest in which amounted to \$5,044.00 per month. After a hearing, the circuit court found William in contempt of court but delayed entering any disposition. The court ordered that William's interest in the marital residence should immediately be quitclaimed to Pattie as compensation for the loss of the anticipated lump sum payment, and that Pattie should

receive \$2,500 of the monthly benefits. Further, William was directed to pay Pattie “an additional \$5,000.00 to cover the past temporary maintenance that has not been paid for five months.” This appeal followed.

First, William contends that the trial court erred by “impos[ing] contempt penalties without a due process hearing.” He asserts in part that before he is penalized for contempt, he is entitled to an evidentiary hearing regarding his mental state during the time in question. We agree.

Civil and criminal contempt are distinguished not by the nature of the underlying proceeding, but by the character and purpose of the sanction. Thus, contempt is civil if the sanction is intended to coerce compliance with a court's order; it is criminal if the sanction is intended to impose punishment. *See Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996); *Blakeman v. Schneider*, 864 S.W.2d 903, 906 (Ky. 1993). Direct criminal contempt, which occurs while the party is before the court, may be punished summarily since the elements of the offense are within the court's personal knowledge. *Burge*, 947 S.W.2d at 808; *Brockman v. Commonwealth*, 185 S.W.3d 205, 208 (Ky.App. 2005). Indirect criminal contempt, which occurs outside of the court's presence, requires a due process hearing and evidence to show willful disobedience toward, or open disrespect for, a court's rule of order. *Burge*, 947 S.W.2d at 808; *Brockman*, 185 S.W.3d at 208.

Here, the court's order of May 15 reflects that the court found William in contempt during the April 25 hearing but “withheld disposition until a later date.” Since

William was not in the court's presence on April 25, and since he no longer was eligible to choose a different retirement benefits option by the time of the May 15 order, the court's sanction was one of criminal contempt for purposes of punishment, rather than civil contempt for purposes of coercing compliance with a prior court order. Further, since the offending behavior occurred out of court and therefore involved indirect rather than direct criminal contempt, William was entitled to an evidentiary due process hearing, as well as findings as to whether he willfully disobeyed or openly disrespected the court's order, before any sanction was imposed. *Burge*, 947 S.W.2d at 808; *Brockman*, 185 S.W.3d at 208. The court's finding of contempt therefore is vacated, and this matter is remanded for further proceedings.

Next, William contends that the trial court abused its discretion when dividing the marital property. We agree.

KRS 403.190(1) requires a trial court to divide marital property between divorcing spouses “in just proportions considering all relevant factors” including those enumerated therein. Here it was agreed that the parties each would receive one-half of the residential equity, as well as one-half of the marital portions of lump sum and monthly retirement benefits. When William violated the agreed order by selecting a retirement benefits option which did not include the anticipated lump sum payment, the court ordered him to relinquish his interests in the residence to Pattie. As a result, Pattie was awarded residential equity valued at \$171,011.07 instead of the \$176,312.84 in cash (\$85,505.54 residential equity plus \$90,807.30 lump sum benefit) which she originally

was to receive. Further, because William selected a retirement benefits option without a lump sum payment which would have decreased the value of subsequent monthly benefits, Pattie's monthly benefits increased by some \$1,103, from \$1,397 to \$2,500 per month, when the court continued to award her one-half of the marital portion of the monthly benefits. Thus, although William also was awarded one-half of the marital share of monthly retirement benefits, his award of marital property significantly decreased since he received nothing in exchange for the residential equity and lump sum payments originally awarded to him by agreement. In other words, rather than equally dividing the marital property, the trial court awarded Pattie \$171,011.07 more in marital property than it awarded William.

Clearly, William engaged in misconduct when he selected a retirement benefits option other than that which served as the basis for the parties' agreed order. Nevertheless, given the court's earlier finding that the parties' marital property should be divided equally, the court's award to Pattie of marital property valued at \$171,011.07, without a commensurate award of marital property to William, violated the KRS 403.190(1) requirement that marital property should be divided in "just proportions" without regard to marital misconduct. On remand, therefore, the marital property must be divided so as to satisfy such requirements.

We note that although William claims that the court erred by failing to assign his nonmarital interest in the retirement benefits to him, the record clearly shows that the value of the nonmarital portion of the benefits was separated out from the figure

used for calculating the parties' shares of marital benefits. Additionally, since in the May 15 order the court specifically denied Pattie's request for an "equalization payment of \$2,200.00 for property," we need not address William's unfounded assertion that the court erroneously granted the request.

Finally, William contends that the trial court erred by awarding Pattie \$5,000 "to cover the past temporary maintenance that has not been paid for five months[.]" More specifically, he alleges that a maintenance obligation did not accrue once he was terminated from his employment and had no income. We agree.

In January 2005, Pattie requested temporary maintenance of \$1,000 per month. Based on the parties' agreement, in February the court ordered that each party would have access to \$1,000 per month from a joint account "provided funds are available." After William was terminated from his employment on September 30, he filed a motion seeking an order setting aside the court's prior award of \$1,000 per month "as temporary maintenance." During an October 25 hearing on the motion, counsel for the parties agreed that although the prior order had directed that each party would receive \$1000 per month from the money deposited into a particular bank account, such payments were never specifically designated as temporary maintenance and no payment obligation would accrue in the absence of income. In its May 15, 2006 order, however, the court referred to the "payments of the temporary maintenance, which [Pattie] contends [William] failed to make for five months" and ordered William to pay Pattie "an

additional \$5,000.00 to cover the past temporary maintenance that has not been paid for five months[.]”

Given the parties' consensus on October 25 that a payment obligation would not accrue in the absence of income, as well as the absence of any evidence to suggest that the parties subsequently reached a different agreement or that William received additional income before May 15, we must conclude that the trial court erred by awarding Pattie a sum as past-due temporary maintenance. Hence, that award must be set aside.

The court's order is vacated and remanded for further proceedings consistent with the views stated herein.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven G. Bolton  
Frankfort, Kentucky

BRIEF FOR APPELLEE PATTIE  
WOLEJSZA:

Paul F. Fauri  
Frankfort, Kentucky