

ENFORCING PROPERTY DIVISION PROVISIONS IN
A JUDGMENT OF DIVORCE

BY

KENNETH E. PRATHER, SR.

PRATHER & GARWOOD, P.C.

19846 MACK AVENUE

GROSSE POINTE WOODS, MI 48236

Ph #(313) 884-5622/(313) 884-6073 (Fx)

E-mail Address: kprather@quixnet.net

Thursday, May 1, 2003
Advanced Level Family Law Seminar
Michigan Chapter American Academy of Matrimonial Lawyers
2000 Townsend Hotel
Birmingham, Michigan

ENFORCING PROPERTY DIVISION
PROVISIONS IN A JUDGMENT OF DIVORCE

After the entry of a Judgment of Divorce and expiration of the appeal period, the Circuit Court has jurisdiction and power to make any Order proper to fully effectuate the Circuit Court's jurisdiction and judgments.

MCL 600.611 provides:

Circuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts jurisdiction and judgments.

As a court of equity, the trial court has inherent power and jurisdiction to enforce its own directives and grant complete equity and conclude the controversy.

Green v Green, 357 Mich 196; 98 NW2d 519 (1959)

Rotzell v Rotzell, 241 Mich 122; 216 NW 400 (1927)

Walworth v Wimmer, 200 Mich App 562; 504 NW2d 708 (1993)

Van Koevering v Van Koevering, 144 Mich App 404; 375 NW2d 759 (1985)

Cohen v Cohen, 125 Mich App 206; 335 NW2d 661 (1983)

Schaeffer v Schaeffer, 106 Mich App 452; 308 NW2d 226 (1981)

Where there are concerns about the enforceability of property divisions in the Judgment of Divorce, the Judgment of Divorce should contain a provision that states:

IT IS FURTHER ORDERED AND ADJUDGED that the Court shall retain jurisdiction to enforce all provisions of this Judgment of Divorce.

When dividing real property, the Judgment of Divorce should contain:

- The legal description of the property to be transferred
- One spouse shall execute a Quit Claim Deed conveying his or her interest in the real property to the other spouse.
- If the transferor-spouse fails to execute such a Quit Claim Deed, the recording of a certified copy of the Judgment of Divorce in the Register of Deeds where the property is located shall operate as a transfer of the spouse's interest in the real property to the other transferor-spouse.
MCL 600.2935

Where there are concerns about enforcement of the division of other marital property, consideration should be given to providing the payee-spouse with a security interest in property awarded and owned by the payer-spouse. The trial court has inherent authority to enforce a security interest or lien provided in a Judgment of Divorce. *Walworth v Wimmer*, 200 Mich App 562; 504 NW2d 708 (1993).

Where the payee-spouse does not comply with specific payment provisions of a property settlement, creditor's rights remedies are available to the payee-spouse to enforce the resulting debt or spouse's obligation.

- Attachment, MCR 3.103; MCL 600.701;
- Garnishment after Judgment, MCR 3.101; MCL 600.4102(4)(a);
- Installment Payment Orders, MCR 3.104; MCL 600.620I;
- Claim and Delivery (Replevin) MCR 3.105; MCL 600.2920;
- Execution, MCL 600.6001-6018; and
- Proceedings Supplemental to Judgment, MCL 600.6104-6143.

The general rule is that contempt proceedings may not be utilized when enforced property divisions or property settlements in the Judgment of Divorce. A provision of a Judgment of Divorce that requires one party to pay money to the other party as part of the property settlement may not be enforced through contempt proceedings.

Guyann v Guyann, 194 Mich App 1; 486 NW 2d 81 (1992)

Thomas v Thomas, 337 Mich 510; 513-514, 60 NW 2d 331 (1953)

Chisnell v Chisnell, 99 Mich App 311, 320; 297 NW2d 909 (1980)

Case law has carved out an exception to the general rule which allows the use of contempt proceedings when the judgment required the delivery of a specific fund or property.

Carnahan v Carnahan, 143 Mich 390; 107 NW 73 (1906);

Schaheen v Schaheen, 17 Mich App 147; 169 NW2d 117 (1969)

Smith v Lapeer Circuit Judge, 251 Mich 126; 230 NW 905 (1930)

In re Ridgley, 261 Mich 42; 245 NW 803 (1932)

Burton v Wayne Circuit Judge, 325 Mich 159 (1949)

American Oil v Suhonen, 71 Mich App 736 (1976)

In re Contempt of Calcutt, 184 Mich App 749, 756, 757 (1990)

In the *Guyann* case, Judge Marilyn Kelly dissented and stated in relevant part:

The aggrieved party, often a woman with custody over the parties' children, is frequently in immediate need of the property awarded her for her and the children's support or well-being. That party is also the least likely to have available funds for a separate enforcement action. The legal logic that forces her to initiate a new lawsuit before a different judge must appear to her

to be extremely flawed.

Corrective legislation is needed. In the alternative, the Supreme Court could specifically extend the inherent authority which resides in the trial courts to enforce their own directives. It could interpret the statute which provides the courts' contempt power to embrace enforcement of the property distribution provisions of divorce judgments. MCL 600.1701(g); MSA 27A.1701(g).

Gynn, 194 Mich App at 5

In *Gynn*, the payment provisions to be enforced consisted of payment of \$80,000 in monthly installments of \$1,300 carrying 7% interest. The Court of Appeals, in review of the *Gynn* decision, recognized the distinction between a money judgment and the delivery of a specific piece of property, citing *Carnahan v Carnahan*, 143 Mich 390; 107 NW 73 (1906) and *Schaheen v Schaheen*, 17 Mich App 147; 169 NW2d 117 (1969).

In addition to *Carnahan* and *Schaheen*, other cases support the special funds exception to the execution rule.

Smith v Lapeer Circuit Judge, 251 Mich 126; 230 NW 905 (1930)

In re Ridgley, 261 Mich 42; 245 NW 803 (1932)

Burton v Wayne Circuit Judge, 325 Mich 159 (1949)

American Oil v Suhonen, 71 Mich App 736 (1976)

In re Contempt of Calcutt, 184 Mich App 749, 756, 757 (1990)

In analyzing whether contempt proceedings can be utilized, it is necessary to determine whether the relief sought is to:

- (1) Enforce a payment provision of a property division which constitutes the payment of a debt enforceable by execution; or
- (2) Enforce a judgment provision requiring the performance of an act, including the transfer of special funds, which does not constitute the

payment of a debt in the ordinary sense and which cannot be enforced by execution.

Where the special fund exception is applicable, damages, interest and attorney fees can be recovered.

EXECUTION STATUTE

MCL 600.6001 states:

“Whenever a judgment is rendered in any court, execution to collect the same may be issued to the sheriff, [bailiff,] or other proper officer of any county[,district, court district or municipality] of this state.”

“While any competent adult, not a party, may serve writ of garnishment, executions may be levied only by sheriffs, bailiffs, and court officers. *In re Fees of Court Officer* 222 Mich App 234; 564 NW2d 509, (1997)

A Judgment of Divorce containing a money judgment need not state specifically that the money judgment may be enforced by execution; the right to execute is implicit in any judgment for money. *Landy v Landy*, 131 Mich App 519; 345 NW2d 720 (1984).

DAMAGES

The Michigan Contempt Statute MCL 600.1701 provides:

Sec. 1701. The supreme court, circuit courts and all courts of record have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all the following cases:

(e) Parties to actions, attorneys, counselors, and all other persons for the nonpayment of any sum of money which the court has ordered to be paid, in cases where by law execution cannot be awarded for the collection of the sum.

(g) Parties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court.

Another provision of the Contempt Statute MCL 600.1721 provides for the payment of damages as follows:

If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant. The payment and acceptance of this sum is an absolute bar to any action by the aggrieved party to recover damages for the loss or injury.

INTEREST

The trial court has the power and authority to award interest on amounts granted in divorce judgments pursuant to its equitable powers. *Lawrence v Lawrence*, 150 Mich App 29; 388 NW2d 291 (1986). The discretion applies to awards of interest on amounts to be paid to a property division when such amounts are overdue. *Saber v Saber*, 146 Mich App 108; 379 NW2d 478, 480 (1985).

ATTORNEY FEES

The loss may include attorney fees incurred as result of the contemptuous conduct.

State County and Municipal Workers v Genesee County, 401 Mich 408; 258 NW2d 55 (1997)

White v Wadhams, 211 Mich 658; 179 NW2d 24 (1920)

Plumbers and Pipefitters Local 190 v Wolff, 141 Mich App 815; 369 NW2d

237 (1985);

In re Contempt of Rochlin, 186 Mich App 639; 465 NW2d 388 (1990);

In re Contempt of Calcutt, supra. 184 Mich App 749; 458 NW2d 919

A Court may award a party attorney fees necessitated by the other party's failure to comply with a divorce a judgment. *Milligan v Milligan*, 197 Mich App 665; 496 NW2d 394 (1992); *Wilson v Wilson* 179 Mich App 519; 446 NW2d 496 (1989); *Davis v Davis*, 179 Mich App 72; 445 NW2d 460 (1989); *Ashbrenner v Ashbrenner*, 156 Mich App 373; 401 N.W.2d 373 Mich App (1986); *Mauro v Mauro*, 196 Mich App 1, 3, 4; 492 NW2d 758 (1992). Attorney fees are properly assessed against a party who, by obstructionist positions, causes them. to be incurred. *Rogner v Rogner*, 179 Mich App 326; 445 NW2d 232 (1989); *Ozdoglar v Ozdoglar*, 126 Mich App 468; 337 NW2d 361 (1983); *Lesko*, supra.

The Court of Appeals reversed the trial court's failure to award fees for a post-judgment motion:

"Plaintiff also argues that she should have been awarded attorney fees relative to motions and hearing necessitated by defendant's failure to comply with judgment of divorce. We agree. The trial court denied plaintiff's request because it found the parties shared blame for post-judgment proceedings. However, there is no indication in the record plaintiff should be faulted for proceedings at issue***based on our de nova review of the record, we believe plaintiff is entitled to an award of attorney fees given defendant's needless actions caused her to incur additional expense. See *Curylo v Curylo*, 104 Mich App 340, 352, 304 NW2d 575 (1981)." *Ashbrenner*, supra, at 375.

The Court of Appeals affirmed a fee award incurred for efforts to protect and conserve property awarded by original judgment. *Kavanagh v Kavanagh*, 30 Mich App 636, 639; 186 NW2d 870 (1971). Fees are appropriate when incurred by the other party's failure to obey court orders. The Court of Appeals stated:

Plaintiff also argues that she should have been awarded attorney fees relative to motions and hearing necessitated by defendant's failure to comply with judgment of divorce. We agree. The trial court denied plaintiff's request because it found the parties

shared blame for post-judgment proceedings. However, there is no indication in the record plaintiff should be faulted for proceedings at issue***based on our de novo review of the record, we believe plaintiff is entitled to an award of attorney fees given defendant's needless actions caused her to incur additional expense. *Curylo v Curylo*, 104 Mich App 340, 352; 304 NW2d 575 (1981). Ashbrenner

With respect to fees awarded for contempt pursuant to MCL 600.1721, the Court of Appeals has ruled that attorney fees are limited to those attorney fees which are directly attributable to the contempt proceedings and may not include attorney fees incurred either in prior proceedings in the same case or in separate proceedings arising out of the same circumstances. *Plumbers and Pipefitters Local*, supra, at 819.

Dated: April 25, 2003

Respectfully submitted,

PRATHER & GARWOOD, P.C.,

Kenneth E. Prather, Sr. P19071
19846 Mack Avenue
Grosse Pointe Woods, Michigan 48236
313-884-5622