

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

**SHM,** :  
 :  
 **Plaintiff** :  
 :  
 **vs.** : **No. 09-20,269**  
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 :  
 **DMM,** :  
 :  
 **Defendant** :

**OPINION AND ORDER**

Before the Court is DM's Emergency Petition for Special Relief and Contempt. Ms. M contends that in violation of a prior Order of Court and agreement of the parties, Mr. McClain took possession of Ms. McClain's safe and the contents thereof. Mr. McClain asserts that he did not take the safe and even if he did, it would not constitute a contempt.

A hearing was held on November 8, 2010. Ms. McClain testified that during the one year prior to the equitable distribution hearing, which took place on September 15, 2010, she and her estranged husband resided in different bedrooms of their home.

Approximately ten years ago, the parties purchased a Sentry safe. Approximately five years later, they received an identical safe by gift.

Prior to the equitable distribution hearing, the one safe was located in Mr. McClain's bedroom while the other safe was located in Ms. McClain's bedroom. The keys to Ms. M's safe were kept in her pocketbook while the keys to Mr. M's safe were kept in a jewelry box on the dresser in Ms. M's room.

Many years ago, Ms. M looked in Mr. M's safe and noticed that it contained numerous records of Mr. M including baptismal, military and other personal documents and maps.

Approximately four or five days prior to September 21, 2010, Ms. M opened her safe. Over the past year or so, she would utilize the safe on a regular basis to store certain items including cash from her one job eventually totaling \$13,800, birth certificates, social security cards, spare keys to cars, rental apartments and a mower, title to vehicles, rent and security deposits, extra bank checks, diplomas, baptismal records, health and shot records, clearances, saving bonds, stamps, deeds, lease documents and tax documents. Ms. M verified the presence of these documents in the safe in her room.

On September 21, 2010, she went to access her safe but the keys did not work. She suspected perhaps some foul play by Mr. M and on a hunch went to obtain his keys. She found only one key in the jewelry box. She utilized the key and it opened the safe. There was nothing in it.

She contacted her son. She suspected that Mr. M took the safe and in retaliation took several of his guns and removed them to a neighbor's house. She informed Mr. M that she took his guns and he would get them back when he returned the safe. She did this via a text message. Mr. M returned to the home and contacted the State Police.

Soon after the parties' son arrived at the home, he and Ms. M searched for her safe but without results.

Ms. M eventually relocated from the residence. One item that she took in her possession was a cherry chest. In the course of moving, Mr. M demanded that she not take the chest. She confirmed for him, however, that it was on her list per the agreement and Court Order. She subsequently found in the chest all of the documents that had previously been stored in Mr. M's safe.

Ethan Hart testified as well on behalf of Ms. M. He was a neighbor to the Ms and helped Ms. M to move. He verified Ms. M's version of what occurred with respect to the cherry chest. He noted that Mr. M clearly wanted the chest back and got in an argument with Ms. M about it.

Beth M also testified on behalf of Ms. M. She noted that Ms. M is her mother-in-law. On September 21, 2010, she and her husband went to the residence of Mr. and Ms. M. She noted that when Ms. M brought up the fact that her safe was taken, Mr. M specifically noted that the Court Order did not specify which safe belonged to whom. He also denied that he took the safe.

Mr. M testified on his own behalf. He noted that he did not take his wife's safe and that he had no reason to do so. Contrary to Ms. M, he indicated that the safe was not put into his room until after the equitable distribution hearing. He also testified that he did not know where the keys were located with respect to either of the safes. He admitted that he may have made the remark as testified to by his daughter-in-law. He also admitted to receiving the text message from his wife, returning to the home and then calling the Pennsylvania State Police.

The parties stipulated that if Jacob M was called to testified, he would testify that he is presently the 16 year old son of the parties. He was present when Mr. M arrived at the house on September 21, 2010 and heard Mr. M deny taking the safe. He would also testify that on no occasion did he ever witness Mr. M handle the safe at issue.

Mr. M argues that there is insufficient evidence to support the conclusion that he took the safe. Alternatively, he argues that even if he did take the safe, he should not be held

in contempt because the agreement/Court Order is vague. Lastly, he submits that even if he is found in contempt, there was insufficient proof as to damages. On the contrary, Ms. M argues that there is both sufficient direct and circumstantial evidence that the safe was taken by Mr. M, that the agreement and Court Order are clear and that the damages are as testified to by Ms. M.

Ms. M's burden of proof as agreed by the parties and controlling case law is by a preponderance of evidence. Sinaiko v. Sinaiko, 664 A.2d 1005 (Pa. Super. 1995).

At the September 15, 2010 equitable distribution hearing, the parties reached an agreement on the record regarding the distribution of their assets. Said agreement was made an Order of Court at the September 15, 2010 hearing, approved by the Court on September 22, 2010 as well on October 27, 2010 by virtue of the Divorce Decree.

As part of the agreement and Order, the parties agreed that the personal property would be split in accordance with Exhibits 50 and 51. It was noted that each party would receive the property contained on their respective lists. (Defendant's Exhibit 2.)

Exhibits 50 and 51 were collectively marked as Defendant's Exhibit 3. Significantly, it is noted that the items to be received by Ms. M included one security safe as well as a hope chest. The items to be distributed to Mr. M included one safe. It was noted on Defendant's Exhibit 3 that the one safe was an item that "he can keep".

The Court finds the testimony of Ms. M to be credible. Additionally, the Court does not find credible Mr. M's testimony that he did not take the safe. Moreover, there is abundant circumstantial evidence that Mr. M took the safe. He admitted that he was not happy with the outcome of the divorce proceedings. Accordingly, he had a motive to take the safe.

Inexplicably, while denying that he took the safe, he explained to others that the Court Order did not specify which safe belonged to whom. The Court accepts this statement as a tacit admission. He also had an opportunity to take the safe. He had access to the residence during times when Ms. M was not present. The safe that Ms. M had in her bedroom was switched with the safe that Mr. M had in his bedroom. The one key to open Mr. M's safe became missing at or around the same time that the safes were switched. Moreover, despite the fact that Ms. M was clearly entitled to the cherry chest, Mr. M demanded that it be returned and became angry when Ms. M refused to comply. Clearly, he knew that the documentation from his safe was in the cherry chest and that if it was discovered, it would implicate him in the switching of the safes.

Mr. M was not credible when testifying. The Court does not believe his denial. He was inconsistent with his answers, evasive on the more pertinent questions and his body language and demeanor were such that the Court easily concluded that he was not being forthright.

The Court also concludes that the clear intent of the agreement and the Court Order was that each of the parties would keep "the safe from their own room". It would be an exercise in intellectual dishonesty for the Court to conclude otherwise. Each of the parties agreed to keep one safe at a time when each of the parties had one safe in their respective possession.

The Court concludes without hesitation that there was a clear and valid existing Order, that Mr. M was aware of the Order and that Mr. M willfully violated the Order by taking possession of Ms. M's safe and switching her safe with his safe only after removing the

contents of his safe. The Court finds beyond any doubt from the totality of the evidence that Mr. M had the ability to comply with the Order but failed to do so.

Regarding an appropriate remedy, it is rather straightforward. Mr. M must return what he took or pay the value thereof.

**ORDER**

**AND NOW**, this \_\_\_\_ day of November, 2010, following a hearing and for the reasons set forth in the above Opinion, the Court finds Scott M in Contempt for violating the prior Court Order regarding the distribution of the parties' assets and in particular the distribution of the safes that were in each party's possession. As a sanction, Mr. M is Ordered and Directed to return the safe along with all of its contents as testified to by Ms. M, within ten (10) days of the date of this Order. If said safe and all the contents are not returned within ten (10) days of the date of this Order, Mr. M is directed to pay to Ms. M the total sum of \$13,800.00 no later than December 3, 2010. Furthermore, Mr. M is directed to reimburse to Ms. M no later than December 3, 2010 all of her costs and legal expenses associated with the filing and litigation of the Motion for Contempt. Ms. M's attorney, Donald Martino, Esquire is directed to forward directly to Melody Protasio, attorney for Mr. M an itemized invoice setting forth in detail the costs and legal expenses incurred in connection with such.

BY THE COURT,

\_\_\_\_\_  
Marc F. Lovecchio, Judge

cc: Melody Protasio, Esquire  
Donald Martino, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work File