

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

ROGER AVAKIAN,	:	O P I N I O N
Plaintiff-Appellant/ Cross-Appellee,		
	:	CASE NO. 2014-P-0036
- vs -		
	:	
SUSAN AVAKIAN,	:	
	:	
Defendant-Appellee/ Cross-Appellant.		

Civil Appeal from the Portage County Court of Common Pleas, Domestic Relations Division, Case No. 2007 DR 00199.

Judgment: Affirmed in part, reversed in part, and remanded.

Jonathan A. Rich and Robert M. Fertel, Zashin & Rich Co., L.P.A., 950 Main Avenue, 4th Floor, Cleveland, OH 44113 (For Plaintiff-Appellant/Cross-Appellee).

Manav H. Raj, Rieth, Antonelli & Raj, 1406 West Sixth Street, 2nd Floor, Cleveland, OH 44113 (For Defendant-Appellee/Cross-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Plaintiff-appellant/cross-appellee, Roger Avakian (“Husband”), appeals from judgments of the Portage County Court of Common Pleas, Domestic Relations Division, regarding various post-decree motions stemming from a divorce proceeding with defendant-appellee/cross-appellant, Susan Avakian (“Wife”). Wife has filed a cross-appeal asserting the trial court erred in not awarding her attorney fees and costs incurred as a

result of Husband's contempt. For the reasons discussed in this opinion, we affirm in part, reverse in part, and remand.

{¶2} On June 23, 1979, Husband and Wife married. No children were born as issue of the marriage. On April 29, 2007, Husband filed a complaint for divorce. Wife filed an answer and counterclaim the next day. The trial court granted the parties a divorce on December 28, 2007. The divorce decree incorporated a separation agreement entered into by the parties, which states in part:

{¶3} "III. **SPOUSAL SUPPORT**

{¶4} "A. For a period of ninety-five (95) months commencing on January 1, 2008, Husband shall pay, as and for spousal support and for the separate maintenance and support of Wife, the sum of Seven Thousand Seven Hundred Thirteen Dollars (\$7,713.00) per month plus 2% fee totaling Seven Thousand Eight Hundred Sixty Seven Dollars and Twenty Six Cents (\$7,867.26) or forty-two percent (42%) of the Husband's annual gross salary, whichever is greater, plus forty-two percent (42%) of Husband's gross bonuses, which are described by Husband's employer, PolyOne, as 'incentives', and 'incentive pensionable'. * * *

{¶5} "B. Husband shall pay to Wife the monthly spousal support obligation based upon his monthly gross salary by wage withholding order through the Ohio Child Support Payment Central and/or the Portage County Child Support Enforcement Agency. Husband shall pay to the Wife her share of his gross bonuses, which PolyOne describes as 'incentives', and 'incentive pensionable' within ten (10) days of his receipt of the same."

{¶6} A main issue on appeal is whether monies received by Husband, i.e., Long Term Incentive Plan ("LTIP") payments, are subject to the spousal support provision of the parties' separation agreement. This issue has been litigated before the trial court on two

separate occasions, the first in 2009 and the second in 2013. The outcome of both contested hearings was the same and contra to Husband's position.

{¶7} By way of background, on March 6, 2009, Husband received a LTIP payment from his employer, PolyOne, in the amount of \$30,967. On July 1, 2009, Wife filed a motion to show cause regarding Husband's failure to pay her 42 percent of that LTIP payment pursuant to the terms of the separation agreement. Husband disagreed that the LTIP payment qualified as a "bonus." The trial court held a show cause hearing on August 26, 2009. At that hearing, Husband paid Wife, albeit untimely, \$13,006.14 (or 42 percent).

{¶8} On September 1, 2009, the trial court found that the March 6, 2009 LTIP payment was a bonus. The court determined that Husband willfully failed to make payment to Wife within the 10-day period in violation of their agreement. The court found Husband in contempt and sentenced him to 10 days in jail subject to a purge condition that he pay Wife 42 percent of all bonuses due within 10 days from the day he receives such bonuses. Husband appealed that judgment to this court on September 16, 2009, Case No. 2009-P-0059.

{¶9} On December 28, 2009, the parties entered into an agreed judgment entry which vacated the purge conditions of the September 1, 2009 judgment entry and required Husband to pay Wife a late fee of \$500 per week for any bonus payments not paid within 10 days of his receipt. Pursuant to a request made by Husband, his first appeal, Case No. 2009-P-0059, was dismissed on January 15, 2010.

{¶10} Thereafter, Husband received three more LTIP payments from PolyOne: one on February 25, 2011 in the amount of \$29,118; a second on January 6, 2012 in the amount of \$52,800; and a third on December 28, 2012 in the amount of \$105,600. Husband did not remit the 42 percent of said monies to Wife. As a result, on February 19,

2013, Wife filed a motion to show cause and for attorney fees regarding Husband's failure to pay her 42 percent of the 2011 and 2012 LTIP payments pursuant to the terms of the separation agreement.

{¶11} The trial court held another show cause hearing which commenced on June 5, 2013. At that hearing, it was Husband's position that the LTIP payments were not considered to be a "bonus" by PolyOne. Husband presented the testimony of Marla Bartolotta, the manager of PolyOne's benefits, pension, and 401(k) plans. Ms. Bartolotta stated the term "bonus" was commonly referred with the Annual Incentive Plan from which 401(k) contributions were withheld. Husband claimed that LTIP payments are not pensionable items whereas the Annual Incentive Plan is pensionable and allows amounts to be contributed into 401(k) plans. Husband said he paid Wife 42 percent of the March 6, 2009 LTIP payment because part of it was earned during the marriage and because it was the "right thing to do."

{¶12} On August 30, 2013, the trial court found that the February 25, 2011, January 6, 2012, and December 28, 2012 LTIP payments are bonuses as described by the divorce decree and subject to the spousal support provision pursuant to the parties' separation agreement. The court found Husband in willful contempt and sentenced him to 30 days in jail for failing to pay Wife 42 percent of the three LTIP payments. The court's entry provided Husband an opportunity to purge his contempt by paying Wife \$78,757.56 within 60 days and an additional \$108,700 in penalties within 90 days.

{¶13} Husband timely appealed the trial court's August 30, 2013 judgment to this court, Case No. 2013-P-0081. Wife filed a timely cross-appeal from that same judgment. However, on April 28, 2014, this court dismissed Husband's appeal and Wife's cross-appeal for lack of a final appealable order because the trial court had not yet determined

whether Husband had complied with the purge conditions and had not actually imposed the 30 day jail sentence. *Avakian v. Avakian*, 11th Dist. Portage No. 2013-P-0081, 2014-Ohio-1777.

{¶14} During the pendency of that second appeal, the parties filed an agreed judgment entry on March 14, 2014 which required Husband to pay legal fees to Wife in the amount of \$3,055. Also, the parties agreed that Husband would deposit \$221,000 into a joint Fifth Third Bank account in lieu of posting a supersedeas bond. The account requires the signature of both parties for any withdrawals.

{¶15} The trial court held a hearing on June 16, 2014, where Wife agreed that Husband's deposit of said funds resulted in his purge of the court's prior finding of willful contempt. On June 25, 2014, the trial court ordered, adjudged, and decreed that Husband purged himself from the August 30, 2013 contempt finding. The court's judgment requires the funds contained in the Fifth Third account to remain therein until the appeals are exhausted.

{¶16} Husband filed the instant appeal, Case No. 2014-P-0036, on July 1, 2014. Wife filed a cross-appeal nine days later.

{¶17} On appeal, Husband raises the following four assignments of error:

{¶18} "[1.] The trial Court erred in finding that the Appellant's long term incentive plan ('LTIP') payments constituted 'bonuses' for purposes of spousal support pursuant to the terms of the parties' Separation Agreement.

{¶19} "[2.] The trial Court's finding that the Appellant was in contempt of court for his non-payment of 42 percent of his LTIP payments to the Appellee was not supported by sufficient evidence.

{¶20} “[3.] The trial Court erred in failing to consider the equities regarding the determination of a spousal support award when it interpreted the spousal support provisions of the parties’ Separation Agreement.

{¶21} “[4.] The trial Court abused its discretion by enforcing an unreasonable penalty provision of an Agreed Judgment Entry (AJE) requiring the Appellant to pay the Appellee a late fee of \$500 per week for his failure to pay her 42 percent of any bonus payments within 10 days of his receipt thereof.”

{¶22} On cross-appeal, Wife raises the following two assignments of error:

{¶23} “[1.] The trial court erred where it merely considered Defendant’s request for fees, costs, and expenses, but didn’t find that those expenditures, whether in whole or in part, were reasonable and the direct result of Plaintiff-Appellant/Cross Appellee’s willful non-compliance with prior court order and finding of contempt under the language of R.C. §3105.18.

{¶24} “[2.] The trial court abused its discretion when it determined that the penalties the parties negotiated and agreed upon were too significant to Order Plaintiff-Appellant to pay for the fees, costs, and expenses of Defendant-Appellee, where the facts supported a finding of Contempt for failure to pay spousal support per the terms of a prior court order and an award of such expenses are attributable to Plaintiff-Appellant as a matter of law.”

{¶25} We will consider Husband’s appeal first. In his first assignment, Husband argues the trial court erred in finding that the LTIP payments constituted “bonuses.” In his second assignment, Husband contends the trial court erred in finding that he was in contempt for not paying 42 percent of his LTIP payments to Wife. In his third assignment, Husband asserts the trial court erred in failing to consider the equities regarding the determination of spousal support when it interpreted the parties’ separation agreement. In

his fourth assignment, Husband maintains the trial court erred in enforcing an unreasonable penalty provision of the December 28, 2009 agreed judgment entry requiring that he pay Wife a late fee of \$500 per week for his failure to pay her 42 percent of any bonus payments. For the reasons that follow, we disagree with Husband's assertions regarding his first, second, and third assignments, however, we agree with Husband's argument with respect to his fourth assignment.

{¶26} Three of Husband's assignments of error focus on whether the LTIP payments are subject to the spousal support provision of the parties' separation agreement. Because we find the trial court committed no error with respect to Husband's first, second, and third assignments, we will address them in a consolidated fashion.

{¶27} ““(A) separation agreement is a contract and is subject to the same rules of construction.’ *In re Netotea*, 11th Dist. Trumbull No. 2004-T-0120, 2006-Ohio-1445, ¶21, citing *Ronyak v. Ronyak*, 11th Dist. Geauga No. 2001-G-2383, 2002-Ohio-6698, ¶10. ““A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.”” *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16, * * * quoting *Perlmutter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D. Ohio 1976).’ *Phinizee v. Phinizee*, 11th Dist. Lake No. 2013-L-081, 2014-Ohio-1360, ¶8.” *Sassya v. Morgan*, 11th Dist. Trumbull No. 2013-T-0084, 2014-Ohio-3278, ¶24. (Parallel citation omitted.) Issues concerning contracts, including separation agreements, are subject to a de novo standard of review on appeal. *Kolar v. Shapiro*, 11th Dist. Lake No. 2007-L-148, 2008-Ohio-2504, ¶19.

{¶28} A reviewing court shall not assert its judgment over that of a trier of fact in areas of credibility and veracity of evidence and witnesses. *See, e.g., Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179.

{¶29} In order to support a finding of contempt, the moving party, by clear and convincing evidence, must establish the following: the existence of a valid court order; that the offending party had knowledge of the order; and that the offending party violated such order. *Dudley v. Dudley*, 12th Dist. Butler No. CA2012-04-074, 2013-Ohio-859, ¶13.

{¶30} In the case at bar, the trial court stated the following in its August 30, 2013 judgment entry:

{¶31} “Again, the LTIP checks at issue [February 25, 2011, January 6, 2012, and December 28, 2012] are no different than the March 6, 2009 LTIP check in so far as the type of payment that they represent. They are Long-Term Incentive Plan payments. The evidence reflects that the March 6, 2009 incentive payment accrued from 2006 to 2008. The parties were divorced on December 28, 2007. Therefore, two-thirds (2/3) of the LTIP accrued prior to the divorce. However, the record further reflects that the parties actually separated in November 2004.

{¶32} “[Husband] submits that because part of the March 6, 2009 LTIP accrued during the marriage, he believed it was the ‘right thing’ to pay [Wife] a portion of the incentive check because he viewed it as marital property. The Court does not find [Husband’s] argument credible as to his past motivation to settle the prior contempt relating to the March 6, 2009 LTIP check.

{¶33} “* * * If [Husband’s] motivation to pay [Wife] a portion of the March 6, 2009 LTIP was truly altruistic and he viewed the check as marital property, arguably he would have either paid her fifty percent (50%) of the entire gross amount or fifty percent (50%) of

the marital portion (2/3) of the check. He did not. He paid forty two percent (42%) of the gross incentive which aligns with the spousal support provision of the Divorce Decree.

{¶34} “* * * [I]f the resolution of the March 6, 2009 LTIP was the settlement of a property claim, it would not have been subject to having to be paid within ten (10) days of receipt, which is the time by which [Husband] must pay [Wife] her spousal support interest in bonus payments. Based upon [Husband’s] delay in paying [Wife] forty two percent (42%) of the March 6, 2009 LTIP, this Court found [Husband] in contempt. Thus, [Husband’s] agreement to treat the March 6, 2009 LTIP as a ‘bonus’ subjected him to a finding of contempt.

{¶35} “* * * [Husband] did not include the Court’s contempt finding and ten (10) day jail sentence as issues on appeal. * * *”

{¶36} The record establishes that the trial court considered and addressed the testimony provided in reaching its conclusion that the LTIP monies received by Husband fall under the spousal support provision contained in the parties’ separation agreement. The court considered and provided reasons for finding that Husband’s testimony lacked credibility.

{¶37} The record further establishes that the February 25, 2011, January 6, 2012, and December 28, 2012 LTIP checks are similar in nature as the March 6, 2009 LTIP check. As stated, Husband was previously held in contempt regarding the 2009 monies and ultimately paid Wife, albeit late, what she was due, i.e., her 42 percent share pursuant to their agreement. It logically follows that Husband must do the same with respect to the 2011 and 2012 LTIP monies. Since Husband paid Wife 42 percent of the LTIP bonus in 2009, he should have known and understood that such LTIP monies were subject to his spousal support obligation to Wife going forward.

{¶38} The trial court did not perceive any ambiguity when analyzing the divisibility of the LTIP payments. Equity supports the court's conclusion that the LTIP is subject to spousal support division pursuant to the parties' separation agreement. The court's finding that Husband was in contempt of court regarding the non-payment of 42 percent of the 2011 and 2012 LTIP payments to Wife was supported by sufficient evidence.

{¶39} Husband relies on the testimony of Ms. Bartolotta, a PolyOne employee. Again, Ms. Bartolotta stated the term "bonus" was commonly referred with the Annual Incentive Plan from which 401(k) contributions were withheld. She also testified regarding what is and what is not considered "pensionable" or "compensation" at PolyOne. However, the trial court, in summarizing the testimony and addressing credibility, stated in its August 30, 2013 judgment entry:

{¶40} "Just because the LTIP does not constitute 'compensation' under the definitions provided by the PolyOne Retirement Savings Plan, it does not mean that the LTIP does not constitute a 'bonus' as referenced in the Divorce Decree. The word 'compensation' does not appear in the spousal support provision of the Divorce Decree. * * *

{¶41} " * * * By name alone, PolyOne describes the LTIP is an 'incentive' payment. Therefore, [Husband] concedes that the LTIP is an 'incentive'. * * *"

{¶42} The court correctly identified that the LTIP payments received by Husband are subject to the spousal support provision of the parties' separation agreement. As stated, paragraph A provides in part:

{¶43} "For a period of ninety-five (95) months commencing on January 1, 2008, Husband shall pay, as and for spousal support * * * (\$7,713.00) per month plus * * * forty-

two percent (42%) of Husband's gross bonuses, which are described by Husband's employer, PolyOne, as 'incentives', and 'incentive pensionable'. * * *

{¶44} Contrary to Husband's assertions, the terms of the spousal support provision contained in the separation agreement are clear and unambiguous. Wife is entitled to 42 percent of all "gross bonuses" received by Husband which are described as "incentives" and "incentive pensionable" for a period of 95 months commencing on January 1, 2008. The LTIP is clearly described as an "incentive." The parties themselves chose to include the words "incentives" and "incentive pensionable" when addressing the issue of bonuses. The trial court did not err in finding those terms mutually exclusive of each other. See *Murphy v. Murphy*, 10th Dist. Franklin No. 12AP-1079, 2013-Ohio-5776, ¶40, quoting *Clagg v. Baycliffs Corp.*, 82 Ohio St.3d 277, 280 (1998) (holding that courts are permitted to interpret the word "and" in the disjunctive "if the sense requires it.")

{¶45} The February 25, 2011, January 6, 2012, and December 28, 2012 LTIP monies received by Husband fall under the purview of paragraph A of the parties' separation agreement. Clearly, when a spousal support clause in a separation agreement provides for the divisibility of bonus monies which are incentives, the LTIP is divisible. LTIP payments which are "incentives" and "incentive pensionable" qualify as "bonuses."

{¶46} Regarding the separation agreement's reference to "bonuses," Husband asserts the trial court failed to give that term its plain and ordinary meaning. We disagree.

{¶47} A "bonus" is defined as: "A premium paid in addition to what is due or expected. In the employment context, workers' bonuses are not a gift or gratuity; they are paid for services or on consideration in addition to or in excess of the compensation that would ordinarily be given." *Black's Law Dictionary* 144 (7th Ed.2000).

{¶48} Husband testified that his compensation package included his base salary, annual incentive plan, long term incentive plan, a cell phone, and a computer. The long term incentive plan is something given “in addition to” what would ordinarily be due or expected. As such, the LTIP monies fall within the definition of “bonuses.”

{¶49} Husband's first, second, and third assignments of error are without merit.

{¶50} In his fourth assignment of error, Husband contends the trial court erred in enforcing an unreasonable penalty provision of the December 28, 2009 agreed judgment entry requiring that he pay Wife a late fee of \$500 per week for his failure to pay her 42 percent of any bonus payments.

{¶51} In lieu of actual damages, parties to a contract may agree to liquidated damages, which is “[a]n amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches.” *Black’s Law Dictionary* (7th Ed.2000) 321.

{¶52} “Liquidated damages clauses in contracts are enforceable if they meet various conditions; otherwise, they are unenforceable as penalties for non-performance. The Ohio Supreme Court’s decision in *Samson Sales, Inc. v. Honeywell, Inc.* (1984), 12 Ohio St.3d 27 * * *, outlines the enforceability test for liquidated damages provisions. First, the amount of actual damages must be uncertain and difficult to prove. Second, the amount of stipulated damages must be reasonable and proportionate to the contract as a whole. Third, the parties’ intent to stipulate to damages must be clear and unambiguous. See, also, *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376 * * *.” (Parallel citations omitted). *Carter v. CPR Staffing, Inc.*, 8th Dist. Cuyahoga No. 94671, 2010-Ohio-6026, ¶16.

{¶53} Domestic relations courts may enforce a liquidated damages clause in divorce matters. See generally *Calloway v. Calloway*, 5th Dist. Stark No. 2002CA00231, 2003-Ohio-267 (concerning a liquidated damages clause in a prenuptial agreement); 24A American Jurisprudence 2d, Divorce and Separation, Section 1064 (2015) (a liquidated damages clause may be enforceable in a separation agreement). However, a liquidated damages clause may not be used as a penalty. See 24 *Williston on Contracts*, Section 65:1 (“a liquidated damages provision will be held to violate public policy, and hence will not be enforced, when it is intended to punish, or has the effect of punishing, a party for breaching the contract * * *. In such cases the clause * * * actually constitutes a penalty, and, since penal clauses are generally unenforceable, provisions having this effect are declared invalid; and this is generally true even where the provision is negotiated in good faith, at arms’ length and between parties of equal bargaining power”).

{¶54} As stated, the parties in this case entered into an agreed judgment entry on December 28, 2009, i.e., a modification of their separation agreement, which vacated the purge conditions of the September 1, 2009 judgment entry and required Husband to pay Wife a late fee of \$500 per week for any bonus payments not paid within 10 days of his receipt. Upon consideration, we determine that this liquidated damages clause constitutes a penalty against Husband and is unenforceable.

{¶55} The record reveals the spousal support owed to Wife was \$78,757.56. However, Husband was imposed a penalty of \$108,700. This sum is punitive to Husband. This sum also amounts to a windfall for Wife as it exceeds any rational calculation of actual damages including potential attorney fees. The amount of damages awarded to Wife bears no relationship to her actual damages. In addition, the penalty assessed against Husband exceeds the actual unpaid spousal support. Thus, we find the trial court erred in

enforcing the liquidated damages clause as it constitutes a penalty against Husband. We note that interest, attorney fees, and costs would be indicative of actual damages.

{¶56} Husband's fourth assignment of error is with merit to the extent indicated.

{¶57} On cross-appeal, Wife asserts two assignments of error. In her first assignment, Wife alleges the trial court erred in merely considering her request for fees, costs, and expenses, but not finding that those expenditures were reasonable and the direct result of Husband's willful non-compliance with a prior court order and finding of contempt under R.C. 3105.18(G). In her second assignment, Wife contends the trial court erred in determining that the penalties the parties negotiated and agreed upon were too significant to order Husband to pay for the fees, costs, and expenses of Wife, where the facts supported a finding of contempt for failure to pay spousal support per the terms of a prior court order and an award of such expenses are attributable to Husband under R.C. 3105.18(G). For the reasons that follow, we agree.

{¶58} Both of Wife's assignments of error on cross-appeal are based upon the trial court's failure to award her an award of reasonable attorney fees and costs regarding the finding of contempt against Husband, who was required to comply with his spousal support obligation, minus the liquidated damages clause as addressed in Husband's fourth assignment of error, pursuant to R.C. 3105.18(G). Because Wife's two assignments are interrelated and deal with her need to file and force Husband to pay her spousal sums, we will address them together.

{¶59} Generally, an award of attorney fees lies within the sound discretion of the trial court. *Rand v. Rand*, 18 Ohio St.3d 356, 359 (1985). However, R.C. 3105.18(G) specifically states:

{¶60} “If any person * * * required to pay spousal support under an order made or modified by a court on or after January 1, 1991, is found in contempt of court for failure to make * * * spousal support payments under the order, the court that makes the finding, in addition to any other penalty or remedy imposed, *shall* assess all court costs arising out of the contempt proceeding against the person and *shall* require the person to pay any reasonable attorney’s fees of any adverse party, as determined by the court, that arose in relation to the act of contempt.” (Emphasis added.)

{¶61} Husband asserts the contempt finding was invalid and that the trial court properly refused to award Wife attorney fees and costs because the fees and penalties levied against him exceeded her losses. Contrary to Husband’s position under Wife’s cross-appeal, we stress that the language of R.C. 3105.18(G) is mandatory, not discretionary. See *Harner v. Harner*, 11th Dist. Portage No. 92-P-0067, 1993 Ohio App. LEXIS 4716, *16 (Sept. 30, 1993) (holding that the trial court erred in not awarding attorney fees to a spouse where the other spouse was found in contempt for failing to make spousal support payments under the mandatory language of R.C. 3105.18(G)); see also *Haren v. Haren*, 5th Dist. Stark No. 2011 CA 00221, 2012-Ohio-2161, ¶22-26 (holding that the trial court erred in declining to award a spouse attorney fees for the contempt regarding spousal support payable to that spouse pursuant to R.C. 3105.18(G)).

{¶62} In this case, Husband was found in contempt for failing to satisfy his spousal support obligation to Wife, which amounted to \$78,757.56. Under the mandatory language of R.C. 3105.18(G), the trial court erred in not awarding attorney fees and costs to Wife, and interest was not addressed. Accordingly, this matter is remanded for a hearing to assess attorney fees and costs pertaining to the trial court proceedings for contempt as to spousal support. See *Harner*, *supra*, at *16-17; *Haren*, *supra*, at ¶26.

{¶63} Wife's first and second assignments of error on cross-appeal are with merit.

{¶64} For the foregoing reasons, appellant's first, second, and third assignments of error are not well-taken and his fourth assignment of error is well-taken. Cross-appellant's assignments of error are with merit. The judgment of the Portage County Court of Common Pleas, Domestic Relations Division, is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.