**[Cite as *Hout v. Hout*, 2004-Ohio-5507.]**

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEBORAH LYNN HOUT

Plaintiff-Appellant

-vs-

JEFFREY R. HOUT

Defendant-Appellee

JUDGES:
Hon. John W. Wise, P. J.
Hon. Julie A. Edwards, J.
Hon. John F. Boggins, J.

Case No. 04 CA 6

O P I N I O N

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| CHARACTER OF PROCEEDING: | Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 01 D 554 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | October 14, 2004 |

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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*Wise, P. J.*

**{¶1}** Appellant Deborah Lynn Hout appeals the decision of the Richland County Court of Common Pleas, Domestic Relations Division, which declined to grant her requested amount of attorney fees in a divorce action. The appellee is Jeffrey R. Hout, appellant's former spouse. The relevant facts leading to this appeal are as follows.

**{¶2}** Appellant and appellee were married in May 1998. One child was born of the marriage. On October 24, 2001, appellant filed a complaint for divorce. Following the issuance of temporary orders on November 21, 2001, the case underwent a lengthy pre-trial period, as further detailed infra, including three reschedulings of the trial date. On May 8, 2003, a few days before the final trial date, appellant filed a motion to show cause and a request for attorney fees. In the meantime, the trial went forward on the morning of May 12, 2003, with appellant calling appellee to the stand as if on cross-examination. The remaining issues in the divorce were resolved by agreement or stipulation after the court's recess for lunch. Thereupon, a separate hearing on the request for attorney fees was held, at which time appellant requested that appellee pay one-half of her attorney fees, which she contended were slightly less than $18,343. The requested sum was therefore $9,171.42. However, the magistrate awarded a lesser sum of $1500 in a decision dated May 28, 2003. Appellant filed an objection to the decision of the magistrate on June 11, 2003.

**{¶3}** The court considered appellant's objection pursuant to Civ.R. 53(E)(4)(b) and issued a judgment entry denying said objection on December 11, 2003. Appellant filed her notice of appeal on January 12, 2004. Shortly thereafter, the final decree of divorce was issued. Appellant herein raises the following sole Assignment of Error:

**{¶4}** "THE TRIAL COURT ABUSED ITS DISCRETION BY AFFIRMING THE MAGISTRATE'S DECISION AWARDING DEBORAH HOUT A VERY SMALL PORTION OF HER REASONABLE AND NECESSARY ATTORNEY'S FEES.

**{¶5}** "1. THERE WAS NO EVIDENCE THAT MR. HOUT DID NOT HAVE THE ABILITY TO PAY AT LEAST HALF OF HIS WIFE'S ATTORNEY'S FEES.

**{¶6}** "2. A SIGNIFICANT AMOUNT OF APPELLANT'S ATTORNEY'S FEES WRE (SIC) INCURRED DUE TO MR. HOUT'S INTRANSIGENCE AND MISCONDUCT.

**{¶7}** "3. SUBSTANTIAL LEGAL RESOURCES WERE EXPENDED TO DEAL WITH MR. HOUT'S OBDURATE INSISTENCE TO TRY CUSTODY ISSUES IN THE FACE OF OBVIOUS IMPEDIMENTS.

**{¶8}** "4. IT IS NOT JUST TO IMPOSE THE COSTS OF REPEATED DELAYS IN THE PROCEEDINGS ONLY UPON THE APPELLANT.

**{¶9}** "5. BUT FOR THE FACT THAT MS. HOUT'S LEGAL COUNSEL EXTENDED HER CREDIT, SHE WOULD HAVE BEEN UNABLE TO PROTECT HER INTERESTS OR TO LITIGATE THE ISSUES IN THE DIVORCE CASE.

**{¶10}** "6. THE RECORD CLEARLY SHOWS THAT MS. HOUT'S FEES WERE REASONABLE.

**{¶11}** "7. THE TRIAL COURT ARBITRARILY FOCUSED ON R.C. 3105.18(H) AND IGNORED ANOTHER LAWFUL BASIS TO IMPOSE MORE OF MS. HOUT'S ATTORNEY'S FEES ON THE APPELLANT (SIC)."

I.

**{¶12}** In her sole Assignment of Error, appellant contends the trial court erred in declining to award her the full requested sum of $9,171 in attorney fees. We disagree.

**{¶13}** An award of attorney fees lies within the sound discretion of the trial court. *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359, 481 N.E.2d 609. R.C. 3105.18(H) reads as follows: "(H) In divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, including, but not limited to, any appeal, any proceeding arising from a motion to modify a prior order or decree, and any proceeding to enforce a prior order or decree, if it determines that the other party has the ability to pay the attorney's fees that the court awards. When the court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully litigating that party's rights and adequately protecting that party's interests if it does not award reasonable attorney's fees."

**{¶14}** The record reveals that the court's original temporary orders of November 21, 2001 awarded temporary custody of the parties' son to appellee. On December 6, 2001, appellant filed an objection to the temporary orders and requested a hearing pursuant to local rule. After obtaining counsel from Cleveland, appellant also filed a motion to show cause based on allegations that appellee had prevented appellant from exercising parenting time with their son. At about the same time, appellant filed a motion for an ex parte civil protection order, claiming appellee had threatened her with physical harm. A full hearing on the CPO, the motion to show cause, and the objections to the temporary orders were set for January 11, 2002. Appellee failed to appear for

said round of hearings. His then-counsel, John Enderle, appeared and obtained leave to withdraw as his attorney.

**{¶15}** The matter proceeded in appellee's absence on January 11, 2002, following which the court designated appellant as the child's temporary custodian. On January 16, 2002, the magistrate ordered four hours of weekly supervised visits between appellee and the child, and imposed a temporary child support order to be paid by appellee. The magistrate further ordered appellee to contact the court and reschedule a new hearing on the motion to show cause; otherwise a bench warrant would issue. Appellee thereafter rescheduled the show cause hearing to February 19, 2002. However, that hearing was again rescheduled to allow appellee to obtain counsel.

**{¶16}** After appellee obtained counsel, Attorney Randall Fry, a pretrial conference was scheduled for June 10, 2002. On that date, appellant's counsel traveled from Cleveland to Mansfield, only to find out the court was continuing the pretrial until October 7, 2002, due to Attorney Fry's illness. The full trial was also set for November 6, 2002; however, the parties filed a joint motion asking the court to set the trial for November 7 and 8, 2002 instead. The joint motion was granted by the court on July 19, 2002.

**{¶17}** On October 7, 2002, the scheduled pretrial conference took place. Appellant filed her pretrial statement and settlement proposal as required by Loc.R. 17D; appellee failed to submit anything. Meanwhile, appellant's counsel scheduled a deposition of appellee on November 6, 2002. Again, after driving to Mansfield from Cleveland, appellant's counsel found out a few minutes before the start time that

Attorney Fry was unavailable due to an illness in his family. As a result, the deposition did not proceed as planned, and the trial was re-set to February 25, 2003.

**{¶18}** As the trial date approached, appellant filed a trial brief as per the court's directive. Appellee did not. On February 25, 2003, appellant and her counsel, as well as her subpoenaed witnesses, were present for the start of the trial, as were appellee and Attorney Fry. Nonetheless, Mr. Fry told the court he was too ill to proceed. The trial was thereupon continued to May 12, 2003. Additionally, appellant filed a second motion to show cause and request for attorney fees based upon allegations that appellee had defaulted on the financial obligations set forth in the temporary orders. This motion was set for May 12, 2003 as well.

**{¶19}** During the portion of the proceedings pertaining to attorney fees, appellee's counsel stipulated to the existence of the legal work for appellant described in the itemized statements submitted to the court, that the charges were reasonable, and that the work was necessary. Appellee called no witnesses nor provided testimony on the issue of attorney fees. Tr. at 77-78, 114-134.

**{¶20}** Appellant's assigned error contains a number of sub-arguments. She points out that appellee did not present evidence that he did not have the ability to pay half of her submitted attorney fees. Appellant also argues that attorney fees should have been awarded based on appellee's intransigence, appellee's insistence on trying custody issues, and the occurrence of several delays during the proceedings below. Appellant also points out testimony that her counsel extended her credit during the proceedings, and that appellee did not dispute the reasonableness of the overall fees.

Finally, appellant suggests the court ignored the fact that R.C. 3105.18(H) was not the sole basis for the requested relief.

**{¶21}** The magistrate, in limiting the award of attorney fees to $1500, noted that it was appellant's choice to obtain a Cleveland attorney, and remarked that there was no evidence as to how Cleveland and Mansfield/Richland County rates compare, essentially taking judicial notice that the $200 per hour minimum rate asserted by appellant's counsel was more than the customary Richland County rate. Magistrate's Decision at 3. The magistrate also noted that several of the delays were caused by illness in appellee's trial counsel's family, not by appellee himself. Id.

**{¶22}** While appellant presently challenges the trial court's reasoning, we reiterate that attorney fees in divorce proceedings are awarded within the rubric of the General Assembly's statutory scheme for a court's discretionary award of spousal support.[1] See, e.g., *Williams v. Williams* (1996), 116 Ohio App.3d 320, 688 N.E.2d 30. In the case sub judice, after reviewing the parties' various financial factors, including the stipulated annual incomes of $39,643 (appellee) and $30,160 (appellant), both the magistrate and the judge concluded that the evidence failed to show that appellant would have been prevented from litigating the divorce and protecting her rights without an award of attorney fees. Magistrate's Decision at 4; Judgment Entry, December 11, 2003, at 2. It is well-established that an abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d

[1] We are cognizant that attorney fees may also be sought in a civil contempt action, as could have been pertinent in this case. However, here the court never issued a judgment entry finding appellee in contempt.

1140. Upon review, we are unpersuaded the trial court abused its discretion in awarding appellant $1500 in attorney fees, rather than a higher amount, under the facts and circumstances of this case.

**{¶23}** Appellant's sole Assignment of Error is therefore overruled.

**{¶24}** For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Richland County, Ohio, is hereby affirmed.

By: Wise, P. J.

Boggins, J., concurs.

Edwards, J., dissents.

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JUDGES

JWW/d 910

EDWARDS, J., DISSENTING OPINION

**{¶25}** I respectfully dissent from the disposition of this case by the majority.

**{¶26}** Based on the facts and circumstances of the case sub judice, I would find that the trial court abused its discretion in awarding only $1,500.00 in attorney fees to the appellant.

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Judge Julie A. Edwards

JAE/mec

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| DEBORAH LYNN HOUT | : | |
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| Plaintiff-Appellant | : | |
| | : | |
| -vs- | : | JUDGMENT ENTRY |
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| JEFFREY R. HOUT | : | |
| | : | |
| Defendant-Appellee | : | Case No. 04 CA 6 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Richland County, Ohio, is affirmed.

Costs to appellant.

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JUDGES