[Cite as *Oberst v. Oberst,* 2010-Ohio-452.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROSE OBERST	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-54
PAUL OBERST	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfiled County Court of Common Pleas, Domestic Relations Division, Case No. 2003 DR 00370
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	February 9, 2010

APPEARANCES:

For Plaintiff-Appellant:	For Defendant-Appellee:
STEVE E. HILLMAN 425 Metro Place North, Suite 460 Dublin, OH 43017	KEITH E. GOLDEN 923 E. Broad St. Columbus, OH 43205

Delaney, J.

{¶1} Plaintiff-Appellant, Rose Oberst, appeals the August 12, 2009, decision of the Fairfield County Court of Common Pleas, Domestic Relations Division. Defendant-Appellee is Paul Oberst.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant and Appellee were married on February 11, 1984. Six children were born as a result of the marriage. The parties were joint owners of a marital residence as well as rental properties. Appellant filed a complaint for divorce on July 30, 2003. Appellee filed an answer and counterclaim on August 15, 2003.

{¶3} The parties entered into an Agreed Judgment Entry and Decree of Divorce ("Agreed Entry") on May 31, 2005. The effective date of the decree was February 24, 2005. Pertinent to the within appeal, the Agreed Entry states as follows:

{¶4} "6. Retirement and Pension Plans and Rights. The defendant [Appellee] has a Thrift Savings Plan containing approximately $49,000.00 as of February 24, 2005. The defendant is to retain this free and clear of the plaintiff's [Appellant's] interest pursuant to paragraph '3' above. The pension plan of the defendant's is to be equally divided by a QDRO. This QDRO is to be done by QDRO Consultants with plaintiff and defendant to each pay one-half of the cost."

{¶5} After the filing of the Agreed Entry, Appellant and Appellee filed respective motions for contempt, each arguing the other failed to abide by the terms of the Agreed Entry. The motions came on for hearing before a magistrate on January 10, 2007, and January 31, 2007, where both parties presented testimony and evidence as to their claims. On March 7, 2008, the magistrate issued a decision granting, in part, and

denying, in part, Appellant's motion for contempt. The magistrate granted Appellee's motion for contempt, finding that Appellant failed to pay Appellee $17,651.50 from the closing of the refinancing of the rental properties. The trial court affirmed the magistrate's decision on April 25, 2008.

{¶6} Appellant appealed the matter to this Court in *Oberst v. Oberst*, Fairfield App. No. 08-CA-34, 2009-Ohio-13. We affirmed.

{¶7} In April 2009, the parties submitted proposed Qualified Domestic Relation Orders. Appellant's proposed QDRO allocated to her one-half of Appellee's retirement plan as of the date of Appellee's actual retirement in the future. Appellee's proposed QDRO allocated to Appellant one-half of his retirement as of the effective date of the divorce, February 24, 2005. All other terms of the QDRO's were the same.

{¶8} The parties could not reach a resolution as to the language of the QDRO and submitted briefs on the matter to the trial court. The trial court set the matter for a non-oral hearing. In a judgment entry issued August 12, 2009, the trial court held that pursuant to the May 31, 2005 Decree of Divorce, Appellant was entitled to one-half of the value of Appellee's retirement account as of February 24, 2005.

{¶9} It is from this judgment entry Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶10} Appellant raises three Assignments of Error:

{¶11} "I. THE TRIAL COURT ERRED BY MODIFYING THE AGREED JUDGMENT ENTRY AND DECREE OF DIVORCE WHEN IT DID NOT SPECIFICALLY RETAIN JURISDICTION TO DO SO.

{¶12} "II. THE TRIAL COURT ERRED BY NOT GRANTING THE PLAINTIFF/APPELLANT A HEARING REGARDING THE CLEAR MEANING OF THE LANGUAGE IN THE AGREED JUDGMENT ENTRY AND DECREE OF DIVORCE THEREBY DENYING THE PLAINTIFF/APPELLANT DUE PROCESS AND EQUAL PROTECTION.

{¶13} "III. THE TRIAL COURT ERRED BY REFUSING TO SIGN A QUALIFIED DOMESTIC RELATIONS ORDER WHICH SPECIFICALLY FOLLOWED THE PLAIN LANGUAGE OF THE AGREED JUDGMENT ENTRY AND DECREE OF DIVORCE DIVIDING THE PENSION OF THE DEFENDANT/APPELLEE EQUALLY WITH THE PLAINTIFF/APPELLANT."

{¶14} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶15} "(E) Determination and judgment on appeal. The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusory form. The decision may be by judgment entry in which case it will not be published in any form."

{¶16} One of the important purposes of accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158.

{¶17} This appeal shall be considered in accordance with the aforementioned rules.

I., II., and III.

{¶18} We will consider Appellant's three Assignments of Error together as they are interrelated on the issue of the interpretation of the parties' Agreed Entry and Decree of Divorce. The disputed provision of the Agreed Entry states as follows, "The pension plan of the defendant's is to be equally divided by a QDRO."

{¶19} Appellant interprets this provision to mean that Appellee's pension plan is to be equally divided on the date of Appellee's retirement. At the time of the parties' divorce on February 24, 2005, Appellee was 43 years old.

{¶20} Appellee argues the disputed provision means that Appellee's pension plan is to be divided on the date of the termination of the marriage. Under this interpretation, Appellant is therefore only entitled to her portion of Appellee's retirement account for the duration of the marriage.

{¶21} The trial court determined that Appellant was entitled to one-half of the value of Appellee's retirement account as of February 24, 2005, the termination date of the marriage and the effective date of the Decree. Appellant argues in her first Assignment of Error that the trial court's application of the February 24, 2005 date was an impermissible modification of its property division.

{¶22} Once a court has made an equitable property division, Appellant is correct in stating that the trial court does not have jurisdiction to modify its decision. See, R.C. 3105.171(I). The trial court, however, retains broad jurisdiction to clarify and construe its original property division so as to effectuate the judgment. *Pierron v. Pierron*, Scioto App. No. 07CA3153, 07CA3159, 2008-Ohio-1286, ¶7 citing *Knapp v. Knapp*, Lawrence App. No. 05CA2, 2005-Ohio-7105, ¶40.

{¶23} Because the divorce decree incorporates a separation agreement, the determination of the above involves the application of the general rules of contract interpretation. Where ambiguity is complained of and where the parties dispute the meaning of clauses in the agreement, it is the duty of the court to examine the contract and determine whether the ambiguity exists. *Oberst v. Oberst*, Fairfield App. No. 08-CA-34, 2009-Ohio-13, ¶21. If an ambiguity does exist, the court has the duty and the power to clarify and interpret such clauses by considering the intent of the parties as well as the fairness of the agreement. Id.; *Houchins v. Houchins*, Stark App. No. 2006CA00205, 2007-Ohio-1450, ¶21. However, if the terms of the Decree are unambiguous then the courts must apply the normal rules of construction. *Houchins*, supra. The interpretation of the clause is a matter of law and the court must interpret the intent of the parties using only the language employed. Id.

{¶24} We have previously held that the determination of whether an ambiguity exists is a question of law to which we apply a de novo standard of review. *Barnes v. Barnes*, Stark App. No. 2003CA00383, 2005-Ohio-544, ¶18.

{¶25} For the purposes of the division of marital property, R.C. 3105.171(A)(2) establishes a statutory presumption that the proper date for the termination of a marriage is the date of the final divorce hearing. R.C. 3105.171(A)(2) also establishes an alternative date for determining what is marital property:

{¶26} "(A) As used in this section:

{¶27} "* * *

{¶28} "(2) 'During the marriage' means whichever of the following is applicable:

{¶29} "(a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation;

{¶30} "(b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, 'during the marriage' means the period of time between those dates selected and specified by the court."

{¶31} "The duration of the marriage is critical in distinguishing marital, separate, and post-separation assets and liabilities, and in determining appropriate dates for the valuation of those assets and liabilities." *Pierron*, ¶12 citing *Pottmeyer v. Pottmeyer*, Washington App. No. 02CA67, 2004-Ohio-3709, ¶12.

{¶32} In *Pierron*, the Fourth District analyzed a separation agreement and divorce decree that did not specify a distribution date for an employee savings account. The employee savings account was valued on February 9, 2005, but the termination of the marriage occurred on July 11, 2006. The trial court determined that effective date of the distribution date was February 9, 2005 and journalized the date in a QDRO.

{¶33} The Fourth District reversed the trial court, finding there was no ambiguity in the divorce decree and therefore the trial court could not construe the decree in an attempt to modify it. The appellate court used the above analysis and found that the date the divorce decree established as the termination of the marriage was the appropriate date of the distribution. Id. at ¶12. The court noted that mere silence on an issue or a failure to address it did not create an ambiguity; nor was the question of

perceived inequity relevant to the issue of whether the decree was ambiguous on its face. It found the parties could have provided for the date of distribution and the related consequences, but did not do so.

{¶34} In the present case, we find no ambiguity in the divorce decree. It states, "The pension plan of the defendant's *is to be* equally divided by a QDRO." (Emphasis added). While the parties could have agreed to a future date in the divorce decree, they did not. As such, we hold the divorce decree unambiguously states that the Appellee's pension plan is to be equally divided effective as of the termination of the marriage, February 24, 2005.

{¶35} We find therefore the August 12, 2009, judgment entry of the trial court was not issued in error. Appellant's Assignments of Error are overruled.

{¶36} The judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

PAD:kgb

[Cite as *Oberst v. Oberst,* 2010-Ohio-452.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ROSE OBERST	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
PAUL OBERST	:	
	:	
	:	Case No. 09-CA-54
Defendant-Appellee	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS