[Cite as *Waites v. Waites*, 2015-Ohio-2916.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEBRA M. WAITES	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
Cross-Appellant	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
ROBERT L. WAITES	:	Case No. 15-CA-1
	:	
Defendant-Appellant	:	O P I N I O N
Cross-Appellee	:	

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 08 DR 360

JUDGMENT: Affirmed

DATE OF JUDGMENT: July 17, 2015

APPEARANCES:

For Plaintiff-Appellee/Cross-Appellant

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For Defendant-Appellant/Cross-Appellee

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Farmer, J.

{¶1} On April 12, 1986, appellant, Robert Waites, and appellee, Debra Waites were married. Appellee filed a complaint for divorce on July 2, 2008. Three children were born of the marriage, with two children being emancipated at the time of the filing. A judgment entry decree of divorce was filed on July 21, 2010. The decree was affirmed on appeal. *Waites v. Waites,* 5th Dist. Fairfield No. 10-CA-46, 2011-Ohio-1504.

{¶2} On June 6, 2011, appellant filed a motion to modify spousal support. On August 7, 2012, appellee filed a motion for contempt, claiming appellant failed to follow several provisions of the divorce decree. On April 1, 2013, appellant filed a motion to determine retirement accounts. Hearings before a magistrate were held on April 22, and May 16, 2013. By decision filed April 26, 2013, the magistrate denied appellant's motion to determine retirement accounts. By decision filed December 23, 2013, the magistrate denied appellant's motion to modify spousal support, once again denied his motion to determine retirement accounts, found him in contempt, and ordered him to pay appellee various amounts for attorney fees. Attached to the December decision was the April decision.

{¶3} Both parties filed objections. By judgment entry filed December 9, 2014 and amended judgment entry filed December 10, 2014, the trial court denied the objections and approved and adopted the magistrate's April and December decisions.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED BECAUSE IT REFUSED TO APPLY THE IMPUTED INCOME AND OTHER CHANGED CIRCUMSTANCES AND FAILED TO APPLY THE NEW STATUTE, ORC 3105.18(F), THAT A CHANGE IN CIRCUMSTANCE MUST BE REVIEWED IF IT WAS NOT TAKEN INTO ACCOUNT AT THE TIME OF THE ORIGINAL DECREE."

II

{¶6} "THE TRIAL COURT ERRED BECAUSE IT FAILED TO APPLY THE NEW STATUTE, ORC 3105.18(F)(2), AND IMPOSED A PROVISION UPON APPELLANT THAT WAS NOT EXPRESSED IN THE INITIAL ORDER THAT APPELLEE DID NOT HAVE TO WORK FULL TIME SO APPELLEE COULD STAY HOME DUE TO THE ADULT DAUGHTER'S ALLEGED CYCLIC VOMITING DISEASE CONDITION."

III

{¶7} "THE TRIAL COURT ABUSED ITS DISCRETION BY ACCEPTING APPELLEE'S ARGUMENT THAT SHE NEEDED TO CARE FOR THE ADULT DAUGHTER DUE TO HER ALLEGED CYCLIC VOMITING DISEASE CONDITION EVEN THOUGH IT WAS APPELLEE'S UNSUPPORTED ASSERTION, THE ALLEGATION WAS RAISED FOR THE FIRST TIME AT TRIAL, THERE WAS NO PROOF BY MEDICAL TESTIMONY OR DOCUMENTATION, AND THERE WAS A REFUSAL ON RECORD TO PROVIDE DISCOVERY OR ANY INFORMTION ABOUT THE MATTER."

IV

{¶8} "THE TRIAL ERRED BY ALLOWING APPELLEE TO KEEP AN OVERPAYMENT OUT OF APPELLANT'S PROFIT SHARING ACCOUNT, BY FAILING TO RECOGNIZE THAT THE PROFIT SHARING ACCOUNTS ARE DIFFERENT FROM TYPICAL RETIREMENT ACCOUNTS, AND BY ALLOWING APPELLEE TO TAKE APPELLANT'S PROFIT SHARES."

V

{¶9} "THE TRIAL COURT ERRED BY REFUSING APPELLANT JUDGMENT FOR A CHILD SUPPORT OVERPAYMENT AND FOR FINDING APPELLANT IN CONTEMPT IN SPITE OF A STIPULATION ON RECORD DISMISSING THE CONTEMPT IN EXCHANGE FOR A PARTIAL WAIVER OF THE CHILD SUPPORT OVERPAYMENT."

VI

{¶10} "THE TRIAL COURT ERRED BY FINDING APPELLANT IN CONTEMPT IN SPITE OF A RESOLVING AGREEMENT, LACK OF A COURT ORDER, LACK OF PROPER NOTICE, AND LACK OF PROOF OF A FAILURE TO COMPLY."

VII

{¶11} "THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES AND DAMAGES BECAUSE THE COURT DID NOT RECOGNIZE THAT APPELLEE MOTIONED FOR A FINDING OF FRIVOLOUS CONDUCT WHICH WAS NOT PROVEN, THE LAW IN THIS CASE WAS NEW AND UNDEVELOPED, AND THE COURT HAD NO JURISDICTION OR PROOF AS TO OTHER FEES AND DAMAGES."

{¶12} Appellee filed a cross-appeal and assigned the following error:

CROSS-ASSIGNMENT OF ERROR I

{¶13} "THE TRIAL COURT ERRED IN THAT SPOUSAL SUPPORT PREVIOUSLY ORDERED SHOULD HAVE BEEN MODIFIED BY THE MAGISTRATE SO AS TO INCREASE SPOUSAL SUPPORT TO BE PAID BY DEFENDANT TO PLAINTIFF."

I, II, III

{¶14} Under these assignments of error, appellant challenges the trial court's denial of his request to modify spousal support to "$0.00" pursuant to R.C. 3115.18(F)(1) and (2). Appellant also argues the trial court erred in factoring in appellee's care for their emancipated daughter when it considered spousal support. We disagree.

{¶15} As explained by our brethren from the Tenth District in *Cox v. Cox,* 10 Dist. Franklin No. 14AP-490, 2015-Ohio-1660, ¶ 36-37:

> A trial court lacks jurisdiction to modify a prior order of spousal support unless (1) the decree of the court expressly reserved jurisdiction to make a modification, (2) the court finds that a substantial change in circumstances has occurred, and (3) the court finds that the change was not contemplated at the time of the original decree. *Piliero v. Piliero,* 10th Dist. No. 10AP-1142, 2012-Ohio-1153, ¶ 3, citing *Mandelbaum v. Mandelbaum,* 121 Ohio St.3d 433, 2009-Ohio-1222.
>
> A party seeking modification of spousal support bears the burden of demonstrating modification is warranted. *Piliero* at ¶ 3, citing *Burkart v.*

> *Burkart,* 191 Ohio App.3d 169, 2010-Ohio-5363, ¶ 22 (10th Dist.). Appellate courts generally afford trial courts wide latitude in considering spousal support issues. *Id.* at ¶ 20, citing *Grosz v. Grosz,* 10th Dist. No. 04AP-716, 2005-Ohio-985, ¶ 89. Accordingly, appellate courts review decisions regarding modification of spousal support for abuse of discretion. *Id.,* citing *Grosz* at ¶ 9.

{¶16} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983).

{¶17} R.C. 3105.18 governs spousal support. Subsections (F)(1) and (2) state the following:

> (F)(1) For purposes of divisions (D) and (E) of this section and subject to division (F)(2) of this section, a change in the circumstances of a party includes, but is not limited to, any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses, or other changed circumstances so long as both of the following apply:
>
> (a) The change in circumstances is substantial and makes the existing award no longer reasonable and appropriate.
>
> (b) The change in circumstances was not taken into account by the parties or the court as a basis for the existing award when it was

established or last modified, whether or not the change in circumstances was foreseeable.

(2) In determining whether to modify an existing order for spousal support, the court shall consider any purpose expressed in the initial order or award and enforce any voluntary agreement of the parties. Absent an agreement of the parties, the court shall not modify the continuing jurisdiction of the court as contained in the original decree.

{¶18} The July 21, 2010 judgment entry decree of divorce included the following provision on spousal support under Section IV:

Effective November 17, 2009, Defendant shall pay to Plaintiff through the Child Support Enforcement Agency spousal support in the Amount of $350.00 per week, plus processing charge, ($1516.67 per month plus processing charge) until such time as the child support obligation for the remaining minor child of the parties known as [C.W.] terminates as provided herein. Effective the date the child support obligation for the remaining minor child of the parties known as [C.W.] terminates as provided herein, Defendant shall pay spousal support to the Plaintiff through the Child Support Enforcement Agency in the amount of $300.00 per week, plus processing charge, ($1,300.00 per month, plus processing charge). Defendant's spousal support obligation to the Plaintiff as set forth herein shall terminate upon the earlier of the following events:

> a. Wife's remarriage;
>
> b. Wife cohabiting with an unrelated adult male as cohabitation is defined by Ohio Law;
>
> c. Death of either party;
>
> d. or July 30, 2018.
>
> The spousal support obligation of the Defendant set forth herein shall be modifiable and subject to the continuing jurisdiction of this Court.

{¶19} Appellant argues there has been a change of circumstance in three respects: 1) appellee is now free from caring for any minor children and is voluntarily underemployed, 2) appellee refinanced her home and rolled all her debt into a single lower payment, and 3) the parties' income has changed. Appellant also argues the trial court unlawfully considered appellee's voluntary care of their adult daughter in denying his request. In her decision filed December 23, 2013, the magistrate included an extensive review of the evidence presented:

> Dr. Growick testified that Debra Waites works in the accounting/bookkeeping clerk field. He testified that based upon the job field of accounting/bookkeeping clerk in Central Ohio she could earn $38,687.00, although she never earned that amount. He testified that there are jobs available for accounting/bookkeeping clerks in Central Ohio. She would have to commute to Columbus to earn said amount. Dr. Growick did not consider in his report that Mrs. Waites must be available

to care for her daughter. He does not believe that her wage earning capabilities would have been different in 2009. He further testified that an employee missing more than eighteen days per year of work (which Mrs. Waites does due the parties' daughter's medical condition) can affect employability. Mrs. Waites did not report any personal health issues to Dr. Growick. He does not consider "soft factors" (e.g. health, family responsibilities) in his analysis, but believes that is a consideration for the Court. Dr. Growick's report was admitted.

Dr. Paugh testified he considered Plaintiff's employability issues such as age, being 52 which he considers beyond retraining; her health issues which requires her to be sedentary; and her daughter's health issues. He determined Plaintiff's job classification as an Order Clerk with an income potential of $25,000.00 for 40 hours per week. She also did part time work as a Data Entry Keyer with an earning capacity of $23,810.00 for 40 hours per week.

The most that Debra Waites earned was $34,000.00 in 2007, as a social and community service manager for the Cyclical Vomiting Assoc. However, the organization moved out of the state.

Dr. Paugh testified that Plaintiff's need to have flexibility to assist her daughter affects her ability to find employment. Her flexibility to adjust her work hours is a benefit of her current employment. He does not find Deborah Waites to be underemployed or underpaid based upon the criteria he reviewed. He does not believe that there has been a change

since 2009. Dr. Paugh's report was admitted. Debra Waites paid Dr. Paugh $2,500.00.

Defendant testified that he earned $63,648.43 in 2011. He earned $67,645.00 in 2012. He testified that he wants to modify the current spousal support order because he has bills to pay, and he believes that Debra Waites should get a job that pays more even it if (sic) means driving to Columbus to work.

Defendant has a mortgage payment in the amount of $525.00. He presented no other evidence of living expenses. Defendant has remarried. His current wife's annual income is social security ($12,720.00), and payments from the Department of Veterans Affairs ($36,360.00), and they share some expenses. His income from employment has increased.

The current amount of spousal support was set by agreement of the parties.

{¶20} Based upon the evidence presented, the magistrate determined the following:

The only change in circumstance regarding spousal support is Mr. Waites' slightly increased income and the fact that he has remarried and sharing some expenses. Mrs. Waites earning have increased only slightly since the time of the divorce. She has made a choice to continue to

support the parties' adult children which has affected her lifestyle. The changes in this case are not substantial. The existing award is still reasonable and appropriate and shall not be modified.

{¶21} It is undisputed that the chronic illness of the parties' adult daughter has been a long term issue. T. at 84. Appellant testified his daughter has had a medical condition "[s]ince she was a toddler." T. at 336.

{¶22} Appellee refinanced her home to place it in her name as required by the divorce decree. T. at 39, 390. She rolled some of her debt into the refinance and lowered her payment from about $860 to $680 per month due to obtaining a lower interest rate. T. at 42, 44. However, the mortgage is "back up where it was" do to another refinance "to pay some of my attorney fees and other things." T. at 467.

{¶23} Appellee works as a bookkeeper/secretary fulltime at thirty-five hours per week earning $11.00 per hour, plus she is a school board member earning approximately $3,000.00 per year for an approximate total of $23,020.00. T. at 56, 58-59, 392-393, 395. Her income has increased approximately $3,000.00 from the time of the divorce decree. T. at 392-393. For 2009, the year before the filing of the divorce decree in July of 2010, appellant made about $60,000.00. Plaintiff's Exhibit 2. He made about $68,800.00 in 2012. T. at 231-232; 279-281; Defendant's Exhibit L-2; Plaintiff's Exhibit 2. Also, appellant remarried in October of 2010 and shares living expenses with his new wife. T. at 274-275, 277, 327.

{¶24} Appellant argues appellee is underemployed because in a larger job market i.e., Columbus, she could make more money. T. at 74, 105, 109, 413. As noted

by the trial court, two vocational experts addressed appellee's earning capability, appellee's expert, Charles Paugh, Ph.D, and appellant's expert, Bruce Growick, Ph.D. Plaintiff's Exhibit 1 and Defendant's Exhibit M-4.

{¶25} Dr. Growick opined appellee was underemployed given the job market in central Ohio which includes the Columbus metropolitan area. T. at 105, 109. He thought a twenty-five mile commute to Columbus would not be unreasonable for employment "if it pays well." T. at 112-113. Dr. Paugh opined to the contrary, stating appellee was not underemployed given her age, health, educational history, and vocational history. T. at 194. Dr. Paugh's report took into consideration the realities of appellee's life. She is 52, "beyond the age of what's considered retrainable, which is 50." T. at 173. As a mother, appellee voluntarily assisted their adult daughter with her medical condition. T. at 174, 177. The daughter's medical condition is not a new factor or circumstance to the family environment as the daughter has had issues from a young age during the parties' marriage. T. at 84, 176, 194, 336, 414. As a result, appellee's geographical area of job employment is limited. T. at 185-186. Dr. Paugh did not think appellee's choice of employment was imprudent or unreasonable "given her ability, given her responsibilities, given her work history." T. at 188-189. Dr. Paugh viewed the flexibility in appellee's current job as a key component, a benefit. T. at 188.

{¶26} It is not "rocket science" to argue that if one works in a larger city, the jobs may pay more; however, not everyone can drive a significant time to work given the family obligations one may choose to continue to help.

{¶27} Given the fact that the medical condition of the adult daughter is not a new circumstance and appellee has continually sought employment (at one point, up to three

part-time jobs), we cannot find the trial court abused its discretion in finding no change of circumstance relative to appellee's underemployment as argued by appellant.

{¶28} The refinance of the home was done pursuant to the divorce decree and although it lowered appellee's monthly payment, is it now back up due to another refinance. We cannot find the trial court abused its discretion in finding no change of circumstance relative to the refinance as argued by appellant

{¶29} Appellee's income has increased by about $3,000.00 and appellant's income has increased by about $8,000.00 for a difference of $5,000.00. We cannot find the trial court abused its discretion in finding no change of circumstance relative to the parties' change in income as argued by appellant.

{¶30} Upon review, we find the trial court did not abuse its discretion in denying appellant's motion to modify spousal support, nor did the trial court disregard any of the mandates in R.C. 3105.18(F)(1) and (2).

{¶31} Assignments of Error I, II, and III are denied.

IV

{¶32} Appellant claims the trial court erred in not finding an overpayment to appellee regarding the one-half distributive share of his Buckeye Ready-Mix profit sharing account. We disagree.

{¶33} The July 21, 2010 judgment entry decree of divorce included the following provision on retirement benefits under Section IX:

> Plaintiff shall have and retain as owner thereof, free and clear of any claim or demand or right of survivorship of Defendant, her share of

> Defendant's Buckeye Ready-Mix LLC Profit-Sharing Plan pursuant to the Qualified Domestic Relations Order filed herewith and incorporated herein by reference and each party shall timely comply with all matters set forth in said Qualified Domestic Relations Order filed herewith and incorporated herein by reference.

{¶34} The July 21, 2010 qualified domestic relations order (hereinafter "QDRO"), provided for the following in pertinent part:

> **7. Amount of Alternate Payee's Benefit:** This Order assigns to Alternate Payee 50% of Participant's total account balance under the Plan as of November 17, 2009, or closest valuation date thereto, plus an additional $3,000.00 from Participant's 50% share of the Plan, plus any interest or *other earnings* attributable to Alternate Payee's share of the Plan for period subsequent to November 17, 2009 until the date of total distribution to the Alternate Payee. (Emphasis added.)

{¶35} During the April 22, 2013 hearing, the parties agreed to the following stipulation: "So the amount paid to Debra Waites from Ready-Mix plan is correctly calculated in accordance with paragraph 7 of the QDRO." T. at 22. The parties further stipulated that Defendant's Exhibit E would be admitted into evidence without further testimony. T. at 22-23.

{¶36} Defendant's Exhibit E established the distributive amount was $46,068.27, with an additional $14,225.16, plus interest of $1,114.30. T. at 51-52. The exhibit noted there was an increase to the distributive award because there was "an investment gain between the time the account was established and the time she requested a distribution."

{¶37} Appellant contested the $14,225.16 which represented "earnings from the date of the settlement in '09 up until the date of the distribution." T. at 52. Appellant's counsel agreed that he stipulated to the fact that the distribution was correctly calculated based on the QDRO, but argued the QDRO did not include "earnings." T. at 54-55. We disagree for the following reasons.

{¶38} First, the QDRO clearly includes "other earnings." Appellant's counsel agreed the $14,225.16 contested amount constituted "earnings" attributable to appellee's share of the profit sharing plan. T. at 225. During the May 16, 2013 hearing, the trial court clearly indicated the "Ready-Mix account issue is done." T. at 333-334. Appellant's counsel stated he understood and no objection was made. T. at 334.

{¶39} Secondly, appellant filed a direct appeal of the 2010 divorce decree and did not assign as error the distributive award or the "other earnings" language of the QDRO. *Waites v. Waites,* 5th Dist. Fairfield No. 10-CA-46, 2011-Ohio-1504. The issue is barred under the doctrine of res judicata. *Grava v. Parkman Twp*., 73 Ohio St.3d 379, 1995-Ohio-331, syllabus.

{¶40} Thirdly, the trial court ruled on this issue and denied appellant's motion to determine distribution of retirement accounts in a decision filed April 26, 2013. The trial court signed the entry at the end of the decision, approving and adopting the decision.

Appellant did not file objections in a timely manner under Civ.R. 53(D)(3)(b)(i) and has therefore waived the right to appeal the issue pursuant to Civ.R. 53(D)(3)(b)(iv) except for plain error. The attachment of the April decision and judgment entry to the magistrate's December 23, 2013 decision did not turn the clock back on for purposes of filing objections.

{¶41} Civil plain error is defined in *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, syllabus, as "error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." We do not find any plain error on this issue.

{¶42} Assignment of Error IV is denied.

V, VI

{¶43} Under these assignments of error, appellant claims the trial court erred in finding him in contempt. We disagree.

{¶44} We review contempt decisions under an abuse of discretion standard. *State ex rel. Celebrezze v. Gibbs,* 60 Ohio St.3d 69 (1991); *Blakemore, supra*.

{¶45} As explained by our brethren from the Fourth District in *McDonald v. McDonald,* 4th Dist. Highland No. 12CA1, 2013-Ohio-470, ¶ 17-18:

> Civil contempt exists when a party fails to do something ordered by a court for the benefit of an opposing party. *Pedone v. Pedone,* 11 Ohio App.3d 164, 165, 463 N.E.2d 656 (1983); *Beach v. Beach,* 99 Ohio App. 428, 431, 134 N.E.2d 162 (1955). The punishment is remedial, or

> coercive, in civil contempt. *State ex rel. Henneke v. Davis,* 66 Ohio St.3d 119, 120, 609 N.E .2d 544 (1993). In other words, civil contempt is intended to enforce compliance with a court's orders.
>
> The party seeking to enforce a court order must establish, by clear and convincing evidence, the existence of a court order and the nonmoving party's noncompliance with the terms of that order. *Wolf v. Wolf,* 1st Dist. Hamilton No. C-090587, 2010-Ohio-2762, 2010 WL 2473277, ¶ 4; *Morford v. Morford,* 85 Ohio App.3d 50, 55, 619 N.E.2d 71 (4th Dist.1993).

{¶46} "Clear and convincing evidence" is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford,* 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶47} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison,* 49 Ohio St.3d 182 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶48} In her decision filed December 23, 2013, the magistrate found the following:

> Regarding the Motions for Contempt, Robert Waites is in Contempt of Court for failing to pay medical expenses to Debra Waites, for changing the beneficiary on life insurance, for failing to sign over the ING USA Annuity and Life Insurance Company account, for failing to sign the Genworth Financial insurance policy rider over to Plaintiff, and for claiming Clayton for tax year 2010.

{¶49} The trial court sentenced appellant to thirty days in jail, but suspended the sentence on the following purge conditions:

> a. Defendant shall pay Plaintiff the sum of $364.37 for medical bills within 30 days;
>
> b. Maintain Plaintiff as beneficiary on life insurance.
>
> c. Transfer the ING USA Annuity account, with interest and growth, to Plaintiff immediately;
>
> d. Pay to Plaintiff the sum of $500.00 to reimburse her for additional costs incurred for life insurance on her life within 30 days;
>
> e. Pay to the Plaintiff the sum of $150.00 to compensate her for her time to work with the IRS to allow her to claim the children within 30 days;
>
> f. Pay to Plaintiff the sum of $1,875.00 as and for attorney fees, and the court costs for Plaintiff's motion within 90 days.

MEDICAL EXPENSES

{¶50} Appellant argues because there was a mistaken overpayment of child support and the overpayment was credited toward the unpaid medical expenses per agreement of the parties, he should not have been found in contempt on the issue.

{¶51} There is no dispute that the July 21, 2010 judgment entry decree of divorce under Section III provided for health care and that appellant was an obligor:

> **When Private Health Insurance Is In Effect:**
>
> ***
>
> 2. Effective November 17, 2009, Plaintiff and Defendant shall each pay 50% of any and all health care expenses, including co-payments and deductibles, of the remaining minor child of the parties to the extent such are not paid for by private health insurance or other third party payor including, but not limited to, medical, dental, optical, prescription, orthodontic, counseling, psychological, etc... Each party shall pay his/her share of said health care expenses within fourteen days of receipt of documentation evidencing the amount not paid for by insurance or other third party payor.

{¶52} Appellee stated she sent appellant invoices for the medical bills via certified letter. T. at 384-386. Appellant stated he did not get notice of the outstanding bills. T. at 283-286, 328. Clearly the trial court found appellee's testimony to be more credible.

{¶53} Any offsetting agreement does not negate the fact that appellant did not pay the medical bills as ordered to do so in the divorce decree.

{¶54} We find no abuse of discretion in finding appellant in contempt for failing to pay the medical bills per the divorce decree and in ordering him to pay appellee $364.37 for said bills as part of the purge order.

BENEFICIARY CHANGE

{¶55} There is no dispute that the July 21, 2010 judgment entry decree of divorce under Section XV provided for appellant's life insurance to name appellee as the beneficiary:

> The Defendant shall pay for and maintain all life insurance on his life which is available through his present or future employers, including any optional life insurance available on his life, and shall name the Plaintiff as sole and exclusive beneficiary on any and all said life insurance on his life which is available through his place of employment and Defendant shall be required to comply with this life insurance provision until Plaintiff's death.

{¶56} Appellant admitted that on April 20, 2012, he signed a form changing the beneficiary on his life insurance policy from appellee to his new wife as beneficiary and his sister as contingent beneficiary. T. at 292-293; Plaintiff's Exhibit 6. Appellant claimed it was an oversight on his part. T. at 296. At some point, he changed the beneficiary designation back to appellee. T. at 331, 340.

{¶57} We find no abuse of discretion in finding appellant in contempt for changing the beneficiary designation in contravention of the divorce decree.

ING USA ANNUITY

{¶58} There is no dispute that the July 21, 2010 judgment entry decree of divorce under Section IX provided for transfer of the ING USA account to appellee:

> Plaintiff shall have and retain as owner thereof, free and clear of any claim or demand or right of survivorship of Defendant, all assets, benefits and value Defendant has in ING USA Annuity and Life Insurance Company, including, but not limited to, the IRA contract number ending in 478. Defendant shall immediately take all actions necessary and sign all documents necessary so that said ING USA Annuity and Life Insurance Company assets are transferred solely into the name of the Plaintiff through a tax-exempt transfer or rollover.***

{¶59} Appellee stated she had made several attempts to have the ING USA account transferred, but appellant had not made any attempt to execute the necessary forms. T. at 381. Appellant admitted to knowing he was to transfer the account to appellee and had failed to do so. T. at 305. He stated "I held up on that." T. at 310.

{¶60} We find no abuse of discretion in finding appellant in contempt for failing to transfer the ING USA account to appellee per the divorce decree

GENWORTH FINANCIAL RIDER

{¶61} There is no dispute that the July 21, 2010 judgment entry decree of divorce under Section IX provided for transfer of the rider to appellee:

> ***Defendant shall retain the cash value in said Genworth Financial life insurance policy owned by him, contract number ending in 5970, except that both parties shall immediately take all actions necessary and sign all documents necessary so that Plaintiff's rider on said life insurance policy with Genworth Financial is transferred solely into Plaintiff's name as owner thereof along with any rights and benefits associated with said rider.

{¶62} The divorce decree also provided that appellant was not to take any loans or encumbrances against the Genworth cash value until appellee received her share.

{¶63} Appellant had a life insurance policy with Genworth with a rider that provided coverage to appellee. T. at 312. Appellant admitted to not signing any forms to transfer the rider to appellee until the after the April 22, 2013 hearing. T. at 314-315. He stated he did everything he could to get the rider transferred (one telephone call), but he was unaware that he needed to sign a release. T. at 315, 318, 335. Appellant admitted to taking a loan out on the policy in 2012 against the language in the divorce decree. T. at 318-320. Appellee stated she contacted Genworth about the life insurance rider "over and over for several years in a row" and was told she could do nothing until appellant sent them a letter releasing the rider. T. at 369, 378. Appellant

signed a letter after the April 22, 2013 hearing, but the rider had been cancelled. T. at 370. Appellee testified it would cost her $52.51 a month for $50,000.00 worth of life insurance which was equivalent to the rider. T. at 377.

{¶64} We find no abuse of discretion in finding appellant in contempt for failing to transfer the rider to appellee per the divorce decree or in ordering him to pay appellee $500.00 to reimburse her for her costs associated with obtaining life insurance as part of the purge order.

TAX EXEMPTION

{¶65} The July 21, 2010 judgment entry decree of divorce under Section XI provided for appellant to claim the children for tax purposes for the year 2009. Thereafter, "[c]laiming the children for tax purposes after the tax year 2009 shall be pursuant to the tax laws."

{¶66} Appellee stated appellant erroneously claimed the minor child in 2010 as a tax exemption when the child lived with her over fifty percent of the time and he did not provide over fifty percent of the child's support. T. at 460-461. Appellee stated she spent a lot of time and money "filing papers, filing complaints, talking to the IRS" because of appellant's actions. T. at 461.

{¶67} We find no abuse of discretion in finding appellant in contempt for taking the tax exemption in contravention of the divorce decree or in ordering him to pay appellee $150.00 to compensate her for her time with the IRS as part of the purge order.

{¶68} Appellant argues he was denied a fair hearing on the issues. We note his trial counsel extensively cross-examined appellee on each and every item. T. at 429-455, 460-462.

{¶69} The evidence supports the magistrate's findings. As noted by the magistrate, the impetus to this prolonged fight was appellant's basic reluctance to accept the orders of the divorce decree. Appellant was ordered to pay appellee attorney fees in the amount of $1,875.00 for the contempt action. The amount is supported by appellee's post hearing exhibit on attorney fees filed May 28, 2013. The parties had agreed to submit the final accounting to the magistrate following the hearing. T. at 494-495. No objection or request for a hearing was made by appellant. "A trial court has discretion to include reasonable attorney fees as a part of costs taxable to a defendant found guilty of civil contempt." *State ex rel. Fraternal Order of Police v. Dayton,* 49 Ohio St.2d 219, syllabus (1977). We find the trial court did not abuse its discretion in awarding appellee her attorney fees as part of appellant's purge order.

{¶70} Given the testimony presented, we find clear and convincing evidence to support the trial court's decision finding appellant in contempt.

{¶71} Assignments of Error V and VI are denied.

VII

{¶72} Appellant claims the trial court erred in awarding attorney fees. We disagree.

{¶73} R.C. 3105.73 governs the award of attorney fees and litigation expenses. Subsection (B) states the following:

> In any post-decree motion or proceeding that arises out of an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that motion or proceeding, the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets.

{¶74} An award of attorney fees in a domestic relations action is within the sound discretion of the trial court. *Wildman v. Wildman,* 5th Dist. Licking No. 12-CA-21, 2012-Ohio-5090; *Blakemore, supra.*

{¶75} In her decision filed December 23, 2013, the magistrate awarded appellee the following attorney fees:

> The above motion [to determine distribution of retirement accounts] was improvidently brought by the Defendant. This retirement account was divided exactly as bargained for in the parties' agreement, as the approved QDRO, and as per the company policy. Plaintiff is unfairly penalized by Defendant in having to expend attorney fees to protect exactly what she bargained for in the divorce agreement. Therefore,

> Defendant shall pay to Plaintiff the sum of $3,000.00 as and for attorney fees within thirty days of the date of this entry.
>
> Defendant's Motion to Modify Spousal Support brought so soon after the appeal (which affirmed the agreement of the parties) when the only change was Defendant's increase income and his sharing expenses with a new spouse, has placed a great and unnecessary burden on the Plaintiff. She has been forced to expend a substantial sum of money to simply retain the funds from spousal support that she bargained for. She has incurred attorney fees for all parts of these motions in excess of $17,500.00. This is unfair. Defendant, through counsel, agreed that the hourly rate was reasonable and did not argue that the work was not necessary. Defendant shall reimburse Plaintiff the sum of $7,500.00 within 60 days of the date of this Entry as and for her attorney fees.

{¶76} Per appellee's May 28, 2013 post hearing exhibit on attorney fees, appellee incurred attorney fees in the amount of $17,500.00 for work following the filing of appellant's motion to modify spousal support. This amount did not include the aforementioned amount for the contempt action. Appellee also paid her vocational expert $3,300.00 to defend appellant's claim of underemployment. Again, no objection was made to this exhibit and appellant did not request a separate hearing on attorney fees.

{¶77} The issue of the Buckeye Ready-Mix profit sharing plan already had been determined per the QDRO as found under Assignment of Error IV. There was no

substantial change in circumstance regarding the motion to modify spousal support as found under Assignment of Error I.

{¶78} Upon review, we find the trial court did not abuse its discretion in awarding appellee $10,000.00 toward her $17,500.00 attorney fees obligation.

CROSS ASSIGNMENT OF ERROR I

{¶79} Appellee claims the trial court erred in denying her motion to increase spousal support. We disagree.

{¶80} As we outlined in Assignment of Error I, pursuant to R.C. 3105.18(F)(1) and (2), there was no substantial change of circumstance and the spirit of the spousal support order was followed.

{¶81} Appellee has chosen to provide support to her emancipated children. Although it is commendable, it is not required by law or the divorce decree.

{¶82} Cross-Assignment of Error I is denied.

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

By Farmer, J.

Gwin, P.J. and

Baldwin, J. concur.

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