

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Dawn M. Keith

Court of Appeals No. L-04-1011

Appellant

Trial Court No. DR-2002-1238

v.

James T. Keith

DECISION AND JUDGMENT ENTRY

Appellee

Decided: March 15, 2004

* * * * *

Douglas K. Jordan, for appellant.

* * * * *

SINGER, J.

{¶1} This is an appeal from a judgment of divorce entered in the Lucas County Court of Common Pleas. Because not all property issues were finally determined in the judgment, the judgment is not a final appealable order and cannot be appealed at this time.

{¶2} The judgment entry of divorce was filed in the Lucas County Court of Common Pleas on December 11, 2003. The judgment awards plaintiff, Dawn M. Keith, a divorce on the grounds that defendant, James T. Keith, "has been guilty of gross neglect of duty and extreme cruelty." The judgment further awards Dawn Keith custody of the

parties' two minor children, orders James Keith to pay child support, awards tax exemptions to James Keith and tax refunds to Dawn Keith, allocates certain marital property, disposes of issues regarding outstanding indebtedness, and orders that James Keith is responsible for attorney fees.

{¶3} One issue remains unresolved. The judgment entry states, "Plaintiff shall receive one-half of the marital interest in the Defendant's pension plan through his present employer *** and Plaintiff's counsel shall prepare a Qualified Domestic Relations Order providing for the division of that marital asset." In a prior paragraph, the judgment entry states, "The Court further finds that Mrs. Keith, the Plaintiff, shall receive one-half of the marital portion of Mr. Keith's present pension plan through his employer *** *if such* [pension plan] *exists*." (Emphasis added). No QDRO was entered on the docket and no QDRO was attached to the judgment entry.

{¶4} "The question of whether an order is final and appealable is jurisdictional and can be raised *sua sponte* by an appellate court." *Farrow Restoration, Inc. v. Kowalski* (1991), 81 Ohio App.3d 54, 56, citing *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, fn. 1.

{¶5} This court and a clear majority of Ohio appellate courts have consistently held that divorce orders are not final and appealable if a QDRO has been ordered but not prepared. See *Procuniar v. Procuniar* (Sept. 8, 1995), Greene App. No 95-CA-19, unreported (order not final and appealable until QDRO filed because "no substantial right was affected until the QDRO was issued"); *Scott v. Scott* (Feb. 8, 2000), Allen App. No. 1-99-79, unreported (noting courts are in "general consensus that a judgment

apportioning pension benefits between ex-spouses is not a final and appealable order until such time as the QDRO is entered"). See also, *Rash v. Rash* (2003), 155 Ohio App. 3d 106, 2003-Ohio-5688, for this court's review of the same case law. In *Rash*, a judgment entry granting a divorce was not a final appealable order where a QDRO was ordered to be prepared on a condition: "if the parties agree to split any of their retirement accounts" and no QDRO was prepared or approved. *Id.* at 107.

{¶6} Here, a QDRO was also ordered to be prepared on a condition: "if such [pension plan] exists." The record does not indicate whether a pension plan was subsequently discovered to exist. Since there is a possibility that not all existing property was divided, property division issues in this matter were not finally determined. "The divorce order in this case could not be made final even with the addition of a Civ. R. 54(B) certification." *Rash* at ¶23. Therefore, the judgment entry does not constitute a final appealable order.

{¶7} The court orders that this appeal is dismissed. Costs to appellant.

APPEAL DISMISSED.

Mark L. Pietrykowski, J.

Judith Ann Lanzinger, J.

Arlene Singer, J.
CONCUR.

JUDGE

JUDGE

JUDGE