**[Cite as *Kendall v. Kendall*, 2009-Ohio-4067.]**

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

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| Richard L. Kendall | Court of Appeals No. OT-08-054 |
| Appellant | Trial Court No. 01DR063A |
| v. | |
| Chris A. Kendall nka Chris A. Gravenhorst | **DECISION AND JUDGMENT** |
| Appellee | Decided: August 14, 2009 |

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Richard L. Kendall, pro se.

Michael W. Sandwisch, for appellee.

* * * * *

OSOWIK, J.

**{¶ 1}** This is an appeal from a judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division. For the following reasons, we affirm the judgment of the trial court.

**{¶ 2}** The original complaint for divorce was filed by appellant, Richard L. Kendall, MD, on March 20, 2001. Since that time appellant and appellee, Chris A. Gravenhorst (f.k.a. Chris A. Kendall), have reached agreement on all of the outstanding issues, with the exception of the issues of their three children's educational trust funds and child support, both of which have been litigated extensively over the past eight years, including two prior appeals in this court. After reviewing the voluminous record that was before the trial court, we determine that the following undisputed facts are relevant to the issues presented in this appeal.

**{¶ 3}** On February 13, 2007, the Ottawa County Child Support Enforcement Agency ("OCSEA") filed a "Motion for Review of Child Support" in the trial court. In its motion, OCSEA stated that appellant, an emergency room physician with several sources of income and a large investment portfolio, had asked for an administrative review and modification of his child support obligation. However, the agency stated that the issues involved were too complex for an administrative determination; therefore, "judicial review would be most appropriate in the present case."

**{¶ 4}** On May 30, 2007, appellant filed his own request for a review and downward modification of his child support obligation in the trial court. In support of his motion, appellant stated that his previous annual income, which the trial court determined was $213,496, had been reduced by 30 percent since the last child support determination.[1]

[1]In the first appeal, we upheld the trial court's computation of appellant's income and initial child support obligation. *Kendall v. Kendall* (Apr. 15, 2005), 6th Dist. No. OT-04-004.

On July 2, 2007, appellee filed a motion in which she asked the trial court to find appellant in contempt of court for not maintaining education funds in three separate trust accounts for the benefit of the parties' minor children. Appellee also asked the trial court to order appellant to provide requested discovery materials that were necessary to determine his child support obligation, and to pay her costs and attorney fees incurred in filing both motions.

**{¶ 5}** A hearing on appellee's motions was held on July 9, 2007. On July 11, 2007, the trial court issued a judgment entry in which it noted that OCSEA's motion to review child support had been withdrawn.[2] After stating that appellant's motion for modification was still pending, the trial court ordered appellant to comply with discovery requests, and continued that issue to allow time for depositions to be taken by both parties. As to the trust accounts, the trial court appointed Edmund Schafer, CPA, to conduct an independent "forensic accounting" of all entities and assets owned by appellant to determine his total income and to evaluate "whether [appellant's] management of the children's educational trust funds has resulted in a loss of income." Schafer's compensation, to be paid by appellant, was set at $100 per hour.

**{¶ 6}** On August 23, 2007, Schafer wrote a letter to the court in which he stated that additional documentation was needed before a report could be issued. Attached to the letter was a list of needed documents relating to the "RRR Family Trust," "Echo Family Limited Partnership," and "Catawba Family Limited Partnership," all of which

[2]The record shows that the withdrawal of OCSEA's motion was journalized on July 13, 2007.

were trusts set up by appellant, as well as documentation relating to appellant's business, Quality Care Corporation[3], and his personal finances. On October 19, 2007, the accountant submitted a report to the trial court, in which he made the following findings:

**{¶ 7}** 1. The RRR Trust was originally established to hold the children's educational funds, with appellant as the sole trustee. Prior to its creation, the children's funds were held in three separate Vanguard investments accounts, with a total valuation of $112,386.01.

**{¶ 8}** 2. The three Vanguard accounts were liquidated on March 30, 2006, at which time they had a total valuation of $141,563.67.

**{¶ 9}** 3. On April 27, 2006, funds from the liquidation of the three Vanguard accounts, along with other funds, were deposited at Huntington Bank and were later placed into the Echo Family Limited Partnership ("EFLP"). The total deposit was $431,320.21.

**{¶ 10}** 4. On October 17 and November 01, 2006, a total of $126,248.01 was withdrawn from the EFLP account, and was used to purchase real estate at 135 West Perry Street, Port Clinton, Ohio. This real estate is referred to by the parties as "the Armory". On January 10, 2007, an additional $312,000 was withdrawn to purchase new Vanguard Funds in the name of EFLP.

[3]At various times during these proceedings, appellant was employed by several different hospitals. However, he later set up his own corporation, Quality Care Corporation, through which he could set his own compensation and benefits package.

**{¶ 11}** 5. No income tax returns were ever filed for the RRR Trust, and a federal tax identification number was not sought for the RRR Trust until August 28, 2007.

**{¶ 12}** 6. Both the 2006 U.S. Return of Partnership Income for EFLP and the Limited partnership Agreement for the EFLP lists the children individually as partners, rather than listing the RRR Trust as a partner.

**{¶ 13}** 7. Earnings/gains from the sale of the custodial accounts were reported individually by the children instead of on a return for the RRR Trust.

**{¶ 14}** Based on the above findings, Schafer concluded that the RRR Trust was never funded by the trustee, appellant. He also concluded that appellant regularly disregarded the RRR Trust as an entity, and freely commingled assets from the children's custodial accounts and the EFLP with his own funds. In other words, appellant "failed to maintain the three minor children's educational trust funds separate from other funds." Schafer also stated that, as of the date of his report, the value of the children's accounts was $106,480.13; whereas, if they had been left in the original Vanguard investment accounts, they would have been valued at $168,830.96. Attached to Schafer's report was an invoice for his services in the amount of $2,575, and a list of additional documents needed from appellant to complete his investigation.

**{¶ 15}** A hearing was held on October 26, 2007, on appellee's contempt motion, at which testimony was presented by Schafer. Schafer testified at the hearing that his assessment of the value of the trust accounts could not be completed without an appraisal of the real estate; nevertheless, the cash value of the children's trust accounts had

diminished since appellant closed the three original Vanguard accounts. Schafer further testified that real estate is a "riskier" type of investment.

**{¶ 16}** Schafer stated that, effective January 9, 2007, appellant transferred an interest in the Echo Family Limited Trust to a fourth child, who was born to appellant and his girlfriend after the parties separated. Schafer also stated that appellant wrote Schafer a letter on September 5, 2007, in which appellant stated that, as both a trustee of the RRR Trust and a general partner of Echo Family Limited Partnership, he could "maintain the separation required by the defense attorney and keep the children from squandering their assets as outlined in the RRR trust." Schafer further stated that appellant has many mechanisms to protect his assets, including an offshore trust in the Cayman Islands. Schafer testified that, in his opinion, the RRR Trust agreement states that the children's educational funds are to be kept separate from other assets, and the risk of losing money in the funds is higher when they are invested in real estate.

**{¶ 17}** On cross-examination by appellant's attorney,[4] Schafer testified that the trust document states the funds are to be in custodial accounts, and used only for appellant's oldest three children. He further testified that, although appellant can add to the funds and include future children in the RRR Trust, appellant is unable to alter the original funds set up through the divorce proceedings. Schafer stated that, including the real estate, the approximate value of the three trusts was $146,588; however, if appellant had not altered the accounts, they would be worth $168,830.

[4]Although appellant was initially represented by counsel, he chose to represent himself at many of the trial court's proceedings, as well as during this appeal.

**{¶ 18}** On January 8, 2008, Schafer submitted a third request for additional documentation to the trial court. The list included explanations of payment for certain cancelled checks written and bank deposits made by appellant; bank statements, cancelled checks, loan agreements, contracts, and schedules of capital accounts for the Catawba Family Limited Partnership; appellant's personal financial statements, mortgage notes and amortization schedules, bank statements, cancelled checks and deposit receipts since January 1, 2002; and an explanation of the source of the $289,756.54 deposited in the EFLP by appellant, in addition to the $141,563.67 from the children's original Vanguard investment accounts. On January 11, 2008, Schafer filed a motion to compel appellant to comply with the January 8 request for additional information. Attached to Schafer's third request is a certification by appellee's attorney that a copy of the request was sent to appellant on January 12, 2008.

**{¶ 19}** On January 15, 2008, a continuation of the hearing was held at which the trial court was informed that three separate accounts had been set up for the children, with the guardian ad litem as trustee. In addition, the trial court stated that appellant had not yet complied with the accountant's third request for additional documentation. The trial court stated that the documentation needed included two bank statements and a financial statement from Ohio Savings Bank in Cleveland. In addition, the trial court ordered appellant to schedule an appointment with the court-appointed counselor by 3 p.m. on January 18, 2008.

**{¶ 20}** On January 22, 2008, appellee filed a motion to dismiss appellant's motion to modify child support. In support of her motion, appellee stated that appellant had "failed to properly prosecute this matter" by refusing to supply the requested documentation in a complete and timely manner, and by failing to comply with the trial court's order to submit to a psychological evaluation and participate in mandatory counseling.

**{¶ 21}** On January 29, 2008, the magistrate filed an order in which he found that appellant failed to provide the accountant with all the requested documents. The magistrate further found that appellant failed to schedule an appointment with the court-appointed counselor. Accordingly, the magistrate issued an order to compel production of the requested documents. In addition, the magistrate set a hearing date of February 5, 2008, on appellee's motion to dismiss and indefinitely postponed a hearing on the matter of shared parenting, pending the outcome of court-ordered counseling.

**{¶ 22}** On January 31, 2008, appellant filed a contempt motion in which he stated that appellee presented fraudulent claims in an effort to "deceive, inflame, and prejudice the court." Specifically, appellant alleged that the RRR Trust document does not require him to keep the children's education funds in three separate accounts. Appellant further stated that appellee's claim that he transferred money from the RRR Trust into his account and commingled the children's funds with his own was fraudulent.

**{¶ 23}** On February 4, 2008, appellant filed objections to the findings set forth in the magistrate's January 29 order. In support, appellant stated that he could not produce

the documents in a timely manner because he received each of Schafer's requests for documentation only a few days before the information was due. Specifically, appellant complained that he had only four days to comply with the third request for documentation. The next day, appellant filed a motion for contempt against Schafer, in which he stated that Schafer should be dismissed for improperly proceeding with an "audit"[5] of appellant's finances without a letter of engagement, as required by the Accountancy Board of Ohio. Appellant also alleged that Schafer was engaging in improper ex parte conversations with appellee's counsel.

**{¶ 24}** On February 5, 2008, a non-evidentiary hearing was held on appellee's motion to dismiss appellant's motion to modify child support. At the outset, the magistrate noted that appellee's motion was journalized on January 22, 2008. Thereafter, appellant had seven days to respond. However, a response was not filed until January 31, 2008, two days past the response deadline. Accordingly, the magistrate refused to consider appellant's response. Thereafter appellant, appearing pro se, argued that he should not be punished for his untimely responses to Schafer's requests for documentation because he did not receive a copy of appellee's motion until less than seven days before the scheduled hearing. Appellant also stated that Schafer's financial audit was "unethical" because it was performed in cooperation with appellee's counsel and was, therefore, not "independent." Finally, appellant complained that he was

[5]Appellant repeatedly uses the term "audit" in both the trial court and on appeal to define Schafer's role. However, the record states that Schafer was ordered by the trial court to conduct a "forensic accounting" for purposes of determining the amount of appellant's child support obligation.

improperly denied an opportunity to cross-examine appellee's attorney on the issue of contempt. Appellant presented no case law in support of his opposition to the motion to dismiss.

**{¶ 25}** On February 19, 2008, the magistrate issued a decision in which she found that, as of the February 5, 2008 hearing, appellant had not fully complied with discovery requests or court-ordered discovery and that, as a direct result of appellant's failure to comply, seven hearing dates were lost on the trial court's calendar, in addition to lost time and expenses incurred by both parties. Accordingly, pursuant to Civ.R. 41(B)(1), the magistrate granted appellee's motion to dismiss appellant's motion to reconsider child support and all motions related thereto, which included appellant's contempt motion. In addition, the magistrate ordered Schafer to cease working on the case, and ordered appellant to pay court costs in the amount of $1,003.64. A hearing on appellee's motion for attorney's fees, forensic accountant's fees and guardian ad litem's fees was scheduled for March 20, 2008.

**{¶ 26}** On February 28, 2008, appellant, acting pro se, filed objections to the magistrate's decision and a motion for an evidentiary hearing by the trial court. In his motion, appellant objected to findings that he purposely refused to provide the requested documentation to appellee and Schafer. Appellant also objected to "the use of a six-year 'forensic audit' dating back to 2002, for the purposes of child support." Appellant reiterated his position that the terms of such an "audit" must be set forth in an "engagement letter." In addition, appellant insisted that Schafer's work must be

"independent," in compliance with O.A.C. 4701-11-01 .[6] Appellant further objected to the dismissal of his contempt motions against appellee, her attorney, and Schafer. Appellant's objections were not supported by any transcripts, affidavits, or other admissible evidence. On March 13, 2008, the trial court summarily adopted the magistrate's February 18 decision and overruled appellant's objections thereto.

**{¶ 27}** On March 20, 2008, a hearing was held on appellee's motions for fees, at which testimony was presented by Schafer; appellee's attorney, Michael Sandwisch; and appellee. Schafer testified at the hearing that his fee was computed at the rate of $100 per hour. Schafer's time sheets, which were admitted as evidence at the hearing, showed total fees of $6,925, excluding preparation for the hearings on February 5, and March 20, 2008. Appellant's attempts to question Schafer concerning his independence and the appropriateness of an "audit" in this case were overruled by the trial court as not relevant to the stated purpose of the hearing, i.e., to determine the reasonable amount of Schafer's fees.

**{¶ 28}** On cross-examination by appellant, Attorney Sandwisch testified that he billed appellee at the rate of $175 per hour; however, the standard in the community allows for up to $250 per hour in domestic relations cases. Sandwisch testified that, since this case began, he has raised his fees for new clients to $200 per hour. He further stated that, generally, attorney's fees are based on the time spent working on a particular case. On direct examination, Sandwisch stated that this case was "complex," and that his fees

[6]O.A.C. 4701-11-01 generally provides that accountants holding an "Ohio permit" are to be independent in the performance of "professional services."

reflect deposition expenses, witness fees, and court reporter fees, in addition to the time he spent personally working on the case, which he supported with copies of time sheets and invoices.

**{¶ 29}** Appellee testified at the hearing that she paid her attorney's fees with her own money, as well as with funds borrowed from her mother and other relatives. Appellee further testified that, at the time of the hearing, she was employed as a kindergarten aide, making $10,000 per year. Appellee stated that she initially received $1,700 per month in spousal support, which expired after several years.

**{¶ 30}** At the close of appellee's testimony, appellant stated to the magistrate that he initially asked for an agency review of his child support obligation to keep down the cost of a trial. Appellant argued that R.C. 3105.73(A) limits the amount of attorney fee awards in post-divorce actions.

**{¶ 31}** On March 28, 2008, the magistrate issued a decision in which she found that Schafer's fees through March 20, 2008, totaled $7,100. After applying funds deposited by the parties, the balance of Schafer's fees was $5,825, which was to be paid from funds deposited by appellant with the court for that purpose. The magistrate further found that Attorney Sandwisch's fees through March 20, 2008, at $200 per hour, totaled $14,120. The magistrate justified the increase in Sandwisch's fees by stating that his current billing rate was $200 per hour, which is an appropriate and reasonable fee. Accordingly, the magistrate ordered appellant to pay appellee the sum of $14,120 for her attorney's fees.

**{¶ 32}** In addition to the above, the magistrate determined that the guardian ad litem's outstanding fee, calculated at $60 per hour, was $705. After applying funds on deposit with the court, appellant and appellee were ordered to share equally any remaining costs of the guardian ad litem. The magistrate ordered the guardian to remain as custodian of the children's three trust accounts until such time as objections and any appeals from the trial court's independent decision expire. Thereafter, the magistrate stated that the guardian ad litem was to make arrangements with appellant to terminate the three accounts and "return the monetary funds contained therein for the benefit of the children to [appellant]."

**{¶ 33}** On April 4, 2008, appellee filed an objection to the magistrate's decision to return the children's trust funds to appellant's control after the time for objections and/or appeals had expired. In support, appellee referred to Schafer's written report, in which he cataloged appellant's improper handling of the trust funds. Appellee suggested that "[t]he custodian of the funds should either remain with [the guardian ad litem], or in the alternative, with the [appellee], or a at a very minimum, with [appellant] and [appellee] jointly, so that [appellant] cannot make any independent decisions regarding said funds as he did previously * * *."

**{¶ 34}** On April 7, 2008, the magistrate issued a nunc pro tunc order which adjusted the amount owed to Schafer from $5,825 to $3,250. On April 18, 2008, the magistrate issued a supplemental order in which, upon further consideration, she granted appellee's motion for reconsideration, and ordered that the three trust funds, totaling

approximately $168,380.96, be held in trust by appellant and appellee, jointly, after the time for objections and appeals expires. The magistrate also enjoined appellant from making any decisions regarding the funds without appellee's written consent and authorization. That same day, the trial court summarily adopted the magistrate's March 28, 2008 decision.

**{¶ 35}** A timely appeal was filed by appellant on May 5, 2008. *Kendall v. Gravenhorst*, 6th Dist. No. 08-OT-024. However, on July 17, 2008, we sua sponte dismissed the appeal for lack of a final, appealable order. On October 14, 2008, the trial court issued a decision and judgment entry in which it ultimately upheld the magistrate's decision, after independently reviewing the entire record, making its own findings of fact and conclusions of law, and addressing each of the parties' objections to the magistrate's decision. Specifically, the trial court denied appellant's objections to the magistrate's decision of February 1, 2008, granted appellee's motion to dismiss and dismissed all of appellant's related pending motions; ordered Schafer to discontinue working on the case until further court order; ordered appellee to pay court costs in the amount of $1,003.64; denied appellant's objections to the magistrate's decision of March 28, 2008, and granted appellee's objections to that decision; ordered appellant to pay the guardian ad litem's fees of $705, Schafer's fees of $3,250, and appellee's attorney's fees of $14,120. In addition, the trial court ordered that the children's trust funds be held jointly by appellant and appellee, with the specific provision that appellant may not make any decisions regarding the three trust accounts without appellee's written authorization and consent.

**{¶ 36}** A timely notice of appeal was filed on October 30, 2008. On appeal appellant, acting pro se, sets forth the following six assignments of error:

**{¶ 37}** "I. The trial court erred and abused its discretion by dismissing plaintiff-appellant's motion for adjustment of child support when both appellant and appellee meet Ottawa County Child Support Enforcement criteria for a child support review.

**{¶ 38}** "II. The trial court erred and abused its discretion by ordering a six year forensic audit of plaintiff-appellant which created an unreasonable burden of compliance and greatly exceeded Ohio Revised Code standards for ordering documents. Trial court then ruled appellant must produce documents found missing by the forensic accountant before notification that any document was missing.

**{¶ 39}** "III. The trial court erred and abused its discretion by ordering a forensic audit that did not meet the Ohio Administrative Code standards for accounting which require independence & engagement letters. Forensic accountant incriminated himself when he testified to conduct which violated independence rules.

**{¶ 40}** "IV. The trial court erred and abused its discretion when it dismissed contempt charges against defendant-appellee without any hearing on the issues. Plaintiff-appellant was denied any opportunity to cross examine defendant-appellee or her attorney on issues of intentional misrepresentation of material fact.

**{¶ 41}** "V. The trial court erred and abused its discretion when it used the divorce & alimony section of Ohio Revised Code to awarded [sic] attorney fees in a child

support review case. The child support section of the Ohio Revised Code limited attorney fees to the cost of parentage determination.

**{¶ 42}** "VI. The trial court erred and abused its discretion by awarding attorney fees much higher than what appellee's attorney was charging the defendant-appellee."

**{¶ 43}** We note at the outset that, as set forth above, appellant has represented himself through much of the trial court's proceedings and on appeal, despite his ability to pay an attorney, and in disregard of repeated warnings from the trial court. In such cases, Ohio courts generally hold that "'a pro se litigant is presumed to have knowledge of the law and correct legal procedures so that he remains subject to the same rules and procedures to which represented litigants are bound. He is not given greater rights than represented parties, and must bear the consequences of his mistakes.'" *Murphy-Kesling v. Kesling*, 9th Dist. No. 24176, 2009-Ohio-2560, ¶ 13, quoting *Sherlock v. Myers*, 9th Dist. No. 22071, 2004-Ohio-5178, ¶ 3. Accordingly, in this case, we will hold appellant to the same legal standard as any represented party. Id.

**{¶ 44}** In his first assignment of error, appellant asserts that the trial court erred in dismissing his motion to modify child support because the record shows he sustained a 30 percent drop in income since 2002, and the forensic accountant did not find that he committed tax fraud. Accordingly, appellant argues that his decrease in income should have resulted in a decrease in child support. Appellant further argues that he failed to produce all the requested documents because he received inadequate notice as to which documents were missing.

**{¶ 45}** The record shows that the trial court dismissed appellant's motion to modify child support, and all related motions, not on their merits, but for lack of prosecution, pursuant to Civ.R.41(B)(1).

**{¶ 46}** Civ.R. 41(B)(1) states:

**{¶ 47}** "(1) Failure to prosecute. Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim."

**{¶ 48}** Ohio courts have held that "[t]he power to dismiss for failure to prosecute is within the sound discretion of the trial court, and appellate review is confined solely to whether the trial court abused its discretion." *Williams v. RPA Development Corp.*, 10th Dist. No. 07AP-881, 2008-Ohio-2695, ¶ 6, citing *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 90. (Other citation omitted.) An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

**{¶ 49}** Before upholding the trial court's decision to dismiss a case for failure to prosecute, an appellate court must determine if: (1) the plaintiff had sufficient notice prior to the dismissal; and (2) notice was provided, whether the trial court abused its discretion. *Williams v. RPA Development Corp.*, supra, citing *Pembaur v. Leis*, supra.

**{¶ 50}** A review of the record shows that appellant was put on notice of a possible dismissal for failure to prosecute by virtue of appellee's motion to dismiss, which was

filed on January 22, 2008. Although appellant had seven days from the date the motion was journalized to file a response, he failed either to file the required response or ask for an extension of time to do so.

**{¶ 51}** In its judgment entry, the trial court noted that, due to appellant's repeated refusal to comply with court orders to produce documents necessary for an evaluation of his motion to modify child support, both parties wasted money, time and effort. In addition, the trial court specifically noted that seven days of the court's calendar were wasted due to appellant's failure to comply with court-ordered discovery.

**{¶ 52}** The trial court also stated that appellant's decision to represent himself throughout most of the divorce proceedings "appeared to be deliberate and for the purpose of hindering [appellee] and this Court's efforts at a resolution of this matter." Appellant's argument that he was not given enough time to produce "missing documents" for the forensic investigation ignores the fact that the documents were only "missing" because appellant failed to timely respond to discovery requests in the first place. Finally, although appellant attempted to explain his tardiness in complying with the court's orders at the hearing, he produced no evidence or case law to support his position.

**{¶ 53}** On consideration of the foregoing, we find that appellant had adequate notice that his motion to modify child support could be dismissed if he failed either to respond to the motion to dismiss in a timely and effective manner or comply with the court's orders to produce documents for Schafer's inspection. Accordingly, we conclude that the trial court did not abuse its discretion by dismissing appellant's motion to modify

child support pursuant to Civ.R. 41(B)(1). Appellant's first assignment of error is not well-taken.

**{¶ 54}** In his second assignment of error, appellant asserts that the trial court erred by ordering Schafer to conduct a "six year audit" of appellant's finances. In support, appellant argues that R.C. 3119.68 limits the production of documents in a domestic relations case to only six months. Appellant further argues that R.C. 3119.68 limits the types of documents to be produced to "tax returns, pay stubs, receipts of salary, wages, or other compensation," and that "[n]owhere in the Ohio Revised Code is there any order for personal expenses and personal bank statements for any time period."

**{¶ 55}** R.C. 3119.68 states that, if a hearing is required by R.C. 3199.66, the court shall order the production of certain documents, including a copy of the obligor's federal income tax return from the previous year, along with copies of the obligor's pay stubs and "all other records evidencing the receipt of any other salary, wages, or compensation by the obligor within the previous six months * * *." However, R.C. 3119.66 only requires a hearing to be held if an obligor or obligee contests the results of an administrative proceeding to determine child support. In this case, the child support enforcement agency and appellant both asked the trial court to determine the amount of child support owed, due to the complexity of appellant's financial situation.

**{¶ 56}** In contrast, R.C. 3109.04(C) and Civ.R. 75(D) state that, in order to gather information to be used in a domestic relations proceeding, which includes a child support determination, the trial court "may cause an investigation to be made as to the character,

family relations, past conduct, earning ability, and financial worth of each parent * * *." *Webb v. Lane* (Mar. 15, 2000), 4th Dist. No. 99CA12. In deciding which documents to assess, the trial court is not limited to only federal and state tax documents. *Scott G.F. v. Nancy W.S.*, 6th Dist. No. H-04-015, 2005-Ohio-2750, ¶ 35.

**{¶ 57}** Pursuant to R.C. 3119.05(H), which provides guidance for verifying income and earnings for purposes of determining child support amounts, the trial court, in its discretion, may average income "'over a reasonable period [of years]' when determining the income of a party or parties. The only guideline provided is that this provision is to be applied in 'appropriate' cases." *Wright v. Wright*, 8th Dist. No. 91026, 2009-Ohio-128, ¶ 22; *Cook v. Cook* (Feb. 9, 1996), Lake App. No. 95-L-115.

**{¶ 58}** In this case, the trial court stated that a lengthy forensic investigation was necessary due to the complexity of appellant's financial situation, which included multiple trusts, offshore investments, income derived from employment as an emergency room physician, and income he paid to himself through his own professional corporation. The goal of the investigation was two-fold: to establish whether a modification of appellant's child support obligation was required and to determine the best way to preserve assets in each child's educational trust fund. Under such circumstances, we cannot say that the trial court abused its discretion by ordering a six-year forensic investigation of appellant's finances, or by seeking to review appellant's personal bank statements and expenses. Appellant's second assignments of error is not well-taken.

**{¶ 59}** In his third assignment of error, appellant asserts that the trial court erred by ordering a forensic investigation in violation of "standards set forth in the Ohio Revised Code and the Ohio Administrative Code." In support, appellant argues that Schafer's investigation was not independent, as required by O.A.C. 4701-11-01, because Schafer and appellee's attorney had "detailed discussions" about the case. In addition, appellant argues that the parameters of the investigation were not set forth in an "engagement letter" which, according to appellant, would have limited the length of the investigative period to six months, pursuant to R.C. 3119.68. Finally, appellant challenges the results of the investigation, by stating that the accountant failed to account for the real estate in calculating the value of the children's trust accounts.

**{¶ 60}** First, as set forth in our determination of appellant's second assignment of error, the trial court's power to order a forensic investigation is governed by R.C. 3109.04(C) and Civ.R. 75(D), not R.C. 3119.68. Appellant's argument to the contrary is without merit.

**{¶ 61}** Second, Schafer's investigation was defined by the court's order issued on July 11, 2007, which stated, in pertinent part:

**{¶ 62}** "The Accountant shall conduct or direct an independent accounting of the assets and liabilities of any entities owned in whole or in part by [appellant], including but not limited to [appellant's] assets and liabilities for the purpose of determining [appellant's] collective income. As well, the Accountant shall ascertain whether [appellant] has maintained the three minor children's educational trust funds separate of

any other funds (i.e., commingling), and whether [appellant's] management of the children's educational trust funds has resulted in a loss of income. The Accountant shall have broad powers to request any documentation or information relevant to his research going back to January 1, 2002."

**{¶ 63}** The court order issued in this case clearly sets forth the duties which Schafer was expected to perform. Appellant's argument that further clarification in the form of an "engagement letter" is necessary for Schafer to carry out the trial court's order is without merit.

**{¶ 64}** Third, as set forth above, Schafer calculated the value of the children's trust accounts by starting with the initial value of the three original Vanguard investment accounts, which was $141,563.67, and calculating what the present value of those accounts would be if they had never been liquidated and mixed with appellant's own funds in the Echo Family Limited Partnership, which Schafer found was $168,830.96. The value of the real estate was irrelevant to Schafer's determination. Appellant's argument to the contrary is without merit.

**{¶ 65}** On consideration of the foregoing, this court finds that the trial court did not err by ordering Schafer to conduct a six-year forensic investigation into appellant's finances for the purpose of determining his income and tracing assets set aside for the education of the parties' three minor children. We further find no error in the method used by Schafer to calculate the value of the children's trust educational funds. Appellant's third assignment of error is not well-taken.

**{¶ 66}** In his fourth assignment of error, appellant asserts that the trial court erred by not holding a hearing on his contempt motion. In support, appellant argues that he should have been allowed to cross-examine appellee and her attorney "on issues of intentional misrepresentation of material fact" relating to his income and his handling of the children's educational trust funds.

**{¶ 67}** As set forth in our determination of appellant's first assignment of error, the trial court did not err by dismissing appellant's motion to modify child support and all motions related thereto, including appellant's motion for contempt, for failure to prosecute. Accordingly, the trial court did not err by refusing to allow appellant to cross-examine appellee or her attorney as to the merits of the contempt motion at the hearing held on February 5, 2008, which was held after the motion was dismissed. For the foregoing reasons, appellant's fourth assignment of error is not well-taken.

**{¶ 68}** In his fifth assignment of error, appellant asserts that the trial court erred when it awarded appellee attorney's fees in the amount of $14,120. In support, appellant argues that R.C. 3105.73(A), which gives the trial court discretion to award attorney fees in an action for divorce, does not apply because children are not a "product" of divorce. Appellant further argues that R.C. 3119.966 limits post-divorce awards of attorney's fees to only parentage determinations. In his sixth assignment of error, appellant asserts that the trial court abused its discretion by awarding appellee attorney's fees based on $200 per hour. In support, appellant argues that appellee's attorney testified that he billed

appellee at the rate of $175 per hour. Because these two assignments of error are related, we will address them together.

**{¶ 69}** We note at the outset that appellant's reliance on R.C. 3119.966 is misplaced, since that statute applies only in parentage actions. As to appellant's remaining arguments, R.C. 3105.73(A) states:

**{¶ 70}** "In an action for divorce, dissolution, legal separation, or annulment of marriage of an appeal of that action, a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. * * *."

**{¶ 71}** Arguably, appellant is correct in asserting that R.C. 3105.73(A) limits the award of attorney fees to original divorce actions. However, appellant's argument fails to recognize R.C. 3105.73(B) which provides that:

**{¶ 72}** "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."

**{¶ 73}** Pursuant to R.C. 3105.73(B), a court may award attorney fees in a post-divorce action, provided that the party requesting such fees establishes financial need and demonstrates that the award is reasonable. *Kitchen v. Kitchen*, 12th Dist. No. CA2006-

01-013, 2006-Ohio-6542, ¶ 23, citing *Smith v. Smith*, 12th Dist. No. CA2001-11-259, 2002-Ohio-5449, ¶ 17. The decision of whether or not to award attorney fees in post-divorce proceedings is within the sound discretion of the trial court. Id. at ¶ 24, citing *Carroll v. Carroll*, 5th Dist. No. 05CAF110079, 2006-Ohio-5531, ¶ 69. As set forth above, an abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, supra, at 219.

**{¶ 74}** The record contains the testimony of appellee's attorney, Michael Sandwisch, as to the amount of hours expended on behalf of appellee, which he billed at $175 per hour. Attorney Sandwisch also testified that the average hourly rate in the community for divorce attorneys is as high as $250 per hour and that he bills new clients at the rate of $200 per hour; however, he did not raise his fees for appellee during the course of these proceedings. Appellee testified that she paid her attorney's fees with her own money, along with money she borrowed from her parents. In addition to the above testimony, the record contains documentation of the disparity in the parties' education and incomes. Finally, the record is replete with evidence of delay, confusion, and unnecessary expenditure of time and effort on the part of the court and opposing counsel that was directly caused by appellant's refusal to cooperate with court orders and his failure to retain legal counsel.

**{¶ 75}** This court has reviewed the entire record that was before the trial court and, upon consideration thereof, we find that, as a matter of law, the trial court was authorized

to award attorney's fees to appellee pursuant to R.C. 3105.73(B). We find further that, under the circumstances of this case, it was equitable and reasonable for the trial court to calculate the amount of an award of attorney's fees based on the rate of $200 per hour and the amount of documented work performed by that attorney in this case. Accordingly, the trial court did not abuse its discretion by ordering appellant to pay $14,210 toward appellee's attorney fees. Appellant's fifth and sixth assignments of error are not well-taken.

**{¶ 76}** The judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division, is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE