

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

Janet M. Sullivan

Court of Appeals No. L-09-1022

Appellee

Trial Court No. DR1996-0989

v.

Daniel J. Sullivan

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2010

* * * * *

Henry B. Herschel, for appellee.

Thomas A. Matuszak and Stephen D. Long, for appellant.

* * * * *

COSME, J.

{¶ 1} Appellant, Daniel J. Sullivan, appeals the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, which enforced the property distribution terms of the parties' divorce decree. We conclude that the trial court did not improperly modify the property distribution terms of the divorce decree, but rather acted

within its authority and discretion to ensure that appellee received the benefits due to her under the divorce decree. Therefore, this court finds appellant's five assignments of error not well-taken, and affirms the judgment of the trial court.

I. BACKGROUND

{¶ 2} The parties were married in November 1986 and their final divorce decree was entered by the Lucas County Court of Common Pleas, Domestic Relations Division in July 1997. As part of the divorce decree, the parties incorporated their agreement related to the division of marital property.

{¶ 3} Relevant to this appeal, the divorce decree provides for the assignment and transfer to appellee, Janet M. Sullivan, through a qualified domestic relations order or separate judgment entry, 25 percent of appellant Daniel J. Sullivan's interest in his retirement plan with the Civil Service Retirement System ("CSRS"), as of May 14, 1997.

{¶ 4} On September 11, 1997, the parties filed a "Pension Distribution Decree," which provided as follows: "Participant is (or will be) eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. Alternate payee is entitled to a share of participant's gross monthly annuity under the Civil Service Retirement System to be computed as follows: Twenty Five Percent (25.00%) of the gross monthly benefit that the participant had accrued as of May 14, 1997." In addition, the distribution decree reserved jurisdiction in the trial court "to supervise the payment of retirement benefits" and to modify the distribution decree if it becomes invalid or ineffective.

{¶ 5} In 1999, appellant withdrew the deposits in the CSRS and redeposited them in the District of Columbia Police Officers' and Firefighters' Retirement Plan ("D.C. Plan.") Thereafter, appellant retired in 2003 and began receiving retirement benefits with no notice or allocation of benefits to appellee.

{¶ 6} In 2006, appellee discovered that appellant had changed retirement plans and was collecting benefits. She filed a motion with the trial court for the approval of a new qualified domestic relations order ("QDRO") directed to the D.C. Plan and the award of retroactive benefits and attorney fees. In a February 7, 2008 judgment entry ("2008 Judgment Entry"), the trial court granted appellee partial summary judgment, holding that she was entitled to a QDRO perfecting her rights in appellant's retirement plan, as defined in the divorce decree, and retroactive benefits. The matter was continued to determine appellee's interest in the D.C. Plan and the amount of retroactive benefits.

{¶ 7} In a January 9, 2009 judgment entry ("2009 Judgment Entry"), the trial court determined that appellee was entitled to a monthly sum of \$1,325.07 from the D.C. Plan, \$76,185.92 in retroactive benefits, and attorney's fees and costs. The court also issued a QDRO assigning appellee a share of the benefits from the D.C. Plan ("2009 QDRO"). The 2009 QDRO provided that "[t]he benefit to be paid from the Plan directly to the alternate payee pursuant to the participant's assignment of benefits, in compliance with the D.C. Spouse Equity Act of 1988, as amended, shall be * * * (\$1,325.07) of the participant's gross monthly benefit."

{¶ 8} Appellant raises five assignments of error.

II. JURISDICTION OVER ASSET DISTRIBUTION

{¶ 9} In his first assignment of error, appellant argues that:

{¶ 10} "I. The trial court lacked subject-matter jurisdiction to modify the property-distribution terms of the parties' Divorce Decree; therefore the orders that purport to do so should be vacated by this Court as being void *ab initio*, namely; the 1997 Pension Distribution Decree, the February 7, 2008 Judgment Entry granting partial summary judgment in favor of Janet, the January 9, 2009 Judgment Entry, and the January 9, 2009 QDRO."

{¶ 11} We disagree.

{¶ 12} Retirement benefits accumulated during a marriage are marital property, subject to division in a divorce proceeding. *Erb v. Erb* (1996), 75 Ohio St.3d 18, 20, 661 N.E.2d 175; R.C. 3105.171(A)(3)(a). In order to divide such assets, a domestic relations court issues what is known as a QDRO or an equivalent judgment entry. *Weller v. Weller* (1996), 115 Ohio App.3d 173, 178, 684 N.E.2d 1284. The QDRO implements some of the terms of the divorce decree by assigning to an alternate payee the right to receive all or a portion of benefits payable with respect to a participant under a retirement plan. See *Wilson v. Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, ¶ 6-7, 878 N.E.2d 16, citing Section 1056(d)(3)(B)(i)(I), Title 29, U.S.Code and Section 414(p)(1)(A)(i), Title 26, U.S.Code.

{¶ 13} As a general rule, once a court orders the division of retirement benefits in a divorce decree, it lacks jurisdiction to subsequently modify the asset distribution. R.C.

3105.171(I); *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 350 N.E.2d 413, paragraph one of the syllabus, superseded by statute and overruled on other grounds, *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355, 421 N.E.2d 1293. A trial court, however, always retains the power to enforce the provisions of a divorce decree. *Green v. Green*, 10th Dist. No. 05AP-484, 2006-Ohio-2534, ¶ 12; R.C. 3105.89. If a decree is ambiguous, a trial court has continuing jurisdiction to "clarify and construe its original property division so as to effectuate its judgment." *Gordon v. Gordon* (2001), 144 Ohio App.3d 21, 24, 759 N.E.2d 431. Further, a trial court may reserve jurisdiction to modify property distribution by providing for such authority in the original decree. *Schrader v. Schrader* (1995), 108 Ohio App.3d 25, 28, 669 N.E.2d 878.

{¶ 14} A question of jurisdiction is reviewed de novo, with no deference given to the trial court. *Swayne v. Newman* (1998), 131 Ohio App.3d 793, 795, 723 N.E.2d 1117. In the present matter, appellant contends that the trial court acted without jurisdiction when it issued two judgment entries and the 2009 QDRO that modified the property distribution terms of the divorce decree. For ease of analysis, we will address each alleged "modification," rather than each order and entry, chronologically.

A. Valuation of benefits

{¶ 15} Appellant first contends that the 1997 Distribution Decree, 2008 Judgment Entry, 2009 Judgment Entry and 2009 QDRO modified the property distribution terms of the divorce decree by changing the valuation of appellee's share of appellant's retirement benefits.

{¶ 16} "In interpreting a divorce decree that incorporates the parties' separation agreement, the normal rules of contract interpretation generally apply to ascertain the meaning of the language." *Yarder v. Scherer*, 6th Dist. No. L-03-1035, 2003-Ohio-6744, ¶ 15. "When construing a contract, the principal goal is to effectuate the parties' intent," as evidenced by the contractual language. *Id.*, citing *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374, paragraph one of the syllabus. "Thus, a court will give common words appearing in the written instrument their ordinary meaning, unless manifest absurdity results or unless some other meaning is clearly evidenced from the instrument." *Peppas v. Hille*, 6th Dist. No. L-03-1211, 2004-Ohio-2463, ¶ 16, citing *Alexander v. Buckeye Pipe Line Co.* (1978) 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus, superseded by statute on other grounds.

{¶ 17} We start by determining whether the language of the divorce decree is ambiguous. The divorce decree, in pertinent part, states: "Defendant, Daniel J. Sullivan, shall assign and transfer to Plaintiff, Janet M. Sullivan, through a Qualified Domestic Relations Order, or separate Judgment Entry, whichever is applicable, twenty-five percent (25%) of the accrued monthly benefit that the Defendant, Daniel J. Sullivan, was entitled to receive as of May 14, 1997, from Defendant, Daniel J. Sullivan's interest in his retirement plan with the Civil Service Retirement System, pursuant to the provision of the Spouse Equity Act of 1984." (Emphasis sic.)

{¶ 18} Appellant contends the provision assigns appellee a share of the contributions that appellant had paid into the CSRS plan as of May 14, 1997, which was

all he was "entitled to receive" on that date. Appellant states he only became eligible to receive monthly retirement benefits after additional years of employment following the divorce and retirement. Appellee, meanwhile, argues this provision assigns her a share of the monthly benefits that appellant would receive upon retirement, based upon his credited service and contributions to the CSRS as of May 14, 1997.

{¶ 19} We find that the disputed terms of the divorce decree are somewhat ambiguous. The date certain in the divorce decree purports to limit appellee's share to whatever benefits appellant could have received on May 14, 1997. The decree, however, also describes appellee's interest as a share of the "monthly benefits" – benefits which appellant claims he could only receive upon timely retirement. The language is reasonably susceptible of more than one meaning.

{¶ 20} The trial court found appellee was entitled to a share of the monthly benefits that appellant would receive upon retirement, based upon his interest in the plan as of May 14, 1997. This approach is not unreasonable, arbitrary or unconscionable. The decree's use of the language "monthly benefits" supports the interpretation that appellee is entitled to a share of the monthly benefits that appellant began receiving upon retirement, and not simply a share of the contributions that appellant had made into the plan as of the divorce date.

{¶ 21} Moreover, the conduct of the parties and relative equities support this outcome. Appellee did not receive her portion of the retirement benefits at the time of divorce, which would have allowed her to invest her share for future distribution.

Instead, appellant retained appellee's share in his retirement account, allowing his pension to remain intact, increasing the value of his total accumulated benefits, and saving him the expense of having to pay appellee's portion of his retirement at the time of the divorce. We have previously found in similar situations that such agreements "anticipate[] that the retirement benefits will be received in the future." *Yarder*, 2003-Ohio-6744, ¶ 22. See *Peppas*, 2004-Ohio-2463, ¶ 17-19.

{¶ 22} In light of these considerations, we find that the trial court did not abuse its discretion by interpreting ambiguous language in the divorce decree to grant appellee a share of the monthly benefits that appellant would receive upon retirement. Accordingly, the court did not act without jurisdiction by improperly modifying the divorce decree in the 1997 Distribution Decree, 2008 Judgment Entry, 2009 Judgment Entry and 2009 QDRO.

B. Entitlement to Benefits from D.C. Plan

{¶ 23} Appellant next contends that the 2008 Judgment Entry, 2009 Judgment Entry and 2009 QDRO modified the property distribution terms of the divorce decree by granting appellee an interest in the D.C. Plan.

{¶ 24} As noted above, a trial court has continuing jurisdiction to enforce the provisions of a divorce decree, and may expressly reserve jurisdiction to revisit the division of property. See *Randolph v. McCullough*, 7th Dist. No. 99-CA-161, 2000-Ohio-2645. A trial court therefore has the "right and privilege" to amend a court order that does not reflect a divorce decree's intent, *Schneider v. Schneider*, 5th Dist. No.

2009CA00090, 2010-Ohio-534, ¶ 19, including one that identifies the wrong retirement plan. See, e.g., *Oliver-Pavkovich v. Pavkovich*, 7th Dist. No. 02 CA 223, 2003-Ohio-6718, ¶ 25-26.

{¶ 25} In the present matter, the intent of the divorce decree and distribution decree was to provide appellee with retirement pay that fairly represents her marital share of appellant's retirement benefits. The divorce decree and distribution decree sought to achieve this intention by assigning appellee an interest in appellant's retirement plan with the CSRS. Following the divorce, appellant transferred his interest in the CSRS to the D.C. Plan.

{¶ 26} We find that the trial court had continuing jurisdiction to recognize and award appellee her share of the benefits appellant accumulated under the CSRS and transferred to the D.C. Plan. The court was merely enforcing the divorce decree and maintaining the integrity of its intent. To hold otherwise would allow appellant to defeat appellee's interest in his retirement benefits simply by transferring them to another plan.

{¶ 27} We further find that the divorce decree and distribution decree contained sufficient language to allow the trial court to retain jurisdiction over this issue. The divorce decree specifically provided for the issuance of the distribution decree to divide marital retirement benefits. The distribution decree reserved jurisdiction in the trial court "to supervise the payment of retirement benefits" and modify the distribution decree in the event that it became invalid or ineffective. Appellant's change of retirement plans frustrated the payment of retirement benefits, essentially rendering the distribution decree

ineffective. Thus, the court retained jurisdiction to resolve the confusion that appellant caused, and issue additional orders protecting appellee's interest as it existed in the D.C. Plan.

{¶ 28} Thus, we find that the trial court did not act without jurisdiction by recognizing appellee's continuing interest in the CSRS plan, as it exists in the D.C. Plan, in the 2008 Judgment Entry, 2009 Judgment Entry and 2009 QDRO.

C. Fifteen-day deadline

{¶ 29} Appellant next contends that the trial court lacked jurisdiction to issue the 1997 Distribution Decree, 2008 Judgment Entry, 2009 Judgment Entry and 2009 QDRO because the implementation clause of the divorce decree divested the trial court of jurisdiction to effectuate a property distribution more than 15 days after the court journalized the decree.

{¶ 30} The divorce decree, in pertinent part, states:

{¶ 31} "IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that upon the execution of this Judgment Entry, each party shall deliver to the other party, or permit the other party to take possession of all items of property to which each is entitled under the terms of this Judgment Entry and all periodic payments required under the terms of this Judgment Entry shall commence.

{¶ 32} "Within fifteen (15) days after journalization of a Decree of Dissolution of the marriage of the parties or a Decree of Divorce between the parties, incorporating this Agreement or any amendment or modification thereof, each party shall execute and

deliver all deeds, conveyances, titles, certificates and other documents or instruments necessary and proper to effectuate all the terms of this Judgment Entry.

{¶ 33} "Upon the failure of either party to execute and deliver any such deed, conveyance, title, certificate or other document or instrument to the other party, this Judgment Entry shall constitute and operate as such properly executed document and the County Auditor and County Recorder and any and all other public and private officials are hereby authorized and directed to accept this Judgment Entry, or properly certified copy thereof, in lieu of the document regularly required for such conveyance or transfer."

{¶ 34} We find that the divorce decree's implementation clause is unambiguous in that it does not limit the trial court's jurisdiction to divide marital retirement benefits through the issuance of a QDRO or separate judgment entry. The implementation clause simply allows the divorce decree to serve in lieu of a properly executed deed, title, or certificate if the parties do not transfer such documents within 15 days of the journalization of the decree. We note that the actions of the parties support this interpretation. Attorneys for both parties signed the distribution decree on their clients' behalf, and submitted it to the court after the 15 day deadline. Thus, it appears that neither party intended the implementation clause to prevent the court from effectuating the division of retirement benefits.

{¶ 35} Accordingly, we find that the implementation clause of the divorce decree did not divest the trial court of jurisdiction to issue a QDRO or separate judgment entry to implement the divorce decree's distribution of retirement benefits.

{¶ 36} Therefore, we conclude that the trial court had subject matter jurisdiction to issue the 1997 Distribution Decree, 2008 Judgment Entry, 2009 Judgment Entry and 2009 QDRO. Appellant's first assignment of error is not well-taken.

III. ENFORCEMENT OF REFUND PROVISION

{¶ 37} In his second assignment of error, appellant contends that:

{¶ 38} "Assuming the 1997 Pension Distribution Decree is not jurisdictionally void *ab initio*, it remains a valid, enforceable order and the trial court committed reversible error when it refused to enforce the refund provision at ¶ H in that order."

{¶ 39} We disagree.

{¶ 40} A domestic relations court has broad discretion and power to enforce its own orders. See *Townsend v. Townsend*, 4th Dist. No. 08CA9, 2008-Ohio-6701, ¶ 57, citing R.C. 3105.011. In the first assignment of error, we determined that the distribution decree was not jurisdictionally void. Appellant now contends that the trial court should have enforced a paragraph H from that order, rather than issue the 2009 QDRO.

{¶ 41} Paragraph H of the distribution decree states: "If participant becomes eligible and applies for a refund of employee contributions, alternate payee is entitled to a pro-rata share of the refund of employee contributions determined as follows: the employee contributions shall be multiplied by a fraction the numerator of which shall be the Twenty Five Percent (25.00%) of the gross monthly benefit that the participant had accrued as of May 14, 1997 and the denominator of which shall be the then existing gross

monthly benefit entitlement of the participant. The United States Office of Personnel Management is directed to pay alternate payee's share directly to alternate payee."

{¶ 42} The issuance of the new QDRO was proper because appellant's own conduct precluded enforcement of Paragraph H. Additionally, it is not at all clear that Paragraph H was even applicable. The clause applies to the direct refund of employee contributions from the retirement plan. Here, appellant transferred the balance under the CSRS plan into the D.C. Plan.

{¶ 43} Therefore, we conclude that the trial court did not abuse its discretion in regard to Paragraph H of the 1997 Distribution Decree. Appellant's second assignment of error is not well-taken.

IV. EXCLUSION OF HEARSAY EVIDENCE

{¶ 44} In his third assignment of error, appellant contends that:

{¶ 45} "The trial court committed reversible error when it refused to admit Defendant's Exhibit 29 at trial."

{¶ 46} We disagree.

{¶ 47} Appellant contends that the trial court erred by sustaining appellee's objection to cross-examination testimony on defendant's exhibit No. 29, and by excluding the same from evidence. Defendant's exhibit No. 29 consisted, in pertinent part, of a letter that the Chief of the Employee Benefits Branch of the U.S. Secret Service, M. Gregory Vass, purportedly authored in response to questions posed by appellant's counsel

concerning his client's retirement benefits. Appellant twice subpoenaed Vass to testify, but the Secret Service refused to "authorize" his participation in the trial.

{¶ 48} Appellant admits that defendant's exhibit No. 29 is hearsay, but claims that it was admissible under the hearsay exceptions within Evid.R. 803(6), 803(8), 803(14), and 803(15). Appellant does not explain how each exception applies. Evid.R. 803(6) and 803(8) do not apply, because the record does not demonstrate the information necessary to authenticate the letter as a business record or public record under the rule. Further, the letter is not admissible under Evid.R. 803(14) or 803(15) because it is not a record of a document or statement in a document that affects an interest in property. It merely states a government employee's opinion concerning appellant's entitlement to retirement benefits, made entirely in response to questions posed by appellant's counsel.

{¶ 49} "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is not admissible except as otherwise provided by rule, statute, or constitution. Evid.R. 802. "A letter written by a third party not involved in the trial and not present for cross-examination is generally excluded [as hearsay]." *Oliver v. Empire Equipment* (Feb. 10, 1983), 8th Dist. No. 45051, citing *Geller v. Geller* (1926), 115 Ohio St. 468, 154 N.E. 727.

{¶ 50} An appellate court will not reverse a trial court's decision to admit or exclude certain evidence, absent an abuse of discretion. *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 299, 587 N.E.2d 290. A trial court has "broad

discretion to determine whether a declaration should be admissible as a hearsay exception." *State v. Denver* (1992), 64 Ohio St.3d 401, 410, 1992-Ohio-41, 596 N.E.2d 436, citing *State v. Rhodes* (1986), 23 Ohio St.3d 225, 492 N.E.2d 430.

{¶ 51} In sum, defendant's exhibit No. 29 was hearsay to which appellee timely objected, and appellant has failed to show that it falls within an exception to the hearsay rule. Therefore, we conclude that the trial court did not abuse its discretion by excluding defendant's exhibit No. 29. Appellant's third assignment of error is not well-taken.

V. 2008 JUDGMENT ENTRY

{¶ 52} In his fourth assignment of error, appellant contends that:

{¶ 53} "The trial court erred as a matter of law when it granted partial summary judgment for Janet in its February 7, 2008 Judgment Entry."

{¶ 54} We disagree.

{¶ 55} We review a trial court's grant of summary judgment de novo. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243. Therefore, appellee may prevail under Civ.R. 56(C) only if "(1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party." *Id.*

{¶ 56} In the present matter, appellee's motion for summary judgment sought a court order recognizing her interest in appellant's D.C. retirement plan, and an award of

retroactive benefits and attorneys' fees. The record establishes that at the time of the divorce, appellant was a participant in the CSRS. The trial court entered a divorce decree awarding appellee a portion of appellant's interest in his CSRS plan, and issued a distribution decree to implement the division. Following the divorce, appellant secretly transferred his interest in the CSRS to the D.C. Plan, retired, and began receiving benefits with no notice or allocation to appellee.

{¶ 57} We conclude without question that a portion of the benefits that appellant is receiving from the D.C. Plan is derived from appellant's interest in the CSRS that was transferred, an interest that appellee retains. Appellant's own conduct frustrated realization of the property distribution as originally set out in the distribution decree. We reach the same conclusion as the trial court. Appellee was entitled as a matter of law to "(a) a qualified domestic relations order or separate judgment entry, whichever is applicable, perfecting her rights in the Defendant's retirement plan as awarded to her pursuant to the Divorce Decree and (b) retroactive benefits to which she would have been entitled since the Defendant's retirement."

{¶ 58} Accordingly, the trial court did not err when it granted appellee partial summary judgment in its 2008 Judgment Entry. Appellant's fourth assignment of error is not well-taken.

VI. 2009 JUDGMENT ENTRY AND QDRO

{¶ 59} In his fifth assignment of error, appellant contends that:

{¶ 60} "The trial court's January 9, 2009 Judgment Entry and QDRO were rendered against the manifest weight of the evidence."

{¶ 61} We disagree.

{¶ 62} An appellate court will not reverse a trial court on the manifest weight of the evidence if "some competent, credible evidence going to all the essential elements of the case" supports the trial court's judgment. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578. A reviewing court presumes that a trial court's findings of fact are correct, and will not substitute its judgment for that of the trial court when the findings are adequately supported. *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. "The rationale underlying this deferential standard of review is rooted in the notion that the trial court is best suited to view the witnesses, observe their demeanor, and utilize first-hand observations in weighing the credibility of evidence and testimony." *Yoder Mach. Sales Co. v. Weldon F. Stump & Co., Inc.* (2008), 176 Ohio App.3d 668, 2008-Ohio-72, ¶ 13, 893 N.E.2d 522.

A. Benefit Valuation and Refund Provision

{¶ 63} Appellant contends that the 2009 Judgment Entry and 2009 QDRO were rendered against the manifest weight of the evidence because they are based on two

alleged faulty presumptions: (1) appellee's share of appellant's benefits was to be calculated upon retirement, and (2) the refund provision in paragraph H of the 1997 Distribution Decree was invalid and unenforceable. This merely recasts appellant's first and second assignments of error, both of which we have already rejected.

{¶ 64} Additionally, appellant's election not to present a defense in chief at trial weakens his argument under this assignment. The direct evidence in the trial record is favorable to appellee's position, particularly that of her expert witness, who testified as to the calculations he used to determine appellee's share of appellant's benefits. The trial court found appellant's direct presentation competent and more credible than the exhibits appellant introduced, and the testimony he elicited through cross examination. The trial court's judgment was supported by competent, credible evidence. Therefore, we conclude that the trial court's 2009 Judgment Entry and 2009 QDRO were not rendered against the manifest weight of the evidence.

B. Attorney's Fees

{¶ 65} Under appellant's fifth assignment of error, appellant challenges the trial court's award of attorney's fees and costs to appellee. We address this argument separately, as it is governed by a different standard of review.

{¶ 66} "The decision of whether to award attorney fees rests in the sound discretion of the court and will not be overturned on appeal absent an abuse of

discretion." *Moore v. Moore*, 175 Ohio App.3d 1, 2008-Ohio-255, ¶ 81, 884 N.E.2d 1113. R.C. 3105.73(B) allows a trial court to "award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable." In determining what is equitable, a 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." R.C. 3105.73(B). (Emphasis added.) Conduct supporting an award of attorney's fees may include the failure to pay a share of retirement benefits pursuant to a court order, see, e.g., *Cabrera v. Cabrera*, 10th Dist. No. 08AP-26, 2008-Ohio-4359, ¶ 25, or actions that unnecessarily prolong the proceedings, see, e.g., *Doody v. Doody*, 11th Dist. No. 2006-L-200, 2007-Ohio-2567, ¶ 63; *McCord v. McCord*, 10th Dist. Nos. 06AP-102 and 06AP-684, 2007-Ohio-164, ¶ 18.

{¶ 67} The trial court focused on the conduct of the parties to determine whether an award of attorney's fees was equitable. It found that appellant knowingly violated appellee's rights by failing to comply with the divorce decree, causing the instant litigation. Further, the trial court found that appellant's conduct during the case was dilatory in nature and designed only for the purpose of delay, citing as examples appellant's appeal of various orders that were not final and appealable, and appellant's failure to advance a defense in chief at trial justifying his position. Finally, the court found that appellee was unable to afford her own attorney's fees and litigation expenses.

{¶ 68} We note that the record contains evidence that appellee is capable of generating sufficient income to afford her own legal expenses. However, the conduct of the parties is a relevant factor in determining whether an award of attorney fees is equitable, and the trial court found that appellant's conduct caused and unnecessarily prolonged the instant litigation. See R.C. 3105.73(B). Under these circumstances, we conclude that the trial court did not abuse its discretion in awarding attorney's fees and litigation expenses to appellee. Appellant's fifth assignment of error is not well-taken.

VII. CONCLUSION

{¶ 69} The judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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