**[Cite as *Borton v. Borton*, 2011-Ohio-143.]**

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

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| Gregory H. Borton | Court of Appeals No. F-10-003 |
| Appellant/Cross-Appellee | Trial Court No. 00 DV 186 |
| v. | |
| Kathy J. Borton | **DECISION AND JUDGMENT** |
| Appellee/Cross-Appellant | Decided: January 14, 2011 |

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Erik G. Chappell, for appellant/cross-appellee.

Daniel P. McQuade, for appellee/cross-appellant.

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OSOWIK, P.J.

**{¶ 1}** This is an appeal from a judgment of the Fulton County Court of Common Pleas, Domestic Relations Division, which denied the parties' opposing motions to modify their spousal support order, affirmed the equal division of certain marital investment accounts as established by the divorce decree, and awarded appellee a partial

contribution for attorney's fees and costs against appellant. For the reasons set forth below, this court affirms the judgment of the trial court.

**{¶ 2}** Appellant/cross-appellee, Gregory Borton, sets forth the following two assignments of error:

**{¶ 3}** "No. 1: Whether the Trial Court erred when it ruled that Appellant did not demonstrate a sufficient change of circumstances to allow him to have a reduction, or termination, of spousal support?

**{¶ 4}** "No. 2: Whether the Trial Court erred when it failed to recognize that Appellee received an additional $26,323.34 from Plaintiff's Retirement Savings Plan which should have, therefore, negated any award of attorney fees?"

**{¶ 5}** On cross-appeal, appellee/cross-appellant, Kathy Borton, sets forth the following two assignments of error:

**{¶ 6}** "No. 1: The trial court erred in denying an increase in the amount of spousal support where there was a change in Appellant's income that was both substantial and not contemplated at the time of the divorce, and where an increase in spousal support was appropriate under the totality of the circumstances.

**{¶ 7}** "No. 2: The trial court erred by viewing the enforcement of the parties' post-divorce agreement, dividing certain undivided or improperly divided, investment accounts, as an impermissible modification of the original property division, and by not viewing such enforcement as an equitable remedy consistent with the original property division."

**{¶ 8}** The following undisputed facts are relevant to the issues raised on appeal. On March 26, 1977, the parties were married. Approximately 23 years later, in 2000, the parties separated and began the divorce process. On August 18, 2000, appellant filed for divorce. On November 10, 2003, a final divorce decree judgment entry between the parties was issued. Subsequent to the filing of the divorce, appellant, a long term employee of First Energy Corp., was ordered to pay appellee, a part-time optical technician at Wal-Mart, $400 per week in spousal support.

**{¶ 9}** On April 9, 2009, an evidentiary hearing was conducted on various post-divorce motions and issues raised by the parties. On January 13, 2010, the trial court issued its ruling. As pertinent to the substantive basis of this appeal, the trial court held that neither party had established the prerequisite change in circumstances to warrant modification of the spousal support order, affirmed the divorce decree provisions dividing enumerated investment accounts on a 50-50 basis, affirmed each party sharing on a likewise equal, 50-50 basis any appreciation or depreciation in these account values prior to the liquidation and split, and awarded appellee approximately two-thirds of her attorney's fees and costs against appellant. Timely notice of appeal was filed.

**{¶ 10}** In the first assignment of error, appellant asserts that the trial court erred in finding that he failed to establish the prerequisite change in circumstances to warrant terminating or reducing the amount of spousal support to be paid to appellee. In support, appellant emphasizes appellee's obtaining part-time employment following the divorce,

rental income paid to appellee by the parties' son, and other claimed income enhancements arguably warranting reduction or elimination of spousal support.

**{¶ 11}** It is well-established that the standard of review of a trial court judgment on a spousal support modification motion is abuse of discretion. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. An abuse of discretion requires demonstrating more than a mere error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

**{¶ 12}** In conjunction with the above-described governing legal principles, R.C. 3105.18(E) establishes that a trial court may elect to modify spousal support upon demonstration of a change of circumstances of either party. A change of circumstances is defined as, "any increase or involuntary decrease in the party's wages, salary, bonuses, living expenses, or medical expenses."

**{¶ 13}** We have carefully reviewed and scrutinized the record of evidence paying particular attention to the January 13, 2010 judgment which triggered the instant appeal. At the outset, we note that the disputed trial court judgment is extensive and precise. With respect to the competing spousal support modification motions, the record reflects appellant's annual average income to be approximately $101,387.87, with it ranging from $83,986 on the low end to a high of $128,324.20 earned by appellant in 2008. By contrast, the record reflects that appellee's post-divorce, part-time employment at Wal-Mart entails compensation of $10.45 per hour. Once appellee purchases medical benefits through her employer, her net earnings are de minimis.

**{¶ 14}** Through an abundance of documentation and evidence submitted over the course of this case, the record reflects appellee's annual gross income to be approximately $41,315.00, in comparison to appellant's average annual gross income of $101,387.87. While it is not disputed that appellee possesses other potentially liquid assets, such as a significant money market account which could conceivably be tapped and utilized towards appellee's normal living expenses, appellant's suggestion that those assets somehow lessen or negate his legal monthly spousal support obligation towards appellee's monthly living expenses is not supported by relevant or controlling law or precedent. There is no requirement that appellee exhaust the money market account as a prerequisite to continuing eligibility to receive previously established spousal support.

**{¶ 15}** The record reflects appellee's approximate monthly living expenses to be $2,769.50 and her gross monthly income to be $3,442.96. Given the readily apparent constraints of such budgetary parameters, along with the numerous other factors taken into consideration by the court and carefully delineated in its opinion, there is no evidence in the record to suggest that the trial court judgment finding that the spousal support order should not be modified or terminated was arbitrary, unreasonable or unconscionable. We find appellant's first assignment of error not well-taken.

**{¶ 16}** In appellant's second assignment of error, he disputes the award to appellee of approximately two-thirds of her attorney's fees and costs, which the court accurately noted parallels the approximate income ratios of the parties. In support, appellant asserts

that appellee received an overpayment or windfall in the distribution to her from appellant's retirement accounts with First Energy.

**{¶ 17}** Like the multitude of other marital investment accounts, the divorce decree established that the First Energy 401(k), "shall be divided equally between the parties on a 50/50 basis, and the parties stipulated a value of $102,000 as of May 6, 2003." Appellant now contends that any amount in excess of $51,000 accrue solely to his benefit and not be shared equally between the parties.

**{¶ 18}** We note simply that the divorce entry did not establish a cap or maximum on the distribution to appellee from the 401(k) at $51,000. Rather, it established that the total value at the stated date to be $102,000 and that the plan be divided equally on a 50/50 basis. As such, any appreciation or depreciation occurring between that valuation date and the payout date must be shared equally between the parties to comport with the unambiguous order of a 50/50 split of the value of the account. To suggest otherwise breaches the clear terms of the agreement.

**{¶ 19}** There is no controlling legal authority directing that any appreciation in account value between judgment date and payout accrue solely to the benefit of appellant or otherwise operate so as to bar the appellee's recovery of a portion of attorney's fees and costs. We find appellant's second assignment of error not well-taken.

**{¶ 20}** On cross-appeal, appellee's first assignment of error is substantively analogous to appellant's first assignment of error. Both are premised on the notion that a change in circumstances was shown so as to warrant adjustment of the spousal support

amount. We need not belabor our analysis on this point. The trial court went to painstaking lengths and examined voluminous evidence and records in support of its decision that the spousal support order of $1,600 per month from appellant to appellee need not be modified or eliminated. The decision to maintain the current spousal support order was not an abuse of discretion. We find appellee/cross-appellant's first cross-assignment of error not well-taken.

**{¶ 21}** Appellee's second cross-assignment of error asserts that the trial court erred in interpreting the language of the divorce decree to mean that each of the enumerated accounts must be apportioned between the parties on an equal, 50/50 basis. Appellee asserts that a "reasonable interpretation" would enable an uneven split of some accounts so long as an even split of a comprehensive account values combined was arguably achieved.

**{¶ 22}** We find that appellee's interpretation does not comport with the plain meaning of the language utilized in the divorce decree executed between the parties. The divorce decree explicitly and unambiguously stated that the parties shall divide on an equal, 50/50 basis various enumerated accounts set forth one by one immediately following the express mandate of a 50/50 split. This mandate was clearly applicable to each of the individually listed accounts and there is simply no language supporting the contention of uneven distribution of any of the enumerated accounts. We find appellee's second cross-assignment of error to be not well-taken.

**{¶ 23}** On consideration whereof, the judgment of the Fulton County Court of Common Pleas, Domestic Relations Division, is hereby affirmed. Pursuant to App.R. 24, the parties are ordered to each pay one-half the cost of this appeal.

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, P.J. _____
CONCUR.
JUDGE