

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jennifer J. Grueser, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-228
 : (C.P.C. No. 07DR-3615)
 :
 Laurence J. Mily, Jr., : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on September 23, 2010

*Solove Law Office, Kerry L. McCormick, Ronald L. Solove
and Elizabeth M. Fischer, for appellee.*

Laurence J. Mily, Jr., pro se.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

McGRATH, J.

{¶1} Defendant-appellant, Laurence J. Mily, Jr. ("appellant"), appeals from the judgment entry/decree of divorce issued by the Franklin County Court of Common Pleas, Division of Domestic Relations on February 10, 2010.

{¶2} Appellant and plaintiff-appellee, Jennifer J. Grueser ("appellee"), were married on June 21, 1997, and had two children born as issue of the marriage, to wit:

Laurence, born April 2, 1998, and Natalie, born June 24, 1999. Appellee filed a complaint for divorce on September 12, 2007. Appellant filed an answer and counterclaim, and on January 5, 2009, the matter came to be heard before the court. All contested issues, however, were resolved by agreement of the parties, except for attorney fees. According to the transcript from the hearing, the parties stipulated to submit the issue of attorney fees to the court on written memoranda with supporting documentation.

{¶3} On May 11, 2009, the trial court issued a judgment entry awarding attorney fees ("attorney fees entry"), pursuant to R.C. 3105.73, to appellee in the amount of \$8,000. Appellant filed an appeal with respect to the attorney fees entry on June 5, 2009. However, because final judgment in the case had not been rendered, this court dismissed said appeal for lack of a final appealable order on December 17, 2009.

{¶4} On February 10, 2010, the parties filed an "Agreed Judgment Entry-Decree of Divorce" ("agreed entry"), resolving all issues in the case. With respect to attorney fees, the agreed entry states:

The issue of attorney's fees and costs was submitted to the Court on written argument with stipulated exhibits. The Court issued its Judgment Entry on the issue on May 11, 2009. Said Entry is incorporated herein, neither party having waived his or her right to appeal this one contested issue.

(Agreed entry at 4.)

{¶5} This appeal followed, and appellant brings the following two assignments of error for our review:

FIRST ASSIGNMENT OF ERROR:

THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING APPELLEE'S MOTION FOR AN AWARD OF ATTORNEY'S FEES.

SECOND ASSIGNMENT OF ERROR:

THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING DEFENDANT TO PAY A LUMP SUM AMOUNT IN LESS THAN 60 DAYS OF ITS JUDGMENT ENTRY.

{¶6} Appellant's two assigned errors challenge the trial court's award of attorney fees pursuant to R.C. 3105.73(A), which provides:

In an action for divorce, dissolution, legal separation, or annulment of marriage or 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. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate.

{¶7} An award of attorney fees under R.C. 3105.73 lies within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Huffer v. Huffer*, 10th Dist. No. 09AP-574, 2010-Ohio-1223, ¶19. Thus, an appellate court must affirm unless the trial court's decision is unreasonable, arbitrary, or unconscionable. *Id.*, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218.

{¶8} Appellee had two different attorneys during this litigation. Appellee's first counsel represented her from August 2007 to July 15, 2008, during which time she incurred approximately \$57,000 in legal fees. Appellee's second counsel, who was responsible for facilitating settlement in this case, has represented appellee from August 5, 2008 to present and submitted bills approximating \$7,900 in legal fees. Thus, of all the fees incurred, and despite the fact that appellee requested \$35,000 in her memorandum in support of attorney fees, the trial court found an attorney fees award of only \$8,000 to be equitable.

{¶9} In its decision awarding fees in the amount of \$8,000, the trial court considered the division of the marital assets and the disparity in incomes between the parties. Most notably, the trial court found "the [appellant's] unfettered actions, perhaps encouraged by his having no liability for additional filing fees or for attorney's fees, have definitely driven up the cost of the litigation between the parties." (Attorney fees entry at 2.) The trial court then went on to list five examples of various filings and noted that the court file was five volumes thick. In the trial court's view, this matter did not present issues sufficient to warrant such a voluminous file.

{¶10} According to appellant, because there was no present motion for outstanding fees, the award of attorney fees could be prospective only and not include any amounts incurred prior to the final hearing. In support, appellant relies on *Avery v. Avery*, 2d Dist. No. 2001-CA-100, 2002-Ohio-1188. The *Avery* case, however, is wholly inapplicable because not only does it concern the former statute, R.C. 3105.18(H),¹ but also, unlike *Avery*, the matter before us contains a request for attorney fees that was asserted in the complaint.

{¶11} Appellant next takes issue with the trial court's finding that there is a disparity in the parties' incomes. Appellant does not assert the incomes attributed to the parties, i.e., \$13,000 annually for appellee and \$50,000 to \$60,000 annually for appellant, are inaccurate but, rather, points out that appellee receives an additional \$16,800

¹ Prior to the enactment of R.C. 3105.73, effective April 27, 2005, R.C. 3105.18(H) provided: "In divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, including, but not limited to, any appeal, any proceeding arising from a motion to modify a prior order or decree, and any proceeding to enforce a prior order or decree, if it determines that the other party has the ability to pay the attorney's fees that the court awards. When the court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully litigating that party's rights and adequately protecting that party's interests if it does not award reasonable attorney's fees."

annually in child-support payments and has a low income because she works only part-time. Appellant does not direct us to evidence but, instead, relies on conjecture to support his position. To the extent it can be argued the record is lacking with respect to appellee's earning potential, we note that appellant *agreed* to have this matter determined by memoranda and evidence already in the record. Secondly, the trial court indeed noted the child-support amounts being received by appellee, even though the statute makes no requirement that it do so. R.C. 3105.73(A) states that the trial court may consider any temporary spousal support, but it makes no reference to the consideration of child support. While such a factor is certainly not *precluded* under the statute, it is certainly not required. Thus, the trial court was well within its discretion to find an income disparity based on the amounts it attributed to each party. Nonetheless, appellant relies on *Gerlach v. Gerlach*, 10th Dist. No. 03AP-22, 2004-Ohio-1607, for the proposition that awarding attorney fees to a litigant that was not prevented from fully litigating her rights may be an abuse of discretion. Such reliance is misplaced, however, because not only is *Gerlach* factually distinguishable since the litigant earned \$36,000 per year, plus received child and spousal-support payments, but also *Gerlach* reviewed an award of fees under R.C. 3105.18(H), not R.C. 3105.73.

{¶12} Appellant next challenges the trial court's reference that the marital estate was "equitably divided." According to appellant, there was actually a disparity in the division of the estate in appellee's favor, and the trial court should have considered this. The trial court was aware of the nature of the division of the estate as the agreed entry that incorporates the attorney fees entry states, "the marital property/debt division herein, although not necessarily equal, is nonetheless equitable in the circumstances." (Agreed

entry at 2.) Thus, there is no indication that, by use of the word "equitable" the trial court assumed the division was necessarily "equal," and we find no merit to appellant's argument that the trial court failed to accurately consider the division of marital assets.

{¶13} Appellant next asserts that appellee's ability to protect her interests and fully litigate her claims must be considered. However, as we stated in *Heyman v. Heyman*, 10th Dist. No. 06AP-1070, 2007-Ohio-2241, unlike former R.C. 3105.18(H), R.C. 3105.73 does not contain an explicit instruction to the court to consider a party's ability to litigate his or her rights fully in determining fees. *Id.* at ¶15. While the trial court may certainly consider such ability, there is no longer any requirement that it do so. *Id.*

{¶14} Appellant also contends that because the trial court awarded only the fees billed by appellee's current counsel, the trial court erred in considering appellant's decision to continue pro se and to consider the actions appellant took prior to the appearance of appellee's current counsel. The memorandum in support of attorney fees filed by appellee requested \$35,000; thus, appellee's counsel sought the attorney fees incurred by her client during the whole course of litigation regardless of who counsel was. Simply because the trial court awarded an amount approximately equal only to what appellee's current counsel billed does not mean the trial court felt it equitable to award only those fees incurred from that specific representation. This is so particularly in light of the fact that the trial court referenced specific actions taken by appellant that drove up the cost of litigation, and most of those actions took place prior to the appearance of appellee's current counsel.

{¶15} Lastly, appellant contends it was an abuse of discretion for the trial court to order the attorney fees award payable in less than 60 days. R.C. 3105.73(C) provides

that the trial court is permitted to specify whether an award of attorney fees will be made payable in gross or in installments. Though expressing displeasure with the trial court's determination, appellant has failed to demonstrate, and we do not find, that such an order is an abuse of discretion. *Day v. Day*, 10th Dist. No. 08AP-440, 2009-Ohio-638.

{¶16} The requirement under R.C. 3105.73 is that a court consider whether an award of fees to a party would be equitable. *Heyman*, supra. In its discretion, the trial court did so here. Because the trial court considered the relevant factors, including the parties' incomes and conduct during the litigation, and awarded less than one-fourth of the requested attorney fees, we do not find an abuse of that discretion. Accordingly, we overrule appellant's two assignments of error.

{¶17} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and BROWN, J., concur.
