[Cite as *Ockunzzi v. Smith*, 2015-Ohio-2708.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102347

KIM M. OCKUNZZI

PLAINTIFF-APPELLEE

vs.

KENNETH SMITH

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-03-292146

BEFORE: E.A. Gallagher, J., Jones, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: July 2, 2015

ATTORNEY FOR APPELLANT

Willa Hemmons
14340 Euclid Avenue
East Cleveland, Ohio 44112

ALSO LISTED

Kenneth Smith
3296 E. 104th Street
Cleveland, Ohio 44104

ATTORNEYS FOR APPELLEE

A. Scott Fromson
32125 Solon Road
Solon, Ohio 44139

Christina M. Joliat
P.O. Box 391531
Solon, Ohio 44139

EILEEN A. GALLAGHER, J.:

{¶1} Appellant Kenneth Smith appeals the decision of the Cuyahoga County Court of Common Pleas, Domestic Relations Division, adopting a magistrate's decision finding him to be in contempt of court due to his failure to abide by the terms of a separation agreement entered into as a result of his divorce with appellee Kim Ockunzzi. For the following reasons, we reverse and remand.

{¶2} The parties were married on January 2, 1998. On April 15, 2003 the parties filed a petition for dissolution of marriage and attached a separation agreement that provided, in relevant part, that Ockunzzi "shall receive *only* $13,500 from [Smith's] Fidelity Investment annuities." (Emphasis added.) The separation agreement was incorporated into the domestic relations court's judgment entry of June 10, 2003, whereby the marriage was dissolved.

{¶3} This provision of the separation agreement has no boundaries and was unartfully drafted. There is no time constraint as to when the funds shall be received, and Ockunzzi has no ability to collect interest on the stipulated amount as the adjective "only" limits the monies due and owing to her to $13,500.

{¶4} Obviously, it would have been in Ockunzzi's best financial interest to have prepared a Qualified Domestic Relations Order ("QDRO") contemporaneous to the hearing on the dissolution of marriage. However, she failed to do so.[1]

[1] The docket in the case reflects that while this case was on appeal the trial court, on

{¶5} More than a decade later, on May 23, 2014, Ockunzzi filed a motion to show cause and motion for attorney fees seeking a contempt finding against Smith for his failure to pay her the $13,500. In an attached affidavit Ockunzzi stated that "prior to the divorce, she had a copy of a University Hospitals Health System Fidelity Investments Retirement Savings Statement from [Smith], dated September 30, 2001, indicating an ending balance of $36,144.24." Ockunzzi averred that she had hired consultants to prepare a QDRO in relation to the retirement account, but was informed that Smith had removed funds from the account and, as of December 31, 2012, the account had a balance of $5,402.74. Ockunzzi argued in her motion that she had not received the $13,500 she was due pursuant to the separation agreement from either her husband or the Fidelity Investment annuity. Smith opposed Ockunzzi's motion arguing that any order requiring a premature distribution of the Fidelity Investment annuity would incur tax penalties that he would have to pay.

{¶6} A hearing on the motion was held before a magistrate who issued a decision finding that Smith had failed to pay Ockunzzi $13,500 and had withdrawn over $10,000 from the annuity in 2012. The magistrate concluded that Smith was in contempt of court for failing to comply with the terms of the separation agreement. The magistrate's order sentenced Smith to 30 days in jail for the contempt but provided Smith with the ability to purge his contempt by complying with the following conditions: (1) that he pay to Ockunzzi the $13,500 ordered to be paid from his Fidelity Investment

---

February 24, 2015, issued a QDRO.

annuity within 30 days and (2) that he pay $3,000 of the attorney fees incurred by Ockunzzi within 60 days.

{¶7} Smith timely filed objections to the magistrate's decision but the trial court overruled his objections, noting that he had failed to file a transcript of the proceedings, and adopted the magistrate's decision in its entirety. Smith appeals and presents the following three assignments of error:

> I. A valid qualified domestic relations order, QDRO, was not created when the parties were divorced.
>
> II. The trial court's contempt finding and attorney award should be reversed since there was no valid QDRO created.
>
> III. It is not just to require that a retirement plan participant incur a 10% tax penalty in addition to other tax events in order to pay a former spouse when there had been a failure to create a valid QDRO.

{¶8} We address Smith's assignments of error together because they present interrelated questions of law. All three assignments of error present the same general legal concept: that the trial court erred in holding Smith in contempt where the parties' separation agreement contemplated Ockunzzi receiving the $13,500 from Smith's retirement plan by way of a QDRO that was never implemented by the parties, rather than a direct payment from Smith to Ockunzzi. Smith further argues that the trial court's purge condition would cause him to incur a tax penalty.

{¶9} An appellate court will not overturn a trial court's finding of contempt absent an abuse of discretion. *State ex rel. Ventrone v. Birkel*, 65 Ohio St.2d 10, 11, 417 N.E.2d 1249 (1981). "Abuse of discretion" is a term of art, describing a judgment neither comporting with the record, nor reason. *See, e.g., State v. Ferranto*, 112 Ohio St. 667,

676-678, 148 N.E. 362 (1925). "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Ents. Inc. v. River Place Community Urban. Redevelopment*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Further, an abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.)

{¶10} "Contempt is a disregard of, or disobedience to, an order or command of judicial authority." *First Bank v. Mascrete, Inc.*, 125 Ohio App.3d 257, 263, 708 N.E.2d 262 (4th Dist.1998). The contempt process was created "to uphold and ensure the effective administration of justice[,] * * * to secure the dignity of the court[,] and to affirm the supremacy of law." *Cramer v. Petrie*, 70 Ohio St.3d 131, 133, 637 N.E.2d 882 (1994). "[T]he burden of proof for civil contempt is clear and convincing evidence." *Delawder v. Dodson*, 4th Dist. Lawrence No. 02CA27, 2003-Ohio-2092, ¶ 10.

{¶11} We note that although a transcript of the hearing before the magistrate has been provided to this court on appeal, the record reflects that Smith failed to provide the transcript to the trial court in support of his objections to the magistrate's decision. Where a party objecting to a magistrate's report fails to provide the trial court with the evidence and documents by which the court could make a finding independent of the report, appellate review of the trial court's judgment is limited to whether the court abused its discretion in adopting the magistrate's report, i.e., whether the trial court's application of the law to its factual findings was an abuse of discretion. *Don Mould's*

Plantation, Inc. v. Kest Prop. Mgt. Group, LLC, 8th Dist. Cuyahoga No. 94279, 2010-Ohio-2608, ¶ 12, citing *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 654 N.E.2d 1254 (1995). Further, the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record. *Id*.

{¶12} Although we accept the magistrate's factual findings as true, we find that the trial court abused its discretion in adopting the magistrate's contempt finding in this instance. Ockunzzi's own affidavit attached to her motion to show cause reveals that the Fidelity Investment annuity referenced in the parties' separation agreement is a retirement account. An employee spouse's retirement or pension plan constitutes a marital asset subject to division by the trial court. *Powell v. Powell*, 49 Ohio App.3d 56, 57, 550 N.E.2d 538 (6th Dist.1989). Ohio courts have recognized several different methods for equitably distributing the spouses' proportionate interests in such funds.

> One method is to order that the appropriate percentage or amount of the future benefits be paid to the non-employee spouse when the pension matures. This can be done through the use of a QDRO where appropriate. Another alternative is for the trial court to reserve jurisdiction to divide the pension interest when the benefits are withdrawn from the plan, at that time reassessing the situation to determine if the circumstances warrant modification of the initial alimony award. Yet another alternative is to withdraw the funds from the plan, if possible, and apportion and distribute them at the time of the divorce. Finally, the trial court could determine the present value of the fund, calculate the non-employee spouse's

proportionate share and offset that amount with other marital assets or with installment payments from the employee spouse.

Id. at 58.

{¶13} A QDRO is an order that "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." *State ex rel. Sullivan v. Ramsey*, 124 Ohio St.3d 355, 2010-Ohio-252, 922 N.E.2d 214, ¶ 18, citing the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1056(d)(3)(B)(i)(I), and 26 U.S.C. 414(p)(1)(A)(i). A QDRO is not an independent judgment entry of the court, but is rather an enforcement mechanism pertaining to a trial court's previous judgment entry of divorce or dissolution. *Ware v. Ware*, 5th Dist. Licking No. 14 CA 28, 2014-Ohio-5410, ¶ 14. A QDRO is an unusual court order in that it is ultimately subject to a definitive interpretation by the plan administrator pursuant to the ERISA statutes. *Id.*, citing *Hoyt v. Hoyt*, 53 Ohio St.3d 177, 180, 559 N.E.2d 1292 (1990).

{¶14} Pursuant to section XVII of the separation agreement, "Performance of Necessary Acts," Smith would be obligated to cooperate with efforts by Ockunzzi to obtain a QDRO for the account. We note that the problem illustrated by this case has been preemptively resolved for future cases by Loc.R. 28(F)(1) of the Cuyahoga County Court of Common Pleas, Domestic Relations Division, which provides for the parties to a dissolution of marriage to prepare a QDRO prior to filing for the dissolution, and where a division of a retirement asset is included in a written separation agreement, the obligation to prepare a QDRO defaults to the participant of the subject account and

mandates submission within 60 days of the final entry of divorce. Unfortunately, the rule is inapplicable in the present instance because it was not adopted until 2010.

{¶15} While the parties' separation agreement in this case provides that Ockunzzi is to receive only $13,500 from Smith's Fidelity Investments annuity, it fails to delineate the precise manner in which Ockunzzi is to obtain the funds or when she is to receive these funds. We conclude that the provision allowed for Ockunzzi to be paid directly from Smith or to proactively secure her interest in the account by way of a QDRO. The trial court, in finding that Smith was in violation of the separation agreement for failing to have *personally* paid Ockunzzi, implicitly reached the same conclusion.

{¶16} However, the separation agreement does not provide any date upon which Smith is personally obligated to pay Ockunzzi the funds related to the account. Therefore, we find that the trial court erred in concluding that Smith was in violation of the separation agreement and abused its discretion in finding him to be in contempt of court.

{¶17} Smith's assignments of error are sustained.

{¶18} The judgment of the trial court is reversed; the case is remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, JUDGE

LARRY A. JONES, SR. P.J., and
MARY J. BOYLE, J., CONCUR