

[Cite as *Hissa v. Hissa*, 2016-Ohio-4714.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 103493 and 103536

JOANNE HISSA

PLAINTIFF-APPELLEE
/CROSS-APPELLANT

vs.

EDWIN A. HISSA

DEFENDANT-APPELLANT
/CROSS-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-97-256928

BEFORE: McCormack, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 30, 2016

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TIM McCORMACK, J.:

{¶1} Dr. Edwin Hissa and Mrs. Joanne Hissa were married in 1985 and have two children, now emancipated. In 1997, Mrs. Hissa filed for divorce. The parties were granted a divorce in 2001.

{¶2} Since their divorce in 2001, the parties have been embroiled in litigation over almost every aspect of the divorce, primarily due to Dr. Hissa's refusal to pay Mrs. Hissa as ordered under the divorce decree. As a result, they have now spent more years as litigants over the divorce than as a married couple. Five trial court judges have at one time or another presided over the proceedings, and this court has entertained six appeals over the divorce.¹

{¶3} In the original divorce decree, the trial court ordered Dr. Hissa to pay \$4,000 in monthly spousal support and \$2,500 in child support. Furthermore, an equal division of the marital property resulted in an award of \$452,385 to each party. In particular, Dr. Hissa, an orthopedic surgeon, was awarded his medical practice, valued at \$553,000. Mrs. Hissa, a part-time nurse, was awarded 100% of Dr. Hissa's share in the Dr. Edwin A. Hissa, M.D., Inc. Profit Sharing Plan and Trust ("the Profit Sharing Plan" or "the Plan" hereafter). Dr. Hissa has contested almost every aspect of the divorce

¹ The prior six appeals are: *Hissa v. Hissa*, 8th Dist. Cuyahoga Nos. 79994 and 79996, 2002-Ohio-6313 ("*Hissa I*"); *Hissa v. Hissa*, 8th Dist. Cuyahoga No. 82809 (no final appealable order) ("*Hissa II*"); *Hissa v. Hissa*, 8th Dist. Cuyahoga No. 84200 (dismissed by appellant) ("*Hissa III*"); *Hissa v. Hissa*, 8th Dist. Cuyahoga No. 90612, 2008-Ohio-4872 (no final appealable order) ("*Hissa IV*"); *Hissa v. Hissa*, 8th Dist. Cuyahoga Nos. 93575 and 93606, 2010-Ohio-3087 ("*Hissa V*"); *Hissa v. Hissa*, 8th Dist. Cuyahoga Nos. 99498 and 100229, 2014-Ohio-1508 ("*Hissa VI*").

decree since 2001, including the amount of spousal support, the payment necessary to equalize the property division, the value of his medical malpractice, and the allocation of marital debt. For his repeated refusal to pay Mrs. Hissa as ordered in the divorce decree, Dr. Hissa has been held in contempt half a dozen times, has twice been to jail, and also had his driver's license taken as punishment for contempt.

{¶4} The present appeal is the seventh over the divorce. The primary issue in this latest round of litigation concerned what Dr. Hissa owed Mrs. Hissa under the Profit Sharing Plan pursuant to the divorce decree. After a trial before the magistrate on June 26, August 15, and December 2, 2014, the magistrate issued a lengthy and detailed decision resolving 11 motions filed by Mrs. Hissa. Both parties filed objections to the magistrate's decision. The trial court overruled the objections and adopted the magistrate's decision.

The Assignments of Error

{¶5} Both Dr. Hissa and Mrs. Hissa appealed from the trial court's judgment (8th Dist. Cuyahoga Nos. 103493 and 103536, respectively). The two appeals were later consolidated, and Mrs. Hissa's appeal was considered a cross-appeal. Dr. Hissa raises 12 assignment of error. Mrs. Hissa raises four assignments of error. Dr. Hissa's assignments of error state:

1. The trial court erred and abused its discretion by ruling that appellee is entitled to \$296,606 from the Dr. Edwin A. Hissa M.D., Inc. Profit Sharing Plan and Trust, rather than 100% of defendant's share of the plan plus or minus any gains or losses.

2. The trial court erred and abused its discretion by ruling that third party defendant Dr. Edwin A. Hissa, Plan Administrator of the Profit Sharing Plan and Trust, failed to take any affirmative action to implement the terms of the QDRO and failed to responsibly managed the plan.
3. The trial court erred and abused its discretion by ruling that appellant continues to owe appellee an additional \$55,244.98 as her share of the plan.
4. The trial court abused its discretion by ruling that Dr. Edwin A. Hissa, in his role as plan administrator, managed the plan in a manner which limited appellee's rights to appellant's share of the benefits she was awarded.
5. The trial court erred and abused its discretion by arbitrarily and speculatively determining that the profit sharing plan and trust should have demonstrated greater financial performance since the divorce, without relying upon any objective analysis of the plan to make such a determination and ruling.
6. The trial court erred and abused its discretion by arbitrarily and speculatively determining that appellee's share of the profit sharing plan and trust as of 2015 had a value of \$296,606 after fourteen years of gains and losses incurred due to the market fluctuation.
7. The trial court erred and abused its discretion by finding Dr. Edwin A. Hissa, in his role as both defendant and third party defendant, in contempt of court and sentencing him to 30 days in jail.
8. The trial court erred and abused its discretion by failing to distinguish the separate and distinct roles Dr. Edwin Hissa has in this matter as both defendant/spouse and third party defendant plan administrator of the Dr. Edwin A. Hissa M.D. Inc. Profit Sharing Plan and Trust.
9. The trial court erred and abused its discretion by ordering appellant to pay \$10,000 in attorney fees to appellee.
10. The trial court erred and abused its discretion by finding the plan administrator in contempt of court for failing to meet his fiduciary duties, when the trial court lacked standing to do so.

11. The trial court erred and abused its discretion by recharacterizing the \$55,244.98 debt allegedly owed to appellee as nontaxable spousal support and making it payable through a wage-withholding order against appellant at a rate of \$10,000 per month.
12. The trial court erred and abused its discretion by granting three separate motions for attorney fees and ordering appellant to pay attorney fees to appellee in the amounts of \$950 and \$5,600.

{¶6} Mrs. Hissa raises four assignments of error. They state:

1. The trial court erred and/or abuse discretion in failing to grant Ms. Hissa's November 12, 2014 Motion to Show Cause and Motion for Attorney Fees and failing [to] hold Dr. Hissa in contempt and issue punishment upon said contempt to the fullest extent of the law.
2. The trial court erred and/or abused its discretion in failing to award Ms. Hissa all statutory interest requested on amounts due and owing from Dr. Hissa, including Dr. Hissa's failure to timely transfer his interest in the Profit Sharing account.
3. The trial court erred and/or abuse its discretion in failing to award Ms. Hissa the full amount of her attorney fees and litigation expenses.
4. The trial court erred and/or abused its discretion in reducing the awards of \$950 and \$5600 in attorney fees to judgment when Dr. Hissa has made himself "judgment proof."

{¶7} Dr. Hissa's 12 assignments of error and Mrs. Hissa's four assignments fall into three categories: (1) how much Dr. Hissa owed Mrs. Hissa under the Profit Sharing Plan pursuant to the divorce decree; (2) the contempt finding against Dr. Hissa; (3) the attorney fees awarded to Mrs. Hissa. For shaping the discussion, we address the 16

assignments of error by category and by grouping them together for discussion when necessary.²

Main Issue in the Instant Appeal: The Profit Sharing Plan

{¶8} Dr. Hissa's first to sixth assignments of error concern the amount he owed Mrs. Hissa under the Profit Sharing Plan pursuant to the divorce decree. We address these six together.

{¶9} Dr. Hissa owned 78.35% of the Plan. Under the divorce decree, Mrs. Hissa was awarded 100% of Dr. Hissa's interest in the Plan. Dr. Hissa's interest in the Plan had a value of \$296,606 as of May 15, 2000, as specified in the divorce decree. The June 21, 2001 divorce decree stated:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff is hereby awarded as property division all of Defendant's interest in the Dr. Edwin A. Hissa M.D., Inc. Profit Sharing Plan and Trust, valued at \$296,606 as of May 15, 2000. Plaintiff is further awarded the pro rata share of any gain or loss attributable to her fractional ownership interest in the profit sharing plan (78.35%) from the date of trial to the date of distribution.³ The transfer to Wife shall be by QDRO at her expense.

²We note that both Dr. Hissa and Mrs. Hissa violated App.R. 16(A) by failing to argue each assignment of error separately. Dr. Hissa improperly argues first to third, fourth to sixth, and seventh to tenth assignments of error together; Mrs. Hissa argues the third and fourth together. Pursuant to App.R. 12(A)(2), we may disregard them. *English v. English*, 4th Dist. Gallia No. 97CA1, 1997 Ohio App. LEXIS 5618, at *7 (Dec. 10, 1997). In the interest of justice, however, we will address the issues raised rather than summarily overrule them.

³The divorce was tried before a magistrate over the course of nine days beginning on June 11, 1999, and concluding on June 9, 2000.

{¶10} Pursuant to the divorce decree, Dr. Hissa's interest in the Plan was to be transferred by a Qualified Domestic Relations Order ("QDRO"). A QDRO journalized on May 29, 2002, stated as follows:

The Plan shall separate the assets in the account of the Participant, Dr. Edwin A. Hissa, under the Plan as of May 15, 2000, so that one hundred percent (100%) of the account balance shall be set aside into a separate account for the benefit of the Alternate Payee, Mrs. Edwin Hissa. Alternate Payee's account shall include the pro rata share of any gain or loss that is attributable to her fractional ownership interest in the Plan [seventy-eight and thirty-five hundredths percent (78.35%)] from the date of trial, to the date of distribution. Alternate Payee's account shall be credited with all interest and investment income or losses that are attributable to her share of the account balance from May 15, 2000, to the date of total distribution.

{¶11} In 2011, ten years after the divorce, Dr. Hissa argued, for the first time, that the above-cited language of the divorce decree regarding the Plan was ambiguous. He argued that the language could be interpreted to mean that the Plan's *entire* value was \$296,606 and Mrs. Hissa was only entitled to 78.35% of that amount, i.e., \$232,390.80 (= 0.7835 x \$296,606). The magistrate who decided the matter back in 2011 found the argument to be wholly disingenuous and reaffirmed Mrs. Hissa's entitlement under the Plan as \$296,606, subject to gains and losses through the date of distribution. The trial

court adopted the magistrate's decision. On appeal from the trial court's decision, one of the assignments of error raised by Dr. Hissa stated that "[t]he trial court erred and abused its discretion by finding that appellee is entitled to receive \$296,606 from the Dr. Edwin A. Hissa, M.D., Inc. Profit Sharing Plan and Trust." Our court affirmed this portion of the trial court's judgment in *Hissa VI*, stating the following:

We also find that the trial court's finding that Mrs. Hissa was entitled to \$296,606 from the Dr. Edwin A. Hissa, M.D., Inc. Profit Sharing Plan and Trust was supported by the evidence. Dr. Hissa argues that the issue was not properly before the trial court. We disagree. The trial court was merely restating what the divorce decree stated, that Mrs. Hissa was entitled to \$296,606, and rebutting Dr. Hissa's newly hatched argument that Mrs. Hissa was entitled to only a portion of that money.

Hissa VI at ¶ 52.

{¶12} Apparently, Dr. Hissa did not find our decision to be clear and convincing. After paying \$241,361 toward the ordered amount of \$296,606,⁴ he refused to pay more, claiming he has paid in full regarding his obligation under the Plan. The last payment he made was on January 27, 2014.

{¶13} Mrs. Hissa filed several motions to collect what she believed she was still owed. The motions were heard before the magistrate. This time around, Dr. Hissa

⁴ Dr. Hissa made three distributions: in 2004, \$83,728 was transferred from the Plan to Mrs. Hissa; on January 17, 2014, \$110,000; on January 27, 2014, \$47,633.

argued that Mrs. Hissa was not entitled to \$296,606 because the May 29, 2002 QDRO did not set forth any lump sum amount that Mrs. Hissa was entitled to receive under the Plan.

He argued that Mrs. Hissa's interest in the Plan was subject to a pro rata share of potential losses. He claimed that the Plan had incurred losses over the years and that, after the distribution of \$47,633 on January 27, 2014, he has distributed all his interest in the account.

{¶14} In a comprehensive decision subsequently adopted by the trial court, the understandably frustrated magistrate pointed out that the property division and equalization chart in the 2000 magistrate decision on the divorce payment listed the lump sum of "\$296,600" as Mrs. Hissa's interest under the Plan. The magistrate noted that the divorce decree and the QDRO were both consistent with Mrs. Hissa's receiving that amount from the Plan, and both the trial court and the Eighth District have since clearly and consistently affirmed that Mrs. Hissa was entitled to that amount. The magistrate in particular emphasized that in the latest decision from this court, *Hissa VI*, the Eighth District struck down Dr. Hissa's argument that Mrs. Hissa is not entitled to the full amount of \$296,606.

{¶15} While the magistrate acknowledged the value of the Plan has fluctuated with the stock market, she found it rather incredible that the Plan, rather than appreciating in value over the last 15 years, suffered a loss of over \$50,000, as Dr. Hissa claimed. The magistrate found that, even if there were a loss of value, because it was Dr. Hissa's decreed responsibility to timely transfer the funds pursuant to the divorce decree and

QDRO, he alone bore the burden of any claimed loss. Consequently, the trial court ordered Dr. Hissa to pay Mrs. Hissa the remaining \$55,244.98 still owed under the Plan.

{¶16} Reviewing the voluminous record of this drawn-out divorce for the seventh time, we cannot but observe that Dr. Hissa appeared to litigate in a piecemeal fashion and to relitigate issues that have already been adjudicated. For example, in *Hissa V*, Dr. Hissa argued he should not have been charged with the debt to Mrs. Hissa's father's estate without a setoff against the marital property division. This court reminded Dr. Hissa that under the "law of the case" doctrine, he was precluded from raising issues related to the allocation of debt as those issues have been previously determined. *Hissa V* at ¶ 42-43.

{¶17} Similarly here, Dr. Hissa attempted to relitigate an issue already adjudicated. As the magistrate noted, this court in *Hissa VI* has affirmed that Mrs. Hissa was entitled to \$296,606 under the Plan. Dr. Hissa could have appealed our decision to the Supreme Court of Ohio but notably chose not to do so. Therefore, it is the law of the case that Mrs. Hissa was and is entitled to \$296,606 under the Plan. *See Nolan v. Nolan*, 11 Ohio St.3d 1, 462 N.E.2d 410 (1984) (the decision of an appellate court in a prior appeal will be followed in a later appeal in the same case and court). Dr. Hissa is precluded from relitigating the issue. His first to sixth assignments of error are overruled.

Statutory Interest

{¶18} In her second assignment of error, Mrs. Hissa argues the trial court abused its discretion in not awarding her the statutory interest on the amount owed under the Plan.

{¶19} While R.C. 1343.03, Ohio's pre-judgment and post-judgment interest statute, applies to domestic relations proceedings in which the trial court orders a distribution of marital assets, the trial court is given wide latitude to affix interest to the monetary obligations arising out of a property division upon divorce. *Augier v. Augier*, 11th Dist. Geauga No. 2009-G-2932, 2010-Ohio-2679, ¶ 50-51. The trial court here was not required to award the statutory interest and we find no abuse of discretion. Mrs. Hissa's second assignment of error is without merit.

{¶20} In Dr. Hissa's eleventh assignment of error, he argues the trial court abused its discretion in enforcing the remaining payment of \$55,244.98 by recharacterizing that amount as nontaxable spousal support and making it payable through a wage-withholding order. Dr. Hissa fails to cite to any legal authority in support of his argument. We may disregard an assignment of error if an appellant fails to cite to any legal authority as required by App.R. 16(A)(7). *Taddeo v. Bodanza*, 8th Dist. Cuyahoga No. 100704, 2014-Ohio-3719, ¶ 11, citing App.R. 12(A)(2). The eleventh assignment of error is overruled.

Contempt

{¶21} Dr. Hissa's seventh, eighth, ninth, and tenth assignments of error and Mrs. Hissa's first assignment of error relate to the trial court's finding of contempt. We address these assignments of error together.

a. Contempt regarding Dr. Hissa's failure to Comply with Property Division

{¶22} R.C. 2705.02 provides that disobedience of a lawful order of the court may be punished as contempt. Contempt is defined as a disregard of, or disobedience to, an order or command of judicial authority. *Kapadia v. Kapadia*, 8th Dist. Cuyahoga No. 96910, 2012-Ohio-808, ¶ 26. Contempt proceedings may be brought against a party for failing to comply with a property division in a divorce decree. *Marx v. Marx*, 8th Dist. Cuyahoga No. 82021, 2003-Ohio-3536, ¶ 15. Punishment for violation of divorce decree provisions does not impinge upon the constitutional prohibition against imprisonment for debts. *Harris v. Harris*, 58 Ohio St.2d 303, 311, 390 N.E.2d 789 (1979).

{¶23} We review a contempt finding for an abuse of discretion. *In re Contempt of Modic*, 8th Dist. Cuyahoga No. 96598, 2011-Ohio-5396, ¶ 7.

{¶24} Here, the magistrate found Dr. Hissa, either in his individual capacity *or* in his capacity as the Plan Administrator,⁵ failed to comply with the terms of the divorce decree and transfer the funds awarded to Mrs. Hissa as ordered. Dr. Hissa continued to

⁵In 2013, Dr. Hissa in the capacity as the Plan Administrator was joined as a party to the divorce proceeding.

contest the amount Mrs. Hissa was entitled to under the Plan even though it was the law of the case after *Hissa VI*. Accordingly, the magistrate found Dr. Hissa in contempt both individually *and* in his capacity as the Plan administrator and sentenced him to 30 days in jail. Hissa was allowed to purge the contempt by paying Mrs. Hissa \$10,000 in attorney fees.

{¶25} Dr. Hissa argues the trial court abused its discretion finding him in contempt in his individual capacity and in his capacity as the Plan Administrator. To support his contention, however, he simply regurgitates his argument that he has fully satisfied the terms of the divorce decree regarding the Plan. We have already addressed and rejected this claim in the foregoing analysis. Thus, the trial court did not abuse its discretion in finding Dr. Hissa in contempt in both capacities for his failure to comply with the court orders and in fashioning appropriate punishment. Dr. Hissa's seventh, eighth, ninth, and tenth assignments of error are without merit.

b. Contempt Motion No. 370056

{¶26} Mrs. Hissa's first assignment of error relates to a motion for contempt she filed on November 12, 2014 (motion No. 370056). That motion concerned Dr. Hissa's failure to pay in full (1) the property division of \$143,032, (2) \$40,000 relating to his life insurance awarded in prior judgments, and (3) \$30,000 in attorney fees previously ordered by the court. The trial court denied the motion. Mrs. Hissa contends on appeal that the trial court abused its discretion in not finding Dr. Hissa in contempt for failing to fully pay these previously ordered payments.

{¶27} Regarding the motion, the magistrate found that beginning in September 2013, Dr. Hissa has begun to comply with the previous court judgments regarding these owed amounts and has made substantial payments toward his obligations, paying \$111,482 between 2013 and 2014. The magistrate also observed that Mrs. Hissa has the right to collect the remaining funds by way of garnishments or liens on Dr. Hissa's property because these awards have been reduced to judgments — although the magistrate recognized these efforts might be difficult.

{¶28} Applying a highly deferential standard of review on contempt matters, we do not find an abuse of discretion by the trial court in declining to find Dr. Hissa in contempt regarding his failure to pay in full the amounts ordered in previous judgments.⁶ Mrs. Hissa's first assignment of error is without merit.

Attorney Fees

⁶In declining to find Dr. Hissa in contempt regarding motion No. 370056, the magistrate cited this court's decision in *Burke v. Burke (In re Pappas)*, 8th Dist. Cuyahoga Nos. 101059 and 101060, 2014-Ohio-5279. In that case, the GAL filed a motion for contempt against the parents to collect the GAL fees ordered in an agreed judgment entry. The trial court declined to find the parents in contempt. This court affirmed. The magistrate in the instant case found *Burke* to stand for the proposition that once a monetary amount has been reduced to judgment, a contempt proceeding is no longer an appropriate mechanism to enforce the judgment. *Burke* does not stand for that proposition. Rather, *Burke* only concerned whether the GAL fees were analogous to child support obligations, which *can* be enforced by contempt proceedings. See *Cramer v. Petrie*, 70 Ohio St.3d 131, 637 N.E.2d 882 (1994) (the obligation to pay child support is not a "debt" within the constitutional prohibition against imprisonment for debts but is a personal duty owed to the former spouse, the child, and society in general, so it may be enforced through contempt proceedings). In *Burke*, this court distinguished the GAL fees from child support and emphasized the trial court's broad discretion in contempt proceedings. Although we do not find *Burke* to be pertinent to the instant case, we nonetheless defer to the trial court's discretion in the exercise of its contempt power.

{¶29} Dr. Hissa’s twelfth assignment of error and Mrs. Hissa’s third and fourth assignments of error relate to the award of attorney fees to Mrs. Hissa. We address all three together.

{¶30} R.C. 3105.73 provides for attorney fees for post-decree proceedings. It states that in such proceedings, 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.” R.C. 3105.73.

{¶31} This court reviews a domestic relations court’s decision to grant attorney fees for an abuse of discretion. *Dureiko v. Dureiko*, 8th Dist. Cuyahoga No. 94393, 2010-Ohio-5599, ¶ 26.

{¶32} Here, in two motions (Nos. 364959 and 364960) filed on June 6, 2014, Mrs. Hissa sought attorney fees she incurred between February 2011 and present. She submitted fees statements totaling \$42,260 for attorney fees and \$2,033.64 for litigation expenses. The magistrate found that an award of attorney fees to Mrs. Hissa was warranted due to Dr. Hissa’s repeated refusal to comply with the court orders. Based on her review of the fee statements, the magistrate found Mrs. Hissa was entitled to an award of attorney fees of \$5,600 pursuant to R.C. 3105.73. This award was in addition to the \$10,000 in attorney fees Dr. Hissa was required to pay in order to purge the finding of contempt. In addition, in a motion (No. 364966) filed on the same day, Mrs. Hissa

sought \$950 for attorney fees incurred in litigating the marital debt issue — Dr. Hissa had failed to pay the debt owed to the estate of her father as previously ordered by the trial court. The magistrate awarded \$950 to Mrs. Hissa in this matter. In total, the trial court awarded Mrs. Hissa \$16,550 in attorney fees, of which \$10,000 is required in order to purge the contempt order.

{¶33} Dr. Hissa argues the award of attorney fees was an abuse of discretion because he does not have the ability to pay. As the magistrate found, this claim was not credible, given that Dr. Hissa's gross annual income was expected to be in excess of \$500,000. Mrs. Hissa, on the other hand, argues the trial court abused its discretion in not awarding her 100% of the attorney fees she sought. A trial court has broad discretion in the award of attorney fees. *Birath v. Birath*, 53 Ohio App.3d 31, 39, 558 N.E.2d 63 (10th Dist.1988). The magistrate indicated the amount of attorney fees awarded was based on R.C. 3105.73. We do not find the award was unreasonable, arbitrary, or unconscionable. Dr. Hissa's twelfth assignment of error and Mrs. Hissa's third and fourth assignments of error are overruled.

{¶34} Judgment affirmed.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, domestic relations division, 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.

TIM McCORMACK, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR