[Cite as *Cefaratti v. Cefaratti*, 2010-Ohio-5661.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

LORRAINE A. CEFARATTI,	:	**O P I N I O N**
Plaintiff-Cross-Appellee/Appellee,	:	**CASE NOS. 2008-L-151 and 2009-L-055**
- vs -	:	
MICHAEL J. CEFARATTI,	:	
Defendant-Cross-Appellant/Appellant.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 04 DR 000418.

Judgment: Affirmed.

Michael J. Drain, 21801 Lakeshore Boulevard, Euclid, OH 44123 (For Plaintiff-Cross-Appellee/Appellee).

Abraham Cantor, Johnnycake Commons, 9930 Johnnycake Ridge Road, #4-F, Concord, OH 44060 (for Defendant-Cross-Appellant/Appellant).

L. Gordon Moser, Guardian Ad Litem, 11905 Fowlers Mill Road, Chardon, OH 44024

COLLEEN MARY O'TOOLE, J.

{¶1} Michael J. Cefaratti appeals from the September 15, 2008 judgment entry for divorce terminating his marriage to Lorraine A. Cefaratti entered by the Lake County Court of Common Pleas, as well as the April 3, 2009 supplemental judgment entry made by that court, correcting a clerical error pursuant to Civ.R. 60(A). We affirm.

{¶2} Lorraine and Michael were married June 12, 1982. *Cefaratti v. Cefaratti*, 11th Dist. No. 2004-L-091, 2005-Ohio-6895, at ¶2 ("*Cefaratti* I"). There is issue of the marriage: Nicole, born December 24, 1986; Danielle, born November 16, 1990; and Michael, born November 11, 1992. During the years prior to their divorce, Michael was employed by Beckman-Coulter, Inc., generally earning approximately $150,000 per year. Lorraine was employed by the Euclid Board of Education, earning some $20,000 per year.

{¶3} Late in 2001, Michael moved out of the marital residence. *Cefaratti* I at ¶25. While telling Lorraine that he wished to reconcile, Michael prepared a separation agreement, and shared parenting plan. Cf. id. at ¶25-26. Evidently, Michael convinced Lorraine that a dissolution of their marriage, followed by a new wedding, was the only way to save their relationship. Id. at ¶26. Michael prevailed upon Lorraine not to consult an attorney. Id. Michael read the separation agreement to Lorraine, but failed to give her a copy. Id. at ¶25. They signed the separation agreement at a bank. Id. at ¶26. A decree of dissolution, incorporating the plans, was entered July 8, 2002. Id. at ¶2. Despite the disparity in the parties' incomes, Lorraine received no spousal support under the separation agreement, and paid one half of the mortgage on the marital residence. Id. at ¶30. The child support provided for in the shared parenting plan deviated some $7,000 from the guidelines in Michael's favor. Id.

{¶4} Eventually, Lorraine became convinced that Michael did not intend a reconciliation. March 18, 2003, she filed a motion for relief from judgment regarding the decree of dissolution, pursuant to Civ.R. 60(B)(3). *Cefaratti* I at ¶3. By a judgment entry filed April 30, 2004, the trial court vacated the decree of dissolution, finding

Michael had procured it by undue influence. Id. Michael noticed appeal in May 2004. Lorraine filed for divorce in June 2004. In July 2004, Michael moved the trial court to stay proceedings pending the outcome of his appeal, which motion the trial court promptly granted. December 23, 2005, in *Cefaratti* I, we affirmed the judgment of the trial court, finding, however, that Michael had used fraud in the inducement to procure the decree of dissolution. Id. at ¶27-34. January 19, 2006, the stay in the trial court was vacated.

{¶5} The matter was referred to the trial court's magistrate. March 19, 2006, he ordered that Michael pay temporary spousal and child support, effective from March 1, 2006 forward. Michael objected, and hearing was held. March 12, 2007, the magistrate issued an order modifying the order of March 29, 2006, and reserving the issue of temporary spousal and child support from the period when the action was stayed due to the appeal in *Cefaratti* I, until March 1, 2006.

{¶6} Trial was held before the magistrate on the complaint for divorce on six days during the summer of 2007. November 9, 2007, the magistrate filed his decision. Michael objected; and, hearing was held before the trial court. June 23, 2008, the trial court filed its judgment entry, overruling the balance of the objections, but modifying the magistrate's decision to give Michael a credit for certain mortgage payments made on the marital residence, and reducing the award of attorney fees made to Lorraine's counsel. September 15, 2009, the trial court filed its judgment entry for divorce.

{¶7} October 15, 2008, Lorraine noticed appeal to this court, that being 11th Dist. Case No. 2008-L-150. Thereafter, on or about December 3, 2008, she moved this court to remand the matter to the trial court. Simultaneously, she filed a motion for a

nunc pro tunc judgment entry, or an entry for relief from judgment pursuant to either Civ.R. 60(A) or (B) with the trial court. At issue in all these filings was the fact that the Lake County Child Support Enforcement Agency ("CSEA") interpreted the judgment entry for divorce, in conjunction with the magistrate's decision of November 9, 2007, as nullifying the magistrate's prior order that Lorraine be awarded temporary spousal and child support from March 2006 through November 2007. Michael opposed Lorraine's motion to remand, which we granted by a judgment entry filed March 4, 2009.

{¶8} Michael also appealed from the September 15, 2008 judgment entry for divorce, that being Case No. 2008-L-151.

{¶9} By a supplemental judgment entry filed April 3, 2009, pursuant to Civ.R. 60(A), the trial court ordered that any arrearage created by the temporary spousal and child support order in effect from March 2006 through November 2007 be collected and enforced by the CSEA. As a result, Lorraine dismissed her appeal, and Michael appealed the supplemental judgment entry, Case No. 2009-L-055. Michael moved this court to consolidate his appeals, which motion we granted by a judgment entry filed May 20, 2009.

{¶10} Michael assigns four errors:

{¶11} "[1.] THE TRIAL COURT ERRED IN DETERMINING DURING THE MARRIAGE AND ITS DIVISION OF PROPERTY.

{¶12} "[2.] THE TRIAL COURT ERRED IN DETERMINING IN FINDING THAT THE HUSBAND DID NOT RECEIVE THE $50,000.00 LOAN FROM HIS PARENTS TO PURCHASE THE CHESTERLAND PROPERTY.

{¶13} "[3.] THE TRIAL COURT ERRED IN GRANTING CIV.R. 60(A) RELIEF TO APPELLEE.

{¶14} "[4.] THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO APPELLEE WHERE IT IMPROPERLY CALCULATED UNREDACTED SERVICES THAT WERE NOT SUBSTANTIATED AS REASONABLE OR NECESSARY FOR THE LITIGATION."

{¶15} Initially, we note that the trial court's decision to adopt, reject, or modify a magistrate's decision is reviewed for abuse of discretion. *In re Gochneaur*, 11th Dist. No. 2007-A-0089, 2008-Ohio-3987, at ¶16. Regarding this standard, we recall the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. 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, at ¶15.

{¶16} In his first assignment of error, Michael advances two, interrelated issues. First, he asserts the magistrate erred in concluding that the marriage terminated on the first day of the final hearing in this matter, June 11, 2007, rather than on the day that Lorraine filed for relief from judgment regarding the dissolution, in March 2003. Consequently, Michael asserts that the division of marital property is incorrect.

{¶17} Regarding the duration of a marriage, in determining the equitable division of marital property, R.C. 3105.171(A) provides:

{¶18} "(2) 'During the marriage' means whichever of the following is applicable:

{¶19} "(a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation;

{¶20} "(b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, 'during the marriage' means the period of time between those dates selected and specified by the court."

{¶21} Thus, a trial court should only apply a "de facto" date of termination for the marriage, R.C. 3105.171(A)(2)(b), if it finds that using the date of final hearing would be inequitable. R.C. 3105.171(A)(2)(a). In this case, the magistrate cited to our decision in *Cefaratti* I, noting that we had determined that Michael had procured the initial, highly favorable separation agreement through fraud in the inducement. The magistrate further noted that, due to this, and Michael's appeal of the trial court's vacation of the dissolution in *Cefaratti* I, Lorraine spent several years without spousal support, with minimal child support, and paying one half of the mortgage on the marital residence, despite the fact that Michael's income far exceeds her income. The magistrate found that, as a consequence, Lorraine's financial condition was far worse than it should be, since she piled up debt to maintain herself. For all these reasons, the magistrate found it would be inequitable to choose a de facto termination date for the marriage, rather than the date of final hearing.

{¶22} We find no error in this conclusion. The first issue under the first assignment of error lacks merit.

{¶23} We review a trial court's division of marital property for abuse of discretion. *O'Grady v. O'Grady*, 11th Dist. No. 2003-T-0001, 2004-Ohio-3504, at ¶50. Having concluded that the trial court did not err in determining that the marriage lasted until the date of final hearing, leads to the further conclusion that the trial court did not abuse its discretion in dividing the marital property as of that date, in 2007, rather than in 2003, as urged by Michael.

{¶24} The second issue under the first assignment of error lacks merit, as does the assignment of error.

{¶25} By his second assignment of error, Michael asserts that the trial court erred in affirming the magistrate's conclusion that $50,000 given to Michael by his parents to purchase a property at 8954 Cedar Road, Chesterland, Ohio in April 2002 (i.e., when the parties were about to file the dissolution) was a gift.

{¶26} At trial, Michael testified on cross-examination that his father had been in the habit of lending money to Michael and Lorraine throughout the marriage, and that he did so again when Michael wished to purchase the Cedar Road property in the spring of 2002. Michael testified he executed a note in his father's favor. When questioned why a mortgage in favor of his father was not filed until November 2003, Michael testified he believed his father wanted the mortgage at that time since Michael was unable to pay interest on the note, and that his father wanted a record of the $50,000 loan in relation to loans made to the rest of the family.

{¶27} We quote from the trial court's judgment entry affirming and modifying the magistrate's decision, at page 4:

{¶28} "In his objection, [Michael] ignores the time line of events as to his purchase of the real estate ***. [Michael's] parents, ***, executed a $50,000 check to [Michael] on April 29, 2002. [Michael's] Exhibit D, dated April 30, 2002, shows a deposit to escrow for the real estate from [Michael] in the sum of $37,800.00. However, eight months after [Lorraine] filed her motion to vacate and almost 19 months after [Michael] received the $50,000 from his parents, [Michael] executed a real estate mortgage on said property with his parents as the mortgagees. The timing of said mortgage is suspect. [Michael's] objection is not well taken."

{¶29} Judging the credibility of witnesses and evidence is peculiarly within the discretion of the trial court. It appears the trial court did not accept Michael's explanation of the lengthy delay between the time he received the $50,000 from his parents, and the time the mortgage on the Cedar Road property was filed. We are not in a position to second guess the trial court on the matter.

{¶30} The second assignment of error lacks merit.

{¶31} By his third assignment of error, Michael asserts the trial court erred when, on remand from this court, it issued its supplemental judgment entry, pursuant to Civ.R. 60(A), ordering the CSEA to enforce and collect any arrearages in temporary child support owed by Michael for the period March 1, 2006, through November 30, 2007. Michael argues that this is a substantive change to the magistrate's decision and the judgment decree for divorce.

{¶32} Civ.R. 60 provides, in relevant part:

{¶33} "(A) Clerical mistakes.

{¶34} "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

{¶35} "The basic distinction between clerical mistakes that can be corrected under Civ.R. 60(A) and substantive mistakes that cannot be corrected is that the former consists of 'blunders in execution' whereas the latter consists of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because, on second thought, it has decided to exercise its discretion in a different manner. *Blanton v. Anzalone* (C.A. 9, 1987), 813 F.2d 1574, 1577 (interpreting Fed. R. Civ. P. 609(a))." *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245, 247. "The modification of a judgment under Civ.R. 60(A) cannot be characterized as substantive merely because of its effect on a party." *Brush v. Hassertt*, 2d Dist. No. 21687, 2007-Ohio-2419, at ¶28.

{¶36} We review a trial court's decision to grant or deny relief under Civ.R. 60(A) for abuse of discretion. *Brush* at ¶25.

{¶37} As the trial court noted in its judgment entry granting the modification, the magistrate had to deal with three separate support orders: one granting temporary spousal and child support from the time the divorce action commenced, until February 28, 2006; one granting temporary spousal and child support from March 1, 2006, until November 30, 2007; and one for permanent support. In his lengthy and detailed

decision, the magistrate evinced considerable concern about the paucity of support extended to Lorraine and the Cefaratti children throughout the lengthy proceedings in *Cefaratti* I, then the divorce following our decision therein. He failed to preserve the child support arrearages for the second period, March 1, 2006, through November 30, 2007 in his decision. However, it is very clear in reading the magistrate's decision that this failure did not indicate he had changed his mind, believed there was any mistake in his original order for the temporary support, or wished to exercise his discretion differently. Again, he was clearly concerned with providing Lorraine and the Cefaratti children with all support which was due them. Consequently, we agree with the trial court that the failure to preserve the arrearages in question in the magistrate's decision and subsequent judgment entry for divorce was an error of execution, correctible under Civ.R. 60(A).

{¶38} The third assignment of error lacks merit.

{¶39} By his fourth assignment of error, Michael objects to the award of attorney fees made to Lorraine's counsel. He notes that it was more than counsel requested. He objects that Lorraine's counsel charged a higher hourly fee than is common in Lake County in family law matters, according to his expert witness' testimony. He urges the trial court failed to apply the appropriate factors in determining the reasonableness of the fee awarded.

{¶40} We review a trial court's decision to award attorney fees for abuse of discretion. *Moore v. Moore*, 175 Ohio App.3d 1, 2008-Ohio-255, at ¶80.

{¶41} R.C. 3105.73 provides, in relevant part:

{¶42} "(A) 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."

{¶43} Courts may be guided by the rules regarding professional conduct in determining the reasonableness of an award of attorney fees. Cf. *Estate of Szczotka*, 166 Ohio App.3d 124, 2006-Ohio-1449; *Swanson v. Swanson* (1976), 48 Ohio App.2d 85. Ohio R. Prof. Conduct 1.5 provides, in relevant part:

{¶44} "(a) A lawyer shall not make an agreement for, charge, or collect an *illegal* or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a *reasonable* fee. The factors to be considered in determining the reasonableness of a fee include the following:

{¶45} "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

{¶46} "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

{¶47} "(3) the fee customarily charged in the locality for similar legal services;

{¶48} "(4) the amount involved and the results obtained;

{¶49} "(5) the time limitations imposed by the client or by the circumstances;

{¶50} "(6) the nature and length of the professional relationship with the client;

{¶51} "(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

{¶52} "(8) whether the fee is fixed or contingent."

{¶53} Our reading of the trial court's judgment entry, modifying the award of attorney fees to Lorraine's counsel indicates the trial court sufficiently considered the relevant factors under R.C. 3105.73(A), and Ohio R. Prof. Conduct 1.5(a). The trial court specifically found that Lorraine's counsel was a highly experienced family law attorney, with a large practice throughout northeastern Ohio. The trial court noted the unique and complicated history of this case required the skills of an experienced attorney. The trial court specifically found that the hourly rate charged by Lorraine's counsel was reasonable given these factors. Pursuant to R.C. 3105.73(A), the trial court specifically found that Michael's conduct throughout the litigation justified an award of attorney fees.

{¶54} The fourth assignment of error lacks merit.

{¶55} The judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is affirmed.

{¶56} It is the further order of this court that defendant-cross-appellant/appellant is assessed costs herein taxed.

{¶57} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J., concurs,

TIMOTHY P. CANNON, J., concurs in part and dissents in part with Concurring/ Dissenting Opinion.

TIMOTHY P. CANNON, J., concurring in part and dissenting in part.

{¶58} I respectfully concur in part and dissent in part from the decision of the majority. I do not believe the trial court employed the appropriate legal standard in analyzing whether to adopt a de facto date for termination of the marriage.

{¶59} Based on the facts and circumstances of the instant case, a de facto date for termination of marriage is warranted. Here, not only did the parties separate physically, they entered into a separation agreement and had their marriage dissolved on July 8, 2002. Thereafter, in March 2003, Lorraine filed a motion pursuant to Civ.R. 60(B) to have the dissolution and separation agreement set aside. The trial court granted that motion, and the parties proceeded to a contested divorce. At the divorce hearing, the trial court ruled that the date of the final hearing, June 11, 2007, was to be used as the date for termination of the marriage.

{¶60} R.C. 3105.171(A) states, in pertinent part:

{¶61} "(2) 'During the marriage' means whichever of the following is applicable:

{¶62} "(a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation:

{¶63} "(b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, 'during the marriage' means the period of time between those dates selected and specified by the court."

{¶64} In this case, Michael argued the proper date to use for the end-date of the relationship was March 18, 2003—the date Lorraine requested the dissolution and separation agreement be set aside. This would be logical, as the parties had been living apart for almost a year assuming their marriage had been terminated.

{¶65} The parties were actually divorced. Even if it is considered a legal separation, the language of the statute suggests that if there is a five-year delay in achieving a legally-binding termination, an earlier date should control. If Michael's conduct warranted making an adjustment in division of property or award of spousal support, that would have been appropriate. However, the query should not be whether the de facto date of termination is inequitable to one party or the other, but whether the date of the final hearing is inequitable to one or the other. Otherwise, the reasoning would be circular.

{¶66} In his recommendation, the magistrate stated the following:

{¶67} "The conduct of Michael placed Lorraine in a substantially weaker financial position subsequent to the dissolution decree than she would have been absent the fraudulent conduct of Michael. As outlined above, this resulted in substantial financial hardship and acquisition of debt from the time of the dissolution decree until the temporary order of support which was issued March 1, 2006 ***. It is legally and logically inconsistent for Michael to claim it is unjust to utilize the first day of trial as the marriage termination date when his fraudulent conduct was the major contributing factor to the lengthy litigation and delay in obtaining a proper termination of the marriage ***."

{¶68} This is not the test set forth in the statute. Whether the date of the prior dissolution or the date proposed by one spouse would be inequitable to the other

spouse is not what the statute requires a court to consider. Rather, it is only whether the date of the final hearing is inequitable to one spouse or the other. R.C. 3105.171(A)(2)(a). A circular analysis should not occur by examining if an alternate date would be inequitable because, invariably, if one date is inequitable to one spouse, it provides a corresponding benefit to the other spouse.