Supreme Court of Ohio Clerk of Court - Filed January 22, 2015 - Case No. 2015-0116

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

MARION J. FLETCHER,	:	**OPINION**
Plaintiff-Appellant,	:	
		CASE NO. 2013-L-084
- vs -	:	
ESTATE OF ALDEN S. FLETCHER, III, et al.	:	
Defendants-Appellees.	:	

FILED
COURT OF APPEALS
DEC 08 2014
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

Civil Appeal from the Lake County Court of Common Pleas, Domestic Relations Division, Case No. 09 DR 000617.

Judgment: Affirmed.

Kenneth J. Cahill, Dworken & Bernstein, 60 South Park Place, Painesville, OH 44077 (For Plaintiff-Appellant).

James M. Lyons, 240 East Main Street, Painesville, OH 44077 and *Jonathan W. Winer,* 5276 Rome Rock Creek Road, Rome, OH 44085 (For Defendants-Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Marion J. Fletcher, appeals the August 20, 2013 Judgment Entry of the Lake County Court of Common Pleas, Domestic Relations Division, ordering her to pay to defendant-appellee, Estate of Alden S. Fletcher, III, one-half of the funds received from Alden's 401(k) account, denying her Motion to Show Cause, and awarding the estate attorney fees. The issues before this court are whether it is equitable to impose a constructive trust to require the beneficiary of a 401(k)

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account to return funds received when it was intended that the account be subject to a division by QDRO; whether a domestic relations court lacks jurisdiction to entertain claims based on a separation agreement more than six months after the death of one of the parties to the agreement; and whether it is an abuse of discretion to award attorney fees to a party against whom a motion for contempt was unsuccessfully prosecuted. For the following reasons, we affirm the decision of the court below.

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{¶2} On December 9, 2010, the marriage of Marion J. and Alden S. Fletcher, III, was terminated by Agreed Judgment Entry. The Entry provided in relevant part:

> **IT IS FURTHER ORDERED** that the Husband's Lincoln Electric 401(k)/Employee Savings account that has an approximate value of $94,650.14 as of December 9, 2009 shall be divided equally between the parties by way of a QDRO as of September 2, 2010 with each party bearing equally any gain or loss in this account after September 2, 2010. Wife shall be responsible for preparation of the QDRO to divide the account.
>
> * * *
>
> **IT IS FURTHER ORDERED** that the marital property located at 209 Riverside Drive, Painesville shall be immediately listed for sale and sold.
>
> * * *
>
> **IT IS FURTHER ORDERED** that beginning September 1, 2010, the Husband and Wife are each equally responsible for the Mortgage payment on the marital home that is payable to National City Bank.
>
> * * *

IT IS FURTHER ORDERED that beginning September 1, 2010, the Husband and Wife are each equally responsible for the costs of the utilities for the marital home which include electric, gas, water and sewer. * * *

{¶3} On December 30, 2011, Mary Elizabeth Lateulere, as Executrix for the Estate of Alden S. Fletcher, III, filed a Motion to Show Cause/Motion to Enforce Agreed Judgment Entry. According to an affidavit attached to the Motion, Alden died on June 12, 2011, and Marion had not prepared the QDRO to divide the 401(k) savings account. Lateulere sought an order requiring Marion to pay to the estate one-half of the funds received from Lincoln Electric following Alden's death.

{¶4} On April 10, 2012, the Estate of Alden S. Fletcher, III was substituted as the defendant in this action.

{¶5} On April 27, 2012, Marion filed a Motion to Show Cause, Motion to Enforce, Motion for Reimbursement Schedule, and Motion for Attorney Fees and Costs. Marion sought an order requiring the estate to pay one-half of the mortgage payment and utility costs for the marital residence.

{¶6} On August 31, 2012, Lateulere filed a Motion for Attorney Fees and Costs.

{¶7} On September 10, 2012, the matter was heard by a magistrate of the domestic relations court.

{¶8} On March 22, 2013, the Magistrate's Decision was issued.

{¶9} On April 2, 2013, Marion filed Objections to the Magistrate's Decision.

{¶10} On April 8, 2013, Lateulere filed Objections to the Magistrate's Decision.

{¶11} On August 20, 2013, the domestic relations court issued a Judgment Entry, ruling on the parties' objections and entering final judgment. The court denied

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Lateulere's Motion to Show Cause, but granted the Motion to Enforce Agreed Judgment Entry and ordered Marion to return one-half of the funds received from the Lincoln Electric 401(k) account to the Estate of Alden S. Fletcher, III. The court denied Marion's Motion to Show Cause and Motion for Reimbursement. The court denied in part and ruled as moot in part Marion's Motion to Enforce. The court denied Marion's Motion for Attorney Fees, and granted Lateulere's Motion for Attorney Fees in the amount of $3,400, representing attorney fees incurred in opposing Marion's Motion to Show Cause.

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{¶12} On September 4, 2013, Marion filed a Notice of Appeal. On appeal, she raises the following assignments of error:

{¶13} "[1.] Whether the trial court committed prejudicial error ordering appellant to pay appellee estate one-half (1/2) the death benefit appellant received."

{¶14} "[2.] Whether the trial court committed prejudicial error by not enforcing those terms of the Agreed Judgment Entry against the estate to pay one-half (1/2) the mortgage of the marital residence and one-half (1/2) the utilities after the decedent's date of death (June 12, 2011) claiming it lacked subject matter jurisdiction."

{¶15} "[3.] Whether the trial court committed prejudicial error by failing to award appellant attorney fees for defending against appellee's Motion to Show Cause and for appellant's prosecution of a Motion to Show Cause against the estate for not paying one-half (1/2) the mortgage for the marital residence and not paying one-half (1/2) the utilities for the marital residence."

{¶16} "[4.] Whether the trial court committed prejudicial error ordering appellant to pay appellee $3,400.00 for attorney fees even though appellee failed to abide by the Judgment Entry of Divorce and the trial court contradicted itself by earlier stating that

attorney fees on both sides were quite high and neither party demonstrated an inability to pay for their own attorney fees."

{¶17} In the first assignment of error, Marion argues that the domestic relations court erred by ordering her to return one-half of the funds received from the Lincoln Electric 401(k) account to Alden's estate. Marion claims that she received those funds in accordance with the plan documents, which designated her as the sole beneficiary of the 401(k) account. According to Marion, the failure to prepare a QDRO had no effect on the ultimate distribution of the funds, as she would have received the balance of the account (that portion not covered by the QDRO) by virtue of being the designated beneficiary.

{¶18} In a domestic relations case, "it is axiomatic that a trial court must have discretion to do what is equitable upon the facts and circumstances of each case," and "that a trial court's decision in domestic relations matters should not be disturbed on appeal unless the decision involves more than an error of judgment." *Booth v. Booth*, 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 (1989).

{¶19} The domestic relations court and magistrate relied on the case of *Drummond v. Drummond*, 5th Dist. Fairfield No. 10-CA-20, 2010-Ohio-6139, which held that a constructive trust was an appropriate remedy where the proceeds of an STRS pension were not distributed in accordance with the terms of a separation agreement. *Id.* at ¶ 31-32.

{¶20} The Ohio Supreme Court has recognized that a constructive trust may be imposed as an equitable remedy "against unjust enrichment * * * where it is against the principles of equity that the property be retained by a certain person even though the property was acquired without fraud." (Citation omitted.) *Estate of Cowling v. Estate of*

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Cowling, 109 Ohio St.3d 276, 2006-Ohio-2418, ¶ 19. The remedy may be appropriately applied to anyone "who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy." *Id.* at ¶ 18.

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{¶21} For example, in *Fischbach v. Mercuri*, 184 Ohio App.3d 105, 2009-Ohio-4790, 919 N.E.2d 804 (2nd Dist.), the current spouse (Mercuri) of an STRS plan participant received retirement benefits owed, according to the terms of the divorce decree, to the former spouse (Fischbach). The court of appeals held that Fischbach was entitled to "the funds received by Mercuri on the basis of unjust enrichment, as a result of a wrongful act by her late husband, the plan participant," i.e., failing to designate Fischbach as a beneficiary on the fund. *Id.* at ¶ 3, 24.

{¶22} We find no abuse of discretion in the domestic relations court's decision to order Marion to pay the estate one-half of the funds received. The order effects the clear intent of the Agreed Judgment entry that the Lincoln Electric 401(k) "be divided equally between the parties." Alden's failure to change the beneficiary prior to his death should not frustrate that intent any more than Marion's failure to file a QDRO.[1]

{¶23} Following oral argument in the present case, the parties submitted supplemental briefs on the issue of the applicability of R.C. 5815.33(B)(1) (former R.C. 1339.63(B)(1)), which provides in relevant part:

> Unless the designation of beneficiary or the judgment or decree granting the divorce, dissolution of marriage, or annulment specifically provides otherwise * * *, if a spouse designates the

1. We note the finding of the magistrate that, "although wife was responsible to complete the QDRO to divide the Lincoln account, she made all good faith efforts to do so through her then attorney, Linda D. Cooper's efforts." Of course, this finding does not justify Marion's retention of the funds.

other spouse as a beneficiary or if another person having the right to designate a beneficiary on behalf of the spouse designates the other spouse as a beneficiary, and if, after either type of designation, the spouse who made the designation or on whose behalf the designation was made, is divorced from the other spouse, obtains a dissolution of marriage, or has the marriage to the other spouse annulled, then the other spouse shall be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made, and the designation of the other spouse as a beneficiary is revoked as a result of the divorce, dissolution of marriage, or annulment.

{¶24} There is no dispute that Alden's Lincoln Electric 401(k) account is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. 1002(1). Under ERISA, employee welfare benefit plans must be administered "in accordance with the documents and instruments governing the plan," and payments thereunder must be made to the "beneficiary" who is "designated by a participant, or by the terms of [the] plan." 29 U.S.C. 1104(a)(1)(D) and 1002(8). It is further provided that ERISA's provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any [subject] employee benefit plan." 29 U.S.C. 1144(a).

{¶25} In *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 121 S.Ct. 1322, 149 L.E.2d 264 (2001), the United States Supreme Court ruled that a Washington statute, providing that "that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce," was pre-empted under ERISA. *Id.* at 143 and 150. As the practical effect of the Washington statute and R.C. 5815.33(B)(1) are

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substantially similar, ERISA pre-empts the application of the Ohio statute in the present action.

{¶26} We note that federal pre-emption under ERISA does not prohibit the imposition of a constructive trust on the proceeds of a benefit plan once paid to the designated beneficiary. "The law recognizes a distinction between a plan administrator's obligation to pay over benefits to a named plan beneficiary and that beneficiary's entitlement to keep those funds thereafter." *Partlow v. Person*, 798 F.Supp.2d 878, 885 (E.D.Mich.2011). "Consequently, trial courts are empowered to impose constructive trusts on proceeds received from [plans] governed by ERISA after the designated beneficiary receives the proceeds." *Crites v. Anthem Life Ins. Co.*, 3rd Dist. Defiance No. 4-13-13, 2014-Ohio-1682, ¶ 22 (cases cited); *Central States, Southeast & Southwest Areas Pension Fund v. Howell*, 227 F.3d 672, 678 (6th Cir.2000) ("the anti-alienation provision of ERISA precluded the imposition of a constructive trust **before** distribution of benefits to the beneficiary, but it held that nothing in the legislative scheme prevented the imposition of a constructive trust **after** the benefits were paid to the beneficiary of the pension benefits") (emphasis sic).

{¶27} The first assignment of error is without merit.

{¶28} Under the second assignment of error, Marion argues the domestic relations court erred in its determination that it lacked jurisdiction to adjudicate her claims that Alden's estate was in contempt for failing to reimburse her for mortgage and utility expenses for the marital home.

{¶29} We review a trial court's determination as to its ability to exercise jurisdiction over a matter de novo. *Burns v. Daily*, 114 Ohio App.3d 693, 701, 683 N.E.2d 1164 (11th Dist.1996).

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{¶30} The domestic relations court ruled that it lacked jurisdiction over these claims. The court noted that on the date of Alden's death (June 12, 2011), there were no outstanding obligations owed to Marion. Stated otherwise, the court ruled that Marion's claims did not arise until after his death. Accordingly, any real estate expenses arising after June 12, 2011 were "within the subject matter of the Probate Court."

{¶31} In support of its position, the domestic relations court cited to *Diemer v. Diemer*, 99 Ohio App.3d 54, 649 N.E.2d 1285 (8th Dist.1994). *Diemer* stands for the proposition that, although "an action for divorce abates and cannot be revived when one of the parties thereto dies, * * * an *action which seeks to enforce fixed rights and liabilities*, such as an action to enforce alimony already awarded, survives the death of that party." (Emphasis sic.) *Id.* at 59-60.

{¶32} *Diemer* was inapposite inasmuch as the abatement of Marion's claims was not an issue in the present case. As noted by the domestic relations court, at the time of Alden's death, there was nothing pending to abate or revive. The issue was whether the domestic relations court could exercise jurisdiction over her claims. On that issue, *Diemer* contributes nothing.

{¶33} "All creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims" to the executor of the estate. R.C. 2117.06(A). "[A]ll claims shall be presented within six months after the death of the decedent." R.C. 2117.06(B). "When a claim against an estate has been rejected in whole or in part * * *, the claimant must commence an action on the claim, or that part of the claim that was rejected, within two months after

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the rejection if the debt or that part of the debt that was rejected is then due, or within two months after that debt or part of the debt that was rejected becomes due, or be forever barred from maintaining an action on the claim or part of the claim that was rejected." R.C. 2117.12.

{¶34} In the present case, Marion presented her claim to the executor of Alden Fletcher's estate on November 3, 2011. On November 7, 2011, Lateulere notified Marion by certified mail that the claim was "rejected in whole." On April 27, 2012, Marion filed her Motion to Show Cause, seeking to assert her claim based on the Decree of Divorce. Since she asserted her claim in domestic relations court more than two months after its rejection by the executor, it is forever barred. *Vitantonio, Inc. v. Baxter*, 116 Ohio St.3d 195, 2007-Ohio-6052, 877 N.E.2d 663, ¶ 3 ("R.C. 2117.12 requires that an action for a rejected claim such as appellees' be filed within two months after the executor's rejection or be forever barred").

{¶35} The procedure set forth in R.C. 2117.12 has been regularly applied in situations where a claim is asserted against a decedent's estate based on a final decree of divorce. *See, e.g., Caldwell v. Brown*, 109 Ohio App.3d 609, 610, 672 N.E.2d 1037 (2nd Dist.1996) ("[t]he claim was expressly predicated upon provisions in a divorce decree"); *Harmer v. Smith*, 2nd Dist. Clark No. 3101, 1994 Ohio App. LEXIS 3200, 2 (July 20, 1994) (claim based on "the decedent's failure to have maintained certain policies of life insurance that * * * he was required to maintain under the terms of the divorce decree"); *Lindsay v. Royse*, 12th Dist. Butler No. CA92-06-111, 1993 Ohio App. LEXIS 1221, 3 (Mar. 1, 1993) (claim "represent[ed] an arrearage of sustenance alimony payments accumulated prior to and after the [obligor's] death").

{¶36} The second assignment of error is without merit.

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{¶37} In the third and fourth assignments of error, Marion asserts that the domestic relations court erred by denying her Motion for Attorney Fees, while awarding the estate fees in the amount of $3,400.

{¶38} "In any post-decree motion or proceeding that arises out of an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that motion or proceeding, 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." R.C. 3105.73(B).

{¶39} "It is well-established that an award of attorney fees is within the sound discretion of the trial court." *Rand v. Rand*, 18 Ohio St.3d 356, 359, 481 N.E.2d 609 (1985).

{¶40} The denial of Marion's request for attorney fees for the prosecution of her Motion to Show Cause was appropriate inasmuch as that Motion was denied.

{¶41} With respect to the award of attorney fees to the estate, we find no abuse of discretion. It was neither unreasonable nor inappropriate to award attorney fees in light of the fact that Marion attempted to litigate her untimely claims for reimbursement in two courts simultaneously.

{¶42} The third and fourth assignments of error are without merit.

{¶43} For the forgoing reasons, the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, ordering Marion to return to the estate one-half of the funds received from Alden's 401(k) account, denying her Motion to Show Cause, and awarding the estate attorney fees is affirmed. Costs to be taxed against appellant.

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TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with a Concurring/Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with a Concurring/Dissenting Opinion.

{¶44} I concur with the majority's disposition of the first and third assignments of error. However, I respectfully dissent regarding the second and fourth assignments of error, and would reverse the trial court on them.

{¶45} On the second assignment of error, the majority agrees with the trial court's conclusion the probate court had sole jurisdiction of the issue whether the estate could be held in contempt for failing to reimburse Marion for mortgage and utility expenses for the marital home. I find the magistrate's conclusion the trial court retained jurisdiction to decide the issue persuasive. The magistrate had substituted the estate as party defendant in the divorce. I agree with the magistrate the trial court retained jurisdiction to enforce its own prior order that the parties each pay one-half of the mortgage and utility expenses for the marital home.

{¶46} On the fourth assignment of error, Marion argues the trial court erred in awarding the estate attorney fees for defending her motions to show cause and for reimbursement regarding the mortgage payments and utilities. She buttresses her argument by citing to the trial court's finding in its judgment entry that each party appeared able to pay its attorney fees.

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{¶47} It is evident from a reading of the trial court's judgment entry on this issue, that it found it unreasonable for Marion to pursue the matter in both the domestic relations division, and the probate division. Given my conclusion the trial court erred in not exercising jurisdiction over the mortgage and utility payments, I cannot find it unreasonable or inequitable for Marion to have pursued the issue in both courts. Thus, any award to the estate of attorney fees for defending the issue in both forums should be reversed.

{¶48} I respectfully concur and dissent.

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STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

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MARION J. FLETCHER,

Plaintiff-Appellant,

- vs -

ESTATE OF ALDEN S. FLETCHER, III, et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2013-L-084

FILED
COURT OF APPEALS
DEC 08 2014
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

For the reasons stated in the Opinion of this court, the assignments of error are without merit. The order of this court is that the judgment of the Lake County Court of Common Pleas, Domestic Relations Division is affirmed. Costs to be taxed against appellant.

Diane V. Grendell
JUDGE DIANE V. GRENDELL

TIMOTHY P. CANNON, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with a Concurring/Dissenting Opinion.

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MAUREEN G. KELLY
LAKE CO. CLERK OF COURT

IN THE COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
LAKE COUNTY, OHIO

MARION J. FLETCHER,	)	CASE NO. 09 DR 000617
	)	
Plaintiff,	)	JUDGE COLLEEN A. FALKOWSKI
-vs-	)	
	)	
ALDEN S. FLETCHER, III,	)	**JUDGMENT ENTRY**
	)	
Defendant.	)	
	)	

F

This case comes before the Honorable Colleen A. Falkowski this 15th day of July, 2013, upon the objections filed by both parties to the Magistrate's Decision of March 22, 2013. Present in Court were the Plaintiff, Marion J. Fletcher, hereinafter referred to as "Wife," being represented by Kenneth J. Cahill, and the Defendant, Estate of Alden S. Fletcher, III, through Executrix Mary Lateulere, being represented by James M. Lyons and Jonathan W. Winer.

A transcript of the proceeding before the Magistrate has been filed herein.

The parties' marriage was terminated by decree of dissolution filed December 9, 2010. Said decree provided in pertinent part:

> IT IS FURTHER ORDERED that the Husband's Lincoln Electric 401(k)/Employee Savings Account that has an approximate value of $94,650.14 as of December 9, 2009 shall be divided equally between the parties by way of a QDRO as of September 2, 2010 with each party bearing equally any gain or loss in this account after September 2, 2010. Wife shall be responsible for preparation of the QDRO to divide this account.

Husband died June 12, 2011. Wife had not prepared the QDRO as of said date. On December 30, 2011, Mary Lateulere, Executrix of Husband's estate, filed a motion to show cause/motion to enforce the agreed judgment entry of divorce as to the QDRO.

On April 10, 2012, Husband's estate was substituted as the Defendant in this case. On April 27, 2012, Wife filed her motion to show cause, motion to enforce, motion for reimbursement schedule, and motion for attorney fees and costs. The parties stipulated to the following on the record before the Magistrate (transcript, p. 5-7) as to Defendant's motion filed December 30, 2011:

> MR LYONS: Yes, Sir. Alden Fletcher, II, died on June 12, 2011.
>
> No QDRO, or Qualified Domestic Relations order, had been submitted to the Court or opposing counsel as of June 12, 2011, for the Lincoln 401(k) account.
>
> Three: No QDRO was ever submitted to the Court or opposing counsel for the Lincoln 401(k) account.
>
> Four: On July 19, 2011, Defendant's attorney, Jon Winer, sent an email to Attorney Cooper asking for the QDRO or, in the alternative, one-half share of the 401(k) proceeds. See Defendant's Exhibit B.
>
> Plaintiff received the Lincoln 401(k) funds on January 4, 2012, and January 5, 2012.
>
> Six: The amount of the Lincoln 401(k) funds received by plaintiff was $107,340.88, plus or minus any losses since January 4, 2012. See Plaintiff's Exhibits 4 and 5. The funds are in a tax qualified account.
>
> Seven: Plaintiff has refused to return or pay to the estate any of the Lincoln 401(k) funds.
>
> Eight: Plaintiff received the Lincoln 401(k) funds as the death benefit beneficiary of the 401(k) fund. The 401(k) account was an ERISA account and the payment of the funds to the death benefit beneficiary was controlled by the ERISA statutes. Plaintiff was the only beneficiary on the account. There is no evidence that the beneficiary was changed after the date of divorce.
>
> The agreed judgment entry awarded one-half of the Lincoln 401(k) account to the plaintiff and one-half to the defendant, Alden Fletcher, III.
>
> Ten: The Defendant Estate of Alden Fletcher, III filed its motion to show cause/motion to enforce the JE on 12/30/2011.
>
> Eleven: The defendant has not received any portion of the Lincoln 401(k) funds from Lincoln or the plaintiff or Fidelity.

Twelve: Defendant has incurred the sum of $6,800 in attorney's fees for prosecuting the Defendant's motion to show cause.

Thirteen: Plaintiff has incurred the sum of $7,000 in attorney's fees in defense of the defendant's motion to show cause.

Fourteen: On June 8, 2011, the Plaintiff's attorney drafted and submitted to Lincoln a draft QDRO for the Lincoln 401(k). See Plaintiff's Exhibits 2 and 3.

Fifteen: A true and accurate copy of the will of Alden Fletcher, III, is attached as exhibit – Defendant's Exhibit K. The will was admitted into the Lake County Probate Court, Case Number 11 ES 0346.

Sixteen: A true and accurate copy of the docket in this case through June 1, 2012, signed by both attorneys and both parties, is attached as Defendant's Exhibit A. This has been signed by myself, by Mr. Cahill, by Mary Elizabeth Lateulere, the executor, and also by Marion Fletcher.

THE COURT: Okay. And, for the record, those exhibits referenced in the stipulations have been submitted as well?

MR. LYONS: That's correct.

MR. CAHILL: That's correct, Your Honor.

There were additional stipulations in the transcript (page 8-12) as to the Plaintiff's April 27, 2012 motion:

MR. LYONS: Yes. One: Plaintiff filed her motion to show cause on April 18, 2012, regarding payment of mortgage and house expenses.

Two: Plaintiff has paid the following expenses for the house since June 2011: A) Utilities: $200 gas, $250 electric, $375 for water, $73 for garbage, total $858; insurance, real estate, $363.73; C) mortgage $10,150 for June 2011 through August 2012; D) landscaping $240.

Three: Plaintiff is requesting one-half of the expenses listed in paragraph 2 above.

Four: Plaintiff has incurred $7,500 in attorney's fees in prosecuting her motion to show cause.

Five: Defendant has incurred $3,400 in opposing the plaintiff's motion to show cause.

Six: Balance of the mortgage was $81,109.86 in July of 2011. See Plaintiff's Exhibit 5.

Seven: Plaintiff filed a claim against the Estate of Alden Fletch, III, in Lake County Probate Court on November 3, 2011. See Defendant's Exhibit C.

The claim was rejected by Alden Fletcher, III, the Estate, on November 7, 2011, and the rejection was sent out by certified mail to plaintiff. See Defendant's Exhibits D and E.

The rejection letter was received by plaintiff on November 25, 2011. See Defendant's Exhibit E, which was a certified green card.

Ten: On December 13, 2011, the estate sent a letter to the mortgage holder that disallowed and rejected any claim that they had against the estate. See Defendant's Exhibit F.

The rejection letter to PNC was received by PNC and National City, was received on 12/27/2011 and 12 – December 28, 2011. See Defendant's Exhibit G.

On April 19, 2012, the plaintiff, in the Lake County Probate Court, filed a motion for an order regarding the estate to pay one-half of the mortgage and costs and a motion for reimbursement. A true and accurate copy of the motion is attached as Exhibit H. Plaintiff does not stipulate this exhibit is relevant or admissible.

Thirteen: A true and accurate copy of the Lake County Probate Court docket is attached as Exhibit I. Plaintiff does not stipulate to the relevance of admissibility of this exhibit.

Fourteen: On June 15, 2012, the Lake County Probate Court issued its judgment entry regarding the 4/19/2012 motion filed by the plaintiff. See Exhibit – Defendant's Exhibit J. Plaintiff does not stipulate to the relevance or admissibility of Exhibit J.

Fifteen: The 6/15/2012 Probate Court JE was not appealed by the plaintiff. Plaintiff does not stipulate to the relevance of admissibility of this fact.

Sixteen: Defendant Alden Fletcher paid the following expenses from December 2010 to June 2011: Mortgage, December 2010 to May 2011, $3,500; Painesville utilities, $94.50; Dominion, $661; insurance, $414; for a total of $5,328.

The following emails were exchanged between Jon Winer, the plaintiff, and the estate: 6/9/2011 email from Jon Winer to Linda Cooper, see Defendant's Exhibit L; an 8/14/2011 email from the estate to plaintiff, see Defendant's Exhibit

M; an 8/25/2011 email from plaintiff to estate and from estate to plaintiff, Defendant's Exhibit N. The parties stipulate to the contents of those emails.

Eighteen: Parties agree all exhibits are admissible except H, I and J. Plaintiff argues that these documents are irrelevant and not admissible. Defendant argues that they are relevant and admissible. The Court must decide this issue.

Parties stipulate Defendant's Exhibits H, I and J are authentic and have been properly offered for admission into evidence without any further testimony.

I think, as an additional stipulation, the exhibits that were referenced in the first set of stipulations on the defendant's motion are all admissible.

MR CAHILL: Correct.

Wife's objections 1, 2 and 7 shall be considered together. Wife objects to the Magistrate finding Wife is entitled to only one-half of the decedent's Lincoln Electric 401(k). Wife argues she is entitled to 100% of the Lincoln Electric 401(k). Pursuant to the terms of the divorce, Wife and Husband were to each receive 50% of Husband's Lincoln Electric 401(k) benefits via a QDRO to be prepared by Wife. Wife's objections also encompass the Magistrate granting the Executrix's motion for Wife to reimburse the estate for the additional 401(k) benefits she received as a death benefit. Both parties submit the United States Supreme Court decision of *Kennedy v. Plan Administrator for Dupont Savings and Investment*, 555 US 285 (2009) is determinative herein. The Executrix submits the U.S. Supreme Court specifically opined "Nor do we express any view as to whether the Estate could have brought an action in state or federal court against [the beneficiary] to obtain the benefit after they were distributed." Wife argues the Supreme Court, in *Kennedy, supra*, determined the payment to wife was a death benefit; therefore, herein, Lincoln Electric is required to pay the entire 401(k) amount to Wife as Husband's named beneficiary of the death benefit. Wife is correct that Lincoln Electric had to pay the entire death benefit to her. However, Wife's reliance on the *Kennedy* case is flawed since said case simply determined who the proper beneficiary of the Dupont Plan's death benefit was. The issue in the instant case goes the step beyond *Kennedy*: recovery of the funds the Executrix claims are due the estate which the Lincoln Electric 401(k) Plan Administrator properly paid out as a death benefit to Wife. Relevant to Wife's objections are the Fifth District Court of Appeals cases of *Drummond v. Drummond,* 2010 Ohio 6139 and *Drummond v. Drummond*, 2013 Ohio 2003. In both *Drummond* cases what is strikingly similar to the case at

bar is that wife in said case received 100% of her deceased former husband's STRS benefits wherein the judgment entry of divorce ordered she receive 44.41% of his gross monthly retirement benefits via a QDRO. In both *Drummond,* cases, *supra*, the Court of Appeals held the trial court erred in failing to impose a constructive trust upon the 55.59% wife received over and above her 44.41% share allocated in the divorce. Accordingly, this Judge finds the Magistrate did not err in finding Wife unjustly enriched by retaining 100% of the Lincoln Electric 401(k) instead of 50%. The terms of the divorce are clear as to Wife's portion of the 401(k). Wife owes her excess 50% recovery to the Executrix as fiduciary for Husband's estate. Wife's first, second and seventh objections are denied.

Wife next objects to the Magistrate not awarding her attorney fees in the sum of $7,000.00 in that she prevailed defending on the motion to show cause the Executrix filed. Wife argues "There was no basis in law or fact for this motion to be brought." To the contrary, Wife did not file any motion asking that the motion to show cause be found as frivolous and not filed in good faith. Further, the Magistrate notes the conduct of Wife did not warrant an award of attorney fees. Exhibit N is an email from Wife to the Executrix in August 2011, about one month after the estate's demand to Wife for 50% of the Lincoln 401(k) as shown in Exhibit B. The Exhibit illustrates Wife's frame of mind to the Executrix. Such behavior results in litigation; negotiation is impossible. The Court finds, based on the parties' stipulations, both attorney fee bills were high for a simple issue show cause. The Court finds Wife's third and fifth objections not well taken.

Wife's fourth and sixth objections shall be considered together. Wife argues the Magistrate erred in finding the Estate was not ordered to comply with the decree of divorce and cannot be found in contempt. The Ohio Supreme Court case of *Coffman v. Finney*, 65 Ohio St. 61, 61 N.E. 155 (1901) holds that what is enforceable in a divorce action after the death of a party are the fixed rights and liabilities of the decedent as of the date of death, pursuant to the terms of the divorce decree. See also the Eighth District Court of Appeals case of *Durgin v. Durgin*, 2013 Ohio 1897.

Herein, the divorce decree provides in pertinent part:

> **IT IS FURTHER ORDERED** that the marital property that the parties own that is located at 209 Riverside Drive, Painesville shall be immediately listed for sale and sold. The marital home shall be sold on the following terms and conditions:

1) The listing agent shall be Lynn Decker unless the parties mutually agree to change listing agents.

2) Upon the sale of the marital home, and after payment of the first mortgage due and owing upon said real estate, any real estate commissions payable and the normal and customary costs of closing, the net proceeds realized therefrom shall be divided equally between the parties.

3) The parties shall remove all their personal property from the marital residence no later than 15 days before the closing date. Neither party is responsible for the condition of the other party's personal property.

IT IS FURTHER ORDERED that beginning September 1, 2010, the Husband and the Wife are each equally responsible for the Mortgage payment on the marital home that is payable to National City Bank. Wife shall give her share of the mortgage payment to Husband seven days before the payment is due and then the Husband shall make the mortgage payment on a timely basis until the home is sold. The joint National City Bank account proceeds shall be applied to the mortgage payment due in September 2010 and the utilities which come due in September 2010 and any remaining proceeds shall be divided equally.

IT IS FURTHER ORDERED that beginning September 1, 2010, the Husband and the Wife are each equally responsible for the costs of the utilities for the marital home which include electric, gas, water and sewer. Wife shall pay to Husband her share of the utilities costs within ten days of receiving a bill from the Husband for those costs.

Therefore, the only financial matters the estate is subject to for a contempt are any unpaid obligations of Husband from the real estate due to Wife as of his date of death. Pursuant to stipulation 16, Husband's obligations to Wife were paid as of the date of his death. Accordingly, this writer finds Wife's motion to show cause is not well taken on a basis other than what the Magistrate determined. The Magistrate's determination of the motion to show cause is hereby set aside.

This Judge finds the Domestic Relations Court is without subject matter jurisdiction to enforce any claimed obligations of Wife's against the estate arising after June 12, 2011. See *Diemer v. Diemer*, 99 Ohio App.3d 54, 649 N.E.2d 1285 (8th Dist. 1994). Therefore, this Judge finds the portion of the Magistrate's Decision holding the Estate liable for any real estate expenses after June 12, 2011, is also (CAT) in error and is set aside. Said expenses are within the subject matter jurisdiction of Probate Court. Wife's fourth and sixth objections are not well taken.

In Wife's supplemental objection seven, the Court finds said objection is moot based upon this Judge's decision as to Wife's first two objections.

Wife's supplemental objection eight is moot due to this Judge's determination of Wife's fourth objection.

The objections of the Executrix shall now be considered.

Objections 2 and 5 of the Executrix shall be considered together. Based on this Judge's prior determination of Wife's fourth and sixth objections, the only financial liability the estate has in the instant case, pursuant to the divorce decree, was as of Husband's date of death. Stipulation 16 shows Husband's obligations were paid as of said date. Said objections are moot.

In objection 3, the Executrix objects to the portion of the Magistrate's Decision wherein he clarified the provisions in the decree for the sale of the marital residence. This Judge has found hereinabove, the Domestic Relations Court has no subject matter jurisdiction over the sale of the real estate. The real estate is now within the jurisdiction of the Probate Court in case number 11 ES 0346. Objection 3 is moot.

In her sixth objection, Executrix requests an award of attorney fees as to the show cause for the QDRO. Said objection is not well taken in that the Executrix did not prevail. Further, this Judge has previously found both attorney fee bills quite high for that simple issue. Neither party has demonstrated any inability to be responsible for their own attorney fees. An award of fees is not equitable pursuant to Revised Code 3105.73 (B).

Objections 1 and 7 shall be considered together. The Executrix objects to the Magistrate finding Plaintiff and her attorney acted in good faith in regard to the preparation and submission to the Court of the QDRO. The Executrix also objects to Wife not being found in contempt. The sequence of events is critical to an analysis of the objections. The timeframe between the date of the divorce and Husband's death is just beyond six months. Obviously, this is not a long period of time. The exhibits and testimony at trial show the QDRO was requested by Wife of her attorney in the spring of 2012. Further, this Judge takes notice QDRO's are routinely submitted to her for signature years past the date of divorce. Although Husband's death is a sad event, an unwarranted delay did not occur as to preparation of the QDRO. The objections are not well taken.

Objections 4, 8 and 9 of the Executrix shall be considered together. In objection 8, the Executrix objects to the Magistrate finding her to take "a vindictive stance" on the sale of the

marital home, In objection 9, the Executrix objects to the Magistrate finding "Under the Estate's position, the marital residence will never be able to be sold." These objections relate to the Magistrate's clarification of orders for the sale of the house within the divorce. In that this Judge has determined hereinabove the Domestic Relations Court is without subject matter jurisdiction as to the real estate, the objection need not be further considered. The house and its sale are within the jurisdiction of Lake County Probate Court. Said objections are moot.

The Executrix last argues she is entitled to attorney fees. This Judge concurs a fee award is warranted to the Executrix in defending the motions to show cause Wife filed April 27, 2012 as to the payment of the mortgage and house expenses. Pursuant to the parties' stipulation as to said show cause motion, stipulations 7 through 15 are relevant to the Executrix's request for a fee award. The stipulations show Wife's claim against the estate was rejected by the Executrix on November 7, 2011, and certified mail of said rejection was mailed to Wife, which she received November 25, 2011. Over five months later, April 27, 2012, Wife filed a motion in this Court for the estate to pay one-half of the house mortgage and related costs and a motion for reimbursement. The parties' stipulations show Wife filed similar motion in Probate Court about two weeks prior, on April 12, 2012. The Honorable Ted Klammer, Judge of the Probate Court, by Judgment Entry filed June 15, 2012, held the Lake County Probate Court was without jurisdiction to adjudicate Wife's April motions. In said entry, the Judge referenced Revised Code Section 2117.12, which requires a claimant to commence action on a rejected claim within two months or be forever barred from mounting an action on the claim. At the time Wife filed said motions in Domestic Relations Court, she was litigating the same motions before the Probate Court. The Court finds it is reasonable and appropriate, based on the conduct of Wife and the stipulations of counsel to award the Executrix the sum of $3,400 for defending the April 27, 2012 motions filed by Wife. Said tenth objection is well taken.

THE COURT HEREBY ORDERS, ADJUDGES AND DECREES the Plaintiff's objections 1 to 7 are denied. Plaintiff's objection 8 is dismissed as moot. The Defendant's objections 1, 6 and 7 are denied; objections 2, 3, 4, 5, 8, and 9 are dismissed as moot. The Defendant's objection 10 is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED the Defendant's motion to show cause filed December 30, 2011 is denied. The Defendant's motion to enforce the agreed judgment entry of divorce is granted. The Plaintiff shall forthwith return one-half (1/2) of the

funds received from the Lincoln Electric 401(k) account to the Estate of Alden S. Fletcher, III, Mary Lateulere Executrix within thirty (30) days of receipt of this order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED Plaintiff's motion to show cause and motion for reimbursement filed April 27, 2012 are each denied. Plaintiff's motion to enforce is moot in part pursuant to stipulation 6. The balance of the motion is denied as set forth in this entry.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED Plaintiff's motions for attorney fees are denied. The Defendant's attorney fees resulted from defending the April 27, 2012 motion filings of the Plaintiff are granted in the sum of $3,400. Said sum shall be paid within thirty (30) days of the filing of this entry.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED each party shall pay their own court costs.

IT IS SO ORDERED.

Colleen A Falkowski

COLLEEN A. FALKOWSKI, JUDGE

cc: Kenneth J. Cahill, Esq., Dworken & Bernstein, 60 S. Park Pl., Painesville, OH, 44077
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