

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

David M. Cohen,	:	
	:	
Plaintiff-Appellee,	:	Nos. 08AP-344
	:	and
v.	:	09AP-548
	:	(C.P.C. No. 06DR06-2561)
Deborah J. House-Cohen	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 15, 2009

Grossman Law Offices, and *Anthony Auten*, for appellee.

Sowald, Sowald, Anderson & Hawley, and *Marty Anderson*,
for appellant.

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

SADLER, J.

{¶1} Defendant-appellant, Deborah J. House-Cohen ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, in which that court granted a decree of divorce to appellant and to plaintiff-appellee, David M. Cohen ("appellee").

{¶2} The parties were married on October 9, 1977, and appellee instituted this action on June 19, 2006. He then filed a motion for determination of de facto end of marriage and the trial court consolidated the hearing on that motion with the trial. On the trial date of November 28, 2007, the court advised the parties that it would begin by separately considering appellee's motion and began by taking testimony relative thereto. During that hearing, the court adjourned at the parties' request, and by the time the court reconvened several weeks later, the parties had reached a settlement as to all matters with the exception of the issue of attorney fees.

{¶3} On December 28, 2007, the court, with the assistance of the parties' counsel, read into the record various stipulations to which the parties had agreed in anticipation of the filing of an agreed judgment entry. The court and both parties' counsel indicated that they were basing the division of assets upon a balance sheet prepared by Susan Moussi and dated December 28, 2007. The transcript indicates that the parties initialed that balance sheet and the court made copies for distribution to the parties for use in preparing an agreed judgment entry. There is no indication that the court reporter was given a copy of that balance sheet and the record does not contain a copy of it. At the conclusion of the hearing, the court and the parties agreed that the parties would make motions for attorney fees and costs, and would submit affidavits in support thereof.

{¶4} On January 4, 2008, appellant filed a motion for attorney's fees and costs, and on January 8, 2008, appellee filed his own such motion. On January 29, 2008, both parties filed affidavits in support of their motions. On February 29, 2008, the trial court journalized the parties' agreed judgment entry – decree of divorce that incorporated the

parties' settlement agreement, though it did not specify the value of any marital asset and did not contain the balance sheet to which the parties and the court had referred during the December 28, 2007 hearing.

{¶5} On March 25, 2008, the trial court journalized a decision and entry denying both parties' motions for attorney's fees and costs. Later, appellant filed a motion for reconsideration of her attorney's fees motion, which the trial court denied on May 5, 2008. Appellant appealed to this court in case No. 08AP-344. Meanwhile, she had filed in the trial court a Civ.R. 60 motion, seeking relief from the court's judgment entry – decree of divorce. Specifically, she alleged that a provision related to division of a particular marital asset was ambiguous, and requested clarification and/or relief from judgment. Appellant then moved this court to remand her appeal in case No. 08AP-344 to allow the trial court to rule on the Civ.R. 60 motion. We granted the motion to remand and we stayed the appeal in case No. 08AP-344 pending the trial court's ruling.

{¶6} On May 8, 2009, the trial court denied appellant's Civ.R. 60 motion. Appellant filed a timely notice of appeal from that judgment in case No. 09AP-548, and moved this court to consolidate that case with her earlier appeal. We granted that motion, reactivated the earlier appeal, and vacated the stay order.

{¶7} Appellant advances five assignments of error for our review, as follows:

ASSIGNMENT OF ERROR NO. 1

A. THE TRIAL COURT ABUSED ITS DISCRETION BY RELYING UPON INCOMPLETE TESTIMONY FROM THE "DURATION OF MARRIAGE" MOTION HEARING, AFTER DIRECTING THE PARTIES THAT ONLY POST TRIAL AFFIDAVIT TESTIMONY AND SUMMARY TRIAL EXHIBITS WOULD BE CONSIDERED REGARDING THE MOTION FOR ATTORNEY FEES.

B. THE TRIAL COURT ERRED BY BASING ITS FINDINGS OF VALUES UPON AN EXHIBIT, NOT ADMITTED INTO EVIDENCE, THAT DID NOT REFLECT THE FINAL DIVISION OF ASSETS AND LIABILITIES.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT'S FINDING THAT PLAINTIFF-APPELLEE HAD AN AVERAGE INCOME OF APPROXIMATELY \$160,000.00 PER YEAR WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING AN AWARD OF ATTORNEY FEES TO DEFENDANT-APPELLANT BASED IN PART ON A FORMULA FOR SPOUSAL SUPPORT NOT OTHERWISE INTENDED AS A SUBSTITUTE FOR AN AWARD OF ATTORNEY FEES.

ASSIGNMENT OF ERROR NO. 4

IN CONSIDERING DEFENDANT-APPELLANT'S MOTION FOR ATTORNEY FEES, THE TRIAL COURT ABUSED ITS DISCRETION BY PENALIZING THE DEFENDANT-APPELLANT FOR ACCEPTING A DIVISION OF ASSETS BY NEGOTIATION AND AGREED DECREE.

ASSIGNMENT OF ERROR NO. 5

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING DEFENDANT-APPELLANT'S REQUEST FOR RELIEF PURSUANT TO CIVIL RULE 60(B), RELATED SPECIFICALLY TO THE AMBIGUOUS PROVISION IN THE AGREED JUDGMENT ENTRY-DEGREE OF DIVORCE.

{¶8} In her first four assignments of error, appellant challenges the trial court's decision to deny her motion for attorney's fees and costs. Pursuant to R.C. 3105.73(A), "[i]n an action for divorce * * * 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."

{¶9} In general, an award of attorney fees is within the sound discretion of the trial court. *Falk v. Falk*, 10th Dist. No. 08AP-843, 2009-Ohio-4973, ¶39; *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. There is no abuse of discretion where there is some competent, credible evidence supporting the trial court's decision. *Kassicieh v. Mascotti*, 10th Dist. No. 05AP-684, 2007-Ohio-5079, ¶12.

{¶10} In her first assignment of error, appellant contends that the trial court abused its discretion by relying upon an exhibit that was not admitted into evidence and that, even if it had been admitted into evidence, did not accurately reflect the final division of marital assets and liabilities.¹ These contentions require that we begin by carefully examining the trial court's decision.

{¶11} In its decision denying the motions for attorney fees the trial court stated that it had reviewed the agreed judgment entry – decree of divorce and the parties' motions for attorney fees and the accompanying affidavits. The court found from the parties' affidavits that appellant had incurred \$61,188.56 in attorney fees, while appellee had incurred \$61,879 in attorney fees, and described these amounts as "relatively

¹ Though appellant's first assignment of error also contends that the court erred by relying upon testimony from a motion hearing, she does not pursue this contention in the argument section of her brief under the first assignment of error. Therefore, we need not address it. *Martin v. CSX Transp., Inc.*, 10th Dist. No. 08AP-846, 2009-Ohio-6054, ¶10. App.R. 12(A)(2).

equal." (Decision Denying Motions for Attorney Fees, 3.) Appellant does not challenge this finding.

{¶12} The court then stated that the division of marital assets and liabilities upon which the parties had agreed appeared to be equitable, based upon the balance sheet prepared on March 19, 2006, by appellant's financial expert, Susan Moussi. We observe that the parties relied, at various stages of this litigation, upon the March 19, 2006 balance sheet, and upon an updated version of that balance sheet, dated June 27, 2007. As noted earlier, a second update to that balance sheet, dated December 28, 2007, was apparently prepared and used in negotiating the parties' settlement. However, the record does not contain the information contained in that balance sheet (e.g., either a copy of that balance sheet or testimony as to its contents).

{¶13} The trial court clearly determined that the parties' final division of assets was relevant to its decision on the motions for attorney fees. With only the March 19, 2006 and the June 27, 2007 versions of Moussi's balance sheet to which it could refer, the court chose the former. Appellant argues that this was an abuse of discretion because, she contends, the court should have looked at the figures in the December 28, 2007 balance sheet. However, as we have already noted, neither that balance sheet itself nor the information contained therein is in the record, so the court could not have considered it.

{¶14} We have carefully examined the two versions that are in the record. The March 19, 2006 and June 27, 2007 balance sheets contain different values for many of the marital assets. These differences are significant enough that, for instance, the value attributed to the assets that appellee received is over \$200,000 greater on the June 27,

2007 balance sheet than it is on the March 19, 2006 balance sheet. We also note that in her affidavit in support of her motion for attorney's fees, appellant avers that the property division results in appellee receiving assets valued at \$147,844 more than the assets that appellant received; this figure differs from the information found in the June 27, 2007 balance sheet.

{¶15} R.C. 3105.73(A) states that the trial court may consider the parties' marital assets and income. The parties had already agreed to the property division and the court had accepted it as equitable. See Feb. 29, 2008 Judgment Entry – Decree of Divorce, 1. However, once the trial court deemed the basis of the property division relevant to its consideration of the motions for attorney fees, it was required to rely on competent, credible evidence to support its findings as to the value that each party received. *Alexander v. Alexander*, 10th Dist. No. 09AP-262, 2009-Ohio-5856, ¶7. Here, the court did not use the most up-to-date figures that the parties placed in the record, and failed to account for the fact that appellant's affidavit testimony differed from the most recent balance sheet of record. For this reason, we cannot say that when the court determined the value that each party received from their agreed property division, and weighed this factor in denying appellant's motion for attorney's fees, it did so based on competent, credible evidence. Had the court used the more recent and significantly different set of asset values, and taken into account appellant's contention as to the degree of disparity between the parties' respective shares of marital assets, its disposition of appellant's motion for attorney's fees might have been different. For these reasons, appellant's first assignment of error is sustained.

{¶16} In her second assignment of error, appellant argues that the trial court erred in determining appellee's income. The trial court found that appellee's annual income was relevant to its determination of the attorney fees issue. The court relied on appellee's February 8, 2007 pretrial statement/affidavit to conclude that appellee's average annual income, including bonuses, is \$160,000. Appellant argues that it was error for the court to have relied upon that document because, she contends, it is not evidence. But she provides no citation to authority for the proposition that a party's affidavit averring that the figures contained in that party's pretrial statement is not evidence, and our research reveals no such authority.

{¶17} The court further found that appellee's income in 2006 was \$216,469.93, citing an exhibit that appellant had proffered and that appears to have been marked at the December 28, 2007 hearing, but never admitted. Though it is in appellant's first assignment of error that she stated the trial court erred in relying on an exhibit that was never admitted, the alleged error occurred with respect to appellee's income, which is the subject of the second assignment of error, so we will address that issue here. We note that the exhibit upon which the court relied was *appellant's* exhibit. Nonetheless, we cannot rely upon an exhibit not in evidence to determine whether the trial court's finding is based upon competent, credible evidence.

{¶18} However, we observe that in her February 8, 2007 pretrial statement/affidavit, appellant stated that appellee's total gross income for the year 2006 was \$216,469.93. Moreover, appellant also stated in her affidavit in support of her motion for attorney's fees that "[appellee's] total income from employment in 2006 was

\$216,470." Thus, the information upon which the trial court relied to find appellee's 2006 income was in the record and was offered by appellant.

{¶19} Appellant points out, however, that in her affidavit in support of her motion for attorney's fees, she averred that appellee's 2007 income was \$241,778. She argues that the court should not have used the 2006 figure and should instead have used the higher 2007 figure to find appellee's annual income. We agree. In this case, the trial court stated various income figures for various years, including bonus figures, taking these figures from various places in the record, yet did not discuss the evidence of the most up-to-date income information. Furthermore, it never discussed which of the figures it was using in its consideration of the disparity of the parties' income, or how much weight it had given to that disparity when it decided to deny appellant's motion for attorney's fees. Absent such an indication of the court's rationale, we must conclude that the trial court abused its discretion. For this reason, appellant's second assignment of error is sustained.

{¶20} In her third and fourth assignments of error appellant contends that the trial court erred in not awarding her attorney fees. Our disposition of appellant's first and second assignments of error renders her third and fourth assignments of error moot.

{¶21} In her fifth assignment of error, appellant contends that the trial court erred and abused its discretion in denying her motion for relief from judgment.² Appellant premised her motion on Civ.R. 60(B)(1), which provides, in relevant part, "On motion

² Though appellant based her motion for relief from judgment on both paragraphs (A) and (B) of Civ.R. 60, on appeal she challenges only the denial of her motion on Civ.R. 60(B) grounds. See brief of appellant, 16.

and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect."

{¶22} "To prevail on a motion brought under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶23} The moving party must establish all three of these requirements and cannot prevail if any one of the requirements is not met. *GTE* at 151. The granting or denying of a Civ.R. 60(B) motion is a matter within the sound discretion of the trial court and the court's ruling will not be reversed absent a showing of abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore*.

{¶24} Appellant sought relief from a provision on page four of the agreed judgment entry – decree of divorce, which stated:

As part of the property division, the Plaintiff shall transfer to the Defendant the assets in his Fidelity account #6970 that total \$253,000. If the assets are less than \$253,000, the Plaintiff shall pay to the Defendant any balance necessary to amount to that total. If the assets exceed \$253,000 the Plaintiff shall retain the balance.

{¶25} In her Civ.R. 60(B) motion appellant advised that a post-decree dispute had developed between the parties as to the exact meaning of this provision. Appellant stated that she believed that the provision required appellee to transfer \$253,000 in cash to her, while appellee believed that the provision required that he transfer the assets to her in kind (except for any additional balance due in order to reach the \$253,000 figure). She argued that the method of transfer was important because each had very different tax consequences. Appellant argued that the provision was, therefore, ambiguous due to the parties' mistake or excusable neglect. She requested that the court clarify the meaning of the provision and rewrite it to reflect its true meaning.

{¶26} The trial court denied the Civ.R. 60(B) motion, finding that the subject provision was not ambiguous and, absent any language such as the term "cash," it clearly required that appellee transfer "assets" worth \$253,000 from the Fidelity account to appellant. The court noted that although both parties represented that the purpose of the transfer was to "equalize the balance sheet," none of the other assets distributed in the agreed judgment entry – decree of divorce were based on a tax-affected value. The trial court also considered that the parties contemplated the tax consequences in regard to the investment accounts by providing in the entry that the parties would be responsible for tax on capital gains and investment income for 2007 on the property they receive.

{¶27} If a provision of a divorce decree is ambiguous, the trial court has the power to hear the matter, to resolve the dispute, and to enforce the decree. *Robins v. Robins*, 10th Dist. No. 04AP-1152, 2005-Ohio-4969, citing *Evans v. Evans*, 4th Dist. No.

02CA2869, 2003-Ohio-4674, and *Quisenberry v. Quisenberry* (1993), 91 Ohio App.3d 341, 348. When interpreting ambiguous decrees, courts have distinguished between divorce decrees that incorporate separation agreements and divorce decrees that only contain terms ordered by a court. *Keeley v. Keeley* (July 21, 1997), 12th Dist. No. CA97-02-013. This distinction exists because when a separation agreement has been incorporated into the decree, as was the case here, the normal rules of contract construction must be applied to determine the meaning of the provisions. When the divorce decree contains only terms ordered by the court, the court retains jurisdiction to interpret and clarify what the court intended in the decree. *Id.* See also *Collette v. Collette* (Aug. 29, 2001), 9th Dist. No. 20423.

{¶28} The construction of a written contract is a matter of law, and such construction is reviewed without deference to the trial court's determination. *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. The goal of construing contract language is to effectuate the parties' intent. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. Additionally, when the parties' agreement is integrated into an unambiguous, written contract, courts should give effect to the plain meaning of the parties' expressed intentions. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, syllabus. Intentions that are not expressed in the writing are "deemed to have no existence." *Id.* at 53, citing *Charles A. Burton, Inc. v. Durkee* (1952), 158 Ohio St. 313, paragraph two of the syllabus.

{¶29} We have reviewed the Agreed Judgment Entry – Decree of Divorce and find no abuse of discretion in the trial court's finding that it is clear and unambiguous. Accordingly, it did not abuse its discretion in concluding that appellant had failed to demonstrate a meritorious claim or defense, one of the requirements under Civ.R. 60(B). For this reason, appellant's fifth assignment of error is overruled.

{¶30} In summary, appellant's first and second assignments of error are sustained, her third and fourth assignments of error are overruled as moot, and her fifth assignment of error is overruled. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, in case No. 06DR-06-2561, appeal No. 08AP-344, relating to attorney fees, is reversed; and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, relating to the Civ.R. 60(B) motion, in case No. 06DR-06-2561, appeal No. 09AP-548, is affirmed.

*Appeal No. 08AP-344 judgment reversed and cause remanded;
Appeal No. 09AP-548 judgment affirmed.*

BROWN and TYACK, JJ., concur.
