

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BREANNA COLVIN

Plaintiff-Appellee

-VS-

JOSHUA COLVIN

Defendant-Appellant

: JUDGES:

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Hon. W. Scott Gwin, P.J.

Hon. Patricia A. Delaney, J.

Hon. Earle E. Wise, Jr., J.

Case No. 18 CA 27

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Guernsey County Court
of Common Pleas, Domestic Relations
Division, Case No. 17-DR-000643

JUDGMENT:

AFFIRMED IN PART; REVERSED AND
REMANDED IN PART

DATE OF JUDGMENT ENTRY:

May 31, 2019

APPEARANCES:

For Plaintiff-Appellee:

STEPHANIE L. CHURCH
139 West 8th St.
P.O. Box 640
Cambridge, OH 43725-0640

For Defendant-Appellant:

BRETT H. HILLYER
201 North Main St.
P.O. Box 272
Uhrichsville, OH 44683

Delaney, J.

{¶1} Defendant-Appellant Joshua Colvin appeals the May 7, 2018 Decree of Divorce and August 23, 2018 judgment entry denying his objections to the magistrate's decision of the Guernsey County Court of Common Pleas, Domestic Relations Division.

FACTS AND PROCEDURAL HISTORY

{¶2} Plaintiff-Appellee Breanna Colvin and Defendant-Appellant Joshua Colvin were married on June 30, 2012. One child was born as issue of the marriage on October 9, 2014.

{¶3} Wife filed a complaint for divorce on November 20, 2017. On November 20, 2017, the trial court ordered Husband to pay Wife \$2,500.00 in attorney fees. The trial court further ordered Husband to make the car payments on Wife's Ford Explorer.

{¶4} A trial was held on May 1, 2018. The following evidence was adduced at the trial.

{¶5} Husband and Wife did not own any real estate. The parties resided in a home owned by Husband's family and did not pay rent. After the parties separated, Husband remained in the marital residence and Wife moved in with her parents.

{¶6} During the marriage, the parties purchased two automobiles: (1) a 2013 Ford Explorer valued at \$18,000 with a loan balance of \$23,478.87 as of April 19, 2018 and (2) a 2017 Ford Raptor truck valued at \$60,000 with a loan balance of \$73,000. The vehicles were titled in Husband's name. The monthly payment on the Ford Explorer was \$550.00. The monthly payment on the Ford Raptor was \$1,300.00. Pursuant to the temporary orders, Husband was ordered to maintain payments on the Ford Explorer. At

trial, Wife requested the trial court order Husband to maintain payments on the Ford Explorer in lieu of spousal support.

{¶7} At the time of the trial, Wife was employed at Genesis as a modality assistant in the radiology department. Wife earned \$13.13 per hour and her total gross income was \$27,310.40. Wife did not consistently work outside of the home during the marriage.

{¶8} At the time of the trial, Husband worked for Stingray Pressure Pumping. Husband previously worked for Telling Industries earning approximately \$25,000 and Peta Industries earning \$4,000.00. Husband initially earned \$19.08 per hour at Stingray and received a raise in November 2017, increasing his wage to \$25.18 per hour. He earned \$60.00 per day as per diem and overtime wages. In 2017, Husband's total income reported on his W-2 was \$81,841.30. His gross income for 2017 was \$93,450.30.

{¶9} Husband admitted at trial that he did not make the payment of \$2,500.00 for Wife's attorney fees as ordered by the trial court on November 20, 2017.

{¶10} The magistrate issued her decision on May 7, 2018. The magistrate's decision named Wife as the residential parent and legal custodian of the minor child. Wife was awarded the Ford Explorer free and clear of any interest of Husband, but Husband was ordered to pay the loan on the vehicle for 24 months or until paid in full, whichever came first. Husband was further ordered to pay Wife \$2,500.00 as and for her attorney fees, as the trial court had previously ordered.

{¶11} The Final Decree of Divorce was filed on May 7, 2018.

{¶12} On May 11, 2018, Husband filed objections to the magistrate's decision. He argued the trial court erred in ordering Husband to make the car payments on the Ford

Explorer for Wife because it was spousal support. Husband contended it was inequitable to consider his current income because his salary increased shortly before Wife filed her complaint for divorce. Husband further argued it was error to order spousal support in a marriage of such short duration. Husband filed supplemental objections to the magistrate's decision on August 10, 2018, again contending it was error to use Husband's current income. He next argued the trial court should have ordered a deviation in his child support obligation because Wife and Husband had nearly 50/50 parenting time.

{¶13} On August 23, 2018, the trial court overruled Husband's objections to the magistrate's decision.

{¶14} It is from these judgments Husband now appeals.

ASSIGNMENTS OF ERROR

{¶15} Husband raises four Assignments of Error:

{¶16} "I. WHETHER THE TRIAL COURT ERRORED [SIC] IN AWARDING PLAINTIFF ATTORNEY FEES IN THE AMOUNT OF \$2,500.

{¶17} "WHETHER THE TRIAL COURT ERRORED [SIC] IN AWARDING THE PLAINTIFF 24 MONTHS OF PAYMENTS (AS SPOUSAL SUPPORT) TOWARDS HER 2013 FORD EXPLORER, AS WELL AS NOT CREDITING THE PLAINTIFF SEVERAL MONTHS OF PAYMENTS HE MADE ON THE VEHICLE FOR TEMPORARY SUPPORT.

{¶18} "III. WHETHER THE TRIAL COURT ERRORED [SIC] IN AWARDING PLAINTIFF SPOUSAL SUPPORT IN THE FORM OF PAYMENTS WHILE USING INCOME FIGURES FOR DEFENDANT HUSBAND THAT INCLUDED A SUBSTANTIAL RAISE JUST PRIOR TO THE FILING OF DIVORCE.

{¶19} “IV. WHETHER THE TRIAL COURT ERRORED [SIC] IN AWARDING CHILD SUPPORT TO THE PLAINTIFF WHILE NOT TAKING INTO CONSIDERATION THE AMOUNT BEING PAID TOWARDS THE 2013 FORD EXPLORER AND THE AWARD OF ATTORNEY FEES.”

ANALYSIS

I. Attorney Fees

{¶20} Husband contends in his first Assignment of Error that the trial court erred by ordering Husband to pay Wife's attorney fees in the amount of \$2,500.00. In Wife's appellate brief, she notes that Husband did not raise this argument in his objections to the magistrate's decision. Based on our review of Husband's objections to the magistrate's decision, we confirm Husband did not raise a specific objection to the award of attorney fees.

{¶21} Objections to a magistrate's decision are governed by Civ.R. 53. Civ.R. 53(D) states in pertinent part:

Magistrate's decision; objections to magistrate's decision

* * *

(b) Objections to magistrate's decision

* * *

(ii) Specificity of objection. An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

* * *

(iv) Waiver of right to assign adoption by court as error on appeal. Except for a claim of plain error, a party shall not assign as error on appeal the

court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

{¶22} Husband failed to file a specific objection pursuant to Civ.R. 53(D)(3)(b) that argued the magistrate erred in awarding Wife attorney fees. We therefore find Husband cannot assign as error on appeal the trial court's adoption of any factual finding or legal conclusion pursuant to Civ.R. 53(D)(3)(b)(iv). We note that authority exists in Ohio law for the proposition that Husband's failure to object to a conclusion of law in a magistrate's decision does not bar appellate review of "plain error." *In re B.H.*, 5th Dist. Fairfield No. 14-CA-53, 2014-Ohio-5790, ¶¶ 56-57 citing *R.G. Real Estate Holding, Inc. v. Wagner*, 2nd Dist. Montgomery App. No. 16737, 1998 WL 199628(Apr. 24, 1998); *In re Ortego*, 5th Dist. Tuscarawas No.1999AP05003, 2000 WL 330069 (Mar. 8, 2000); *Batsch v. Tress*, 11th Dist. Portage No.2000-P-0022, 2001-Ohio-4343. However, the Supreme Court has cautioned against the over application of plain error analysis:

The plain error doctrine originated as a criminal law concept. In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings. *Schade*, 70 Ohio St.2d at 209, 24 O.O.3d at 317, 436 N.E.2d at 1003; *LeFort v. Century 21-Maitland*

Realty Co. (1987), 32 Ohio St.3d 121, 124, 512 N.E.2d 640, 643; *Cleveland Elec. Illum. Co. v. Astorhurst Land Co.* (1985), 18 Ohio St.3d 268, 275, 18 OBR 322, 327–328, 480 N.E.2d 794, 800.

Goldfuss v. Davidson, 79 Ohio St.3d 116, 121, 1997–Ohio–401, 679 N.E.2d 1099.

{¶23} An award of attorney fees in a domestic relations action is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Hostetler v. Hostetler*, 5th Dist. Stark No. 2018 CA 00052, 2019-Ohio-609, 2019 WL 761640, ¶ 32 citing *Chattree v. Chattree*, 8th Dist. Cuyahoga No. 99337, 8 N.E.3d 390, 410, 2014–Ohio–489, ¶ 79, citing *Wildman v. Wildman*, 5th Dist. Licking No. 12–CA–21, 2012–Ohio–5090, ¶ 79. “* * * [A] domestic relations court, well-versed in the ordinary flow of divorce litigation through its doors, is in a much better position to determine whether a particular case has been unduly hampered by one or more of the participants.” *Compton v. Compton*, 5th Dist. Stark No. 2015CA00199, 2016-Ohio-4626, ¶ 14.

{¶24} In this case, we find no plain error or abuse of discretion for the trial court to award attorney fees to Wife. On November 20, 2017, the trial court ordered Husband to pay \$2,500.00 in Wife’s attorney fees. Husband admitted at trial that he did not follow the trial court’s order to pay the attorney fees.

{¶25} Husband’s first Assignment of Error is overruled.

II. Spousal Support

{¶26} In his second Assignment of Error, Husband contends the trial court erred when it ordered Husband to make the payments on Wife’s Ford Explorer for 24 months

or until the loan was paid in full, whichever came first. The car payments on the Ford Explorer were \$550.00 per month, which would equate to \$13,200.00.

{¶27} At trial, Wife stated:

Q. And so you would ask that Josh be ordered to pay the vehicle payment, your vehicle payment?

A. Yes.

Q. And are you asking for that in lieu or instead of any spousal support order?

A. Yes.

(T. 17).

{¶28} In the magistrate's decision, the magistrate stated:

6. Wife is **AWARDED** the 2013 Ford Explorer free and clear of any interest of Husband. Due to the huge disparity of income and minimal assets available for division, Husband is **ORDERED** to timely pay the loan on the 2013 Ford Explorer for 24 months or until paid in full whichever comes first. Wife will be solely responsible for the upkeep and insurance on the vehicle and for any payoff remaining on the vehicle after the 24 months unless the overage is a result of Husband's failure to pay.

(Magistrate's Decision, May 7, 2018)

{¶29} Husband objected to the imposition of the car payment on the basis that spousal support for Wife was not warranted. Wife responded to the objections, arguing the magistrate was within her discretion to award spousal support pursuant to R.C. 3105.18(C). Husband raises the same argument on appeal and in response, Wife

contends the imposition of car payments was an equitable property division under R.C. 3105.171(B).

{¶30} We find that based on Wife's testimony at trial and the parties' lack of assets, the order for Husband to make the payments on the Ford Explorer on behalf of Wife was an award of spousal support. The award of spousal support will be reversed on appeal only if an abuse of discretion is shown. *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 24, 550 N.E.2d 178, 181 (1990). The term "abuse of discretion" connotes more than an error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary, or capricious. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). A reviewing court may not substitute its judgment for that of the trial court unless, considering the totality of circumstances, the trial court abused its discretion. *Holcomb v. Holcomb*, 44 Ohio St.3d 128, 131, 541 N.E.2d 597 (1989).

{¶31} Pursuant to R.C. 3105.18(B), a trial court may award reasonable spousal support to either party upon request and after the court determines the division or disbursement of property under R.C. 3105.171.

{¶32} In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, terms of payment, and duration of spousal support, R.C. 3105.18(C)(1) directs the trial court to consider all 14 factors set forth therein:

- (a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;
- (b) The relative earning abilities of the parties;

- (c) The ages and the physical, mental, and emotional conditions of the parties;
- (d) The retirement benefits of the parties;
- (e) The duration of the marriage;
- (f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;
- (g) The standard of living of the parties established during the marriage;
- (h) The relative extent of education of the parties;
- (i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
- (j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
- (k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
- (l) The tax consequences, for each party, of an award of spousal support;
- (m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
- (n) Any other factor that the court expressly finds to be relevant and equitable.”

{¶33} Trial courts must consider all the factors listed in R.C. 3105.18(C). We have previously held that a trial court need not acknowledge all evidence relative to each and every factor listed in R.C. 3105.18(C) and we may not assume that the evidence was not considered. *Hutta v. Hutta*, 177 Ohio App.3d 414, 2008–Ohio–3756, 894 N.E.2d 1282, ¶ 27 (5th Dist.), citing *Clendening v. Clendening*, 5th Dist. Stark No. 2005CA00086, 2005–Ohio–6298, ¶ 16. The trial court must set forth only sufficient detail to enable a reviewing court to determine the appropriateness of the award. *Id.*, citing *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 518 N.E.2d 1197 (1988).

{¶34} We find the trial court’s decision does not include sufficient information regarding the factors in R.C. 3105.18(C)(1) to enable us to determine whether the award was fair, equitable, and in accordance with the law. *See Hill v. Hill*, 5th Dist. Delaware No. 18 CAF 02 0014, 2018-Ohio-4695, 2018 WL 6131264, ¶ 26. There is no statement in the magistrate’s decision or the trial court’s judgment entry stating it considered the factors of R.C. 3105.18(C)(1) in determining spousal support. Pursuant to *Kaechele*, *supra*, the trial court was required to indicate the basis for the spousal support award in sufficient detail to enable review. *See Hill*, *supra* at ¶ 27. Without such detail, we are unable to review the propriety of the order. *Id.*

{¶35} Husband further argues in his second Assignment of Error that the trial court did not credit Husband for the payments made on the Ford Explorer pursuant to the trial court’s temporary orders. The judgment entries in this case do not reflect whether the trial court considered the car payments made pursuant to the trial court’s temporary orders when the trial court ordered Husband to make the car payments as Wife’s spousal support.

{¶36} Husband's second Assignment of Error is sustained.

III. Husband's Income

{¶37} Husband contends in his third Assignment of Error that the trial court erred in determining his income and earning abilities pursuant to R.C. 3105.18(C)(1). He states that Husband received a raise in November 2017, the same month Wife filed her complaint for divorce, and therefore the trial court should have given more weight to Husband's earning history than current salary. Based on our disposition of the second Assignment of Error, we find analysis of Husband's third Assignment of Error would be advisory. We have insufficient information to determine whether the trial court's determination of Husband's income was appropriate under R.C. 3105.18(C)(1).

{¶38} Husband's third Assignment of Error is sustained.

IV. Child Support

{¶39} Husband argues in his fourth Assignment of Error that the trial court erred when it failed to account for the spousal support awarded to Wife in the form of car payments in the Child Support Computation Worksheet. Based on the disposition of Husband's second Assignment of Error, we agree the trial court must revisit this issue.

{¶40} Husband also argues the trial court failed to consider that Husband and Wife had "nearly 50/50" parenting time with the child in determining Husband's child support obligation. In his appellate brief, Husband does not refer to the record upon which Husband relies on the issue of shared parenting time, nor does Husband cite any authority in support of his argument as required by App.R. 16(A)(7). It is not the duty of an Ohio appellate court to create arguments for the parties and search the record for evidence to support them. *Washek v. Washek*, 5th Dist. Fairfield No. 18 CA 22, 2019-Ohio-1504, 2019

WL 1785411, ¶ 21 citing *Sisson v. Ohio Department of Human Services*, 9th Dist. Medina No. 2949–M, 2000 WL 422396.

{¶41} Husband's fourth Assignment of Error is sustained and overruled in part.

CONCLUSION

{¶42} Accordingly, the final judgment of the Guernsey County Court of Common Pleas, Domestic Relations Division is reversed and remanded to the trial court for specific findings of fact and conclusions of law in accordance with this Opinion and law as to its order of spousal support.

By: Delaney, J.,

Gwin, P.J. and

Wise, Earle, J., concur.