[Cite as *Morse v. Morse*, 2017-Ohio-5690.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Laurie A. Morse	Court of Appeals No. OT-16-023
Appellee	Trial Court No. 15-DR-027
v.	
Charles A. Morse	**DECISION AND JUDGMENT**
Appellant	Decided: June 30, 2017

* * * * *

Craig M. Witherell, for appellee.

Howard C. Whitcomb, III, for appellant.

* * * * *

MAYLE, J.

{¶ 1} Defendant-appellant, Charles A. Morse, appeals the October 5, 2016 judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division,

which awarded spousal support to his former spouse, plaintiff-appellee, Laurie Morse. For the reasons that follow, we affirm the trial court judgment.

I. Background

{¶ 2} Laurie Morse filed a complaint for divorce on March 12, 2015, after almost 30 years of marriage to Charles Morse. The Morses reached an agreement as to the division of most of their assets and liabilities, including their real estate, vehicles, personal property, debts, and interests in bank accounts, insurance policies, and pension plans. Only three items remained in contention: (1) Mrs. Morse's request for spousal support, (2) her request for attorney fees, and (3) the division of cash from an account maintained at the Commodore Perry Federal Credit Union. These three issues were tried to a magistrate on November 10, 2015.

{¶ 3} The magistrate heard testimony from both Mr. and Mrs. Morse, and a number of exhibits were admitted into evidence. After the hearing, both parties submitted proposed findings of fact and conclusions of law. On November 23, 2015, the magistrate issued a decision adopting the proposed findings of fact and conclusions of law submitted by Mrs. Morse, except that it denied her request for attorney fees. The magistrate recommended that the court award spousal support to Mrs. Morse of $1,000.00 per month for ten years, with the court to retain jurisdiction to modify spousal support as appropriate. It also recommended that Mrs. Morse be awarded $2,396.53, as her share of a bank account from which Mr. Morse made two significant withdrawals in the days after Mrs. Morse filed her complaint for divorce.

{¶ 4} Mr. Morse filed objections to the magistrate's decision. The trial court overruled his objections in a decision and judgment entry filed on April 11, 2016. In that entry, the court also "incorporated" the magistrate's decision. Mr. Morse appealed that judgment, but we found that the judgment failed to comply with Civ.R. 53. In an order dated September 8, 2016, we remanded the matter to the trial court for entry of a final, appealable order. On October 5, 2016, the trial court entered a judgment consistent with the magistrate's recommendation in an entry compliant with Civ.R. 53. Mr. Morse appealed that judgment and assigns the following two errors for our review:

> I. THE TRIAL COURT ERRED IN AWARDING THE PLAINTIFF-APPELLEE AN AMOUNT AND DURATION OF SPOUSAL SUPPORT THAT WAS NOT NECESSARY, REASONABLE, AND APPROPRIATE[.]
>
> II. THE TRIAL COURT ABUSED ITS DISCRETION IN THIS CASE BY AWARDING SPOUSAL SUPPORT TO THE PLAINTIFF-APPELLEE BECAUSE THE PLAINTIFF-APPELLEE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUPPORT AN AWARD OF SPOUSAL SUPPORT AND/OR IT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO MAKE SUCH AN AWARD[.]

II. Law and Analysis

{¶ 5} Mr. Morse contends that the trial court erred in awarding spousal support to Mrs. Morse because she failed to establish that such support was necessary, reasonable,

and appropriate. In his first assignment of error, he challenges the amount and duration of the spousal support, and in his second assignment of error, he argues that spousal support should not have been awarded at all.[1]

A. The Trial Court's Consideration of R.C. 3105.18(C)(1)

{¶ 6} R.C. 3105.18(C)(1) governs the award of spousal support and sets forth a number of factors that a trial court must consider, first, in determining whether spousal support is appropriate and reasonable, and, second, in determining the nature, amount, terms of payment, and duration of such support. Those factors are as follows:

> (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;

[1] Mr. Morse also complains that the trial court erred in awarding Mrs. Morse $2,396.53, representing half of the funds that Mr. Morse withdrew from the Commodore Perry Federal Credit Union account in the days after Mrs. Morse filed her complaint for divorce. Mr. Morse's only challenge to this aspect of the trial court judgment is that the court should have focused on the account balance as of the date Mrs. Morse vacated the marital residence—February 18, 2015—instead of the date she filed for divorce. Mr. Morse did not assign error in this aspect of the trial court's judgment and, in any event, he cites no authority for his position. We, therefore, decline to consider this argument. *See State v. Roberson*, 6th Dist. Lucas No. L-16-1131, 2017-Ohio-4339, ¶ 103.

(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.

{¶ 7} A trial court judgment awarding spousal support need not address every single one of these factors, but the judgment must contain sufficient detail to demonstrate that the trial court considered all the relevant factors. *Allan v. Allan*, 6th Dist. Sandusky Nos. S-12-017, S-12-023, 2013-Ohio-1475, ¶ 11. Absent an abuse of discretion, we will not reverse a trial court judgment awarding spousal support. *Hahn v. Hahn*, 6th Dist. Ottawa No. OT-16-029, 2017-Ohio-4018, ¶ 14. "'[A]buse 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*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 8} In paragraph 30 of its judgment entry, the trial court summarized its reasons for awarding spousal support:

> Plaintiff is entitled to spousal support due to the length of marriage, the disparity of income, her history of work during the marriage, and Defendant's ability to continue working beyond age 56, with said amount being $1,000 per month for a period of ten years, with the Court retaining jurisdiction to modify the spousal support award. Plaintiff will be unable to meet all of her monthly expenses and pay off her debts without receiving spousal support from Defendant.

{¶ 9} In addition to providing this succinct rationale for its support order, the court made a number of specific findings touching upon almost all of the factors set forth in R.C. 3105.18(C)(1).

{¶ 10} As to factors (a) and (b), the parties' income and relative earning abilities, the trial court found that Mrs. Morse earns $9.50 per hour working 30-35 hours per week for a home health care company, with an approximate annual income of just over $13,000.00. The court found this amount to be typical of what Mrs. Morse earned throughout the course of the marriage. The court also found that Mr. Morse recently retired from his teaching position in the Benton-Carroll-Salem school district and continued to teach after his retirement. It acknowledged that Mr. Morse's full-time employment with the school district would terminate at the end of the school year, but it found that Mr. Morse could find work as a substitute teacher if he so desired. The court also noted that in the past, Mr. Morse had expressed an intent to pursue other employment opportunities after retiring from teaching.

{¶ 11} As to factor (c), the ages and the physical, mental, and emotional conditions of the parties, the court found that Mr. Morse is 55 years old and is healthy. It found that Mrs. Morse is 52 years old and has significant health problems, including asthma, back problems, and knee problems. She has had shoulder surgery in the past, and has had pre-cancerous cells removed from her breast.

{¶ 12} As to factor (d), retirement benefits, the court found that under the parties' stipulated property settlement, Mr. Morse's pension will be divided such that he will receive a benefit of $2,000.00 per month, and Mrs. Morse will receive a benefit of $1,400.00 per month. The court observed that Mrs. Morse will not be eligible for social

security for approximately ten years, at which time her social security benefit will be $552.00 per month.

{¶ 13} As to factor (e), the duration of the marriage, the trial court found that the Morses' marriage lasted almost 30 years. As to factor (f), the extent to which it would be inappropriate for a party to seek employment outside the home because of responsibilities relating to minor children, it observed that the Morses have no minor children. And as to factor (g), the standard of living of the parties established during the marriage, the court found that the Morses lived comfortably during their marriage.

{¶ 14} As to factor (h), the relative extent of education of the parties, the court found that Mrs. Morse has a high school diploma and completed approximately one year of college in the 1980's. Mr. Morse has a college degree.

{¶ 15} As to factor (i), the relative assets and liabilities of the parties, the court found that under their agreed division of property, Mr. Morse will receive half of one of the Morses' annuities and one retirement account. It noted that Mrs. Morse will receive a number of investment accounts, some of which may be subject to withdrawal penalties and taxes. Mr. Morse will retain the marital home free and clear, and Mrs. Morse will reside in a mobile home that she owns. Mrs. Morse must pay rent of $300 per month for the land on which her mobile home sits, and both parties have to pay taxes, insurance, and utilities on their homes. Mrs. Morse will have to procure her own private health insurance at a cost of $300 to $500 per month, she owes between $10,000 and $11,000 on

her vehicle, and she owes approximately $15,000 for medical bills, attorney fees, and loans from family.

{¶ 16} Concerning factor (j), the court made no findings as to the contribution of each party to the education, training, or earning ability of the other party. It also did not specifically address factor (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;[2] (l) the tax consequences of an award of spousal support; or (m), the lost income production capacity of either party that resulted from marital responsibilities.

B. First Assignment of Error: The Amount and Duration of Spousal Support

{¶ 17} In his first assignment of error, Mr. Morse challenges the amount and duration of the award of spousal support. He makes essentially three arguments in support of this assignment of error: (1) Mrs. Morse did not present sufficient evidence of need; (2) given that his teaching position ended May 31, 2016, his monthly expenses leave him with no "disposable income" with which to pay spousal support of $1,000.00 per month for ten years; and (3) the trial court judgment did not address the tax consequences of a spousal support award under R.C. 3105.18(C)(1)(l). Mr. Morse insists that the trial court should have found that both parties are employed and able to support

[2] Mrs. Morse testified, however, that she intends to pursue education and training that would qualify her to work as a medical assistant.

themselves, and he maintains that the award was not appropriate and reasonable under the circumstances.

{¶ 18} As Mr. Morse recognizes numerous times in his brief, courts no longer examine whether spousal support is "needed" or is "necessary"—they must determine whether spousal support is "appropriate and reasonable." (Citations omitted.) *Basista v. Basista*, 6th Dist. Wood No. WD-14-076, 2016-Ohio-146, ¶ 28. The factors enumerated in R.C. 3105.18(C)(1) guide the court in making this determination. While many of the factors relate, either directly or indirectly, to the need for support or the ability to pay support, the trial court must ultimately decide whether an award of spousal support is "appropriate" and "reasonable." *See Kelly v. Forbis*, 6th Dist. Wood No. WD-09-050, 2010-Ohio-3071, ¶ 37-39, citing *Abbott v. Abbott*, 6th Dist. No. F-06-020, 2007-Ohio-5308, ¶ 78.

{¶ 19} As to Mrs. Morse's "need" for spousal support, Mr. Morse contends that Mrs. Morse does not need the support awarded because she received 90% of the parties' cash accounts as part of the divorce settlement, and she continues to work. He also claims that her monthly income plus her portion of Mr. Morse's pension benefits exceed her monthly expenses.

{¶ 20} Mrs. Morse presented evidence showing that she earned $13,029.27 for 2014, she will receive approximately $1,400.00 per month from Mr. Morse's pension, and she will receive $552.00 per month when she becomes eligible for social security benefits in ten years. She testified that she pays $300 per month in rent, health insurance

will cost between $300 and $500 per month, she owes $10,000 to $11,000 on her car, and she owes $15,000 for medical bills, attorney fees, and loans from family and friends. Mrs. Morse also testified to the amounts of her electric, gas, water, cablevision, internet, and cell phone bills, her car insurance premiums, her prescription costs, her food and clothing budget, and the cost of upcoming dental work that she requires. Considering these obligations, the trial court found that Mrs. Morse's monthly expenses exceed her monthly income.

{¶ 21} We also observe that the court's award of spousal support terminates in ten years, the point at which Mrs. Morse will become eligible to receive social security benefits. We find no abuse of discretion in the court's conclusion that Mrs. Morse is in need of spousal support to meet her living expenses.

{¶ 22} As to his ability to pay the award, Mr. Morse describes the court's award as an effort to equalize the parties, and he insists that after May 31, 2016—the expiration date of his teaching contract—he will lack sufficient funds to pay Mrs. Morse $1,000.00 per month.

{¶ 23} In determining the supportive spouse's ability to pay spousal support, the trial court must consider both the payor's actual income and the payor's earning potential. R.C. 3105.18(C)(1)(a) and (b). *Kelly*, 6th Dist. Wood No. WD-09-050, 2010-Ohio-3071 at ¶ 38. As this court has recognized, "[e]arning ability under R.C. 3105.18(C)(1)(b) includes 'both the amount of money one is capable of earning by his or her qualifications, as well as his or her ability to obtain such employment.'" *Id.*, quoting *Haninger v.*

Haninger, 8 Ohio App.3d 286, 288, 456 N.E.2d 1228 (10th Dist.1982). Ohio courts will impute income to parties who are voluntarily underemployed or otherwise not working up to their full earning potential. *Id.* at ¶ 39.

{¶ 24} Here the court specifically found that Mr. Morse is capable of working beyond the age of 56, the age at which he elected to retire from the Benton-Carroll-Salem school district. It observed that Mr. Morse could work as a substitute teacher, either there or elsewhere, that he has significant masonry experience, and that he had at some point expressed a desire to seek employment at Davis-Besse after retiring. In addition to this, Mr. Morse agreed that some of his monthly expenses could be reduced. We find no abuse of discretion in the trial court's conclusion that Mr. Morse is able to pay the amount of support awarded.

{¶ 25} Finally, turning to the court's consideration of R.C. 3105.18(C)(1)(l), there was no evidence presented that would suggest that the payment and receipt of spousal support will be treated out of the ordinary for tax purposes—i.e., it presumably will be treated as income to Mrs. Morse and a deduction to Mr. Morse. *See, e.g., Andrew v. Andrew,* 3d Dist. Henry No. 7-96-04, 1997 Ohio App. LEXIS 5842, 13 (Dec. 23, 1997) ("[W]e find it is implicit in the divorce decree that the spousal support payments should be deductible by the defendant from his gross income and taxable to the plaintiff for federal income tax purposes."). And while the trial court did not make specific findings of fact in regard to tax consequences, there is no evidence that the court failed to consider it. *See Baker v. Baker*, 9th Dist. Lorain No. 10CA009764, 2010-Ohio-4398, ¶ 10 ("No

evidence was presented as to any tax consequences for the parties in regard to an award of spousal support. However, while the trial court did not make a specific finding of fact in regard to tax consequences, there is no evidence that the court failed to consider it."). *See also Bolden v. Bolden*, 11th Dist. Geauga No. 2006-G-2736, 2007-Ohio-6249, ¶ 30.[3]

{¶ 26} It was clear from the trial court's judgment that the length of the Morses' marriage, the disparity between the Morses' income, and Mr. Morse's ability to continue to earn money were important factors in its decision to order spousal support. It was also clear that the trial court considered that Mrs. Morse will be eligible for social security benefits in ten years, and chose a duration corresponding to that event. We find that the trial court's consideration of the factors enumerated in R.C. 3105.18(C)(1) was thorough, and the amount and duration it awarded was appropriate and reasonable.

{¶ 27} Related to his challenge to the duration of the spousal support awarded, Mr. Morse also argues that the trial court abused its discretion in retaining jurisdiction to modify the award of spousal support. He argues that by retaining jurisdiction, the trial court has failed in its obligation to bring finality to the litigation. He claims that this denies him due process and prevents a final determination of the parties' division of assets and liabilities.

[3] Mr. Morse also complains that Mrs. Morse failed to present evidence of any other factor that would be relevant and equitable under R.C. 3105.18(C)(1)(n). But (n), which allows the court to consider "[a]ny other factor that the court expressly finds to be relevant and equitable," is simply a catch-all that allows the court to consider relevant information that does not fall into the other specifically-enumerated factors. Mr. Morse does not identify what other factor the trial court should have considered in this case.

{¶ 28} R.C. 3105.18(E)(1) provides that a court that enters a decree of divorce does not have jurisdiction to modify the amount or term of spousal support unless it determines that the circumstances of either party have changed and unless the decree specifies that the court retains authority to modify the amount or terms spousal support. "The decision to retain jurisdiction to modify an award of spousal support is reviewed for an abuse of discretion." *Pettit v. Pettit*, 12th Dist. Fayette No. CA2011-08-018, 2012-Ohio-1801, ¶ 64, citing *Wolf v. Wolf*, 12th Dist. No. CA2009-01-001, 2009-Ohio-3687, ¶ 15.

{¶ 29} In *Bohme v. Bohme*, 2d Dist. Montgomery No. 26021, 2015-Ohio-339, ¶ 34-35, the appellant was ordered to pay spousal support to appellee for a definite period of time. He argued that the trial court essentially created an indefinite term of spousal support because it retained jurisdiction to modify the award. He argued that this contravened the directive from the Ohio Supreme Court in *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 554 N.E.2d 83 (1990), that "sustenance alimony should provide for the termination of the award, within a reasonable time and upon a date certain, in order to place a definitive limit upon the parties' rights and responsibilities." *Id.* at 36. The Second District rejected this argument and concluded that the trial court did not abuse its discretion in retaining jurisdiction. It noted that, in fact, "the retention of jurisdiction makes it possible for both [parties] to ask for modification of the award." *Bohme* at ¶ 39.

{¶ 30} We reach the same conclusion as the Second District in *Bohme*. We also observe that the Fifth District has articulated that it actually *encourages* trial courts to

retain jurisdiction to modify a spousal support award. *Compton v. Compton*, 5th Dist. Stark No. 2014CA00207, 2015-Ohio-4327, ¶ 24. We find no abuse of discretion in the trial court's decision to retain jurisdiction to modify the award of spousal support.

{¶ 31} Accordingly, we find Mr. Morse's first assignment of error not well-taken.

C. Second Assignment of Error: The Decision to Award Spousal Support

{¶ 32} Turning to Mr. Morse's second assignment of error, he claims that the award of spousal support was against the manifest weight of the evidence. Again, he insists that the trial court should have found that both parties were employed and capable of earning sufficient wages to support themselves. He maintains that it was to be expected that the parties would experience a change in their standards of living following the divorce, and he points out that both of them are currently struggling to meet their monthly financial obligations. He again complains that Mrs. Morse offered no evidence concerning R.C. 3105.18(C)(l)(l), and he maintains that the evidence supported a finding that Mr. Morse lacked the disposable income to pay spousal support.[4]

[4] Mr. Morse makes additional arguments in paragraph 87 of his brief, but his record citations do not match up to the evidence that was presented in this case. For instance, he makes reference to Attachment A, pages 33 and 34, when Attachment A is only six pages long. He also makes reference to pension benefits, and cites to page 22 of the hearing transcript. There is no reference to pension benefits on page 22 of the transcript. In addition to the misplaced citations in paragraph 87 of his brief, Mr. Morse makes a number of arguments in paragraph 72 that seem to be unrelated to the present case. For instance, he comments on child support issues and refinancing of marital debt, neither of which are at issue here. He provides a citation to page 131 of the transcript, yet the hearing transcript in the present case ends at page 94. We assume that the inclusion of these arguments and citations was an oversight.

{¶ 33} The standard of review for manifest weight is the same in a civil case as in a criminal case. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. We weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Id.* at ¶ 20. In so doing, however, we must be "mindful of the presumption in favor of the finder of fact." *Id.* at ¶ 21.

{¶ 34} While Mr. Morse challenges the trial court's conclusion that an award of spousal support was warranted, he identifies no specific errors in the court's factual findings, other than to allege that Mrs. Morse did not introduce extrinsic evidence concerning such things as the condition of her health, her ability to work, and the status of loans from friends and family members. Mrs. Morse did, in fact, present evidence in the form of her testimony under oath, and Mr. Morse presented no evidence to refute Mrs. Morse's testimony as to the amounts she claims to owe. Accordingly, we find that the trial court did not clearly lose its way and create a manifest miscarriage of justice in its factual findings or in its decision to award spousal support to Mrs. Morse.

{¶ 35} We, therefore, find Mr. Morse's second assignment of error not well-taken.

III. Conclusion

{¶ 36} Because we find that the trial court's decision to award spousal support was not against the manifest weight of the evidence, and the amount and duration of the award were appropriate and reasonable, we find Mr. Morse's two assignments of error

not well-taken. We affirm the October 5, 2016 judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division. Mr. Morse is ordered to pay the costs of this appeal under App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

James D. Jensen, P.J. _____
JUDGE

Christine E. Mayle, J. _____
CONCUR.
JUDGE