[Cite as *Hoopes v. Hoopes*, 2018-Ohio-5232.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106855

BRENDA HOOPES

PLAINTIFF-APPELLANT/
CROSS-APPELLEE

vs.

PRESTON L. HOOPES

DEFENDANT-APPELLEE/
CROSS-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-13-348493

BEFORE: Stewart, J., McCormack, P.J., and Blackmon, J.

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MELODY J. STEWART, J.:

{¶1} The court granted a divorce to plaintiff-appellant Brenda Hoopes and defendant-appellee Preston Hoopes. The issues in this appeal and cross-appeal from that judgment primarily involve the valuation and distribution of marital assets, spousal support, and whether the court abused its discretion by refusing to make a distributive award due to party misconduct.

I. Bank Accounts

{¶2} Brenda first argues that the court erred by failing to grant her, as separate marital property, two bank accounts that she maintains were funded solely as from an inheritance that she received from her father. Preston maintains that the court correctly found the accounts were marital property, but erred by dividing the balances in those accounts as they existed at the time of trial, rather than at the time mutual restraining orders went in to effect.

{¶3} A party's separate property is not "marital" property. *See* R.C. 3105.171(A)(3)(b). Separate property includes "[a]ny gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse." R.C. 3105.171(A)(6)(a)(vii). An inheritance, even if received during the marriage and commingled with marital assets, remains separate marital property as long as it remains traceable. *See* R.C. 3105.171(A)(6)(a)(i). The party asserting that an asset is separate property has the burden of proof. *Turner v. Davis-Turner*, 8th Dist. Cuyahoga No. 106002, 2018-Ohio-2194, ¶ 12.

{¶4} Brenda claimed that her father died during the marriage, that she inherited between $250,000 and $300,000 from his estate, and that "I would never touch that money and I still haven't." The magistrate found, however, that Brenda's father died intestate, that no estate was

opened, and that Brenda and her siblings merely divided their father's property among them. The magistrate found that the lack of any estate made it difficult to know exactly what the father owned at the time of his death and how his assets were distributed. Brenda gave equivocal testimony on the exact amount she inherited: when asked how much money she received as a result of her father's death, she stated that "I would imagine that it was close probably about between 250 and 300 thousand, possibly." In addition, the magistrate found it "not at all clear" if Brenda's claim of separate property included $40,473.94 that she received as a beneficiary of her father's life insurance.

{¶5} Brenda also contradicted her assertion that she had not used any of the inheritance money. The magistrate found that Brenda was unable to offer adequate explanations for transfers of funds from the accounts where the inheritance had allegedly been deposited. The record supports this finding — Brenda could not remember whether she took certain withdrawals in cash, nor, for example, could she remember what she did with a $17,200 withdrawal. At one point, Brenda transferred $115,000 to a bank in the Congo as part of a business arrangement with her sister's friend. She admitted that she was lucky to get the money back. The magistrate found, however, that "having declared that the money was sacrosanct [Brenda] acted as if it were just pennies that have no significance if lost."

{¶6} Brenda argues that with Preston having failed to offer any evidence on the issue of whether the inheritance was marital property, all she needed to do was present some evidence and testimony to sustain her burden of proof. This is not entirely true; it is more accurate to say that Brenda had to present *credible* evidence in support of her burden of proving that the inheritance was her separate property. As the trier of fact, it was within the magistrate's purview to assess the credibility of the witnesses. *Johnson v. Mills*, 8th Dist. Cuyahoga No. 102241,

2015-Ohio-4273, ¶ 23. Our review is limited to determining whether the trier of fact lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20.

{¶7} Given the lack of documentation in bank records, the magistrate found that Brenda's credibility was "of paramount significance." As the trier of fact, the magistrate concluded that Brenda was not credible: she did not know how much money she received from the sale of her father's assets, nor could she provide proof that some of the assets had actually been sold. In addition, the magistrate made extensive findings on individual transactions from the accounts, finding that "in some cases they raise more questions than they answer." These findings supported the magistrate's conclusion that Brenda's failure to offer credible proof of her claim of separate property meant that Preston had no obligation to prove anything. We have no basis for concluding that the magistrate lost his way by finding that the two accounts were not Brenda's separate property.

{¶8} In his first cross-assignment of error, Preston complains that the magistrate erred by dividing the two bank accounts based on their balances at the time of trial, rather than on their balances at the time mutual restraining orders over the accounts went into effect. He maintains that he offered proof that the balances of the two accounts were approximately $13,000 higher when the restraining order went into effect. He attributes the lower balance at the time of trial to Brenda either dissipating the funds or secreting them for her own future use.

{¶9} When a party violates the terms of a restraining order preventing the party from spending funds in a bank account, the court has the discretion to make a distributive award to the party aggrieved by the violation of the restraining order. *See* R.C. 3105.171(E)(4); *Rodgers v. Rodgers*, 8th Dist. Cuyahoga No. 105095, 2017-Ohio-7886, ¶ 30; *Best v. Best*, 10th Dist. Franklin

No. 11AP-239, 2011-Ohio-6668, ¶ 17. The decision whether to grant a distributive award is discretionary. *Gentile v. Gentile*, 8th Dist. Cuyahoga No. 97971, 2013-Ohio-1338, ¶ 55.

{¶10} Each party asked the court to make a distributive award based on the other's misconduct. The magistrate thoroughly addressed these contentions and found that both parties had violated the court's mutual restraining orders — it stated that "[n]either party is without fault and both could have been sanctioned for their actions." The magistrate offered several reasons why he would not make a distributive award; for example, noting that he had equalized some of the misconduct so there was no loss. But the most compelling reason was that "because of their actions neither party is in a position to ask the Court to punish the other party for engaging in the same misconduct that they did." This was a reasonable decision under the circumstances. As such, it did not rise to the level of an abuse of discretion.

II. Diamond Ring

{¶11} During the marriage, Preston purchased a diamond ring. Brenda claimed that Preston gifted her the ring for their anniversary, making it her separate property; Preston claimed that he purchased the ring as an investment and that it was marital property. The magistrate found that even though Preston gave the ring to Brenda for her use, he purchased the ring as an investment and did not intend to give up his interest in it. Brenda argues that this finding is against the weight of the evidence.

{¶12} "Gifts acquired by either spouse during the course of a marriage are presumed to be marital property pursuant to R.C. 3105.171(A)(6)(a) unless there is clear and convincing evidence that the donor intended the item to be the exclusive property of the recipient spouse." *Marsala v. Marsala*, 8th Dist. Cuyahoga No. 67301, 1995 Ohio App. LEXIS 2852, 9 (July 6, 1995). "The essential elements of an inter vivos gift are (1) an intention on the part of the donor to transfer the

title and right of possession to the donee, (2) delivery by the donor to the donee, (3) relinquishment of ownership, dominion, and control over the gift by the donor, and (4) acceptance by the donee." *Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, 966 N.E.2d 255, ¶ 20. The donee spouse has the burden, by clear and convincing evidence, of proving that the donor spouse made an inter vivos gift that constitutes the donee spouse's separate property. *See* R.C. 3105.171(A)(6)(a)(vii); *Nethers v. Nethers*, 5th Dist. Guernsey No. 18 CA 000005, 2018-Ohio-4085, ¶ 16.

{¶13} The magistrate made extensive factual findings on the issue, noting that the only point of agreement between the parties was that Preston presented the ring to Brenda on an anniversary. Although Brenda denied that she ever heard Preston use the word "investment" in conjunction with the ring, Preston testified that he first learned about the ring from Brenda, who had visited a jewelry store and was told by a sales clerk that the ring could be bought for half its actual value. Preston resisted buying the ring because it was being sold for an amount that was "far more" than half his yearly income, but testified that Brenda told him "[i]t would be a tremendous investment for us to have" and that "the investment value of the ring * * * could really help us in the future * * *."

{¶14} The magistrate found Preston "credible and compelling" on the issue. While Preston had purchased jewelry for Brenda during the marriage, he never before purchased anything so expensive as a gift for her, certainly not when compared to jewelry he had previously gifted to her. With the price of the ring far-exceeding half of Preston's income, the magistrate's finding that it was more credible to believe that Preston purchased the ring as an investment rather than solely as a gift is reasonable.

{¶15} The magistrate cited other reasons for finding that Brenda lacked credibility; for example, she claimed that Preston did not learn about the ring from her, but either on his own or from the parties' 11 year old son. In addition, Brenda could not actually remember when Preston handed her the ring, despite it being no ordinary ring (the ring had been appraised at $130,000). And after the divorce action had been filed, and while she was under a restraining order preventing her from removing the ring from the parties' safe deposit box, Brenda took the ring and gave it to family members and/or friends, the names of whom she was unable to recall.

{¶16} Brenda testified that when Preston presented the ring to her, he told her that he wanted her to "start enjoying this right now.[1] We might as well enjoy it right now instead of waiting for our 50th wedding anniversary." She maintains that these words, and the fact that she later wore the ring, proves it was a gift. This testimony does not alter the conclusion that the ring had been purchased as an investment. Brenda's possession of the ring does not establish ownership. *Link v. Link*, 3d Dist. Mercer No. 10-11-21, 2012-Ohio-4654, ¶ 51. In addition, Preston's statement that he wanted Brenda to enjoy the ring is not mutually exclusive with the notion that the ring was a gift — the ring could be worn and enjoyed by Brenda without affecting its value as an investment. Brenda offers nothing on appeal to show that the magistrate erred by finding that she failed to show by clear and convincing evidence that the ring had been gifted to her solely and was her separate property. This conclusion is not against the manifest weight of the evidence.

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[1] Brenda also claims that when Preston gave her the ring, he wrote a note stating his intention to gift the ring to her and that the jeweler who sold the ring verified in writing his recollection that Preston bought the ring as an anniversary gift. Those items were not introduced into evidence at trial — Brenda first raised them in a motion to submit additional evidence filed more than three years after trial concluded. The court did not rule on that motion, so we presume that the motion was denied. *Panzica Constr. Co. v. Bridgeview Crossing, L.L.C.*, 8th Dist. Cuyahoga No. 97580, 2012-Ohio-4932, ¶ 4. Because the court did not consider this evidence, we likewise cannot because it is outside of the record before us.

III. Life Insurance

{¶17} The magistrate found that at the time of trial, the parties owned four life insurance policies on Preston's life. Two of the policies had combined cash surrender values of approximately $49,000. Preston requested that the two policies with cash values be surrendered and the proceeds divided as marital property. He maintained that the original purpose behind the policies — insurance to fund college for the parties' three children — no longer existed as the first child had graduated college, the second child had secure funding to pay tuition, and the third child had a full scholarship. Brenda opposed liquidation and, as described by the magistrate, "would like the Court to order that ownership of the policies be transferred to her and allow her to name herself as beneficiary in order to guarantee her spousal support in the event of [Preston's] death." The magistrate refused Brenda's request on authority of our decision in *Robiner v. Robiner*, 8th Dist. Cuyahoga No. 67195, 1995 Ohio App. LEXIS 5425 (Dec. 7, 1995), which held that securing spousal support obligations with life insurance would provide spousal support after the death of the payor spouse. The magistrate thus decided that "the Court cannot force the defendant to ensure the plaintiff's spousal support after his death." The court ordered that the two policies at issue be surrendered and the net proceeds divided equally between the parties.

{¶18} R.C. 3105.18(B) states: "Any award of spousal support made under this section shall terminate upon the death of either party, unless the order containing the award expressly provides otherwise." This court has been consistent in holding that "[a] trial court may not secure a spousal support order with life insurance, unless the order specifically states that the spousal support continues after the death of the obligor." *Janosek v. Janosek*, 8th Dist. Cuyahoga Nos. 86771 and 86777, 2007-Ohio-68, ¶ 10, citing *Waller v. Waller*, 163 Ohio App.3d 303, 2005-Ohio-4891, 837 N.E.2d 843 (7th Dist.), and *Robiner, supra*. We have, however, held that a

life insurance policy "is proper as security for the division of property settlement award (as finally determined) and attorney fees." *McCoy v. McCoy*, 91 Ohio App.3d 570, 582-583, 632 N.E.2d 1358 (8th Dist.1993), citing *Nori v. Nori*, 58 Ohio App.3d 69, 568 N.E.2d 730 (12th Dist.1989), and *Gore v. Gore*, 27 Ohio App.3d 141, 499 N.E.2d 1281 (9th Dist.1985).

{¶19} Brenda argues on appeal that she "is not seeking to be named as irrevocable beneficiary on the policies of insurance upon Preston's life" but is "seeking a division of those policies as marital property." Appellant's brief at 13. She contradicts that argument, however, by saying that the insurance policies "should have been used as a source to ensure that Brenda receives the spousal support to which she is entitled." *Id*. The contradiction in her argument shows that she is attempting to avoid the clear application of *Robiner*. The court's spousal support order terminates, in part, upon Preston's death. An order that he provide life insurance would conceivably allow Brenda to collect her spousal support beyond his death. The court did not abuse its discretion by adhering to precedent from this appellate district.

IV. Spousal Support

{¶20} The court awarded Brenda spousal support in the amount of $5,700 per month for 100 months, stating that spousal support "shall terminate upon the death of either party or the Plaintiff's remarriage or the Plaintiff's cohabitation with a member of the opposite sex in a relationship tantamount to marriage." Brenda argues that the court erred by making remarriage or cohabitation with another person in a relationship tantamount to marriage events that would terminate spousal support. She maintains that there is no statutory requirement that remarriage terminate spousal support and that, to the extent the remarriage rule is one of public policy, the rationale behind the rule is flawed. She also complains that the court abused its discretion by only awarding her $5,700 per month for 100 months.

A. Remarriage or Cohabitation

{¶21} We agree with Brenda that there is no statutory requirement that remarriage terminate spousal support. *Tedrick v. Tedrick*, 12th Dist. Clermont No. CA2015-07-065, 2016-Ohio-1488, ¶ 23. Nor is there any public policy that spousal support should terminate upon a payee spouse's remarriage. *Kimble v. Kimble*, 97 Ohio St.3d 424, 2002-Ohio-6667, 780 N.E.2d 273, ¶ 9. Unlike the death of a payee spouse that would be grounds for automatic termination of spousal support, "a party's remarriage does not automatically terminate an award of spousal support." *Meeks v. Meeks*, 10th Dist. Franklin No. 05AP-315, 2006-Ohio-642, ¶ 48. That part of the court's order stating that spousal support would terminate upon Brenda's remarriage or cohabitation with another in a relationship tantamount to marriage was error.

{¶22} Remarriage or cohabitation with another in a relationship tantamount to marriage may, however, be grounds for showing a change of circumstances warranting modification of spousal support under R.C. 3105.18(E), provided that the court specifically retains jurisdiction to modify spousal support consistent with R.C. 3105.18(E). *Kimble* at ¶ 10; *Mlakar v. Mlakar*, 8th Dist. Cuyahoga No. 98194, 2013-Ohio-100, ¶ 20. Whether a payee spouse's circumstances have changed in a manner that warrants modification or termination of spousal support can only be determined after a full hearing on the matter. The court did, in this case, retain jurisdiction to modify spousal support. Nevertheless, unless and until either of those events specified in the spousal support order occur and Preston files a motion to modify spousal support, the court's error is nonprejudicial.

{¶23} In addition, we call attention to that part of the spousal support order that allows modification of spousal support only upon cohabitation with another of the *opposite sex* in a relationship tantamount to marriage. The court's decree makes no such distinction for

remarriage, likely because at the time it entered the decree, Ohio defined marriage as "a union between one man and one woman." Ohio Constitution, Article XV, Section 11. That definition has been rendered unenforceable by *Obergefell v. Hodges*, 576 U.S. __, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), where the United States Supreme Court held "that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Obergefell* at 2608. This is, however, a constitutional question that we avoid answering given that neither party raised the issue on appeal. What is more, the issue itself is not ripe for adjudication unless and until Brenda were to cohabitate with a same-sex partner in a relationship tantamount to marriage. *Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 29 ("a court should avoid reaching constitutional issues if a case can be decided on other grounds").

B. Amount of Spousal Support

{¶24} Brenda complains that the magistrate erroneously used a "mathematical formula" to determine the amount of spousal support. She also complains that the magistrate disregarded Preston's work-related reimbursements and rental income and failed to acknowledge that the parties' mutual decision that Brenda would be a full-time homemaker degraded her earning ability moving forward.

{¶25} R.C. 3105.18 allows the court to award spousal support provided it is "appropriate and reasonable." When deciding whether spousal support is appropriate and reasonable, the court must consider the factors set forth in R.C. 3105.18(C)(1). There is no "mathematical formula" for determining what amount of spousal support should be ordered, *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 96, 518 N.E.2d 1197 (1988), so the court has broad discretion to determine the amount and the duration. *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67, 554 N.E.2d 83

(1990). If some competent, credible evidence supports the court's order, that order will not be an abuse of the court's discretion. *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 696 N.E.2d 575 (1998).

{¶26} While there is no "mathematical formula" for determining an amount of spousal support to be ordered, that does not mean that the court cannot use mathematical formulas as an aid. The magistrate used "FinPlan" — "a computer generated calculation performed by the trial court that determines the amount of money each spouse contributes to the household[,]" *Lumpkin v. Lumpkin*, 9th Dist. Summit No. 21305, 2003-Ohio-2841, ¶ 23, fn. 4, — to determine the cash each party would have available to them based on different spousal support amounts. We have upheld spousal support determinations that used FinPlan in conjunction with the factors set forth in R.C. 3105.18(C)(1). *See Branden v. Branden*, 8th Dist. Cuyahoga No. 104523, 2017-Ohio-7477, ¶ 26, citing *Organ v. Organ*, 2014-Ohio-3474, 17 N.E.3d 1192, ¶ 15 (9th Dist.); *Wojanowski v. Wojanowski*, 8th Dist. Cuyahoga No. 99751, 2014-Ohio-697, ¶ 50. *See also Cramblett v. Cramblett*, 7th Dist. Harrison No. 05 HA 581, 2006-Ohio-4615, ¶ 56; *Carroll v. Carroll*, 5th Dist. Delaware No. 2004-CAF-05035, 2004-Ohio-6710, ¶ 37. The magistrate used FinPlan in conjunction with a thorough application of the statutory factors for establishing the amount of spousal support. We find no error.

{¶27} As to the amount of spousal support ordered, we find no abuse of discretion. Brenda's argument that the court should have awarded her $7,500 per month in spousal support makes no attempt to explain why the ordered amount of spousal support is inadequate to meet her living expenses. The amount ordered by the magistrate, after imputing $16,600 in income to Brenda, worked a 50-50 split of the combined cash available to both parties. Brenda's suggested support amount would have given her 61 percent of the parties' combined cash income to

Preston's 39 percent. The magistrate could rationally conclude that Brenda's demand was unreasonable and reject it on that basis.

{¶28} For similar reasons, we reject Preston's argument, made in fifth cross-assignment of error, that the court abused its discretion by setting spousal support at $5,700. He maintains that over the 100-month period in which he is obligated to pay spousal support, he will pay $570,000 to Brenda. This may be so, but during that same period, Preston will earn $1.391 million, assuming his income remains static. At all events, Preston will have to pay roughly one-half of his income in spousal support.

{¶29} We also reject Preston's argument that the court, unlike the magistrate, failed to include language stating that the duration of spousal support shall not exceed 100 months. The court's judgment entry clearly states that Preston shall pay spousal support "for a period of 100 months" and that "all payments shall terminate upon the death of either party or the Plaintiff's remarriage or the Plaintiff's cohabitation with member of the opposite sex in relationship tantamount to marriage." This language makes it clear that Preston does not have a lifetime spousal support obligation.

V. Spousal Support Arrears

{¶30} Brenda raises multiple arguments about support arrears: that the magistrate erred by calculating arrears; that the magistrate erred by failing to reserve jurisdiction to determine further arrears from the last day of trial to the final entry of divorce; and that the magistrate erred by failing to grant her motion to modify spousal support.

A. House Maintenance

{¶31} Preston and Brenda agreed that he would pay the following: $4,000 per month in temporary spousal support; the real estate taxes, homeowner's insurance, and maintenance on the

house (including lawn care and snow removal); the loan on Brenda's car; three life insurance policies; the automobile insurance policies; and his own personal living expenses. Brenda agreed to pay: her personal living expenses and utilities for the house. As described by the magistrate, the temporary spousal support obligation "was a bargain [Preston] had been trying to get out from under since he signed the agreed entry in August of 2012." Brenda filed a motion to have Preston held in contempt for failing to pay home maintenance expenses of nearly $6,000 and nearly $5,400 in other expenses. In a post-trial motion, Brenda sought reimbursement for an additional $4,000 for house maintenance.

{¶32} The magistrate found that Brenda's "proof" of the expenses consisted of 36 pages of untotaled expenses. Some of the expenses were not legitimately within Preston's temporary spousal support obligations; for example, department store bills, cleaning supplies, and light bulbs, and expenses to improve the house for sale. Other claimed expenses duplicated some of Preston's obligations, like snow removal and lawn care. In all, the magistrate found Preston in arrears of his obligation to pay for the maintenance of the house in the amount of $6,920.45. That decision is supported by competent, credible evidence.

{¶33} In his third cross-assignment of error, Preston argues that the magistrate erred by allowing Brenda to recoup some home maintenance expenses despite her lack of documentation. We reject this argument because many of the documents obviously pertained to home maintenance. Preston does not address any items not specifically considered by the magistrate, but instead claims only that Brenda failed to carry her burden of proving the merit behind her motion to show cause when she did nothing more than offer non-itemized receipts.

{¶34} As the proponent of the motion, Brenda had to make out a case for why the motion should be granted; she could not dump a pile of documents on the court and expect it to make the

case for her. *Brown v. Brown*, 2014-Ohio-2402, 14 N.E.3d 404, ¶ 28 (8th Dist.). Nevertheless, the magistrate undertook an independent and thorough review of the documents offered by Brenda despite any deficiencies in the manner with which she presented them. With the magistrate having done so, we have no basis for finding that the magistrate acted unreasonably.[2]

B. Real Estate Taxes

{¶35} Brenda also complained that Preston failed to pay the real estate taxes on the house. The magistrate found this issue to be "not as simple" as Brenda would claim. Preston set aside money to pay the taxes in the parties' savings account, but Brenda withdrew all of it (in violation of a restraining order) and deposited the money into an account in her own name. Preston had funds available to him, but insisted that Brenda pay from the money she withdrew from the joint savings account. The magistrate found both parties at fault, but decided that Preston bore the greater responsibility because he had voluntarily assumed the obligation to make the payments. Nevertheless, the magistrate declined to find Preston in contempt because of Brenda's actions. The magistrate thus found that Brenda was not entitled to the $20,142.84 that Brenda claimed as a result of Preston not paying the real estate taxes, but that she pay $5,538.35 towards the unpaid real estate taxes. Brenda's argument on appeal omits these background facts. The court did not act arbitrarily or unreasonably by approving and adopting the magistrate's decision.

C. Reservation of Jurisdiction

{¶36} Brenda next complains that the magistrate erred by failing to reserve jurisdiction to determine spousal support arrears that accrue after the trial date. This was prejudicial error, she

[2]Both parties complain that the magistrate erred by ruling on a post-trial motion to show cause on arrears without first conducting an evidentiary hearing at which they could cross-examine each other. It is unclear why Brenda desired a hearing when she submitted the bills for house maintenance. As for Preston, he claims that he does not want a remand because the cost to him of having a new hearing would likely exceed the amount of his arrears.

claims, because the magistrate did not issue a decision until eight months after trial concluded, so his order did not determine any further arrears that may have accrued in the temporary support order until the point where there was a final entry of divorce.

{¶37} We agree with Preston that nothing prevented Brenda from seeking to raise potential support arrears before the court issued a final divorce decree. The magistrate's decision was interlocutory until all objections to it were ruled on by the court. *Robinson v. BMV*, 8th Dist. Cuyahoga No. 88172, 2007-Ohio-1162, ¶ 5. It does not appear that Brenda supplemented her motion to show cause with additional evidence of Preston's support arrears that accrued post-trial. In fact, Brenda makes no claim in this appeal that Preston actually did accrue additional support arrears — her argument asserts only that he "may have" accrued additional arrears. She thus cannot point to any prejudice from the magistrate's alleged error in failing to reserve jurisdiction.

VI. Financial Misconduct

{¶38} While the divorce proceedings were pending, Preston came into possession of an insurance settlement check made out to both parties in the amount of $20,000. Brenda never saw the check — Preston either signed her name to it or had someone else sign it (Preston pleaded "the Fifth" when questioned about it) and then used the proceeds for his own purposes. Although the magistrate found that Preston had "a deliberate plan to keep his wife in the dark about the money's existence," the court refused to award Brenda treble damages as part of a distributive award because the settlement money was for a personal injury that Preston suffered, so the money would, in any event, have gone to Preston as his separate property. Brenda maintains that the court erred by failing to make a distributive award to her.

{¶39} Any compensation to a spouse for the spouse's personal injury is considered that spouse's separate property. *See* R.C. 3105.171(A)(6)(a)(vi). Brenda does not dispute that the

insurance settlement was paid as compensation for an injury Preston suffered after being struck by a motorist while riding his bicycle, but argues that some part of the settlement would have been intended to settle her loss of consortium claim given that her name appeared on the check. The magistrate rejected this argument because Brenda "did not make any effort to establish that any part of the settlement included a claim for loss of consortium." Brenda argues that the insurance company "obviously intended to settle any loss of consortium claim" because it included her name on the check. But this is not proof that Brenda was a party to an action against the tortfeasor and actually filed a claim for loss of consortium. And assuming that the matter with the tortfeasor settled without resort to legal action, the settlement agreement was not offered into evidence to prove Brenda's assertion that she had a consortium claim.

{¶40} The magistrate found that Preston's machinations were unnecessary; however, this finding did not resolve Brenda's argument that she was entitled to a distributive award for his misconduct. Indeed, the magistrate found that he could issue a distributive award to Brenda based on Preston's misconduct even though the insurance settlement proceeds were his separate property. Brenda argues that we should punish Preston's machinations as being in violation of a party's duty to make a full and complete disclosure of all assets, lest we send a message that a litigant can, "while under the scrutiny of the court, forge his or her spouse's name to a sizable check from a third party" without disclosure to the court.

{¶41} The magistrate declined to make a distributive award because Brenda "does not come to court with clean hands, having engaged in behavior similar to [Preston's]." Notably, the magistrate found that Brenda not only secreted the diamond ring in violation of a court restraining order, she then offered a new appraisal of the ring at $40,000 to $45,000. This was a dubious appraisal not only because it was made by the same jeweler who two years earlier appraised the

value of the ring at $130,000, but because the appraiser never actually inspected the ring before giving the second appraisal. The magistrate also found that Brenda purposely prevented Preston from having his own appraiser value the ring. Although Brenda's conduct with the ring was more subtle than Preston's machinations with the insurance settlement, the magistrate concluded that Brenda's actions were "no less deliberate than his" and "done for the same reason; to hide the value of an asset."

{¶42} The magistrate detailed other misconduct committed by Brenda that consisted of withdrawals from joint bank accounts in violation of a restraining order and had Preston's name removed from a homeowner's insurance policy. To be sure, the magistrate detailed instances where Preston engaged in similar misconduct. In short, the magistrate found that "[n]either party is without fault and both could have been sanctioned for their actions." The magistrate equalized any loss suffered resulting from the misconduct. This was a fair and sensible course of action when dealing with misconduct committed by both parties.

{¶43} In his fourth cross-assignment of error, Preston complains that the court abused its discretion by failing to grant him a distributive award based on Brenda's misconduct. For the reasons outlined above, the magistrate reasonably considered that Preston, too, had engaged in misconduct by violating the restraining order on marital assets. Neither party was without fault to the point where it made little sense for the court to make value judgments as to which party was slightly less at fault than the other. The court did not abuse its discretion by affirming the magistrate's decision.

VII. Furniture and Gold Coins

{¶44} Brenda complains that the magistrate failed to value the items of furniture that Preston requested be awarded to him. We reject this argument because apart from family

heirlooms that Preston brought into the marriage, the court ordered all of the parties' possessions to be sold and the proceeds divided equally. The valuation would occur at the time of sale.

{¶45} Brenda also complains that the magistrate failed to divide the value of furniture that Preston bought when he moved into an apartment, even though Preston testified that he spent between $20,000 and $25,000 of marital funds on the furniture. The testimony showed, however, that the money Preston used came from the insurance settlement — funds that the magistrate found were Preston's separate property.

{¶46} The parties also contested possession of several gold coins. The exact number of coins was contested — the magistrate found that neither party could agree on how many actually existed, whether the coins were purchased, or how many were purchased at a time. The magistrate found that Brenda's uncertainty meant that she did not meet her burden of proving that all of the coins were her separate personal property, particularly given the magistrate's finding that Preston testified with "no such uncertainty." There was competent, credible evidence to support this finding.

VIII. Timeliness of Magistrate's Decision

{¶47} After the issues were tried to the magistrate and the parties submitted post-trial final argument, it took the magistrate six months to issue a decision. Brenda argues in her eighth assignment of error that this length of time violated Sup.R. 40(A)(2), which states that "[a]ll cases submitted for determination after a court trial shall be decided within ninety days from the date the case was submitted."

{¶48} We have noted that the time limits set forth in the rules of superintendence present guidelines for trial judges, not mandatory deadlines. *Brown*, 2014-Ohio-2402, 14 N.E.3d 404, at ¶ 6. And in the context of divorce trials, we have been critical of delays far-exceeding that in this

case, but that did not nonetheless require reversal. *See Phelps v. Saffian*, 8th Dist. Cuyahoga No. 103549, 2016-Ohio-5514, ¶ 56. Given the length of trial and the issues resolved by the magistrate's thorough decision, we find no error that would require reversal, particularly when Brenda does not argue that the delay prejudiced her in any way.

IX. Attorney Fees

{¶49} Brenda asked the court to award her attorney fees in the amount of $98,867.80, and in an abbreviated argument claims the fees "in light of Preston's misconduct and the large disparity in the income of the parties." This is an inadequate argument under App.R. 16(A)(7), which requires the appellant to present an argument "with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." Brenda's argument contains nothing more than a conclusion, so we disregard it. *See* App.R. 12(A)(2); *Glendell-Grant v. Grant*, 8th Dist. Cuyahoga No. 105895, 2018-Ohio-1094, ¶ 16.

X. Post-Decree Motions

{¶50} Brenda appealed from the divorce decree, but we dismissed that appeal for want of a final order because the trial court had explicitly reserved jurisdiction over the question of child support arrearage and thus failed to resolve all issues ancillary to the divorce. *Hoopes v. Hoopes*, 8th Dist. Cuyahoga No. 101994, motion No. 485703 (May 20, 2015). As the case ended on remand, in 2017, Brenda filed two motions to show cause, a motion to modify spousal support, a motion for wage attachment, and a motion to submit additional evidence regarding a diamond ring that was found to be a marital asset and not Brenda's separate property (Preston had eight pending motions). The court dismissed the motion as "not ripe for adjudication" until it finalized the divorce decree by making a determination regarding any arrearage or overpayment of child

support. Brenda argues that if the divorce decree was nonfinal, it was an interlocutory order that was subject to modification at any time prior to final judgment.

{¶51} In a "status of the proceedings" memorandum to the court, Brenda suggested that the court had two alternatives with respect to post-decree motions pending even though the decree was not final: "either entertain all motions that are currently pending, or finalize the divorce decree." Brenda conceded that if the court were to finalize the decree, "all pending matters merge into the final decree."

{¶52} We fail to see how the court could modify the amount of spousal support set forth in the divorce decree before that decree actually became final. Finalization of the decree was the only viable course, and as Brenda told the court, finalizing the decree meant that all outstanding motions would be merged into the decree. It is true that the court dismissed the outstanding motions before finalizing the divorce decree, but under the circumstances, dismissal was a precursor to finalization. In any event, dismissal will not prejudice Brenda from refiling her motions, so the court could have concluded that dismissal did not affect Brenda's substantial rights. *See* Civ.R. 61.

XII. Equity in Vehicle

{¶53} As the divorce proceedings were pending and a temporary restraining order was in place, Preston, in order to finance a new vehicle, withdrew $20,000 from a bank account that contained funds that the parties' children earned. The magistrate ordered Preston to repay the $20,000 in equal shares to the children. For his second cross-assignment of error, Preston complains that the court erred by ordering him to pay the $20,000 while refusing to offset that debt against the equity in the vehicle.

{¶54} Preston maintained that he used his children's money only because Brenda had, in violation of the same restraining order, emptied their only other bank account and moved those funds into an account in her name. The magistrate noted that Brenda did not dispute that Preston had no other options to finance the vehicle, but disagreed with Preston's argument that the money he withdrew from the children's account was a "formal lien" on the vehicle. For this reason, the magistrate found that "it would be inappropriate to reduce the equity in [Preston's vehicle] by $20,000."

{¶55} We have no basis for overturning the court's determination that the $20,000 that Preston removed from the children's bank account was a lien on the vehicle that should be shared by both parties. It is true that but for Brenda's actions in withdrawing all of the money from the parties' joint account that the money for the down payment on the vehicle would have come from marital funds and would be a marital debt. Nevertheless, this was not tit for tat: Brenda's violation of the restraining order did not allow Preston to do the same. The court did not act arbitrarily by finding that Preston improperly withdrew the money from the account.

{¶56} Judgment affirmed.

It is ordered that the parties share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the domestic relations division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

TIM McCORMACK, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR