[Cite as *Falk v. Falk*, 2009-Ohio-4973.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jodi L. Falk,	:	
Plaintiff-Appellee,	:	
v.	:	No. 08AP-843 (C.P.C. No. 07DR06-2415)
Gary R. Falk,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 22, 2009

Robert A. Koblentz, for appellee.

Raymond L. Eichenberger, for appellant.

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

KLATT, J.

{¶1} Defendant-appellant, Gary R. Falk, appeals from a September 16, 2008 decision and judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, that granted a divorce, awarded temporary spousal support, divided marital property and debt, and awarded attorney's fees in a divorce action involving plaintiff-appellee, Jodi L. Falk.[1] For the following reasons, we affirm.

[1] On September 22, 2008, the trial court issued a second judgment/entry pursuant to Civ.R. 60(A), correcting a typographical error in ¶26, page 15, of the September 16, 2008 judgment entry/decree of divorce.

{¶2} The parties were married on August 21, 1998. Prior to the marriage, the parties signed an antenuptial agreement. Prepared by appellee's attorney, the agreement identified property owned by appellee prior to the marriage and directed how appellee's property would be distributed in the event of appellee's death or the legal termination of the marriage. Although the antenuptial agreement stated that both parties intended that they retain their separate property free and clear of any claim by the other, the agreement did not identify appellant's property. Nor did the antenuptial agreement address the issue of spousal support or the disposition of property acquired by the parties during the marriage in the event of divorce.

{¶3} Appellee filed a complaint for divorce on June 15, 2007. Appellant filed a counterclaim for divorce. No children were born during the parties' marriage. At the time appellee filed her complaint, appellee was 52-years old and appellant was 49-years old.

{¶4} Prior to trial, the parties agreed to submit the issue of the enforceability of the antenuptial agreement to the trial court on briefs. Based upon those submissions, the trial court determined that the antenuptial agreement was invalid and unenforceable.

{¶5} During a subsequent two-day trial, the parties presented evidence of their education, employment, and income history. The parties stipulated to the fair market value of their marital residence as well as to the mortgage balance on the property. Both parties identified bank accounts, retirement accounts, motor vehicles, and other assets in their name and, for the most part, stipulated to the value of these assets. However, the parties disputed the value of a 1971 Plymouth Duster owned by appellant. Both parties presented expert testimony regarding the fair market value of this automobile.

{¶6} Appellee also presented a budget reflecting her living expenses. She also expressed her desire to relocate from the marital residence and to purchase her own home. Appellant expressed his desire to remain in the marital residence.

{¶7} The trial court entered a judgment granting the parties a divorce, ordered appellant to pay appellee temporary spousal support, valued and divided the marital property, and ordered appellant to pay a portion of appellee's attorney's fees.

{¶8} Appellant appeals from the judgment, assigning the following errors:

> 1. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN ORDERING APPELLANT GARY FALK TO PAY SPOUSAL SUPPORT IN THE AMOUNT OF $1,000 PER MONTH FOR TWENTY-FIVE (25) MONTHS.
>
> 2. THE TRIAL JUDGE ERRED AS A MATTER OF LAW AND TO THE PREJUDICE AND DETRIMENT OF DEFENDANT GARY FALK WHEN SHE ABROGATED AND VOIDED THE ANTENUPTIAL AGREEMENT OF THE PARTIES WITHOUT FIRST INQUIRING BEYOND THE SCOPE OF THE AGREEMENT AS TO WHETHER PLAINITFF JODI FALK KNEW THE FINANCIAL WORTH AND ASSETS OF DEFENDANT GARY FALK; THE ANTENUPTIAL AGREEMENT SHOULD HAVE BEEN CONSTRUED TO THE DETRIMENT OF PLAINTIFF JODI FALK AS THE DRAFTER OF THE AGREEMENT.
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> 3. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN ADOPTING THE VERY HIGH FAIR MARKET VALUE FOR THE 1971 PLYMOUTH DUSTER.
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> 4. THE TRIAL COURT ERERD AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FAILING TO ALLOCATE PLAINTIFF JODI FALK'S SHARE OF THE WINDOW DEBT AND AIR CONDITIONER REPLACEMENT TO THE PLAINTIFF, AND IN ALLOCATING OTHER DEBT WHICH SOLELY BELONGED TO PLAINTIFF TO DEFENDANT FARY FALK-PLAINTIFF'S PERSONAL MEDICAL BILLS AND CREDIT CARD BILL.

> 5. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN AWARDING ATTORNEY'S FEES PAYABLE BY DEFENDANT GARY FALK TO PLAINTIFF JODI FALK.

{¶9} In his first assignment of error, appellant contends that the trial court erred by ordering appellant to pay appellee spousal support in the amount of $1,000 per month for 25 months. We disagree.

{¶10} An award of spousal support is governed R.C. 3105.18(C), which provides in relevant part:

> (C)(1) In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:
>
> (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.
>
> (2) In determining whether spousal support is reasonable and in determining the amount and terms of payment of spousal support, each party shall be considered to have contributed equally to the production of marital income.

{¶11} Our standard of review in reviewing a spousal support award is whether the trial court abused its discretion. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144; *Dunham v. Dunham*, 171 Ohio App.3d 147, 2007-Ohio-1167, ¶75; *Chelsey v. Chelsey*, 10th Dist. No. 08AP-455, 2008-Ohio-5697, ¶6. " '[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." *Grosz v. Grosz*, 10th Dist. No. 04AP-716, 2005-Ohio-985, ¶9, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} In determining whether spousal support is appropriate, and if so, in what amount and duration, the trial court must consider all of the factors set forth in R.C. 3105.18(C)(1). *Saluppo v. Saluppo*, 9th Dist. No. 22680, 2006-Ohio-2694, ¶23; *McClung*

v. McClung, 10th Dist. No. 03AP-156, 2004-Ohio-240, ¶21. However, the consideration of those factors remains in the discretion of the trial court. *Saluppo* at ¶23.

{¶13} The trial court is not required to comment on each statutory factor. Rather, the record need only show that the trial court considered the statutory factors in making its award. *Chelsey* at ¶6, citing *McClung* at ¶21.

{¶14} Appellant does not dispute that the trial court considered the factors set forth in R.C. 3105.18(C)(1). Rather, appellant argues that the trial court should have focused primarily on appellee's need for the temporary spousal support instead of the factors set forth in R.C. 3105.18(C)(1) in determining whether spousal support was "appropriate and reasonable." We disagree. The trial court was not free to ignore the statutory requirements. R.C. 3105.18(C)(1) expressly required the trial court to consider all of the factors set forth therein in fashioning a spousal support award. Nor are we free to rewrite the statute in the manner suggested by appellant.

{¶15} Here, the trial court examined the evidence presented in the context of each statutory factor set forth in R.C. 3105.18(C)(1). Without reiterating every factual finding made by the trial court, we note that the trial court found both parties were employed but that appellant's income historically had been significantly higher than appellee's income. Appellee is a high school graduate. Appellant is a college graduate. Appellee has a heart condition that requires prescription medication costing $72 per month. Although appellant has some health issues, there is no indication that he requires any on-going prescription medication. After specifically identifying the parties assets and liabilities, the trial court expressly considered the parties' income, relative earning abilities, education, physical and mental condition, and their retirement benefits. The trial court also made

specific findings regarding the duration of the marriage, the standard of living established by the parties during the marriage, the contribution each party made to the education, training or earning ability of the other party, the time and expense necessary for appellee to acquire education, training or job experience so that she will be qualified to obtain appropriate employment, and the tax consequences of a spousal support award for each party. It appears the trial court did exactly what R.C. 3105.18(C)(1) required.

{¶16} The trial court also identified and considered some additional factors that it found significant to its decision as it was permitted to do under R.C. 3105.18(C)(1)(n). ("Any other factor that the court expressly finds to be relevant and equitable.") Specifically, the trial court noted appellee's need for temporary spousal support to assist her in moving from the marital residence, and appellant's ability to pay temporary spousal support. Given the trial court's detailed consideration of the evidence and statutory factors, the trial court was well within its discretion in awarding temporary spousal support of $1,000 per month for 25 months. Therefore, we overrule appellant's first assignment of error.

{¶17} By his second assignment of error, appellant contends the trial court erred when it determined the antenuptial agreement was unenforceable. We disagree.

{¶18} An antenuptial agreement is a contract in contemplation of marriage, which defines the property rights and economic rights of the parties thereto, usually upon the termination of the marriage or death of one of the parties.[2] *Gross v. Gross* (1984), 11

[2] R.C. 3105.171(B) requires a trial court to determine what constitutes marital property and what constitutes separate property. Upon making such a determination, the trial court must divide the marital and separate property equitably between the parties, in accordance with this section. Among the separate property to be distributed is any real or personal property or interest in real or personal property that is excluded from marital property by a valid antenuptial agreement. R.C. 3105.171(A)(6)(a)(v).

Ohio St.3d 99, 102. Antenuptial agreements are valid under Ohio law as long as certain conditions are met:

> Such agreements [antenuptial agreements] are valid and enforceable (1) if that have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse's property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce.

Id. at paragraph two of the syllabus; *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 466.

{¶19} In the case at bar, the parties agreed to submit the issue of the validity of the antenuptial agreement to the court on briefs. Therefore, appellee filed a motion for summary judgment seeking to enforce the terms of the antenuptial agreement as a matter of law. Appellant filed a memorandum contra to appellee's motion for summary judgment as well as a motion in limine. Appellant argued in both pleadings that the agreement should be interpreted in appellant's favor as the nondrafting party. Specifically, appellant argued that the trial court should interpret the antenuptial agreement to prohibit an award of spousal support.

{¶20} Although the antenuptial agreement contains one sentence that indicates the parties intended that they each retained their separate property free and clear from any claim by the other party, all substantive provisions of the agreement address appellee's right to retain her separate property and only appellee's property is identified. The antenuptial agreement does not expressly or implicitly address the issue of spousal support.

{¶21} The trial court found that the antenuptial agreement was invalid because there was not full disclosure, or full knowledge and understanding of the nature, value,

and extent of appellant's property. The antenuptial agreement did not identify appellant's property. The trial court also noted that appellant did not demonstrate by other means that appellee was aware of the nature, value and extent of appellant's property. Therefore, the trial court determined that the antenuptial agreement failed to satisfy the second prong of the *Gross* test.

{¶22} Appellant argues on appeal that the trial court erred by not conducting an evidentiary hearing to determine if appellee was aware of appellant's assets and property at the time they signed the antenuptial agreement. Essentially, appellant argues that because the antenuptial agreement could have been supplemented by parol evidence, the trial court erred when it found that it was invalid as a matter of law.

{¶23} We note that appellant did not make this argument in the trial court. In fact, appellant agreed to submit the validity of the antenuptial agreement on briefs, without any evidentiary support. Appellant did not contend in either his motion in limine or his memorandum contra to appellee's motion for summary judgment that appellee was fully aware (or, in fact, had any knowledge) of the extent and value of appellant's property at the time they signed the antenuptial agreement. Appellant never requested an evidentiary hearing or argued that there were material issues of fact that the trial court needed to resolve. Nor did appellant submit any Civ.R. 56(C) evidence in response to appellee's motion for summary judgment.

{¶24} Because appellant did not assert in the trial court that appellee was fully aware of appellant's property at the time they signed the antenuptial agreement, or that there were issues of fact for the trial court to resolve, he waived these arguments on appeal. *Niskamen v. Giant Eagle, Inc.*, ___ Ohio St.3d ___, 2009-Ohio-3626, ¶34 (slip

opinion) (a party who fails to raise an argument in the trial court waives his or her right to raise it here). Therefore, we overrule appellant's second assignment of error.

{¶25} Appellant contends in his third assignment of error that the trial court abused its discretion and erred in determining the value of appellant's 1971 Plymouth Duster. Appellant argues that the trial court adopted an unreasonable market value for this automobile. Again, we disagree.

{¶26} In making an equitable division of property, a trial court must first determine the value of marital assets. *Kestner v. Kestner*, 173 Ohio App.3d 632, 2007-Ohio-6222, ¶11; *Spychalski v. Spychalski* (1992), 80 Ohio App.3d 10, 15. We must affirm a trial court's determination if it is supported by competent, credible evidence and is not otherwise an abuse of discretion. *Moro v. Moro* (1990), 68 Ohio App.3d 630, 637; *James v. James* (1995), 101 Ohio App.3d 668, 681.

{¶27} The parties presented conflicting expert testimony regarding the value of appellant's 1971 Plymouth Duster. Appellee offered the testimony of J. Mark Hagans, a licensed automobile dealer and appraiser of antique, classic, and collectible cars, including street rod and muscle cars. Mr. Hagans is also a licensed auctioneer. Mr. Hagans testified that he has been performing value appraisals and pre-purchase inspections of antique, classic, and collectible cars for 20 years in Columbus, Ohio. He personally inspected the 1971 Duster. Based upon his inspection and research of the market, Mr. Hagans opined that the fair market value of the 1971 Duster was $15,500.

{¶28} Appellant offered the testimony of John Bakitis. Mr. Bakitis is a licensed auctioneer and an adjunct professor at Columbus State Community College. As an auctioneer, Mr. Bakitis primarily auctioned antiques and collectibles, including glass,

advertising, and tools. Mr. Bakitis has worked at least part-time as an auctioneer for seven or eight years. Prior to his work as a full-time auctioneer in 2007, Mr. Bakitis was a professor at DeVry University for 17 years where he taught primarily communications, writing, public speaking, and critical thinking. He testified that the last time he auctioned a collector car was about five years ago. Based upon Mr. Bakitis' inspection of the 1971 Duster, as well as his research, he opined that the fair market value of the automobile was $6,700.

{¶29} The trial court assessed the credentials of each expert and evaluated the strength of their opinions regarding the fair market value of the 1971 Duster. The trial court expressly found that Mr. Hagan's credentials and testimony were more credible. Therefore, the trial court accepted Mr. Hagan's valuation of the 1971 Duster. Given Mr. Hagan's background and experience, coupled with his explanation of the basis for his opinion, the trial court did not abuse its discretion when it valued the 1971 Duster at $15,500. A trial court can accept one expert opinion over another. Therefore, we overrule appellant's third assignment of error.

{¶30} By his fourth assignment of error, appellant argues that the trial court abused its discretion and erred by failing to properly allocate certain debt of the parties. Specifically, appellant contends that the trial court: (1) should have allocated one-half of the cost of new windows for the marital residence to appellee; (2) should have allocated one-half of the cost of a new air conditioner for the marital residence to appellee; and (3) should not have allocated to appellant one-half of the Chase Bank credit card debt of $935.96 and one-half of a medical bill from TMJ and Facial Pain Center, Inc., in the

amount of $569.94. For the following reasons, the trial court did not abuse its discretion in characterizing and allocating this debt.

{¶31} As appellee points out, the record reflects that the cost of the new windows for the marital residence was paid for with funds out of a marital account. Therefore, each party effectively paid one-half of the costs of the new windows. Although the trial court did not expressly address this issue in its decision, there was no reason for it to do so given that there was no debt for the trial court to allocate at the time it issued its decision.

{¶32} Regarding the new air conditioner, we note that approximately one month after the trial concluded, appellant informed the trial court that the air conditioner in the marital residence ceased working properly. Without consulting with the trial court or appellee, appellant elected to purchase a new air conditionerb for $4,996. Appellant wanted appellee to share in this expense, so he requested the trial court to re-open testimony. The trial court granted appellant's request, and the parties submitted additional evidence by affidavit.

{¶33} The evidence submitted by the parties was conflicting. Appellant submitted evidence of the cost of the new air conditioner and evidence that a heating and cooling company had not recommended repairing the old unit. Appellee submitted evidence that the old unit could be repaired for $500.

{¶34} The trial court expressly found that the old unit could have been repaired for $500. In addition, the old unit was 20-years old, a fact that was presumably taken into account in determining the value of the marital residence. The trial court further noted that a new air conditioner would likely increase the value of the marital residence. Given that any increase in the value of the residence after the final hearing was appellant's

separate property, the trial court declined to order appellee to pay any portion of the cost of the new air conditioner.

{¶35} Based on the evidence in the record, we find that the trial court did not abuse its discretion by failing to order appellee to pay a portion of the cost of the new air conditioner.

{¶36} Lastly, appellant argues the trial court erred in characterizing $935.96 in credit card debt and a $569.94 medical bill as marital debt, and in turn, allocating one-half of that debt to appellant. Given that these debts were clearly incurred during the course of the marriage, and given the disparity of income between the parties, the trial court was well within its discretion in allocating one-half of this marital debt to appellant.

{¶37} Therefore, we overrule appellant's fourth assignment of error.

{¶38} In his fifth assignment of error, appellant contends that the trial court erred by ordering appellant to pay $3,500 toward appellee's attorney's fees. We disagree.

{¶39} In an action for divorce, R.C. 3105.73(A) authorizes a court to award 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. Id. In general, it is within the sound discretion of the trial court to award attorney's fees in a divorce action. *Dannaher v. Newbold*, 10th Dist. No. 05AP-172, 2007-Ohio-2936, ¶17; *Trott v. Trott*, 10th Dist. No. 01AP-852, 2002-Ohio-1077, ¶10, citing *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359. The party seeking attorney's fees has the burden of proving the reasonableness of the fees. *Groza-Vance v. Vance*, 162 Ohio App.3d 510, 2005-Ohio-

3815. A trial court may also use its own knowledge and experience when evaluating the nature of the services rendered and the reasonableness of the fees charged. *McCord v. McCord*, 10th Dist. No. 06AP-102, 2007-Ohio-164, ¶19.

{¶40} In arguing that the trial court erred in granting attorney's fees, appellant cites an incorrect legal standard. Appellant relies on former R.C. 3105.18(H). Effective April 27, 2005, the General Assembly repealed subsection (H) of R.C. 3105.18 and enacted R.C. 3105.73. As previously stated, pursuant to R.C. 3105.73(A), a court may award reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable.

{¶41} Appellant argues that the trial court abused its discretion because he does not have sufficient cash to pay the $3,500 attorney's fees award. Appellant also contends that appellee received more than an enough cash assets in the property division to afford to pay all her own attorney's fees. Appellant does not contest the necessity or reasonableness of appellee's attorney's fees.

{¶42} It appears the trial court allocated $3,500 of appellee's attorney's fees to appellant for two reasons. First, although the trial court divided the parties' marital assets equally, it noted that appellant used marital assets to pay some of his attorney's fees. Second, the trial court found that the disparity in the parties' income warranted a contribution from appellant toward appellee's attorney's fees. For the year 2007, appellant earned $68,840.53 and appellee earned $23,183.56. Although the total amount of each parties' attorney's fees was not known because neither counsel had billed for time spent during the trial, appellee had incurred $10,589 in attorney's fees and costs and appellant had paid his attorney in excess of $9,000 prior to trial.

{¶43} The trial court clearly relied upon the factors identified in R.C. 3105.73 in its allocation of attorney's fees. Given the equal distribution of the marital property and the disparity of income between the parties, the trial court did not abuse its discretion in ordering appellant to pay $3,500 toward appellee's attorney's fees. Therefore, we overrule appellant's fifth assignment of error.

{¶44} Having overruled all five of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

FRENCH, P.J., and TYACK, J., concur.