

[Cite as *Colley v. Colley*, 2009-Ohio-6776.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Michael F. Colley,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-333
	:	(C.P.C. No. 07DR-01-384)
Nancy D. Colley,	:	
Defendant-Appellant,	:	(REGULAR CALENDAR)
Edward Whipps, Trustee of the	:	
Michael F. Colley Trust,	:	
Third-Party	:	
Defendant-Appellee.	:	
	:	
Michael F. Colley,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-335
	:	(C.P.C. No. 07DR-01-384)
Nancy D. Colley,	:	
Defendant-Appellee,	:	(REGULAR CALENDAR)
Edward Whipps, Trustee of the	:	
Michael F. Colley Trust,	:	
Third-Party	:	
Defendant-Appellant.	:	

Michael F. Colley,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-336
	:	(C.P.C. No. 07DR-01-384)
Nancy D. Colley,	:	
Defendant-Appellee,	:	(REGULAR CALENDAR)
Edward Whipps, Trustee of the	:	
Michael F. Colley Trust,	:	
Third-Party	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 22, 2009

Tyack Blackmore & Liston Co., L.P.A., and Thomas M. Tyack, for Michael F. Colley.

Hyslop & Hyslop Co., L.P.A., Jean Forquer Hyslop, and Bruce A. Hyslop, for Nancy D. Colley.

John C. Nemeth & Associates, John C. Nemeth, and David A. Herd, for Edward Whipps, Trustee of the Michael F. Colley Trust.

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

FRENCH, P.J.

{¶1} Appellants, Michael F. Colley ("Michael"), Nancy D. Colley ("Nancy"), and Edward Whipps ("Whipps"), each appeal the March 4, 2009 Judgment Entry/Decree of Divorce ("Judgment Entry") issued by the Franklin County Court of Common Pleas, Division of Domestic Relations, granting defendant-counterclaimant, Nancy, a divorce from plaintiff, Michael.

{¶2} Michael and Nancy were married on December 16, 1987, and no children were born as issue of the marriage. On January 30, 2007, Michael filed a complaint for a divorce or legal separation and, on February 23, 2007, Nancy filed an answer and counterclaim for divorce. On April 27, 2007, the trial court ordered Whipps joined as a defendant. Whipps, who initially served as Michael's divorce attorney, is the trustee of the Michael F. Colley Trust (the "Trust"), which holds title to much of the Colleys' marital estate. With leave of court, Nancy subsequently filed an amended counterclaim, including additional claims and a request for the creation of a constructive trust over the Trust property and property held by or under the control of Budros, Ruhlin and Roe ("Budros"), which administered Michael's investments.¹

{¶3} This matter came on for trial on October 14, 2008, and stretched over 15 non-consecutive dates. Although Michael withdrew his claim for a divorce at trial, Nancy continued to pursue her counterclaim for divorce. On March 4, 2009, the trial court issued its Judgment Entry, granting a divorce, ordering division and distribution of

¹ Upon Nancy's motion, the trial court joined Budros as a defendant, but Nancy voluntarily dismissed her counterclaim against Budros on May 20, 2008. Nevertheless, the trial court granted Budros' motion to dismiss in its Judgment Entry.

the parties' marital and separate assets and liabilities, ordering spousal support in favor of Nancy, and awarding attorney fees in favor of Nancy. The trial court also denied Michael's pre-trial motion to set aside a September 24, 2008 magistrate's order that he pay Nancy an additional \$7,500 in interim attorney fees and Nancy's motion for contempt, based on Michael's failure to comply with the September 24, 2008 order. Additionally, the trial court appointed attorney Michael N. Schaeffer as a special master, having determined that it was appropriate for a special master "to review the expenses of the * * * Trust, file any actions for recovery of over payments as may be necessary and to report to the Court regarding the management of the Trust." This court will address further specifics of the Judgment Entry as necessary in concert with our discussion of the assignments of error.

{¶4} Michael, Nancy, and Whipps each filed a timely notice of appeal, and this court sua sponte consolidated the three appeals. Nancy raises the following 15 assignments of error:

ASSIGNMENT OF ERROR NO. 1

The trial court's finding that [Michael] successfully traced a separate interest in marital property was against the manifest weight of the evidence and an abuse of discretion.

ASSIGNMENT OF ERROR NO. 2

The trial court abused its discretion when [it] inaccurately and inconsistently calculated the non-marital and marital portions of the marital assets.

ASSIGNMENT OF ERROR NO. 3

The trial court abused its discretion when it failed to award [Nancy] her non-marital personal property, when she

presented uncontroverted testimony regarding such property, and proffered further testimony which the trial court declined to hear.

ASSIGNMENT OF ERROR NO. 4

The trial court abused its discretion in not ordering that [Nancy] be made the irrevocable beneficiary of [Michael's] life insurance policies to protect her in the event of [Michael's] imminent death.

ASSIGNMENT OF ERROR NO. 5

The trial court abused its discretion when it used 40.3% to "tax affect" the assets it awarded to [Michael], when [Michael] will have a much diminished budget in the future, and [Michael's] own expert testified that his tax burden would hereafter be less.

ASSIGNMENT OF ERROR NO. 6

The trial court abused its discretion in distributing all of the [liquid] MFC trust assets to [Michael], and none to [Nancy].

ASSIGNMENT OF ERROR NO. 7

The trial court abused its discretion when it failed to set off [Michael's] Social Security benefits against the value of [Nancy's] OPERS.

ASSIGNMENT OF ERROR NO. 8

The trial court abused its discretion when [it] incorrectly and inconsistently calculated and allocated the non-marital and marital liabilities.

ASSIGNMENT OF ERROR NO. 9

The trial court abused its discretion in making no contingent provision in the event [Michael] does not refinance the mortgage encumbering 4484 East Cliff, Port Clinton, Ohio within ninety days.

ASSIGNMENT OF ERROR NO. 10

The trial court abused its discretion and acted against the manifest weight of the evidence in failing to find that the expenditures from the MFC Trust prior to and during the pendency of the case were financial misconduct and for denying [Nancy's] request for a constructive trust.

ASSIGNMENT OF ERROR NO. 11

The trial court abused its discretion when it made [Nancy] equally responsible for the costs and fees of the Special Master, when it appointed the Special Master to investigate and, if appropriate, recover assets, but made no provision for distribution of any part of those assets to [Nancy].

ASSIGNMENT OF ERROR NO. 12

The trial court abused its discretion when it made an award of spousal support to [Nancy], to end with [Michael's] death, in lieu of a distributive award, when evidence at trial repeatedly showed that [Michael] is in severely compromised health.

ASSIGNMENT OF ERROR NO. 13

The trial court abused its discretion when it found that [Nancy] may be able to find employment in the near future, when no such evidence was presented at trial, and [Nancy] is a 62 year old retired person.

ASSIGNMENT OF ERROR NO. 14

The trial court erred as a matter of law when it found that [Nancy] is not to pay attorney fees to her trial counsel, which fees [Nancy] testified were pursuant to a valid contract between herself and her attorneys.

ASSIGNMENT OF ERROR NO. 15

The trial court abused its discretion and made a finding against the manifest weight of the evidence and contrary to law when it overruled [Nancy's] Motion for a Finding in Contempt against [Michael] for failure to pay the \$7,500 interim award of attorney fees, after finding from the bench

during trial that [Nancy] had made her prima facie case, and declining to allow further testimony on the issue.

{¶5} Michael raises the following assignments of error:

I. THE TRIAL COURT ERRED IN APPOINTING A SPECIAL MASTER GIVEN THE CIRCUMSTANCES OF THIS CASE.

II. THE TRIAL COURT ERRED BY ISSUING INSTRUCTIONS TO THE SPECIAL MASTER TO CONDUCT DISCOVERY AS TO [WHIPPS'] LEGAL REPRESENTATION OF [MICHAEL], INCLUDING OBTAINING OR ASKING FOR DOCUMENTS RELATING TO SERVICES PERFORMED BY [WHIPPS] IN THE ABSENCE OF WAIVER OF ATTORNEY/CLIENT PRIVILEGE BY [MICHAEL].

III. THE TRIAL COURT ERRED IN ORDERING [MICHAEL] TO PAY AN ADDITIONAL \$75,000 AS REIMBURSEMENT FOR ATTORNEY FEES TO [NANCY].

{¶6} Whipps also asserts three assignments of error, as follows:

ASSIGNMENT OF ERROR NO. 1 The trial court erred in making findings and orders against Whipps without due process of law.

ASSIGNMENT OF ERROR NO. 2 The trial court erred in finding that Whipps' attorney fees were excessive.

ASSIGNMENT OF ERROR NO. 3 The trial court erred in appointing a Special Master to review Whipps' [attorney] fees.

{¶7} We begin with those assignments of error relating to the special master, by which the parties raise several arguments regarding the appointment and purported authority of the special master. Michael argues that the trial court erred in appointing the special master; Michael and Whipps both argue that the trial court erred by instructing the special master to investigate and conduct discovery absent a waiver of

the attorney-client privilege between them; Nancy argues that the trial court abused its discretion by making her equally responsible for the special master's costs and fees without providing for the distribution of any recovered assets to her. Because it is dispositive of the issues regarding the special master, we begin with Michael's basic argument that the trial court lacked authority to appoint a special master under the facts of this case.

{¶8} In many respects, the Judgment Entry suggests that the trial court appointed the special master for the purpose of carrying out the ordered distribution of property, pursuant to Civ.R. 70, which permits the appointment of a non-party to perform acts required by a court's judgment. For example, the court conferred upon the special master "all necessary authority *for the purpose of satisfying the terms of [the] Judgment Entry.*" (Emphasis added.) Elsewhere, the court granted the special master "full authority to investigate the [Trust] and the assets of the parties to this action *for the purpose of distributing the assets and liabilities held by the parties that are to be divided pursuant to the [Judgment Entry.]*" (Emphasis added.) The Judgment Entry suggests, however, that the court intended the special master's role to go beyond enforcing the judgment, as the court found it appropriate to appoint the special master, in part, to review Trust expenses and file necessary actions for recovery of overpayments, presumably because the court was "troubled by * * * the expenses paid by the [Trust], including the payments to the Trustee," which the court found excessive.

{¶9} In support of its appointment, the trial court cited two Ohio cases, in which special masters were appointed, pursuant to Civ.R. 70, to oversee compliance with

court-ordered property divisions. See *Pittman v. Pittman* (Aug. 5, 1999), 10th Dist. No. 98AP-1408; *Stallard v. Stallard* (July 13, 1994), 2d Dist. No. 93 CA 58.² Civ.R. 70 provides, in part, as follows:

If a judgment directs a party to execute a conveyance of land, to transfer title or possession of personal property, to deliver deeds or other documents, or to perform any other specific act, and the party fails to comply within the time specified, the court may, where necessary, direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party. * * *

{¶10} In *Pittman* and *Stallard*, the appellate courts affirmed the appointments of special masters after the parties had failed to comply with orders concerning property division in their divorce decrees. In *Pittman*, nearly two years after the divorce decree and after twice finding the husband in contempt for failure to comply with that decree's order to sell real property, the trial court appointed a special master to facilitate a sale of the real estate. We stated that "[t]he trial court properly availed itself of the Civ.R. 70 appointment of a special master, who was appointed simply to effectuate the original orders of the trial court pertaining to the repair and sale of the property." In affirming the appointment of a special master in *Stallard*, the court emphasized that "Civ.R. 70 provides for the appointment of someone to perform those acts which a party is required, but refuses, to perform under the terms of a judgment."

{¶11} Michael argues that Civ.R. 70 did not authorize the appointment of a special master because the rule requires a failure to comply with a judgment as a

² The court also cited *Golick v. Golick* (1983), 9 Ohio App.3d 106, but, as that case involves neither Civ.R. 70 nor the appointment of a special master, we find it irrelevant to the issues on appeal.

prerequisite to appointment. We agree. The Judgment Entry did order the parties to take certain actions to effectuate the division of property, but Civ.R. 70 authorizes appointment of a special master to undertake the ordered actions only after the parties themselves fail to comply. Axiomatically, there can be no failure to comply with a judgment entry contemporaneous with the issuance of the entry itself. When the trial court appointed the special master, there had been no failure to comply with the Judgment Entry, thus negating any authority to appoint a special master under Civ.R. 70. The appointment was also improper because the court delegated to the special master duties not contemplated by Civ.R. 70, which authorizes an appointment for the sole purpose of ensuring compliance with a judgment. The rule does not authorize the appointment of a special master to conduct the additional actions purportedly referred to the special master in this case, including reviewing Trust expenses, conducting discovery, and filing actions for recovery of overpayments by the Trustee. For these reasons, we conclude that the appointment of a special master, pursuant to Civ.R. 70, was in error.

{¶12} Nancy responds that, even if a failure to comply with a judgment is a necessary prerequisite to appointment under Civ.R. 70, Michael's argument is moot because he subsequently failed to comply with the Judgment Entry in numerous respects. While we have no reason to doubt the veracity of Nancy's assertions, evidence of the parties' subsequent acts is not a part of the record on appeal. "[A] bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings at trial." *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-

6110, ¶13. See also App.R. 9 and 12(A)(1)(b). Therefore, we may not rely on factual assertions outside the record to review the appointment of the special master. Nevertheless, we do not suggest that the trial court would be without authority to later make an appointment, pursuant to Civ.R. 70, should the parties fail to comply with the Judgment Entry.

{¶13} The parties have not suggested any alternative to Civ.R. 70 to cloak the trial court with authority to appoint a special master in this case, and we discern no alternative authority that would support the appointment. The Eighth District Court of Appeals discussed the authority to appoint a special master in *State ex rel. Allstate Ins. Co. v. Gaul* (1999), 131 Ohio App.3d 419, 429-34, an action for a writ of prohibition against, inter alia, a common pleas court judge who appointed a special master to investigate a defense medical expert's compensation in a personal injury action. In a lengthy discussion, the *Gaul* court rejected each purported basis for appointing a special master and concluded that the appointment exceeded the judge's judicial power because "no authority existed for the appointment of a special master * * * pursuant to Canon 3(C)(4) of the Code of Judicial Conduct, pursuant to the inherent authority of the court of common pleas, or pursuant to Civ.R. 53." *Id.* at 434.

{¶14} Although the court of common pleas historically had inherent authority, subsequently codified, to appoint a master in cases not involving the right to a jury trial, *Gaul* recognized that many statutes concerning special masters were repealed after adoption of the Ohio Rules of Civil Procedure, as conflicting with those rules. *Gaul* at 432. See, e.g., former R.C. 2315.26 through 36. Accordingly, the court concluded that

any power to appoint a special master allegedly derived from prior statutes or from a trial court's inherent authority would likewise conflict with the civil rules. A court may still statutorily appoint a special master in certain contexts, including the following: dissolutions of corporations, non-profit corporations, and cooperatives (R.C. 1701.89; 1701.91; 1702.50; 1702.52; 1729.59; 1729.61); probate cases (R.C. 2101.06); executions against property (R.C. 2329.34 to 2329.35); and certain cases involving nursing facilities (R.C. 3721.08; 5111.51) or taxation (R.C. 5727.57; 5733.23; 5747.451). None of those contexts, however, were applicable in *Gaul*, and none are applicable here. *Gaul* also rejected reliance on Civ.R. 53, which governs the appointment of magistrates, because that rule not only expressly limits the matters that may be referred, but, also, "eliminate[s] any alleged authority for the appointment of a non-court-employed special master in an individual case." *Id.* at 434.

{¶15} Upon review, we discern no authority for the trial court's appointment of a special master in this case. Accordingly, we need not address Michael and Whipps' argument that the special master's authority to investigate Trust affairs would intrude upon the attorney-client privilege or Nancy's argument regarding apportionment of the special master's fees and costs. For these reasons, we sustain Michael's first assignment of error and Whipps' third assignment of error and render moot Michael's second assignment of error and Nancy's eleventh assignment of error.

{¶16} We now turn to the remaining assignments of error. For ease of discussion, we address them out of strict numerical order, beginning with those assignments concerning the trial court's classification, allocation, and distribution of the

parties' marital and separate assets and liabilities. Because these assignments of error, including Nancy's first, second, third, fifth, sixth, seventh, and eighth, involve overlapping analysis, we address them together.

{¶17} A domestic court has broad discretion to make divisions of property. *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 1998-Ohio-403, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318. In divorce proceedings, the trial court must classify property as marital or separate property, determine the value of the property, and, thereupon, divide the marital and separate property equitably between the spouses. R.C. 3105.171(B); *Roberts v. Roberts*, 10th Dist. No. 08AP-27, 2008-Ohio-6121, ¶16. We review a trial court's classification of property as marital or separate under a manifest weight of the evidence standard and will affirm if the classification is supported by some competent, credible evidence. *Taub v. Taub*, 10th Dist. No. 08AP-750, 2009-Ohio-2762, ¶15. A trial court's valuation and division of property will be upheld absent an abuse of discretion. *Roberts* at ¶16. Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. If there is some competent, credible evidence to support the trial court's decision, there is no abuse of discretion. *Middendorf* at 401, citing *Ross v. Ross* (1980), 64 Ohio St.2d 203.

{¶18} Nancy takes issue with the trial court's determination of Michael's separate property interest in certain marital assets, including the marital residence located at 4200 Dublin Road (the "Dublin Road property"), and with the trial court's allocation of the marital and separate portions of those assets and the liabilities associated with

them. "Marital property" includes "[a]ll real and personal property that currently is owned by either or both of the spouses * * * and that was acquired by either or both of the spouses during the marriage" and "[a]ll interest that either or both of the spouses currently has in any real or personal property * * * and that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(i) and (ii). Marital property also includes "income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage." R.C. 3105.171(A)(3)(a)(iii). Thus, "when *either* spouse makes a labor, money, or in-kind contribution that *causes* an increase in the value of separate property, that increase in value is deemed marital property." (Emphasis sic.) *Middendorf* at 400.

{¶19} In contrast, "separate property" includes "[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage," "[p]assive income and appreciation acquired from separate property by one spouse during the marriage," and "[a]ny gift of any 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)(ii), (iii), and (vii). Appreciation of separate property due solely to market forces, such as location and inflation, is passive appreciation and remains separate property. *Sterbenz v. Sterbenz*, 9th Dist. No. 21865, 2004-Ohio-4577, ¶5. "The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." R.C. 3105.171(A)(6)(b).

{¶20} A party requesting classification of an asset as separate property bears the burden of tracing that asset to his or her separate property. *Dunham v. Dunham*, 171 Ohio App.3d 147, 2007-Ohio-1167, ¶20, 26. When parties contest whether an asset is marital or separate property, there is a presumption that the asset is marital property, unless proven otherwise. *Miller v. Miller*, 7th Dist. No. 08 JE 26, 2009-Ohio-3330. On appeal, our job is not to reweigh the evidence, but to determine whether there was competent, credible evidence to support the trial court's findings. *Dunham* at ¶27.

{¶21} Nancy first argues that the trial court erred by finding that Michael traced a separate property interest in his retirement accounts, and specifically in the Michael F. Colley Schwab IRA #7690 ("Schwab IRA"). The trial court found that Michael successfully traced a 53.38 percent separate property interest in the Schwab IRA based on the expert testimony of Michael's tracing expert, W. Dana Lavelle ("Lavelle"), a certified public accountant, and other evidence produced at trial. Nancy essentially argues that the trial court should have rejected Lavelle's analysis because he used an inappropriate method for tracing separate funds, given the evidence of commingling of marital funds in the Schwab IRA and the absence of transactional records. She also argues that Budros' active management of the investments, coupled with Michael's own involvement, renders any increase in Michael's pre-marital separate funds marital property.

{¶22} Lavelle testified extensively about the tracing analysis he performed with respect to the Schwab IRA, including his analysis of Michael's prior IRA account and prior profit sharing and defined benefit plans, all of which were rolled into the Schwab

IRA. In addition to Lavelle's testimony, the tracing documents prepared by Lavelle were admitted into evidence. Lavelle concluded that 53.38 percent of the Schwab IRA was traceable as Michael's separate property. Nancy's tracing expert, Brian Russell, agreed with the method Lavelle utilized for periods through 1992, but disagreed with Lavelle's method for the subsequent time frame, for which Lavelle lacked evidence of individual transactions, including marital contributions to the account. To calculate the passive gains and losses on Michael's separate property in tracing the separate property forward from 1992, Lavelle utilized a figure from Budros, indicating that, from December 31, 1992 to December 31, 2006, assets under its investment authority averaged an annual rate of return of 10.4 percent. Russell disagreed with this method based on his belief that the 10.4 percent factor was inaccurate because it did not take into account marital contributions to the account after 1992. Despite his disagreement with Lavelle's analysis and ultimate calculation of Michael's separate property interest, however, Russell was unable to offer an alternative calculation. Lavelle responded to Russell's criticism of his analysis and testified that evidence of marital contributions to the account after 1992 would not have affected his analysis or his conclusions regarding the growth of Michael's separate property because he accounted for additional marital contributions elsewhere in his analysis. In his rebuttal testimony, Lavelle again defended his analysis and stated that the contribution of additional marital funds would not impact the 10.4 percent passive growth on the non-marital portion of the account.

{¶23} Upon review of the evidence, including specifically Lavelle's testimony and the documents supporting that testimony, we conclude that the record contained

competent, credible evidence to support the trial court's finding that Michael successfully traced a separate property interest in 53.38 percent of the Schwab IRA. Accordingly, we may not substitute our judgment for that of the trial court. See *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶24} Nancy next argues that the trial court erred by finding that Michael successfully traced a separate property interest in the Dublin Road property and, if not, that the court erred in its allocation of the separate and marital portions of that asset. The trial court concluded that Michael traced the proceeds from the sale of his pre-marital residence into the purchase of the Dublin Road property and was entitled to a 51.2 percent separate property interest in that property.

{¶25} Nancy contends the trial court's finding that Michael sufficiently traced the proceeds from the sale of his pre-marital residence into the Dublin Road property was against the manifest weight of the evidence. Michael and Nancy purchased the Dublin Road property in August 1988, during their marriage, and financed the entire purchase price with a bridge loan mortgage of \$594,240. On February 21, 1989, the parties obtained a permanent mortgage on the Dublin Road property in the amount of \$300,000, and the settlement statement shows that \$289,694 was paid toward the bridge loan. Michael's pre-marital residence sold on May 15, 1989, for \$345,000. Lavelle testified that Michael used those funds to pay off the remaining balance on the bridge loan, in the amount of \$304,546, representing 51.2 percent of the original purchase price of the Dublin Road property. The bridge loan was cancelled in

September 1990. Accordingly, Lavelle opined that Michael was entitled to 51.2 percent of the current market value of the Dublin Road property as his separate property.

{¶26} Nancy maintains that the record lacks any evidence to show that the proceeds from the sale of Michael's pre-marital residence were used to pay off the bridge loan. Lavelle admitted that he was unaware of any documents indicating where the sale proceeds from Michael's pre-marital residence went for the 15 months between the sale of the residence and the cancellation of the bridge loan. However, Lavelle testified about a Budros document regarding a tax planning meeting between Budros and Michael in December 1988, stating that Michael would obtain permanent financing on the Dublin Road property, in the amount of \$300,000, which would be used to pay down the bridge loan, and that funds from the sale of Michael's pre-marital residence would pay off the remainder of the bridge loan. The evidence established that Michael (and Nancy), in accordance with that document, obtained permanent financing in the amount stated and paid down the bridge loan. Nancy's tracing expert, Russell, testified that Lavelle's primary method for tracing the payment of \$304,546 on the bridge loan from Michael's separate proceeds from the sale of his pre-marital residence was reasonable and presented "a logical sequence going up to the \$304,000 component being [Michael's] separate property." (Vol. II Tr. 354.) Upon review, we conclude that the record contained competent, credible evidence tracing Michael's separate property proceeds from the sale of his pre-marital residence into the Dublin Road property via his payoff of the bridge loan.

{¶27} Because the trial court's conclusion that Michael traced separate property interests in the Schwab IRA and the Dublin Road property were supported by competent, credible evidence, we overrule Nancy's first assignment of error.

{¶28} Our conclusion that Michael traced a separate property interest in the Dublin Road property, however, does not end our consideration of the trial court's treatment of that interest. While, as stated above, Russell did not contest Lavelle's conclusion that Michael traced his payoff of the bridge loan to his separate property, Russell did disagree with Lavelle's characterization of Michael's separate property interest as 51.2 percent of the current market value of the Dublin Road property, in light of extensive renovations completed during the marriage, of which Lavelle took no account. Nancy takes up this argument as part of her second assignment of error, dealing with the trial court's calculation of the marital and separate portions of the Dublin Road property, arguing, in part, that the court erred by failing to factor into its allocation the effects of the extensive renovations to the Dublin Road property made during the marriage.

{¶29} Where there is appreciation on separate property as a result of a labor, monetary, or in-kind contribution of either party, the increase in value is deemed marital property. *Middendorf* at 400. Here, Nancy testified about major renovations to the Dublin Road property lasting over a year and exceeding a cost of \$400,000. Nancy stated that she was at the Dublin Road property every day during the renovations and was involved on a day-to-day basis with those improvements. Significantly, the record

contained no evidence that any of the renovations to the Dublin Road property were funded by Michael's separate assets.

{¶30} A party seeking more than the actual amount of his separate contribution to real property bears the burden of proving by a preponderance of the evidence that appreciation of his separate property interest was passive. See *Hemming v. Hemming*, 10th Dist. No. 02AP-94, 2002-Ohio-4735, ¶10. Recently, in *Alexander v. Alexander*, 10th Dist. No. 09AP-262, 2009-Ohio-5856, this court rejected a husband's claimed separate property interest in excess of his separate property contribution to the down payment of the marital residence where the husband presented no evidence as to how much of the appreciation on the property was due to passive factors such as location or inflation and how much was due to improvements to the property made over the course of the marriage. "[A] party who fails to provide adequate evidence as to the amount of passive appreciation fails to meet his burden of tracing the appreciation as separate property," and a court should not speculate "when the evidence is devoid of a *cause* for the increase." (Emphasis sic.) *Bizjak v. Bizjak*, 11th Dist. No. 2004-L-083, 2005-Ohio-7047, ¶12, citing *McLeod v. McLeod*, 11th Dist. No. 2000-L-197, 2002-Ohio-3710, ¶31.

{¶31} Lavelle admitted that, if there were improvements made to the Dublin Road property from marital funds during the marriage and if those improvements increased the value of the property, that increased value should be credited as marital property. Lavelle also admitted that he was aware of the improvements to the Dublin Road property and that he had no documents indicating that those improvements were paid for with Michael's separate property. Nevertheless, Lavelle did not factor those

improvements into his analysis regarding Michael's separate interest in the Dublin Road property despite his admission that improvements from marital funds that increased the value of the property might substantially affect his calculations. Because the record lacks competent, credible evidence that any portion of the appreciation in the Dublin Road property was passive appreciation on Michael's separate property contribution, we conclude that the trial court abused its discretion by finding that Michael's separate property interest in the Dublin Road property equaled 51.2 percent of the current value or actual sale price. Instead, the evidence demonstrated only that Michael had a separate property interest of \$304,546 in the Dublin Road property.

{¶32} Nancy's remaining argument regarding the trial court's allocation and calculation of the marital and non-marital portions of the Dublin Road property stemmed from the trial court's order that Michael's separate interest of 51.2 percent be calculated prior to the payment of the outstanding mortgage balances on the Dublin Road property, resulting in less marital equity. Because we have concluded that Michael has traced, and is entitled to recoup as his separate property, only the \$304,546 payment on the bridge loan, as opposed to a percentage of the actual sale price, Nancy's argument is rendered moot. For these reasons, we sustain Nancy's second assignment of error.

{¶33} In her final argument relating to the Dublin Road property, Nancy contends, in her eighth assignment of error, that the trial court erred in its allocation of the mortgage debt on the Dublin Road property as marital debt, subject to equal division. Nancy makes this same argument with respect to the mortgage on the parties' lake house on East Cliff Road in Port Clinton ("the East Cliff property"), in which Michael

had a separate property interest of \$244,130.09. Nancy argues that the trial court abused its discretion by not allocating to Michael, as his separate debt, percentages of the mortgages proportionate to his separate interests in the properties themselves. Nancy cites no authority, nor has our research revealed any authority, to suggest that the existence of a separate property interest in real property requires the allocation of a portion of the attached mortgage as separate debt. To the contrary, without addressing this precise issue, case law is replete with judgments dividing marital equity in real property between spouses after deducting from the property value the parties' respective separate interests, if any, and the total mortgage without any indication that the mortgage debt is allocated, in part, as separate property. See, e.g., *An v. Manson*, 10th Dist. No. 06AP-90, 2006-Ohio-6733; *Liggett v. Liggett*, 10th Dist. No. 05AP-624, 2005-Ohio-6956; *Crofut v. Crofut*, 5th Dist. No. 2004 CA 00273, 2005-Ohio-3289; *Bell v. Bell*, 2d Dist. No. 2002 CA 13, 2002-Ohio-5542; *McClelland v. McClelland* (Feb. 25, 2000), 7th Dist. No. 97-JE-60. Here, the mortgages were obtained after the date of the marriage, and Michael and Nancy were jointly liable for those debts. Accordingly, we discern no abuse of the trial court's broad discretion in its allocation of the debts encumbering the Dublin Road and East Cliff properties, and we overrule Nancy's eighth assignment of error.

{¶34} Nancy's arguments next turn to the trial court's division and distribution of personal property and liquid assets. With respect to personal property, Nancy argues, in her third assignment of error, that the trial court abused its discretion by failing to award her specific items she identified at trial as her separate, non-marital property,

either as a result of her pre-marital ownership or her receipt of the items as gifts during the marriage. No evidence was presented to contradict Nancy's claims of separate property, and Michael's testimony and written closing argument demonstrate that he had no objection to Nancy retaining those items she identified as her separate, non-marital property.

{¶35} The trial court concluded that Michael and Nancy were each entitled to half of the marital household goods and furnishings and attributed a like amount of \$33,735 to each party on the marital balance sheet, but the court did not address any of the personal property identified in uncontroverted evidence as Nancy's separate property. Neither Michael nor Nancy contest the trial court's decision to equally divide the marital household goods and furnishings, but Nancy maintains that the court erred by not first awarding her the property she identified as her separate property.³ With respect to the division of personal property, the court stated as follows:

* * * The Court firmly believes that these parties will continue to have a life long relationship and that, given the opportunity to divide the household goods and furnishings they accumulated during their 21 year marriage, they will come to an equitable division based on the guidance provided by this Court. Therefore, the Court orders that the parties are to equally divide the household goods and furnishings as identified to the Court in this proceedings [sic], and they may affect this division in any manner they deem appropriate so long as each party is ultimately presented with household goods and furnishings in an amount equal to the other. * * *

³ The trial court specifically awarded Michael 11 items identified in his closing argument, but it is unclear whether the court awarded those items as his separate property, to be removed before dividing the remaining personal property, or as a portion of his equal share of the marital property.

{¶36} To the extent that the trial court classified all of the personal property as marital property, including items uncontrovertedly identified as non-marital, the court abused its discretion, and its finding is against the manifest weight of the evidence. To the extent that the trial court simply ordered an equal distribution of all personal property, regardless of its marital or separate character, the court likewise abused its discretion. With certain exceptions, a trial court must divide marital property equally (unless it would be inequitable to do so, in which case, it must be divided equitably) and must disburse separate property to the spouse who owns it. R.C. 3105.171(C) and (D); *Hueber v. Hueber*, 12th Dist. No. CA2003-12-104, 2004-Ohio-6660, ¶8. Even were the trial court entitled to depart from the general rule requiring disbursement of a spouse's separate property to that spouse, R.C. 3105.171(D) requires that the trial court make written findings to explain the factors considered in deciding not to disburse the separate property to the spouse who owns it. The Judgment Entry contains no findings of fact justifying a deviation from the general rule in this case. For these reasons, we conclude that the trial court abused its discretion by not awarding the parties' separate personal property, based on the uncontroverted evidence, before ordering an equal division of the marital household goods and furnishings. Accordingly, we sustain Nancy's third assignment of error.

{¶37} Nancy also argues, in her sixth assignment of error, that the trial court abused its discretion by distributing all of the liquid assets of the Trust to Michael, allegedly resulting in an inequitable property distribution. It is well-established that an appellate court reviews a trial court's ordered distribution of property and liabilities as a

whole rather than reviewing one item or category of items out of context. *Briganti v. Briganti* (1984), 9 Ohio St.3d 220, 222. The appropriate consideration here would be whether the trial court's allocation of the liquid assets resulted in a property distribution which, viewed in its entirety, constitutes an abuse of discretion. Other conclusions herein will require the trial court to alter the marital balance sheet in several respects on remand and, thus, render moot any consideration of the trial court's current allocation of the liquid assets in light of the total distribution. Because valuations and allocations of marital and separate property and liabilities will change on remand, we cannot determine whether the trial court's current allocation of the liquid assets, should it withstand the alterations on remand, creates an inequitable distribution that, as a whole, represents an abuse of discretion. Accordingly, Nancy's sixth assignment of error is moot.

{¶38} While not directly contesting the trial court's classification or allocation of specific assets or liabilities, Nancy's fifth and seventh assignments of error relatedly assign error to the court's treatment of certain assets on the marital balance sheet. In her fifth assignment of error, Nancy argues that the trial court abused its discretion by using 40.3 percent to "tax affect" the value of Michael's retirement accounts for inclusion on the marital balance sheet, whereas, in her seventh assignment of error, she argues that the court abused its discretion by not setting off Michael's Social Security benefits against the value of her Ohio Public Employees Retirement System ("PERS") retirement benefits.

{¶39} The trial court assigned values to each of Michael's three retirement accounts and then deducted 40.3 percent to account for tax liabilities on Michael's withdrawals before including the values of those assets on the marital balance sheet. Nancy argues that Michael's future tax bracket will be lower because his expenses will significantly decrease as a result of the divorce, specifically through the elimination of attorney fees, expenses for the Dublin Road property, which is to be sold, and expenses for Nancy's current home ("the Birnam Court property"), awarded to Nancy. Thus, Nancy contends that the trial court's use of 40.3 percent to tax affect the retirement accounts artificially reduced the value of the distributions of marital property to Michael, was against the manifest weight of the evidence, and constituted an abuse of discretion.

{¶40} Although the trial court does not explain its decision to tax affect Michael's retirement accounts at a rate of 40.3 percent, we do not conclude that the trial court's decision is either against the manifest weight of the evidence or an abuse of discretion. Lavelle compiled a marital balance sheet with backup documentation, stating values of Michael's three retirement accounts. Originally, Lavelle did not reduce those values to account for tax effects, although he testified that Michael pays taxes on distributions from the IRA account "at the rate of about 40 percent." (Vol. I Tr. 137.) The trial court asked Lavelle if he could tax affect the assets that he had testified about, and Lavelle subsequently testified that he reassessed the value of the retirement accounts, applying a tax rate of 40.3 percent, and compiled an amended balance sheet using the tax-affected values. Although Nancy's counsel cross-examined Lavelle about the amended balance sheet, he did not question Lavelle about his choice of 40.3 percent as the tax

rate. Moreover, Nancy's own expert, Russell, agreed that, if money were being taken out of Michael's IRA accounts, it would be a taxable item on Michael's tax return and that a working rate between state and personal income tax at the levels on Michael's tax returns is a little over 40 percent of the net taxable. Based on the evidence presented, the trial court's use of a 40.3 percent tax rate to tax affect the retirement accounts was neither contrary to the manifest weight of the evidence nor an abuse of discretion. Any reduction in Michael's tax bracket based on a presumed future reduction of his expenditures and tax bracket after the divorce would have been based on mere speculation. For this reason, we overrule Nancy's fifth assignment of error.

{¶41} Nancy's seventh assignment of error stems from the trial court's inclusion of her PERS benefits on the marital balance sheet with no setoff for Michael's Social Security benefits. "[A] trial court, in seeking to make an equitable distribution of marital property, may consider the parties' future Social Security benefits in relation to all marital assets," but Social Security benefits cannot be divided as a marital asset. *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶11. Here, the trial court expressly found it appropriate to consider Michael's Social Security benefits as an offset when making its property division.

{¶42} The record includes evidence of both the parties' monthly income as a result of their respective Social Security benefits and PERS retirement benefits and of the present values of those benefits. The court found that Michael's Social Security benefits have a value of \$137,826.65, which should be used for purposes of property division. The court stated, however, "[t]his amount is not reflected on the Court's

balance sheet but was considered by the Court as a matter of equity in arriving at the final property distribution." While the court did not include the value of Michael's Social Security benefits on the marital balance sheet, it did include the total value of Nancy's PERS account, presently in repayment status, on the balance sheet. Nancy argues that the trial court's exclusion of Michael's Social Security benefits from the balance sheet was an abuse of discretion.

{¶43} In response to Nancy's arguments under this assignment of error, Michael cites *Parsons v. Parsons*, 10th Dist. No. 07AP-541, 2008-Ohio-1904, in which this court found no abuse of discretion in a trial court's refusal to offset the values of the parties' respective Social Security benefits in its property division. There, the trial court found it inappropriate to utilize an offset of the present value of the parties' respective future Social Security benefits given the particular circumstances of that case. Unlike in *Parsons*, however, the trial court here expressly found that it was appropriate to consider Michael's Social Security benefits as an offset in the property division. The question simply becomes whether the trial court abused its discretion in the manner in which it considered the Social Security benefits in effectuating the property division. Accordingly, *Parsons* is easily distinguishable and does not offer a basis for affirming the trial court's exclusion of the Social Security benefits from the marital balance sheet.

{¶44} This court has suggested that consideration of Social Security benefits is particularly important in equitably allocating pension benefits between spouses where one spouse's pension consists of a PERS account because participation in PERS precludes the public employee from building credit in the Social Security program during

her tenure in exempt public service. *Smith v. Smith* (1993), 91 Ohio App.3d 248. Although the trial court stated that it considered Michael's Social Security benefits, which provide a monthly income approximating Nancy's monthly PERS income, the Judgment Entry offers no explanation of how the court took those benefits into account in its division and distribution of property and contains no specific findings regarding setoff of the parties' retirement benefits. Other Ohio appellate courts have noted that a trial court's failure to make specific findings regarding the manner in which it calculates a setoff of retirement benefits, including Social Security benefits, constitutes an abuse of discretion. See *Neel v. Neel* (1996), 113 Ohio App.3d 24, 30, citing *Risner v. Risner* (Dec. 28, 1995), 4th Dist. No. 94CA757.

{¶45} In the Judgment Entry and on the marital balance sheet, the trial court found that Nancy's PERS account, with a value of \$491,287, was marital property subject to division, but, while stating that it should be used for purposes of an offset, the trial court did not include the \$137,826.65 value of Michael's Social Security benefits on the balance sheet. Nor did the trial court address the parties' respective monthly incomes from their Social Security and PERS benefits in relation to setoff. Upon review, we conclude that the absence of specific findings regarding the manner in which the trial court considered Michael's Social Security benefits as an offset in the division of property, essentially precluding this court's review of its analysis, constitutes an abuse of discretion. Accordingly, we sustain Nancy's seventh assignment of error.

{¶46} Having disposed of each of Nancy's assignments of error relating to the trial court's classification, allocation, and distribution of property, we turn to the remaining assignments of error.

{¶47} By her fourth assignment of error, Nancy maintains that the trial court abused its discretion by not ordering that she be made the irrevocable beneficiary of Michael's four life insurance policies, all of which the court deemed marital property, and each of which named the Trust as beneficiary. The trial court ordered Michael to designate Nancy as the irrevocable beneficiary of one policy, with a face amount of \$50,000, until she receives her full property division as ordered in the Judgment Entry, in order "to secure her payment for the proceeds from the sale of the two properties" ordered sold in the Judgment Entry. Nancy presently argues that the trial court abused its discretion by not ordering Michael to name her the irrevocable beneficiary of all four policies to offset her future loss of spousal support upon Michael's death and the unequal distribution of liquid assets. In her proposed findings of fact and conclusions of law, however, Nancy proposed that Michael's life insurance policies should become his sole property, free from Nancy's claims. We therefore conclude that Nancy has waived any error regarding the trial court's treatment of the life insurance policies and, further, discern no abuse of discretion by the trial court's order that she be made the beneficiary on a single policy. Consequently, we overrule Nancy's fourth assignment of error.

{¶48} In her ninth assignment of error, Nancy argues that the trial court abused its discretion by not including in the Judgment Entry a contingent enforcement provision in case Michael did not comply with the court's order to refinance the mortgage

encumbering the East Cliff property within 90 days. Although the court could have included a provision to deal with that contingency, the absence of a contingent enforcement mechanism does not rise to the level of an abuse of discretion, especially in light of the trial court's retention of continuing jurisdiction to enforce the Judgment Entry. Therefore, we overrule Nancy's ninth assignment of error.

{¶49} Nancy's tenth assignment of error asserts that the trial court abused its discretion and acted against the manifest weight of the evidence by not finding financial misconduct as a result of Trust expenditures prior to and during the pendency of the divorce and by denying her request for a constructive trust over the Trust assets. Nancy argues that a constructive trust was warranted based on dissipation of Trust assets, which were subject to allocation and division by the trial court and over which she had no control or access. We review the decision whether to impose a constructive trust under a manifest weight standard. See *LeCrone v. LeCrone*, 10th Dist. No. 04AP-312, 2004-Ohio-6526, ¶6.

{¶50} A constructive trust is an equitable remedy that arises by operation of law against one who, through any form of unconscionable conduct, holds legal title to property where equity and good conscience demands that he should not. *LeCrone* at ¶11, citing *Hill v. Hill*, 10th Dist. No. 01AP-716, 2002-Ohio-685. A constructive trust is an appropriate remedy against unjust enrichment, and, although usually invoked when property has been acquired by fraud, a constructive trust may also be imposed where it is against the principles of equity that the property be retained by a person even though the property was acquired without fraud. *Ferguson v. Owens* (1984), 9 Ohio St.3d 223,

226, citing 53 Ohio Jurisprudence 2d (1962) 578-79, Trusts, Section 88, and V Scott on Trusts (3rd ed.1967), 3412, Section 462. Where a person holds title to property against equity and good conscience and will be unjustly enriched by retaining title, Ohio courts have not required, as a prerequisite for a constructive trust, that the holder obtained title by fraudulent or questionable means. See *Groza-Vance v. Vance*, 162 Ohio App.3d 510, 2005-Ohio-3815, ¶27.

{¶51} The trial court denied Nancy's request for a constructive trust after finding that neither Michael nor Nancy presented evidence establishing that the other has been unjustly enriched by the operation of the Trust. The court considered evidence offered by Nancy to demonstrate extravagant spending by Michael and Whipps, as Trustee. This included evidence of Trust expenditures for gifts totaling approximately \$25,000, Ohio State University season football tickets, meals, entertainment, travel, political contributions, and Michael's 24-hour care and medical treatment. Based on the evidence presented, however, the court found that those expenses were normal for Michael and that the expenses for Michael's care or normal living expenses were not excessive. The record also included evidence that the Schwab IRA diminished in value from \$4.5 million to approximately \$1.9 million between March 2006 and September 2008. When needed to pay Michael's bills, funds were transferred from the Schwab IRA into a checking account from which Whipps could write checks or deposit funds into the Trust's bank accounts. Ultimately, the trial court refused to find financial misconduct, stating that "neither party intentionally spent * * * funds to create a hardship

to the other or with the intent to otherwise deprive the opposing party of what would be due to them under an equitable property division."

{¶52} Contrary to Nancy's suggestion on appeal, we do not discern internal inconsistencies in the Judgment Entry. The trial court's questioning of the parties' extravagant spending does not necessarily create an inconsistency with its ultimate conclusion that the evidence did not establish financial misconduct in Trust expenditures for Michael. It is evident from both the court's active participation at trial and the Judgment Entry itself that the trial court carefully considered all of the evidence presented at trial regarding the parties' expenditures, including Trust expenditures, in formulating its decision and its division of property. Upon review, we cannot conclude that the trial court abused its discretion in rejecting a finding of financial misconduct in Trust expenditures for Michael or that the trial court acted in opposition to the manifest weight of the evidence in denying Nancy's request for a constructive trust in that regard. Accordingly, we overrule Nancy's tenth assignment of error insofar as it contests Trust expenditures for Michael.

{¶53} We do note, however, that the trial court specifically noted in its discussion of the parties' expenditures that large amounts of money were paid from the Trust to Whipps as attorney fees and trustee fees during and immediately preceding the divorce action. Specifically, Whipps was paid \$412,935.52 for attorney fees from 2006 through October 2008, including \$306,792 in attorney fees during the pendency of the divorce case, and he was paid an additional \$82,500 in trustee fees from 2006 through 2008. The court was not presented with detailed information supporting the expenditures to

Whipps as a result of Michael's claim of attorney-client privilege based on Whipps' legal representation of Michael, originally on the divorce and also on other matters. Nevertheless, the trial court was "troubled by the evidence presented regarding the expenses paid by the [Trust], including the payments to the Trustee." As a result, the trial court appointed a special master, in part to investigate the Trust expenditures. Despite our conclusion that the trial court lacked authority to appoint a special master, we do not intend this decision to express any opinion or impose any limitation on the trial court's authority during its reconsideration of the property division on remand to take any authorized actions, including a constructive trust, regarding the Trust assets, which the parties stipulated were subject to division by the court.

{¶54} Nancy's twelfth and thirteenth assignments of error concern the trial court's award of spousal support. By her thirteenth assignment of error, Nancy argues that the trial court erred by finding that she may be able to find future employment, whereas, by her twelfth assignment of error, she argues that the trial court erred by ordering her monthly spousal support to terminate at the death of either party, in light of the undisputed precariousness of Michael's health, as opposed to awarding her a lump sum. The trial court awarded Nancy spousal support in the amount of \$5,000 per month for a minimum of ten years or until the death of either party or Nancy's remarriage or cohabitation with an unrelated adult other than Michael, whichever occurs first. The court retained continuing jurisdiction to review and modify the amount of support based on a change in either party's circumstances.

{¶55} A trial court must consider the factors listed in R.C. 3105.18(C)(1) when determining whether spousal support is appropriate and reasonable and in determining the nature, amount, duration, and terms of support. *Brown v. Brown* (May 11, 1995), 10th Dist. No. 94APF09-1306. A trial court possesses wide latitude in determining the appropriateness of spousal support, and we review a trial court's order regarding spousal support for an abuse of discretion. *Wilder v. Wilder*, 10th Dist. No. 08AP-669, 2009-Ohio-755, ¶10; *Neal v. Neal* (Sept. 30, 1996), 10th Dist. No. 96APE02-150, citing *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93.

{¶56} One factor a court must consider in determining whether to award spousal support is the relative earning ability of the parties. See R.C. 3105.18(C)(1)(b). In this regard, the trial court found that Michael's Social Security income is fixed and that his health limits his earning ability and his continuing service in his current position on the Franklin County Board of Elections. The trial court found that Nancy, "at 61 years old, is in relative[ly] good health and has degrees and training that certainly make her employable," although her PERS retirement income is fixed. The court concluded that Nancy "may be able to obtain employment at some time in the not to[o] distant future, given her age, general good health and previous work history," a conclusion that Nancy contends constitutes an abuse of discretion because the record contained no evidence as to how she might become re-employed. The trial court then awarded Nancy spousal support of \$5,000 per month based on the parties' long-term marriage and relative ages and its finding that Michael's lifestyle was unaffected by the court's temporary orders, which included monthly spousal support of \$5,000 to Nancy. The trial court neither

found Nancy voluntarily underemployed nor imputed income to her, and the court's finding that she has the potential for employment is supported by competent, credible evidence. Therefore, we defer to the court's factual finding and overrule Nancy's thirteenth assignment of error. Pursuant to our remand, however, the court will consider an appropriate distribution of marital assets between Michael and Nancy, a task that may impact spousal support.

{¶57} Nancy's twelfth assignment of error asserts that the court abused its discretion by ordering spousal support via periodic payments, terminating upon either party's death, instead of a lump sum. An award of spousal support "may be * * * payable either in gross or by installments, from future income or otherwise, as the court considers equitable," and "shall terminate upon the death of either party, unless the order containing the award expressly provides otherwise." R.C. 3105.18(B). Like the decision of whether to award spousal support at all, the decision to award a lump sum or periodic payments lies within the trial court's discretion and will only be reversed for an abuse of discretion.

{¶58} Nancy did not specifically ask the trial court for a lump sum award of spousal support. To the contrary, in her written closing argument and proposed findings of fact/conclusions of law, she proposed an award of permanent spousal support in the amount of \$100 per month, with the court retaining jurisdiction over the amount and term. The trial court was clearly aware of Michael's serious health condition, which it expressly took into account when determining whether spousal support was warranted and in its retention of continuing jurisdiction to modify the spousal support in the event

of changed circumstances. Given the trial court's express consideration of the parties' health, the lack of a request for a lump sum award of spousal support, and the award of monthly support in an amount 50 times greater than Nancy requested in her proposed findings of fact/conclusions of law, we discern no abuse of discretion in the trial court's award of periodic support payments terminable upon either party's death in lieu of a lump sum. Accordingly, we overrule Nancy's twelfth assignment of error.

{¶59} We now turn to Nancy and Michael's assignments of error concerning the award of attorney fees in favor of Nancy. Pursuant to R.C. 3105.73(A), a divorce court "may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable." In determining whether an award of fees 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.* The decision whether to award attorney fees is within the trial court's sound discretion and will not be reversed absent an abuse of that discretion. *Trott v. Trott*, 10th Dist. No. 01AP-852, 2002-Ohio-1077. Here, the trial court ordered Michael to pay Nancy \$75,000 for her attorney fees.

{¶60} Nancy presented evidence that she had incurred attorney fees and costs in the amount of \$225,450 up to the beginning of trial. Based on the trial judge's domestic relations practice experience and judicial experience reviewing attorney fees in other cases, the trial court opined that Nancy's attorney fees were excessive and

found that her reasonable and necessary attorney fees up to the date of trial should be approximately \$100,000.⁴

{¶61} Over the course of this action, Michael made several payments to Nancy for her attorney fees. Nancy admitted that Michael paid \$25,000 toward her attorney fees, as agreed in a March 19, 2007 Magistrate's Status Conference Order. On April 30, 2007, the magistrate ordered Michael to pay Nancy \$7,500 for attorney fees and expenses, and, on July 6, 2007, the magistrate ordered Michael to pay Nancy an additional \$5,000 for interim attorney fees. Finally, on September 24, 2008, the magistrate ordered that Michael pay Nancy an additional \$7,500 as interim attorney fees. While Michael did not pay the final \$7,500 award, which was the basis of Nancy's motion for contempt, Michael undisputedly complied with the other orders. Accordingly, prior to trial, Michael paid a total of \$37,500 toward Nancy's attorney fees.

{¶62} The discussion of attorney fees in the Judgment Entry states that previous court orders provided for \$15,000 in attorney fees, citing the April 2007 magistrate's order and the September 2008 magistrate's order. The trial court did not consider, however, the \$25,000 Michael paid by agreement or the \$5,000 payment ordered in July 2007. After finding Nancy's reasonable and necessary fees to be approximately \$100,000, the court stated that, "[i]n light of the prior orders for attorney fees in this case of \$15,000.00, [Michael] is ordered to pay to [Nancy] the sum of \$75,000.00 for her attorney fees."

⁴ Although not the subject of any motion for attorney fees, the court also opined that Whipps' attorney fees to Michael were excessive, finding "the amount in excess of \$300,000.00 charged by * * * Whipps for his roles as attorney for [Michael], trustee for the * * * Trust, and * * * Whipps' representation of the * * * Trust, to be unconscionable."

{¶63} In his third assignment of error, Michael argues that the court abused its discretion by ordering him to pay Nancy an additional \$75,000 in attorney fees, based on his previous payments and on Nancy's payment of additional attorney fees from marital funds removed from her deferred compensation plan. While Nancy has paid her attorneys in excess of \$100,000, the trial court was within its discretion, pursuant to R.C. 3105.73(A), to order Michael to pay up to the total \$100,000 it deemed reasonable and necessary. The trial court's order to pay an additional \$75,000, however, results in an award of attorney fees in excess of the amount of Nancy's fees deemed reasonable and necessary by the court. Because we cannot determine what the trial court intended, we sustain the third assignment of error to the limited extent of allowing the trial court to clarify, and recalculate if appropriate, the award of attorney fees.

{¶64} Nancy's fourteenth assignment of error concerns, not the trial court's actual award of attorney fees, but its concomitant order that she not pay her own attorney fees in excess of \$100,000 up to the date of trial. The court stated as follows:

* * * [The attorney fee award] is to reimburse [Nancy] for fees already paid. These funds are not intended for [Nancy] to pay additional attorney fees over the \$100,000.00 this Court believes is reasonable and necessary for the prosecution of this case. [Nancy] shall pay the balance of any attorney or other professional fees and any expenses associated with her litigation of this matter, including the costs of trial. The attorney fees are not inclusive of other professional fees or expenses and are not to exceed \$100,000.00 up to the date of trial. The domestic court is a court of equity and this Court believes it would be inequitable to not protect the interests of the litigants appearing before the Court.

Nancy argues that the trial court lacked jurisdiction to interfere with her contract with her attorneys and to order that she not pay her attorney fees in excess of \$100,000.

{¶65} The Eighth District Court of Appeals addressed a similar situation in *Zeefe v. Zeefe* (1998), 125 Ohio App.3d 600, 613, in which it stated that, although a domestic relations court may award reasonable attorney fees from one party to another, the statute authorizing attorney fee awards does not permit the court to determine the amount of fees between a client and his or her own attorney. The *Zeefe* trial court found that the reasonable amount of the wife's attorney fees and expenses was \$55,000, although her bills totaled more than twice that amount. The trial court ordered the husband to pay \$30,000 of the wife's reasonable fees and expenses, ordered the wife to pay \$25,000 in fees and expenses, and stated that neither party would be obligated to pay more. The court also issued an order purportedly precluding the wife's attorney from pursuing collection against her for unpaid fees. The appellate court reversed the order limiting the amount of attorney fees for which the wife was obligated, pursuant to her contract with the attorney, concluding that attorney fees are a matter of contract between the attorney and the client. See also *Seelie v. Coombs* (Oct. 9, 1997), 8th Dist. No. 71883 (domestic relations court exceeded its jurisdiction by ordering that a party's attorney could not collect the unpaid balance of fees from his client.) We agree with the reasoning expressed by the Eighth District in *Zeefe* and conclude that the trial court exceeded its jurisdiction and abused its discretion in ordering that Nancy not pay her attorney fees in excess of \$100,000.

{¶66} In a final argument regarding attorney fees not specifically assigned as error, Nancy contends that the trial court abused its discretion by including the attorney fee award as a liability to Michael on the marital balance sheet. Although we instruct

the trial court to clarify, and recalculate if appropriate, its award of attorney fees on remand, the trial court's inclusion of the award as a liability on the balance sheet appears not to be an abuse of discretion, especially because it did not affect the trial court's analysis or judgment regarding valuation or distribution. Nevertheless, for the foregoing reasons, we sustain Nancy's fourteenth assignment of error.

{¶67} Nancy's final assignment of error asserts that the trial court erred by denying her motion for contempt against Michael, premised on his failure to comply with the September 24, 2008 magistrate's order that he pay her \$7,500 as interim attorney fees. We may not reverse a trial court's grant or denial of a motion for contempt absent an abuse of discretion. *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11.

{¶68} On October 9, 2008, Michael filed a motion to set aside the September 24, 2008 magistrate's order, and Nancy filed her motion for contempt against Michael. In his motion, Michael stated, without elaborating, that the magistrate's order "disregards a Release of Restraining Order filed in November of 2007, granting in excess of \$180,000 in assets be made available to [Nancy], part of which funds were to be utilized by [Nancy] for her legal expenses." At trial, Michael's counsel suggested that the agreement to release the restraining order, which related to Nancy's deferred compensation plan, was premised upon a representation by Nancy's counsel that the funds would be used for attorney fees.

{¶69} The trial court considered both motions at trial and found that Nancy established a prima facie case of contempt, having presented undisputed evidence of the magistrate's order and Michael's non-compliance. See *LeuVoy v. LeuVoy* (May 25,

2000), 10th Dist. No. 99AP-737, citing *Morford v. Morford* (1993), 85 Ohio App.3d 50. The trial court also noted Michael's argument that his motion to set aside excused his non-compliance. Civ.R. 53(D)(2)(b) provides, in part, that "[t]he pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order." In its Judgment Entry, the court found that the order to pay the attorney fees was stayed by the motion to set aside and denied the motion for contempt. The court also denied the motion to set aside, however, and ordered Michael to pay the \$7,500 as interim attorney fees pursuant to the magistrate's order. Pursuant to Civ.R. 53(D)(2)(b), the trial court had the authority to stay the effectiveness of the magistrate's order as a result of Michael's motion to set aside, and its exercise of that authority in rendering its decisions on the related motions does not rise to the level of an abuse of discretion. Accordingly, we overrule Nancy's fifteenth assignment of error.

{¶70} Finally, we briefly turn to the remaining assignments of error asserted by Whipps, specifically that the trial court erred in making findings and orders against him without due process of law and in finding that his attorney fees were excessive. Whipps' appeal focuses exclusively on the trial court's appointment of a special master to review Trust expenses and the trial court's finding that fees paid to Whipps were excessive. Having concluded that the trial court lacked authority to appoint a special master, Whipps' assignments of error are, for the most part, moot. For example, Whipps' due process argument is based on the trial court "order[ing] a Special Master to investigate the purported excessiveness [of his fees] with the end result that the court

engaged in a taking of Whipps' monetary property rights that were earned through his attorney services." Our rejection of the trial court's appointment of a special master for those purposes negates any potential due process concern and moots Whipps' first assignment of error. Moreover, although the trial court stated that Whipps' fees were excessive, it did not purport to issue any order or judgment against Whipps with respect to those fees in its judgment entry. Accordingly, Whipps' first and second assignments of error are moot.

{¶71} In conclusion, we sustain Nancy's second, third, seventh, and fourteenth assignments of error, Michael's first and third assignments of error, and Whipps' third assignment of error. We overrule Nancy's first, fourth, fifth, eighth, ninth, twelfth, thirteenth, and fifteenth assignments of error. We also overrule Nancy's tenth assignment of error insofar as it contests Trust expenditures for Michael. We render moot Nancy's sixth and eleventh assignments of error; Michael's second assignment of error; and Whipps' first and second assignments of error. We affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, and remand this matter to that court for further proceedings consistent with this decision.

*Judgment affirmed in part, reversed
in part, and cause remanded.*

BRYANT and KLATT, JJ., concur.
