

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dianna Leimbach,	:	
Plaintiff-Appellee,	:	No. 09AP-509
v.	:	(C.P.C. No. 07DR-03-1282)
Warren H. Leimbach, II,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on December 31, 2009

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*Phyllis J. Rowan*, for appellee.

*Mowery Youell & Galeano, LTD, James S. Mowery, Jr., and Nicholas W. Yaeger*, for appellant.

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

BROWN, J.

{¶1} The parties were married on October 18, 1980, in Columbus, Ohio and three children were born as issue of this marriage, all of whom were emancipated at the time of trial. Plaintiff-appellee, Dianna Leimbach, filed a complaint for divorce on March 27, 2007, and the trial court granted a judgment entry/decree of divorce on

April 24, 2009, based upon incompatibility and a finding that the parties had lived separate and apart since March 1, 2007.

{¶2} Appellee met defendant-appellant, Warren H. Leimbach, II, while he was a medical student and she was working as a nurse at Grant Hospital. Initially, appellee was the only spouse working but, after the birth of their third child, she became a stay-at-home mother and did so for the next 19 years. In 1989, appellant became a neurosurgeon and practiced at Grant Hospital and Mount Carmel Hospital. In 2005, appellant's practice had dwindled and he closed his practice. Because he owed Grant Hospital money, the parties cashed in appellee's life insurance policy and used those funds to pay the debt. (Tr. 74.) Appellant, after being unemployed for several months, moved to Fresno, California, and worked with a practice for 3 months before he was asked to leave. Appellant's income was \$340,758 in 2005, and dropped to \$52,085 by 2006. However, they continued to spend beyond their income. The parties began borrowing from a line of credit on their home.

{¶3} In the fall of 2006, appellant accepted a job in North Carolina and was expected to start in early 2007. However, in December 2006 he suffered a stroke. His medical insurance through COBRA had just lapsed. As a result of the stroke, appellant has some memory impairment; has difficulty reading, and can no longer practice as a neurosurgeon.

{¶4} Appellant receives disability insurance in the amount of \$6,000 per month that will terminate upon reaching age 65. In addition to disability insurance, appellant receives Social Security benefits in the amount of \$1,885 per month. His total annual income is approximately \$94,600. Appellant's father passed away in May 2008, leaving

appellant and his sister as the beneficiaries of a trust that is worth approximately \$117,450. Appellant lives in the condominium that belonged to his late father, which is mortgage free and drives his father's Lexus, which also is payment free.

{¶5} After appellant's stroke, appellee took care of appellant and his father, who lived with them. She continued to pay the marital bills from the home equity loan. When the parties realized appellant was not able to work in North Carolina, they agreed to borrow \$100,000 on appellant's life insurance policy to pay bills. Appellee moved out of the house in March when she no longer felt safe because of problems the parties were having with their youngest son. The gun closet and her personal safe were broken into and the gun and knife collection were missing. The final incident occurred when appellee found the son joyriding while he should have been in school. When she confronted him and reached to get the keys, he drove away and dragged her down the street. She had an argument with appellant and his father and received no help in disciplining the son.

{¶6} Before leaving, appellee filed the paperwork to complete the Social Security documents and disability health insurance documents so that appellant would begin receiving payments. Appellee maximized the home equity line of credit by taking the final \$33,800, and deposited that and the \$100,000 check from appellant's life insurance policy into her checking account and continued to pay all the marital bills.

{¶7} Appellee found full-time employment in December 2007, earning \$12 per hour. She started with her current employer, Marion General Hospital, on May 5, 2008, earning \$26.50 per hour working the night shift.

{¶8} In granting the parties' divorce, the trial court used a de facto termination date for the marriage of March 3, 2007, and divided the parties' assets and liabilities.

Appellant filed a notice of appeal and raised the following assignments of error:

1. The Court Erred As A Matter of Law And Abused Its Discretion By Failing To Allocate \$52,931.00 To The Plaintiff And Offset This Amount To The Defendant In Other Marital Property As Part of The Property Distribution Pursuant to Ohio Revised Code § 3105.17.1 As These Funds Were Spent By The Plaintiff For Her own Personal Benefit.
2. The Trial Court Prejudicially Erred and Abused Its Discretion In Determining The Appellee Was Entitled To Spousal Support, Or, In The Alternative, Abused Its Discretion In The Amount And Duration Of Support Where The Evidence Demonstrated The Appellant is Totally And Permanently Disabled, Does Not Have The Ability To Earn Income In The Future, and, Conversely, Where The Appellee Is Presently Working, Earning Income, and Has A Potential To Continue To Earn Income and Increase Her Income In The Future.

{¶9} By the first assignment of error, appellant contends that the trial court erred and abused its discretion by failing to allocate \$52,931 to appellee and offset this amount to appellant in other marital property as part of the property distribution. Appellant alleges these funds were spent by appellee for her own personal benefit.

{¶10} "A trial court has broad discretion in making divisions of property in domestic cases." *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 1998-Ohio-403, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318. Therefore, a trial court's decision will not be reversed on appeal absent an abuse of discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128; *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-95. An 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. "The abuse of discretion standard is based upon the principle that a trial court must have the discretion in domestic relations matters to do what is equitable given the facts and circumstances of each case." *Jefferies v. Stanzak* (1999), 135 Ohio App.3d 176, 179, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144.

{¶11} R.C. 3105.171 provides for the division of marital property in a domestic relations case and requires in division (C)(1) that the division of marital property be equal unless an equal division would be inequitable. R.C. 3105.171(G) provides that the court shall make written findings of fact that support the determination that the marital property has been equitably divided. See also *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93. It is axiomatic that "[e]quitable need not mean equal." *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355. However, this does not mean that equal division can never be equitable. A trial court's decision is dependent upon the facts and circumstances of each case. *Id.*

{¶12} Appellant argues that the trial court abused its discretion because it failed to allocate \$52,931 to appellee when appellee used the marital funds for her personal benefit. Appellant contends that, of the \$133,800 in marital funds of which appellee took possession immediately before the parties separated, she spent \$52,931 for her personal benefit.

{¶13} The trial court found that appellee deposited the money into her account and continued to pay marital debt and household expenses from that account, after the parties separated and while neither was employed. Appellee did not start working until December 2007. The court found that appellee did not commit financial misconduct or

convert this money to her sole use. Instead, the trial court found that she paid marital debts.

{¶14} Appellee testified that she spent the money on the first and second mortgages, electric, gas, water, credit card bills, the home security system, the alarm permit, storage fee for furniture, life insurance bills, home association fees, vet bills, and expenses for the children. (Tr. 102; 107; 108.) She did admit that she had to purchase some new clothes because she had lost some weight. Additionally, she paid for dental bills, medications because she had no medical insurance and a new computer in order to apply for a job. (Tr. 108; 215.)

{¶15} Appellant argues that the trial court erred in disregarding appellant's accountant's conclusion, regarding the \$52,931 and finding this conclusion was based upon opinions of an employee of appellant's attorney's law firm. Appellant argues that the categorizations of marital and personal expenses were based upon cross-examination of appellee, rather than the paralegal's work. However, the summary was based upon both. Even if the finding of the trial court was inaccurate, it is irrelevant to our finding because the evidence supports the trial court's conclusions.

{¶16} Appellant contends that, on cross-examination, appellee admitted that these expenses were "personal expenses." However, appellee's testimony is not as clear as appellant contends. While some of those expenses are clearly expenses that pertain only to appellee, such as clothes or medications, at the time neither party was employed. Appellee was paying necessary living expenses, not frivolous expenses or spending money extravagantly.

{¶17} Further considerations include the following: (1) the parties used appellee's life insurance policy to pay a debt to Grant Hospital when appellant closed his practice there in 2005; (2) pursuant to the magistrate's order, effective September 24, 2007, appellant was ordered to pay the first and second mortgages on the marital residence and, when he did not, the bank withdrew the money from appellee's account without her knowledge; (3) the trial court awarded appellant the remaining value of the life insurance policy, worth \$20,290.07, free and clear of any claim by appellee; and (4) appellee continued to pay the marital bills on the residence from her income after the marital money was depleted. (Tr. 137.)

{¶18} The trial court found appellee did not commit financial misconduct and we find no abuse of discretion in that finding. Appellant's first assignment of error is overruled.

{¶19} By his second assignment of error, appellant contends that the trial court erred and abused its discretion in determining that appellee was entitled to spousal support, or that it abused its discretion in the amount and duration of support where the evidence demonstrated appellant is totally and permanently disabled, does not have the ability to earn income in the future, and appellee is presently working, earning income, and has a potential to continue to earn income and increase her income in the future. R.C. 3105.18(B) authorizes the trial court to order an award of reasonable spousal support to either party in a divorce proceeding. R.C. 3105.18(C)(1) provides that "[i]n 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." "These factors include each party's income, earning capacities, age, retirement benefits[,] education, assets and liabilities, and physical, mental and emotional condition; the duration of the marriage; their standard of living; inability to seek employment outside the home; contributions during the marriage; tax consequences; and lost income capacity due to a party's fulfillment of marital responsibilities." *Brickner v. Brickner*, 12th Dist. No. CA2008-03-081, 2009-Ohio-1164, ¶21, citing R.C. 3105.18(C)(1)(a) through (m). Additionally, a trial court is free to consider any other factor it deems relevant. R.C. 3105.18(C)(1)(n).

{¶20} The trial court need not comment on each factor, but the record should demonstrate that the court considered each factor in making its spousal support award. *Kreilick v. Kreilick*, 161 Ohio App.3d 682, 2005-Ohio-3041, ¶24. However, the trial court must provide a basis in its decision with sufficient detail for the appellate court to determine that the spousal support award is fair, equitable, and in accordance with law. *Kaechele*. The trial court has broad discretion in determining whether to award spousal support under the facts and circumstances of each case and an appellate court cannot substitute its judgment for that of the trial court unless, considering the totality of the circumstances, the trial court abused its discretion. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67.

{¶21} Appellant is not arguing that the trial court did not consider the factors in R.C. 3105.18(C), just that the trial court erred in its conclusion. He contends that, since he is totally and permanently disabled, and appellee is working, he should not have to pay spousal support. Initially, we note that the evidence did not provide that appellant was "totally and permanently disabled" as he contends. He testified that he is no longer



able to work as a neurosurgeon, however, he has renewed his medical license in two states and attends conferences as part of a continuing education series. The trial court found that it is "unknown whether he can work as a doctor in some other capacity or in a different line of work altogether" because there was no evidence presented that he is totally disabled. The evidence provided that he has residual problems from the stroke and cannot work as a neurosurgeon.

{¶22} Appellant also argues that he has no money left in his monthly budget to save for future retirement benefits while appellee is continuing to work and increase her retirement benefits. Further, appellant contends that the trial court failed to consider that the parties' fairly affluent lifestyle was forever changed after appellant's stroke. However, appellant makes arguments that do not comport with the evidence at trial.

{¶23} The trial court considered the factors, including that appellant currently has income of \$94,620 and appellee \$43,992. Appellant lives in a mortgage free residence and drives a payment free car. He also will receive an inheritance from his father's estate of approximately \$58,500, of which he has received advancements of at least \$11,500. The marriage was of long duration, 26 years. Both parties have health issues, although appellant's issues prevent him from working as a neurosurgeon. The trial court found that appellant's disability insurance is based on a career path that appellee helped him to achieve and she might have been able to earn more presently had she maintained nursing employment, rather than taking a 19-year leave of absence.

{¶24} The trial court also considered the testimony regarding appellant's current expenses. His expenses and lifestyle far exceed his income. His suggested monthly budget of \$6,890 included groceries of \$500 for himself. The trial court considered

evidence that his credit card statement included stores where he did not shop and the YMCA, where he was not a member. Between April 2007 and November 2008, he spent almost \$18,000 for travel and sporting events. The condominium was recently renovated and should not require much maintenance. Appellant admitted that he pays for expenses for his adult children and allows them to use his credit card.

{¶25} Conversely, appellee lives in a one bedroom apartment and does not have money in her monthly budget for a bigger apartment, life insurance, attorney fees, car maintenance or travel expenses.

{¶26} We find that the trial court considered the R.C. 3105.18(C)(1) factors and did not abuse its discretion in awarding appellee spousal support or abuse its discretion in the amount and duration of support. Appellant's second assignment of error is overruled.

{¶27} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

*Judgment affirmed.*

SADLER and TYACK, JJ., concur.

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