

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sandra M. Furman,	:	
	:	
Plaintiff-Appellee/ [Cross-Appellant],	:	
	:	
v.	:	No. 10AP-407
	:	(C.P.C. No. 08DR-01-29)
Franklin Furman,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant/ [Cross-Appellee].	:	

D E C I S I O N

Rendered on December 20, 2011

Eugene R. Butler Co., LPA, and Eugene R. Butler, for appellee.

Golden & Meizlish Co., LPA, and Keith E. Golden; Vincent A. Dugan, for appellant.

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

CONNOR, J.

{¶1} Plaintiff-appellee/cross-appellant, Sandra M. Furman, and defendant-appellant/cross-appellee, Franklin Furman, have both appealed from a decree of divorce entered by the Franklin County Court of Common Pleas, Division of Domestic Relations. The parties were married on November 1, 1986 and have one adult child. Sandra filed a complaint for divorce in 2008, to which Franklin responded with a counter-claim for

divorce. Proceedings culminated in a seven-day trial in October 2009. The trial court then rendered a decision distributing the marital assets and liabilities in the net amount of \$304,084 to Sandra and \$257,075 to Franklin. The trial court awarded spousal support payable from Franklin to Sandra in the amount of \$1,500 per month for a period of eleven years and one-half months. The court also ordered that Franklin reimburse Sandra \$9,280 for attorney fees based upon the conduct of the parties during the course of litigation.

{¶2} Franklin has timely appealed and brings the following assignments of error:

I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN AWARDING SPOUSAL SUPPORT FOR ELEVEN AND ONE-HALF YEARS WITHOUT STATING THE UNDERLYING BASIS FOR THE LENGTH OF SAID AWARD.

II. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN FAILING TO MAKE ITS SPOUSAL SUPPORT ORDER TAX DEDUCTIBLE TO APPELLANT AND TAXABLE INCOME TO APPELLEE AS WELL AS TERMINABLE UPON THE DEATH OF EITHER PARTY OR APPELLEE'S REMARRIAGE OR COHABITATION.

III. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW BY FAILING TO RESERVE ITS JURISDICTION OVER A LENGTHY SPOUSAL SUPPORT ORDER.

{¶3} Sandra has timely cross-appealed and brings the following assignments of

error:

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FAILING TO RETURN TO PLAINTIFF HER PREMARITAL SEPARATE PROPERTY DOWN PAYMENT THE COURT DETERMINED HAD BEEN ESTABLISHED.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FAILING TO AWARD TO PLAINTIFF THE APPRECIATION ON HER PREMARITAL SEPARATE PROPERTY.

{¶4} Franklin's first assignment of error asserts that the trial court erred in awarding spousal support for a duration of eleven and one-half years. When reviewing a trial court's decision granting or denying an award of spousal support, we will reverse or alter the award only upon a finding that the trial court abused its discretion. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67; *Hess v. Riedel-Hess*, 153 Ohio App.3d 337, 2003-Ohio-3912, ¶29. 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. R.C. 3105.1(A)(C)(1) governs such an award:

(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.

{¶5} The trial court's decision extensively addresses these factors in light of the evidence heard at trial. Upon appeal, Franklin largely does not contest the trial court's conclusions in instances where the facts were contested. Rather than challenging the amount of the award Franklin contests the duration, asserting that the trial court, pursuant to the statute, was required to present a separate analysis and rationale specifically supporting the eleven and one-half years duration of spousal support.

{¶6} At the time of trial, Sandra was 56 years old and held a law degree from Capital University. She worked principally as a mediator and arbitrator, supplementing her income with part-time work as an adjunct professor teaching labor arbitration at Capital University and as an assistant to the president at Columbus State Community College. Due to her work as a mediator and arbitrator, Sandra has not engaged in the representational practice of law, as this would conflict with her work as a third-party neutral. (Tr. 192, 205.) Sandra's average income from employment from 2004 to trial was approximately \$44,600 with a spike in mediation income to \$84,517 in 2008, although Sandra testified that this was in part due to collection of receipts for work billed in 2007. (Tr. 221.) The testimony of a vocational expert presented by Franklin opined that Sandra has an earning capacity of about \$50,000 per year (Tr. 562), which was consistent with the trial court's finding that Sandra's average annual income for the three years preceding trial was approximately \$55,000 per year.

{¶7} At the time of trial, Franklin had income as a self-employed businessman buying and selling wholesale cellular equipment through his company, Link Processor. Franklin's own expert, Thomas P. Giusti, CPA, testified that the specific financials of this business were in many respects lacking and the expert could only testify based on certain underlying assumptions. The trial court's decision notes that this and other testimony demonstrates that Franklin runs many of his personal expenses through Link Processor, takes shareholder distributions or loans in addition to his nominal salary, and otherwise confuses the financial picture with uncertain accounting. Further testimony by Sandra's expert witness, Bradford Smith Ellridge, CPA, concluded that the net cash flow available to Franklin after taxes and expenses was \$144,000 from Link Processor.

{¶8} In addition to his business, Franklin works part-time for his father's business, Semco, with his tax returns reflecting annual W-2 income ranging from \$39,132 to \$44,402 for the period 2004 to 2008, plus a vehicle allowance.

{¶9} With respect to their ages, physical, mental, and emotional conditions, the court found that both parties were free from health conditions that restricted their ability to work. While both were taking medication for various conditions, and Franklin in particular had undergone multiple surgeries from 1972 to 1975 for serious illnesses, both Franklin and Sandra testified that they were capable of continuing their current work regime for the foreseeable future and not restricted by health concerns.

{¶10} With respect to other financial circumstances, the court noted that testimony established a relatively modest standard of living by the parties during the marriage, with their lifestyle dictated by a compromise between Sandra's tendency to save for retirement and Franklin's profligate tendency to spend extensively on consumer items. Franklin in particular bought and sold a number of expensive men's watches and purchased other expensive men's clothing and accessories. During the latter years of the marriage, Franklin accumulated large amounts of consumer debt while Sandra built up substantial retirement savings, each primarily in his or her own name. The court noted that in these final years of the marriage, Franklin borrowed heavily against certain life insurance policies, including some not in his name.

{¶11} Based upon the above income figures, lifestyle habits, relative needs of the parties, and Franklin's past practice of providing a \$350-per-week domestic allowance to Sandra, the trial court concluded that spousal support in the amount of \$1,500 per month was warranted. Not directly disputing the amount of this figure, Franklin focuses in the

appeal on the duration of the support, eleven and one-half years. Because of the respective ages of the parties and relatively long duration of support, Franklin seeks to invoke principles generally applied to awards of permanent spousal support.

{¶12} Ohio law certainly permits permanent support only where circumstances warrant: "[w]here a payee spouse has the resources, ability and potential to be self-supporting, an award of sustenance alimony should provide for terminating the award within a reasonable time and upon a date certain, in order to place a definitive limit upon the parties' rights and responsibilities." *MacMurray v. Mayo*, 10th Dist. No. 07AP-38, 2007-Ohio-6998, ¶8, citing *Kunkle* at paragraph one of the syllabus. Nonetheless, "a marriage of long duration 'in and of itself would permit a trial court to award spousal support of indefinite duration without abusing its discretion or running afoul of the mandates of *Kunkle*.'" *Vanke v. Vanke* (1994), 93 Ohio App.3d 373, 377, quoting *Corpac v. Corpac* (Feb. 27, 1992), 10th Dist. No. 91AP-1036.

{¶13} Franklin presents no authority for the proposition that a terminable award of spousal support, even one of eleven and one-half years duration, is subject to the strict *Kunkle* analysis applied to permanent support merely because the duration of that finite term is asserted to be excessive. In the present case, therefore, we undertake a conventional abuse of discretion review of the trial court's application of the R.C. 3105.18 factors. "Under certain circumstances, a trial court's failure to provide findings to support spousal support of *limited* duration constitutes error requiring a remand to enable the trial court to make such findings." *MacMurray* at ¶13. (Emphasis added.) Reviewing the totality of the evidence outlined above, we do not find any abuse of discretion in the eleven and one-half years of spousal support in this case. The trial court's detailed

analysis of the statutory factors supports the award. We particularly note the relatively long duration of the marriage (23 years), the findings regarding relative incomes and earning potential of the parties, the expense associated with Sandra's need to procure individual health insurance after termination of her COBRA coverage expiration three years from the end of the marriage, and the respective age of the parties. The term of spousal support awarded by the court, although the court did not explicitly so state, coincides with the putative end of Sandra's working career at age 67 and eligibility for full Social Security retirement benefits at that time. The court's examination of the relative earning capacity and future income of the parties also supports the award. As this court noted in *DiBari v. DiBari*, 10th Dist. No. 08AP-1050, 2009-Ohio-3437, which involved a marriage of over 20 years, an 11-year term of spousal support is not on its face unreasonable if the statutory factors justify the term. Franklin's first assignment of error is accordingly overruled.

{¶14} Franklin's second assignment of error asserts that the trial court erred in failing to explicitly state that spousal support would be tax deductible to Franklin and terminable upon death or remarriage.

{¶15} With respect to the termination upon death, R.C. 3105.18(B) explicitly provides that "[a]ny award of spousal support * * * shall terminate upon the death of either party, unless the order containing the award expressly provides otherwise." The trial court's order in the present case does not provide otherwise, so the award of spousal support, by operation of statutory law, is in fact terminable upon the death of either party. *Meeks v. Meeks*, 10th Dist. No. 06AP-1186, 2008-Ohio-2015.

{¶16} With respect to the tax treatment of the spousal support, Internal Revenue Code Section 215 and 71 provide that spousal support is deductible when, inter alia, the support is terminable upon the death of either party. Because, as stated above, this award is so qualified by operation of law, there is nothing on the face of the decision that prohibits the tax consequences from accommodating the relative incomes of the parties and giving the tax benefit of deductibility to the higher earner, Franklin.

{¶17} Finally, Franklin argues that the trial court abused its discretion when it did not provide that the spousal support would terminate if Sandra remarried or cohabitated and conduct a separate analysis of the statutory factors governing support in this respect. The only authority provided by Franklin on appeal for the proposition that this aspect of the award requires an independent review of the statutory factors, is *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 96-97. While that case generally addresses the requirements that the trial court consider the statutory factors set forth in R.C. 3105.18(B) in determining the duration, amount, and terminable aspects of alimony, the case does not otherwise address the issue of remarriage or cohabitation. To the contrary, this court recently addressed these factors in *Kuper v. Halbach*, 10th Dist. No. 09AP-899, 2010-Ohio-3020, and applied a conventional R.C. 3105.18(B) analysis. In *Kuper*, we found no abuse of discretion on the part of the trial court in declining to require termination for remarriage or cohabitation based upon the trial court's analysis of the statutory factors with respect to other aspects of the spousal support award. *Id.* at ¶66. For the same reasons set forth above with respect to our discussion of those other aspects, we find no abuse of discretion in declining to make the award thus terminable in the present case.

{¶18} Franklin's third assignment of error asserts that the trial court erred in declining to reserve jurisdiction to modify the award of spousal support were circumstances of the parties to change during the term of the award. Pursuant to R.C. 3105.18(E)(1), the trial court will not retain jurisdiction to modify the amount or term of a spousal support award unless the court explicitly retains such jurisdiction and determines that the circumstances of either party are likely to significantly change and render the award no longer equitable. The decision to retain jurisdiction to modify an award of spousal support is left to the sound discretion of the trial court. *Deacon v. Deacon*, 8th Dist. No. 91609, 2009-Ohio-2491, ¶63, citing *Johnson v. Johnson* (1993), 88 Ohio App.3d 329.

{¶19} Although some Ohio courts have held that a trial court abuses its discretion in failing to reserve jurisdiction when imposing an *indefinite* award of spousal support, see, e.g., *Nori v. Nori* (1989), 58 Ohio App.3d 69, 72, those cases, if sound, would nonetheless not automatically apply when the court imposes a *definite* period. *Kuper*, at ¶62, citing *Deacon*, *Johnson*, and *Nori*. Rather, an appellate court must consider the totality of circumstances and the specific facts of each case in determining whether a trial court abused its discretion in declining to retain jurisdiction. *Id.* "A trial court abuses its discretion in failing to reserve spousal support jurisdiction where there is a substantial likelihood that the economic conditions of either or both parties may change significantly within the period of the award." *Id.* at ¶63, citing *Newman v. Newman*, 5th Dist. No. 2003 CA 00105, 2004-Ohio-5363.

{¶20} The trial court's extensive analysis of the financial circumstances of the parties does address the future economic circumstances of the parties. With particular

emphasis upon the ages, past earning experience, health circumstances, and future employment projections, we likewise find that it was not an abuse of discretion to decline to retain such jurisdiction, as the circumstances of the parties appear stable, as much as the uncertainties of life may provide for the term of the award set forth in the trial court's order. Franklin's third assignment of error is accordingly overruled.

{¶21} Sandra's first assignment of error on cross-appeal asserts that the trial court erred in declining to award her, as premarital separate property, a proportion of the equity in the marital residence directly traceable to a down payment on a prior marital home made with Sandra's separate funds.

{¶22} At the time of separation, the parties resided at 205 South Chesterfield in Bexley, Ohio. The stipulated value of this marital residence at the time of trial was \$190,000. Subsequent evidence established that with a mortgage balance of \$55,620, the net equity in the marital residence at the time of trial was \$134,380, which the trial court awarded entirely to Franklin.

{¶23} Prior to purchase of the South Chesterfield home, the parties owned a home at 915 South Roosevelt Road, in Bexley, Ohio, purchased in October 1987 for \$73,500. Sandra testified without contradiction that the \$7,400 down payment on the South Roosevelt home came out of her premarital assets. (Tr. 242.) The couple sold the South Roosevelt home in 1993 for \$91,900, replacing it in July 1993 with the South Chesterfield home, purchased for \$105,900. Sandra variously testified that "all" of the net proceeds from the South Roosevelt sale were rolled into the South Chesterfield home, or that the parties put 20 percent down on the South Chesterfield home. (Tr. 245-47, 382.)

{¶24} The trial court's decision accepted the first portion of Sandra's testimony and found that the couple purchased the South Roosevelt residence using a \$7,400 down payment provided from Sandra's separate property. The court went on to find, however, that despite this premarital interest in the South Roosevelt home, Sandra's calculations of a present-day separate property interest of \$16,648 in the South Chesterfield residence at the time of trial were not verifiable.

{¶25} Interestingly, Franklin also claims that he invested separate funds toward the purchase of the South Chesterfield residence, but the trial court found that his testimony in this respect was not credible. However, the trial court found that Sandra's attempt to ascertain the present value of her initial \$7,400 separate interest in the first marital residence was handicapped by the absence of "clear tracing detail and credible testimony." (Trial court decision, at 5.) The trial court also noted that neither party had presented a settlement agreement relating to the purchase of the South Chesterfield residence nor otherwise elaborated the financial circumstances surrounding the disposition of proceeds from the South Roosevelt home and the purchase of the South Chesterfield home.

{¶26} Sandra now argues that the trial court should have found, on the basis of unrebutted testimony regarding her \$7,400 separate property down payment on the first marital residence and her unrebutted testimony that the couple rolled the entire proceeds into their second residence, that the initial down payment was both separate property and traceable through various sales and purchases.

{¶27} Pursuant to R.C. 3105.171(B), a spouse's separate property should be distributed to that spouse, and it is error to award separate property as marital property.

Colley v. Colley, 10th Dist. No. 09AP-333, 2009-Ohio-6776. When assessing whether an asset is marital property or separate property, the presumption is that an asset acquired during the course of marriage is marital property unless proved otherwise. R.C. 3105.171(A)(6)(B). A party in a divorce action requesting classification of a commonly-held asset as separate property, therefore, 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.

{¶28} In the present case, we do not find sufficient evidence in the record to establish an abuse of discretion on the part of the trial court in concluding that the funds initially and undisputedly contributed to the purchase of the first marital residence by Sandra can be conclusively traced through the subsequent sale of that residence, purchase of a new residence, and acquisition of equity in that residence to her initial contribution. In particular, the absence of a settlement agreement or other documentary or detailed exposition of the circumstances regarding the purchase of the South Chesterfield home makes it difficult to accurately trace the funds. There is also little in the record to indicate to what extent appreciation in either house, and consequently the amount of equity derived from either, is attributable to the initial down payment, subsequent improvements, or scheduled pay-down of mortgage debt. While the trial court in the present case might well have reasonably found that the initial down payment was traceable, to do so would have required to some degree a leap of faith regarding the intervening financial circumstances affecting the value of the homes. In sum, we find that it was not an abuse of discretion on the part of the trial court to decline to make that leap. Sandra's first cross-assignment of error is overruled.

{¶29} Sandra's second cross-assignment of error asserts that the trial court erred in failing to award appreciation upon the premarital separate property contribution to the purchase of the first marital residence. Because we have found pursuant to our discussion resolving Sandra's first cross-assignment of error that this contribution is not sufficiently traceable and is not awardable as separate property, the question of appreciation upon the amount is a foregone conclusion. Sandra's second cross-assignment of error is, accordingly, overruled.

{¶30} In summary, Franklin's first, second, and third assignments of error on appeal are overruled. Sandra's first and second cross-assignments of error are also overruled. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

BRYANT, P.J., and FRENCH, J., concur.
