

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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|---------------------------|---|-------------------------|
| Susan Wilkinson, | : | |
| | : | |
| Plaintiff-Appellee, | : | |
| | : | |
| v. | : | No. 13AP-73 |
| | : | (C.P.C. No. 11DR-01-18) |
| William C. Wilkinson, | : | |
| | : | (REGULAR CALENDAR) |
| Defendant-Appellant, | : | |
| | : | |
| Thompson Hine LLP et al., | : | |
| | : | |
| Defendants-Appellees. | : | |

D E C I S I O N

Rendered on August 22, 2013

Taft, Stettinius & Hollister, LLP, and Eugene B. Lewis, for appellee.

Kemp, Schaeffer & Rowe Co., L.P.A., and Jacqueline L. Kemp, for appellant.

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

TYACK, J.

{¶ 1} Defendant-appellant, William C. Wilkinson, is appealing from certain provisions of his decree of divorce. He assigns three errors for our consideration:

[I.] The Trial Court's award of spousal support constitutes error as a matter of law and an abuse of discretion.

[II.] The Trial Court erred as a matter of law and abused its discretion by including both parties' legal fees as marital liabilities on the marital balance sheet.

[III.] The Trial Court erred and abused its discretion by awarding Appellee attorneys' fees.

{¶ 2} William and Susan Wilkinson separated in December 2006 after almost 40 years of marriage. William was a very successful attorney with Thompson Hine, LLP, a well-respected law firm. Susan had done very little work outside the home and had minimal personal income during the marriage. As a result, the trial court judge who heard this divorce case imputed minimum wage income to her—\$16,016 per year.

{¶ 3} The trial court imputed income of \$525,955 per year to William, which was consistent with his income from Thompson Hine, LLP during his last two years with the firm and his own testimony at trial that he was optimistic to make more money in his solo practice. William had left the law firm over four years after the couple separated, but before the trial of his divorce case. Because the marriage was of such long duration, permanent spousal support was appropriate, with the amount of that spousal support being the point of contention. On December 31, 2012, the trial court awarded supposal support of \$230,000 per year effective June 1, 2013. William timely appealed the trial court order.

{¶ 4} This court reviews spousal support orders under an abuse of discretion standard as a trial court is generally afforded wide latitude in deciding spousal support issues. *Grosz v. Grosz*, 10th Dist. No. 04AP-716, 2005-Ohio-985, ¶ 9, citing *Booth v. Booth*, 44 Ohio St.3d 142, 144 (1989). "The term '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*, 5 Ohio St.3d 217, 219 (1983). The

appellate court must not substitute its judgment for that of the trial court when reviewing under an abuse of discretion standard. *Id.* The decision to impute income for the purpose of spousal support is also within the discretion of the trial court. *Havanec v. Havanec*, 10th Dist. No. 08AP-465, 2008-Ohio-6966, ¶ 23.

{¶ 5} Counsel for William asserts in the brief filed on his behalf that "before imputing income to a retired party, the trial court must make a finding that the retired party's decision to retire was based on an intent to defeat an award of spousal support." (Emphasis sic; Appellant's brief, at 8.) This is simply not in accord with the case law in this district. Instead, trial courts may impute income to a party who has a history of income at a certain level or has the potential for such income, even if the party earned less at the time of the divorce trial. *Havanec* at ¶ 8. "When considering the relative earning abilities of the parties in connection with an award of spousal support, Ohio courts do not restrict their inquiry to the amount of money actually earned, but may also hold a person accountable for the amount of money a 'person could earn if he made the effort.' " *Id.*, citing *Beekman v. Beekman*, 10th Dist. No. 90AP-780 (Aug. 15, 1991). Then the trial court had every right to impute income to a lawyer who, for several years in the past, had income in the seven figures only to claim no income at the time of trial.

{¶ 6} William mistakenly relies on *Friesen v. Friesen*, 10th Dist. No. 07AP-110, 2008-Ohio-952, to support his argument. The appellant in *Friesen* moved for spousal support to be modified and reduced due to his recent retirement, the parties had been divorced for several years at that time. *See Friesen*. We determined that the trial court did not appear to have examined the evidence with an eye to whether the appellant's intent in retiring was to avoid his support obligation. *Id.* at ¶ 46. This determination was

necessary in finding if the appellant had voluntarily reduced his income which created the change in circumstances necessary for a modification. In contrast, the case at bar is not a modification but an initial determination of spousal support, there is no change in circumstance as the trial court is examining the entirety of the circumstance of the parties for the first time. *Friesen* is also distinguishable in that William never was actually retired. The record and the trial court reasoning is clear that, while William did leave Thompson Hine, LLP, he continued to work, purchased a law firm, tried cases, maintained his law license, maintained an office, and therefore could not be considered retired.

{¶ 7} The first issue under the first assignment of error has no merit.

{¶ 8} The second issue questions the amount of income imputed to William. William claimed to have had no law-related income after January 1, 2011, but expressed optimism that he could earn income in his new sole practice which was commensurate with his former income with Thompson Hine, LLP. William "testified confidentially that he will build a successful and fulfilling practice and will ultimately earn more money than he did as a partner at Thompson Hine." Decree of Divorce, at 14. The trial court was willing to give credibility to that optimism and delayed the start of spousal support payments until June 1, 2013 to allow for the solo practice to develop.

{¶ 9} The trial court also stated when imputing William's income that there is substantial testimony that there was limited retirement planning which suggests that William would have to work long after the age of 65 in some capacity in order to continue the parties' lifestyle either together or separate. Further, the trial court noted that testimony from both Thompson Hine, LLP, and William indicated that William expected

to work after his 65th birthday. The trial court is within its discretion concluding that William was not retired, would need to continue to work, and always intended to do so. It is clear that William was not earning as much as he could if he had made an effort. We cannot find the trial court's findings and orders regarding spousal support to be an abuse of discretion. The first assignment of error is overruled.

{¶ 10} The second assignment of error disputes the trial court's including the legal fees of the parties in the assets and liabilities consideration for determining marital assets.

{¶ 11} It is well established that the trial court has broad discretion to determine the division of assets and liabilities and courts have repeatedly stressed the importance of leaving discretion to the trial courts. *Cherry v. Cherry*, 66 Ohio St.2d 348, 353 (1981). Nor is the trial court obligated to allocate the debt on an equal basis merely an equitable one. *Id.*

{¶ 12} The trial court in listing the marital assets and liabilities stated that both the \$114,332.00 owed by Susan and \$30,238.50 owed by William to their respective law firms were marital liabilities. Decree of Divorce, at 7. This is based on the court's finding that the case involved the termination of a long-term marriage with complicated financial tracing and spousal support issues. *Id.* The court also cites the circumstances and issues involved in the case and the amounts already paid by the parties to their attorneys as reasoning for including the attorney fees as liabilities. *Id.* The circumstances that the court explored are: the financial misconduct of William in expending monies on an extramarital relationship, the retention of an expert to track the expenditure of marital funds, Susan's lack of consideration in retaining an expert as to whether the cost would outweigh the benefit, and the length of the marriage and complications of the case. The

trial court also considered the reasonableness of the attorney fees based on its own experience with similar litigation in domestic court. We see no reason to consider this approach as an abuse of the trial court's discretion.

{¶ 13} The second assignment of error is overruled.

{¶ 14} The trial court also was clearly within its discretion to award attorney fees to Susan. "In an action for divorce * * * a 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 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." R.C. 3105.73(A). "An award of attorney fees is generally within the sound discretion of the trial court and not to be overturned absent an abuse of discretion." *Wagenbrenner v. Wagenbrenner*, 10th Dist. No. 10AP-933, 2011-Ohio-2811, ¶ 19, citing *Shirvani v. Momeni*, 10th Dist. No. 09AP-791, 2010-Ohio-2975, ¶ 22.

{¶ 15} The trial court found that William, as an attorney, has a vastly greater earning ability and such is a factor in the award of attorney fees. The court also found that Susan incurred significant bills for attorney fees, part of which the trial court felt was due to William being less than cooperative in discovery issues. "[William] (despite being an officer of the court) has been less than cooperative and evasive in the discovery process and in his testimonial evidence." Decree of Divorce, at 28. The court properly used its own knowledge and experience when evaluating the reasonableness of the fees. *McCord v. McCord*, 10th Dist. No. 06AP-102, 2007-Ohio-164, ¶ 19. We find no abuse of discretion occurred in the award \$10,000 of attorney fees to Susan.

{¶ 16} The third assignment of error is overruled.

{¶ 17} Having overruled all three assignments of error, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.
