[Cite as *Gallo v. Gallo*, 2015-Ohio-982.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Tamara Kay Gallo,	:	
Plaintiff-Appellee,	:	
		No. 14AP-179
v.	:	(C.P.C. No. 12DR-1778)
Samuel Anthony Gallo,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 17, 2015

Grossman Law Offices, *Jeffrey A. Grossman* and *Susan M. Suriano*, for appellee.

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

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

KLATT, J.

{¶ 1} Defendant-appellant, Samuel A. Gallo, appeals a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, that granted him and plaintiff-appellee, Tamara K. Gallo, a divorce, divided the parties' marital property, adopted a shared parenting plan, and ordered Samuel to pay spousal and child support. For the following reasons, we affirm in part and reverse in part that judgment.

{¶ 2} The parties married on May 16, 1998. They have two children—twins—born on September 14, 2001. Tamara filed a complaint for divorce on April 25, 2012. Samuel answered and filed a counterclaim for divorce.

{¶ 3} Samuel is an ocular plastic surgeon. He owns a professional practice known as Gallo Eye and Facial Plastic Surgery ("Gallo Eye"). He also has an ownership interest in two surgical centers—Perimeter Surgical Center ("Perimeter") and Ohio Valley Medical Center ("Ohio Valley").

{¶ 4} The parties entered into stipulations regarding the value and allocation of most of their marital assets and debts. Using an asset-based valuation approach, the parties valued the interest in Gallo Eye at $63,015 and the interest in Perimeter at $49,815. Using the 2013 share price, the parties valued the interest in Ohio Valley at $549,646.

{¶ 5} In addition to their stipulations regarding their assets, the parties stipulated regarding Tamara's earning capacity. Prior to the birth of her children, Tamara worked as an occupational therapist. Tamara did not return to work after having the twins. The parties stipulated that Tamara:

> is capable of being employed full time (80,000 a yr) despite earlier physical issues. [Tamara] asks that she not be required to work more than part time (40,000) a yr or that only part time income is imputed due to her desire to maintain her [role] as a full time parent.

(R. 100.)

{¶ 6} The parties could not agree on the amount of either parties' income or the appropriate amount of spousal and child support. Therefore, a trial commenced at which the parties presented evidence on those issues.

{¶ 7} On February 14, 2014, the trial court issued a judgment that, in relevant part, valued and divided the parties' marital assets and debts, and set spousal and child support. The trial court based its division of the marital property almost entirely on the parties' stipulations. The trial court only deviated from those stipulations to allocate a debt—the parties' 2013 tax liability—which the stipulations did not address.

{¶ 8} For the purposes of determining spousal and child support, the trial court concluded that Samuel's annual income was $700,000, which included distributions that he received from Ohio Valley. The trial court imputed $40,000 in annual income to Tamara to decide the appropriate amount of child support. The trial court ordered

Samuel to pay $12,000 per month in spousal support for 66 months, as well as $2,658.04 per month in child support if he provided the children with health insurance.

{¶ 9} Samuel now appeals the February 14, 2014 judgment, and he assigns the following errors:

> [1.] The Trial Court Erred In Its Calculation Of Appellant's Income By Utilizing Future Profits From Appellant's Closely Held Corporation (Ohio Valley Medical) To Determine Its Value And Then Assigning Those Same Profits As Appellant's Income To Fashion Spousal And Child Support In Violation Of This Court's Holding In *Heller v. Heller*, 10[t]h Dist. No. 07AP-871, 2008-Ohio-3296.
>
> [2.] Even If The Prohibition Against Double Dipping As Set Forth In Heller Is Not Applicable[,] The Trial Court Nevertheless Erred As It Utilized $170,000 In Income Which The Appellant Does Not Receive[.]
>
> [3.] The Trial Court Erred When It Assigned A Large Marital Tax Liability In The Amount Of $170,000 Solely As Appellant's Responsibility Resulting In A Large Disparity In Debt Responsibility Between Appellant and Appellee And An Unequal and Inequitable Property Distribution In Violation Of Ohio Revised Code §3105.171.
>
> [4.] The Trial Court Erred By Not Imputing Income To Appellee In The Amount Of $80,000 For The Purposes Of Calculating Appellee's Income When Fashioning its Spousal And Child Support Award Constituting An Abuse Of Discretion.
>
> [5.] The Trial Court Erred As A Matter Of Law In Fashioning A Spousal Support Award That Allows The Appellee To Cohabitate With An Unrelated Adult Male For Eighteen Months While Receiving Spousal Support[.]

{¶ 10} By his first assignment of error, Samuel argues that the trial court erred in valuing the marital interest in Ohio Valley using its future earnings and then also including the distributions from Ohio Valley's earnings as part of his income for purposes of determining spousal and child support. Samuel contends that the court could only rely on the earnings to determine the value of the marital assets *or* to determine his income. Because the court used the earnings to do both, Samuel maintains the trial court impermissibly "double dipped."

{¶ 11} Samuel cites *Heller v. Heller*, 10th Dist. No. 07AP-871, 2008-Ohio-3296, to support his argument. In *Heller*, one of the marital assets was the husband's 39.5 percent interest in a Subchapter S corporation known as H & S Forest Products, Inc. ("H & S"). The husband worked at H & S and drew a salary. The husband also received yearly distributions from H & S's earnings.

{¶ 12} The husband's expert witness valued the interest in H & S using an income-based approach; namely, the discounted cash flow method.[1] First, the expert projected H & S's future earnings stream by analyzing its past earnings. The expert "normalized" the earnings by excluding from them the salaries paid to the husband and other shareholders as compensation for their day-to-day labor, but including all "excess earnings," i.e., the distributions to the husband and other shareholders that exceeded their normal salaries. By normalizing the earnings, the expert captured the total return on investment that a prospective buyer could expect to realize from the business. Next, the expert multiplied the projected earnings by a risk-adjusted discount rate to arrive at H & S's present value. From that value, the expert determined the value of the husband's 39.5 percent interest in H & S. The expert then discounted the value of the husband's shares to account for lack of control and marketability. *Id.* at ¶ 18.

{¶ 13} The trial court adopted the valuation offered by the husband's expert, and it awarded all of the shares in H & S to the husband. *Id.* at ¶ 10. The trial court then considered whether the wife should receive spousal support. Following R.C. 3105.18(C)(1)(a), the trial court included the husband's income in its deliberation. One component of that income was the distributions, or excess earnings, that the husband received from H & S. At the conclusion of its analysis, the trial court awarded the wife $8,000 of monthly spousal support, plus 20 percent of the distributions the husband received from H & S. *Id.* at ¶ 11.

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[1] The expert in *Heller* actually identified the valuation method he used as the capitalization of earnings method. However, the expert's explanation of his method fits the discounted cash flow method, not the capitalization of earnings method. The expert began by projecting a future benefit stream—a step only present in the discounted cash flow method. Haas, *Valuation Strategies in Divorce*, Section 4.22 (5th Ed.2014) ("If a discounted future earnings approach is used, the logic is similar to [the capitalization of earnings method], but the number crunching is not exactly the same. Earnings projections for each year into the future (10 to 15 years) must be made."). We discuss both the discounted cash flow method and capitalization of earnings method below.

{¶ 14} On appeal, the husband argued that the trial court abused its discretion in basing spousal support on his income, inclusive of his share of H & S's future earnings, when the court had already used those earnings to value a marital asset (the husband's interest in H & S) and divide that asset between the parties. The husband asserted that it was unfair to count his interest in H & S's future earnings twice—once when valuing and distributing a marital asset and again in awarding the wife spousal support. *Id.* at ¶ 12. Essentially, the husband's argument echoed the argument, heard previously in Ohio and other state courts, against double dipping.

{¶ 15} Our analysis in *Heller* began with defining the "double dip" both generally and specifically. We stated:

> The "double-dip" refers to the double counting of a marital asset, once in the property division and again in the [spousal support] award. More specifically, where a court uses a business owner's "excess earnings" to value the interest in the business and also fixes support on that spouse's total income (inclusive of the "excess earnings" used to value the business), a "double-dip" occurs.

(Citation omitted.) *Id.* at ¶ 20. We then considered whether to allow double dipping or, as the husband urged, to prohibit it. Based on R.C. 3105.171(C)(3) and 3105.18(A), we:

> discern[ed] a statutory mandate * * * to consider the potential "double dip" when ruling upon [property division and spousal support] issues in cases where one spouse's ownership interest in a going concern is discounted to present value and divided, and where excess earnings arising from that ownership interest will constitute part of that spouse's stream of income into the future.

Heller at ¶ 21. We then went one step further, concluding that "[t]rial courts may treat a spouse's future business profits either as a marital asset subject to division, or as a stream of income for spousal support purposes, but not both." *Id.* at ¶ 23. Applying that rule to the case at bar, we held that the trial court abused its discretion in treating Samuel's share of H & S's expected future earnings both as an asset and as income. *Id.*

{¶ 16} In order to determine whether *Heller* applies to the case at bar, we must first determine whether the trial court engaged in double dipping here. As we stated above, *Heller* defined the "double dip" both generally and specifically. Unfortunately, *Heller*'s general definition is misleading, and its specific definition too constrained.

{¶ 17} To understand why *Heller*'s general definition is misleading, we must examine the origins of the concept of double dipping. Complaints about double dipping arose in cases in which the divorcing spouses' marital property included an income-producing asset that was valued based on its future income stream. 2 Blumberg, *Valuation and Distribution of Marital Property*, Section 41.07[3] (2014). Trial courts would award that asset in either whole or major part to the economically superior spouse as part of the property distribution, and then consider the income from that asset when determining that spouse's capacity to pay spousal support. *Id.*; Turner & Bogniard, *Double Dipping is Not Necessarily Alive and Well*, 20 Ohio Dom.Rel.J. 89 (2008). Thus, the trial courts "dipped" twice into the same future income stream—once when valuing the asset and then again when calculating the economically superior spouse's income. According to the economically superior spouses, double dipping was unfair because it placed too great a demand on a single income stream. Degrazia & Collins, *The Double Dipping Arguments*, 31-SPG Fam.Advoc. 16, 20 (2009).

{¶ 18} As we stated above, *Heller* generally defined a "double dip" as "the double counting of a marital asset, once in the property division and again in the [spousal support] award." *Id.* at ¶ 20. Double dipping, however, does not entail the double counting of a *marital asset*. Rather, a double dip occurs when a court twice counts a *future income stream*—once in valuing the marital asset and once in deciding the economically superior spouse's ability to pay spousal support. It is the future income stream, not the marital asset, that is the subject of the doubling in the double dip. Thus, if the marital asset is valued without specific reliance on a future income stream—say, through a market-based or asset-based approach—then no double dipping occurs.[2] *Haynes v. Haynes*, 8th Dist. No. 92224, 2009-Ohio-5360, ¶ 48 (no double dipping occurred because the business valuation adopted by the trial court was an asset-based valuation method).

{¶ 19} Defining "double dipping" as *Heller* does equates the marital asset (the interest in the business) and income the asset produces (the business's earnings). However, a business and its income are separate entities, with the income merely serving

[2] Samuel's ownership interests in Gallo Eye and Perimeter are not at issue in this assignment of error because both were valued using an asset-based approach.

as a tool for valuing the business. Morgan, *"Double Dipping": A Good Theory Gone Bad*, 25 J.Am.Acad.Matrim.Law. 133, 145 (2012). As the Supreme Court of Wisconsin stated:

> [W]hen an income earning asset is assigned to one spouse, * * * that spouse, generally, receives the full fair market value of that asset at the time of the property division. * * * [I]f the spouse was awarded income property, that spouse could turn around and sell the income property the next day and, thereby, attain the value of the property. The spouse could also elect to keep the property and earn income from it. As the spouse earns income, he or she does not lose the value of the property because he or she always has the option to sell the property for fair market value. Therefore, * * * the value of investment property is separate from the income it generates.

McReath v. McReath, 335 Wis.2d 643, 2011 WI 66, ¶ 53.

{¶ 20} The second part of *Heller*'s definition of a "double dip" is too constrained because it only encompasses businesses valued based on excess earnings. Numerous types of assets may be valued based on future income streams, including pensions, business and professional goodwill, and dividend-yielding stock. Blumberg, Section 41.07[3]. Moreover, business valuations may be premised on future income streams, even if a calculation of excess earnings is not a step in the valuation method. Occurrences of double dipping, therefore, are not limited to situations where excess earnings factor into the valuation of a business.

{¶ 21} Because valuation of an asset based on its future income stream is a necessary component of a double dip, we must determine whether Samuel's interest in Ohio Valley was valued that way. Although the parties stipulated to the value of Samuel's interest, their stipulation is largely silent regarding how they arrived at that agreed-upon value. The stipulation indicates only that the value was calculated "PER 2013 share price." (R. 91, 92.)

{¶ 22} Samuel contends that the value resulted from a methodology for valuing the company that was set out in Ohio Valley's operating agreement. Samuel introduced the operating agreement at trial, but he failed to ensure that the record contained a complete version of that agreement. The truncated version that appears in the record does not contain the relevant provision.

{¶ 23} Thus, the only evidence in the record regarding the valuation methodology is the testimony of Samuel's expert witness, Brian Russell, who testified that:

> [t]he valuation [of Ohio Valley] was done on a three times EBITDA multiple[,] which is * * * a specific description of an earning[s] stream which is earnings before interest, taxes, depreciation and amortization * * *[.]
>
> And that earning[s] stream is then capitalized or assumed that it will continue into the future. And in order to come up with a value, you can use a capitalization of earnings method, which is essentially what they did, which is taking that income stream and dividing it by a 33 percent rate of return which is equivalent to a three times multiple of that earning[s] stream. That is the valuation, I believe, of the calculated share price.

(Tr. 89-90.) Russell later clarified that the earnings at issue were actually an average of the two most recent years of Ohio Valley's EBITDA figures. Russell explained that such an average was indicative of future performance because "a reasonable person anticipates that [the average of the most recent years' earnings is] going to represent what you would expect in the future years from that entity." (Tr. 108.)

{¶ 24} From this testimony, we deduce that the value of Ohio Valley was computed using the capitalization of earnings method, which entailed dividing Ohio Valley's prior annual earnings by a 33 percent rate of return, or capitalization rate. The value was then multiplied by Samuel's percentage of ownership, 2.5 percent, to arrive at the "2013 share price" for Samuel's shares.

{¶ 25} The valuation method used in this case is similar, but not identical, to the method used in *Heller*. H & S, the business at issue in *Heller*, was valued pursuant to the discounted cash flow method, while Ohio Valley was valued pursuant to the capitalization of earnings method. Both of these valuation methods are income-based approaches to valuing a business. *Adams v. Adams*, 459 Mass. 361, 381 (2010). " '[T]he basic concept of the income approach is to project the future economic income associated with the investment and to discount this projected income stream to a present value at a discount rate appropriate for the expected risk of the prospective income stream.' " *Id.*, quoting Pratt & Niculita, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies*, 175 (5th Ed.2008). Although both methods depend on a future income stream to determine value, they differ in how they arrive at that future income stream.

The capitalization of earnings method merely uses a business's historical earnings as an augur of future earnings. Hood, Mylan, & O'Sullivan, *Valuation of Closely Held Business Interests*, 65 UMKC L.Rev. 399, 412 (1997). The discounted cash flow method, on the other hand, uses an equation to project future annual earnings over a chosen forecast period. *Id.* at 418; *accord Adams* at 382 ("Unlike the direct capitalization of income approach, which assumes a perpetual stream of income, the discounted cash flow method uses a more complex equation to reduce a finite period of future income * * * to present valuation."). *See also* Haas, *Valuation Strategies in Divorce*, Section 4.22 (5th Ed.2014) (comparing the discounted cash flow and capitalization of earnings methods).

{¶ 26} For our purposes, the similarities between the two methods overshadow their differences. Both methods derive a business's value from its future income stream. That feature constitutes the hallmark necessary for the danger of double dipping to arise. Thus, the valuation method used in this case, like the valuation method in *Heller*, opens the door to possible double dipping.

{¶ 27} Here, the parties do not dispute that the trial court took the next steps necessary for double dipping; namely, it awarded Samuel his share of Ohio Valley in the property division and then considered Samuel's income from that asset, which derived from the business's income stream, in setting spousal support. Double dipping, therefore, occurred in this case.

{¶ 28} Nonetheless, our inquiry is not over. We must address whether the double dipping warrants reversal, which, in turn, requires us to evaluate our holding in *Heller*. That holding is problematic for two reasons. First, almost immediately after we decided *Heller*, we began to soften its holding. As we stated above, *Heller* held that "[t]rial courts may treat a spouse's future business profits either as a marital asset subject to division, or as a stream of income for spousal support purposes, but not both." *Id.* at ¶ 23. This statement appears to outright prohibit double dipping, but, on subsequent appeal, this court stated that *Heller* did not contain any "language * * * to suggest * * * a flat prohibition against double dipping applicable to every income-producing asset." *Heller v. Heller*, 10th Dist. No. 10AP-312, 2010-Ohio-6124, ¶ 8.

{¶ 29} Second, *Heller* failed to address precedent from multiple appellate districts wherein the courts allowed the consideration of pension income to determine spousal

support when the trial court had already valued and divided the pension as a marital asset. *Kelhoffer v. Kelhoffer*, 12th Dist. No. CA2001-02-031 (Nov. 26, 2001); *Lawrence v. Lawrence*, 144 Ohio App.3d 454, 459-60 (2d Dist.2001); *Frederick v. Frederick*, 11th Dist. No. 98-P-0071 (Mar. 31, 2000); *Guidubaldi v. Guidubaldi*, 11th Dist. No. 96-P-0022 (Sept. 12, 1997); *Lindsay v. Curtis*, 115 Ohio App.3d 742, 745-46 (12th Dist.1996); *Enix v. Enix*, 2d Dist. No. 13535 (Feb. 4, 1993). Like businesses valued under an income-based approach, pensions are valued based on their expected future income streams. Consequently, the arguments against double dipping appear in divorce cases involving the division of a pension and the award of spousal support.

{¶ 30} Representative of these pension cases is *Enix*, where the Second District Court of Appeals stated:

> It is clear that under R.C. 3105.18 the trial court was required to consider James Enix's income from his pension and from [the Public Employees Retirement System, otherwise known as] PERS. James Enix argues, *inter alia*, that the trial court abused its discretion by including the pension and PERS income in the pool of income from which spousal support could be drawn because that inclusion amounted to "double dipping" in that James Enix's pension benefits had previously been divided as part of the property settlement. We see no abuse of discretion. In calculating the spousal support, the trial court, as required by R.C. 3105.18([C])(1)(a), considered the income of both parties. * * * It is clear that a trial court may order the payment of spousal support from income which is all or in part derived from retirement benefits.

{¶ 31} Like *Enix*, the other pension cases premised their holdings on R.C. 3105.18(C)(1)(a), which provides that "[i]n determining whether spousal support is appropriate and reasonable * * *, the court shall consider * * * [t]he 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.*" (Emphasis added.) Interpreting R.C. 3105.18(C)(1)(a) in a pension double-dipping case, the Eleventh District Court of Appeals held that " '[t]he income to be considered can come from *any* source, regardless of whether that source was already distributed as part of the property division.' " (Emphasis sic.) *Guidubaldi*, quoting *Clontz v. Clontz*, 11th Dist. No. 96-T-5531 (May 16, 1997).

{¶ 32} In light of all the foregoing, we find it appropriate to revisit the double-dipping issue. Our review of that issue must start with R.C. 3105.18(C)(1)(a), a provision that *Heller* failed to consider. R.C. 3105.18(C)(1)(a) requires a court to consider all sources of income, including income derived from a marital asset divided in the property distribution, in determining spousal support. A flat prohibition of double dipping would require a trial court to exclude from its consideration income derived from any marital asset valued based on its future income stream and divided in the property division. Consequently, R.C. 3105.18(C)(1)(a) precludes us from adopting an outright prohibition of double dipping. To the extent that *Heller* did that, we must overrule *Heller*.

{¶ 33} Nevertheless, we find merit in the portion of *Heller* that "discern[ed] a statutory mandate * * * to consider the potential 'double dip' when ruling upon" property distribution and spousal support. *Id.* at ¶ 21. In dividing the parties' property and determining spousal support, courts must craft equitable resolutions. *Kehoe v. Kehoe*, 8th Dist. No. 99404, 2013-Ohio-4907, ¶ 13 ("The goal of spousal support is to reach an equitable result."); *Hardy v. Hardy*, 2d Dist. No. 22964, 2010-Ohio-561, ¶ 14 ("The goal of any property division the court orders is equity."). Thus, in the interest of equity, trial courts should factor the impact of double dipping into their property division and spousal support decisions. With an eye to avoiding unfairness, trial courts should carefully consider the division of income-producing and non-income-producing assets and the probable effects of that division on the availability of income and need for support. *McReath*, 335 Wis.2d 643, 2011 WI 66, at ¶ 54; *Steneken v. Steneken*, 183 N.J. 290, 303 (2005); *see also Loutts v. Loutts*, 298 Mich.App. 21, 30 (2012) (adopting a case-by-case approach); *Croak v. Bergeron*, 67 Mass.App.Ct. 750, 759 (2006) (a trial court "must look to the equities of the situation to make [its] decision").

{¶ 34} A trial court may ameliorate the inequity inherent in double dipping by splitting the income-producing asset at issue between the parties, thus ensuring that each spouse will share in advantages and disadvantages associated with that asset. Alternatively, a trial court may determine that some circumstances, such as the disparity in income between the parties, override the unfairness in double dipping. Ultimately, the trial court has discretion regarding if and how to remedy the double dip, and such decisions will turn upon the facts and circumstances of each particular case.

{¶ 35} Here, the trial court did not consider the double dip, so we must remand for that consideration to occur. Accordingly, we sustain Samuel's first assignment of error, but only to the extent that the trial court erred in not factoring the double dip into its analysis of this case. By sustaining the assignment of error, we do not suggest that the trial court must necessarily alter the current division of property or award of spousal support. We, instead, merely direct the trial court to expand its consideration of those issues to include the effect of the double dip.

{¶ 36} As a final matter, we must address the application of Samuel's double dipping argument to the calculation of his child support obligation. As we explained above, double dipping occurs when a trial court "dips" into a future income stream to value a marital asset and then again to determine the capacity to pay spousal support. Unlike a spouse, a child receives nothing in the property division. Thus, with regard to children, the trial court only "dips" once: when it calculates the parent's income for child support purposes. The double-dipping argument, therefore, does not apply to the calculation of child support. *Rossi v. Rossi*, 8th Dist. No. 100133, 2014-Ohio-1832, ¶ 88; *Corwin v. Corwin*, 12th Dist. No. CA2013-01-005, 2013-Ohio-3996, ¶ 55, fn. 5. Accordingly, we conclude that the trial court did not err in refusing to consider the double dip when calculating Samuel's income for child support purposes. We overrule Samuel's first assignment of error to the extent that Samuel so argues. Additionally, to the extent not sustained above, we overrule the remainder of Samuel's first assignment of error.

{¶ 37} By his second assignment of error, Samuel argues that the trial court erred in including the distributions from Ohio Valley in his income for a second reason: he does not actually receive those distributions. We reject this argument because the evidence does not support it.

{¶ 38} Apparently, Ohio Valley's earnings are not taxed at the corporate level, but instead flow through to Ohio Valley's shareholders, who must claim the earnings on their tax returns. From 2010 to 2012, Samuel reported on his tax returns the annual income attributable to his interest in Ohio Valley. The trial court included those amounts in its calculation of Samuel's total income.

{¶ 39} At trial, Samuel expressed concern that Ohio Valley could decide to retain the majority of its earnings and only distribute sufficient funds so that the shareholders could satisfy their tax liability. Samuel testified that:

> [i]n the operating agreement, the board has discretion as to what they're going to do with earnings. It's only -- The one requirement is that enough earnings are distributed to pay for the -- for the tax liability.
>
> So, in effect, I could get triple dipped. I could have a scenario where we made $150,000 a year. I am giving -- given no money except $60,000 to cover that liability -- tax liability from that portion. And then I would still have that income imputed to me to be used for spousal support calculations.

(Tr. 201-02.)

{¶ 40} In this testimony, Samuel spoke of what "could" happen, not what has happened. Although Samuel fears the possibility that Ohio Valley may decide to retain its earnings, Samuel presented no evidence that Ohio Valley had, at the time of trial, ever done that. On appeal, however, Samuel claims that he "does not actually receive" full distributions from Ohio Valley's earnings. (Appellant's Brief, at 25.) The record does not support that claim. Accordingly, we conclude that the trial court did not err as alleged in the second assignment of error, and we overrule that assignment of error.

{¶ 41} By his third assignment of error, Samuel argues that the trial court erred in allocating the 2013 tax liability to him. We disagree.

{¶ 42} In divorce proceedings, a trial court must divide marital property equally or, if an equal division is inequitable, equitably. R.C. 3105.171(C)(1); *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶ 5. A trial court has broad discretion in the allocation of marital assets, and an appellate court will not disturb a trial court's judgment absent an abuse of discretion. *Id.*

{¶ 43} Here, the parties' pre-trial stipulations valued and divided most of the parties' marital assets and debts. The parties, however, failed to address in their stipulations the amount or division of their 2013 tax liability. At trial, Samuel explained that although the 2013 tax bill remained unpaid, he had estimated the amount of tax owed at $170,000. Samuel's attorney then asked, "[T]his is an obligation you're assuming out

of this * * * marriage, correct?" Samuel answered, "Correct." (Tr. 194.) Based on Samuel's answer, the trial court assigned the tax debt to Samuel in its judgment.

{¶ 44} On appeal, Samuel initially disavows his assumption of the 2013 tax liability. Samuel asserts that, by his testimony, he only meant that he would necessarily have to pay the tax debt as Tamara was not working. We do not accept this strained interpretation of Samuel's testimony.

{¶ 45} Next, Samuel asserts that he testified that he would only assume the tax debt if the trial court gave him some sort of consideration for doing so. According to Samuel, his request for consideration should have galvanized the trial court to rearrange the stipulated property division to make it more equitable after allocating the tax debt to him. Samuel's recounting of his testimony is wrong: he did not make his assumption of the 2013 tax liability conditional on receipt of consideration from the court in the property division. Rather, Samuel merely asked the trial court "to take into consideration one way or the other" his assumption of the tax debt when the trial court "calculate[d] [his] spousal and child support obligations." (Tr. 195.) This request did not suggest that allocation of the 2013 tax liability to Samuel would or should require the trial court to rework the otherwise stipulated property division.

{¶ 46} Samuel also argues that the allocation of the 2013 tax debt renders the property division inequitable, contrary to the trial court's finding otherwise. We, however, find error in the figures and calculations Samuel relies upon to assert this argument. Pursuant to the balance sheet attached to the parties' stipulations, the parties' net worth equaled approximately $1.4 million. The agreed-upon distribution allotted approximately $740,000 of the parties' net worth to Tamara and $660,000 to Samuel. Samuel argues that assignment of the 2013 tax liability to him decreased his portion of the parties' net worth to approximately $320,000. This calculation, however, erroneously double counts the other debt Samuel assumed. In actuality, Samuel's portion of the parties' net worth fell to approximately $490,000. Thus, the disparity in the property division amounted to $250,000, not $420,000, as Samuel claims.

{¶ 47} While even the corrected disparity is large, the size of the disparity is mostly due to Samuel's voluntary assumption of the 2013 tax liability. We conclude that the trial court did not abuse its discretion in relying on that assumption and, concomitantly,

finding that the property distribution was equitable given that assumption. Accordingly, we overrule Samuel's third assignment of error.

{¶ 48} By Samuel's fourth assignment of error, he argues that the trial court erred in not imputing $80,000 in income to Tamara when determining spousal and child support. We disagree.

{¶ 49} We will first address Samuel's argument that the trial court should have imputed more income to Tamara in determining spousal support. A trial court may determine spousal support is appropriate and reasonable, and set the nature, amount, and terms of payment, as well as the duration of the support, only after considering:

> (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 a 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.

R.C. 3105.18(C)(1)(a) through (n). The trial court must consider all of these factors; it may not base its decision regarding spousal support on any one factor in isolation. *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 96 (1988). An appellate court will not reverse a trial court's determination as to spousal support absent an abuse of discretion. *Havanec v. Havanec*, 10th Dist. No. 08AP-465, 2008-Ohio-6966, ¶ 23.

{¶ 50} None of the factors set forth in R.C. 3105.18(C)(1) require a trial court to impute income to an unemployed or underemployed spouse. *Walpole v. Walpole*, 8th Dist. No. 99231, 2013-Ohio-3529, ¶ 60; *Valentine v. Valentine*, 9th Dist. No. 11CA0088-M, 2012-Ohio-4202, ¶ 4; *Petrusch v. Petrusch*, 2d Dist. No. 15960 (Mar. 7, 1997). However, a trial court may, in its discretion, impute income when considering the R.C. 3105.18(C)(1)(a) and (b) factors, which require a court to examine the parties' incomes and relative earning abilities. *Havanec* at ¶ 9, 23; *Weller v. Weller*, 11th Dist. No. 2001-G-2370, 2002-Ohio-7125, ¶ 47. Of course, a court may compare the parties' earning abilities without imputing a specific sum of income. *Collins v. Collins*, 9th Dist. No. 10CA0004, 2011-Ohio-2087, ¶ 16, 18-19. "Clearly, if one spouse has substantial earning ability and the other does not, then this disparity will be a factor to be considered along with the other statutory factors when arriving at reasonable spousal support." *Id.* at ¶ 19.

{¶ 51} Here, in considering whether to award Tamara spousal support, the trial court did not actually impute any income to her. After finding that Tamara "has not worked outside the home for many years, and presently has no earned income," the trial court observed that the parties had stipulated that Tamara is capable of full-time

employment at an approximate salary of $80,000. (R. 115, at 9, 16.) The trial court also noted Tamara's request that the trial court impute to her only part-time income of $40,000. Finally, the trial court concluded that "[t]here is a very large disparity of income between the parties, even if the court imputes full-time income to" Tamara. (R. 115, at 22.)

{¶ 52} Thus, the trial court did not actually impute any income to Tamara, but it conducted its spousal support analysis as if it had imputed $80,000 to her. Samuel, consequently, has no basis for complaint with regard to the trial court's spousal support determination.

{¶ 53} Although the trial court did not impute income when considering spousal support, it did impute income to Tamara when considering the appropriate amount of child support. For child support purposes, a trial court must determine the amount of each parent's income. That income must include, "[f]or a parent who is unemployed or underemployed, the * * * potential income of the parent." R.C. 3119.01(C)(5)(b). "Potential income" is imputed income that the court determines the parent would have earned if fully employed based on the following factors:

> (i) The parent's prior employment experience;
>
> (ii) The parent's education;
>
> (iii) The parent's physical and mental disabilities, if any;
>
> (iv) The availability of employment in the geographic area in which the parent resides;
>
> (v) The prevailing wage and salary levels in the geographic area in which the parent resides;
>
> (vi) The parent's special skills and training;
>
> (vii) Whether there is evidence that the parent has the ability to earn the imputed income;
>
> (viii) The age and special needs of the child for whom child support is being calculated under this section;
>
> (ix) The parent's increased earning capacity because of experience;

> (x) The parent's decreased earning capacity because of a felony conviction;
>
> (xi) Any other relevant factor.

R.C. 3119.01(C)(11)(a)(i) through (xi). The amount of potential income to be imputed to a parent is a determination within the trial court's discretion that will not be reversed on appeal absent an abuse of that discretion. *Rock v. Cabral*, 67 Ohio St.3d 108, 112 (1993).

{¶ 54} In the case at bar, the parties stipulated to Tamara's earning ability. That stipulation states:

> [The] parties agree that [Tamara] is capable of being employed full time (80,000 a yr) despite earlier physical issues. [Tamara] asks that she not be required to work more than part time (40,000) a yr or that only part time income is imputed due to her desire to maintain her [role] as a full time parent.

(R. 100.) Based on this stipulation, the trial court concluded that the parties had agreed that Tamara would earn a salary of $80,000 per year working full time and $40,000 per year working part time.

{¶ 55} Samuel argues that the trial court erred in interpreting this stipulation. According to Samuel, he did not agree in this stipulation that Tamara would earn $40,000 from part-time employment. We agree with Samuel that the wording of the stipulation is ambiguous on this point. However, we cannot say that the trial court abused its discretion in interpreting the stipulation as it did.

{¶ 56} Moreover, we cannot find an abuse of discretion in the conclusion that Tamara would earn $40,000 a year for part-time work. Tamara testified that she had searched online for available occupational therapy positions and part-time positions offered an annual salary of $35,000 to $40,000. On appeal, Samuel argues that Tamara could work up to 35.5 hours a week and, based on this total, calculates that she could earn $71,000 a year. Samuel did not set forth this calculation, nor did he disagree with the $40,000 figure, during the trial. Therefore, it was not an abuse of discretion for the trial court to impute a $40,000 salary to Tamara.

{¶ 57} As a final matter, we note that Samuel's fourth assignment of error states that the trial court erred in not imputing $80,000—a full-time salary—to Tamara. Yet,

Samuel does not contest the trial court's decision that Tamara is working at full capacity with just part-time work. Samuel only argues that Tamara could earn more than $40,000 per year when working less than 40 hours a week. Consequently, we will not review the trial court's decision to permit Tamara to work part time due to the demands of her childcare responsibilities. App.R. 12(A)(2); *accord Bond v. Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶ 16 ("It is the duty of the appellant, not the appellate court, to construct the legal arguments necessary to support the appellant's assignments of error.").

{¶ 58} In sum, we conclude that the trial court appropriately dealt with the question of imputed income when awarding Tamara spousal support and setting the amount of spousal and child support that Samuel must pay. Accordingly, we overrule Samuel's fourth assignment of error.

{¶ 59} By Samuel's fifth assignment of error, he argues that the trial court erred in conditioning the termination of spousal support on cohabitation with another person for more than 18 months. Samuel contends that the 18-month period is too lengthy.

{¶ 60} R.C. 3105.18 requires the termination of spousal support upon the death of either party, unless the trial court orders otherwise in the divorce decree. R.C. 3105.18 does not address any other circumstances that will or might terminate spousal support. In the absence of any statutory mandate or restriction, the appellate courts have concluded that a trial court may, within its discretion, make spousal support terminable upon the happening of certain events, such as remarriage or cohabitation. *Brown v. Brown*, 8th Dist. No. 100499, 2014-Ohio-2402, ¶ 41; *Furman v. Furman*, 10th Dist. No. 10AP-407, 2011-Ohio-6558, ¶ 17; *Eley v. Eley*, 3d Dist. No. 8-83-18 (Mar. 11, 1994).

{¶ 61} Here, the trial court exercised its discretion in Samuel's favor by including a termination provision based on cohabitation. Generally, cohabitation requires persons to live together and share expenses for "a sustained duration." *Cleland v. Cleland*, 7th Dist. No. 03 MA 8, 2004-Ohio-561, ¶ 13. We find no abuse of discretion in the trial court setting the length of that "sustained duration" at 18 months. Accordingly, we overrule Samuel's fifth assignment of error.

{¶ 62} As a final matter, we must address Tamara's motion to strike an exhibit attached to Samuel's appellate brief. Tamara urges us to strike the exhibit because it

constitutes evidence that Samuel failed to introduce at trial. Samuel responds that exhibit is not evidence but authority. We will not decide this argument because we did not rely on Samuel's exhibit in deciding this case. However, in order to maintain a pristine record, we grant Tamara's motion to strike.

{¶ 63} For the foregoing reasons, we sustain in part and overrule in part Samuel's first assignment of error, and we overrule Samuel's second, third, fourth, and fifth 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 we remand this case to that court for further proceedings consistent with law and this decision.

Motion to strike granted;
judgment affirmed in part, reversed in part;
cause remanded.

DORRIAN, J., concurs.
SADLER, J., concurs in judgment only.