[Cite as *Gore v. Gore*, 2010-Ohio-3906.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

PEGGY GORE	:	
	:	Appellate Case No. 09-CA-64
Plaintiff-Appellee	:	
	:	Trial Court Case No. 07-DR-379
v.	:	
	:	(Civil Appeal from Domestic Relations,
JOHN WALTER GORE, III.	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 20th day of August, 2010.

. . . . . .

JAMES R. KIRKLAND, Atty. Reg. #0009731, Kirkland & Sommers, 130 West Second Street, Suite 840, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

PAUL J. WINTERHALTER, Atty. Reg. #0018799, Pickrel, Schaeffer & Ebeling, 2700 Kettering Tower, Dayton, Ohio 45423
Attorney for Defendant-Appellant

. . . . . .

BROGAN, J.

I

{¶ 1} John Gore has appealed the domestic relations court's order that he pay spousal support of $1,800 per month for ten years. A reviewing court will disturb such an order only if the lower court abused its discretion. *Long v. Long*, 176 Ohio App.3d 621, 2008-Ohio-3006, at ¶11 (Citation omitted). A lower court abuses

its discretion not simply with an error of law or judgment but with an attitude that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

Amount of the award

First Assignment of Error

{¶ 2} "THE TRIAL COURT'S AWARD OF SPOUSAL SUPPORT WAS AN ABUSE OF DISCRETION BECAUSE THE COURT BASED THE AWARD ON AN INACCURATE CALCULATION OF APPELLANT'S YEARLY INCOME."

{¶ 3} Under R.C. 3105.18, "the court of common pleas may award reasonable spousal support to either party." R.C. 3105.18(B). After the court determines that spousal support is "appropriate and reasonable," it must decide, among other details, the amount and duration of the award. In making its decision the court must consider thirteen specific statutory factors plus any other factor that the court thinks relevant and equitable:

{¶ 4} "(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;

{¶ 5} "(b) The relative earning abilities of the parties;

{¶ 6} "(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶ 7} "(d) The retirement benefits of the parties;

{¶ 8} "(e) The duration of the marriage;

{¶ 9} "(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;

{¶ 10} "(g) The standard of living of the parties established during the marriage;

{¶ 11} "(h) The relative extent of education of the parties;

{¶ 12} "(i) The relative assets and liabilities of the parties * * *;

{¶ 13} "(j) The contribution of each party to the education, training, or earning ability of the other party * * *;

{¶ 14} "(k) The time and experience 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;

{¶ 15} "(l) The tax consequences, for each party, of an award of spousal support;

{¶ 16} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶ 17} "(n) Any other factor that the court expressly finds to be relevant and equitable." R.C. 3105.18(C)(1).

{¶ 18} " '[E]ach of the factors * * * relates, either directly or indirectly, to the obligee spouse's need or the obligor spouse's ability to pay' support." *Norbut v. Norbut*, Greene App. No. 06-CA-112, 2007-Ohio-2966, at ¶ 21, quoting *Billingham v. Billingham* (Feb. 16, 2001), Montgomery App. No. 18403. Here, John acknowledges that some award of spousal support is appropriate and reasonable. But he argues that the amount and duration of the award ordered by the trial court are unreasonable.

{¶ 19} John first argues that the amount awarded is too high. He contends that the trial court calculated his income to be higher than it actually is, that the court failed to consider Peggy's interest income, that the court should have imputed income to Peggy, and that the court failed to consider his ability to pay such an amount each month.

{¶ 20} The issue of John's income presents a question of fact. Reviewing courts defer to the factual findings of a trial court provided competent, credible evidence exists to support the finding. See *Gevedon v. Ivey*, 172 Ohio App.3d 567, 2007-Ohio-2970, at ¶60. The trial court here found that John earns an annual salary of $78,400 plus he receives $3,600 as a car allowance. The court found also that John receives $14,000 each year in disability benefits from the Veteran's Administration. John contends that his annual salary is actually only $46,800. We agree, seeing in the record no evidence to support the trial court's finding.

{¶ 21} The trial court does not explain how it calculated John's salary, nor, after carefully reviewing the record, can we infer a satisfactory explanation. There is no dispute that in May 2008 John's salary was cut. Before then his salary was around $97,000. His employer began feeling the economic slowdown and cut his salary beginning on July 1, 2008, to $46,800. John had a greater opportunity for bonuses on the work he brought in, but he did not receive any in 2008. While John does not raise the issue, we do not understand why the trial court fixed John's car allowance at $3,600 per year. The evidence shows that John receives $600 per month–even after his salary was cut–which means that he receives $7,200 per year ($600 per month multiplied by 12 months) as a car allowance.

{¶ 22} With respect to John's salary, the court could be understood as imputing income to John under factor (b) based on his ability to earn commissions. A vice-president of his employer attributes the company's slow down solely to the general economic slowdown. So when the economy recovers (assuming it does) John will begin earning regular commissions. The vice-president testified that under his new compensation scheme John could make as much as he did under the old scheme.

{¶ 23} John is correct that the court did not consider Peggy's interest income. But John points to no evidence that she could have or did earn income from her property.

{¶ 24} Regarding Peggy's income, the trial court found that, being unemployed, she does not earn a regular income, and it did not impute any income to her. The court found that Peggy is 56 years old. She has a high school diploma and trained as a cosmetologist before she married John. Peggy worked for one year as a cosmetologist, but she has not worked as one or worked outside the home at all since 1984. The court also found that Peggy worked in retail and as a receptionist at some point, presumably before 1984. Peggy is currently recovering from a broken vertebra.

{¶ 25} By not imputing income to Peggy we do not think that the court abused its discretion. The parties had three children during their marriage. Peggy did not work outside the home during their 24-year marriage, staying home instead to be a homemaker and to raise the children. Having not practiced her trade for 24 years, any ability or knowledge she gained from schooling is likely gone; she would basically be starting over. Other courts have found no error under similar circumstances. See *Seaburn v. Seaburn*, Stark App. No. 2004CA00343, 2005-Ohio-4722, at ¶¶34-35

("[T]he trial court determined that Appellee-Wife did not substantially work outside the home during the thirty-year marriage of the parties, that she was occupied as a homemaker and raised the parties' three children during that time, and further that she had no post high school education or training. The court further considered that Appellee-Wife has no health benefits except those provided through her husband. Based on the foregoing, we find that the court did not err in not imputing any income to Appellee for purposes of spousal support.").

{¶ 26} The trial court found that John was fully employed and that John's income each month is at least $5,666, based on a $46,800 salary, $7,200 car allowance, and $14,000 in VA benefits. This monthly income does not include any commission that John may earn. According to John's revised financial disclosure affidavit, he has monthly expenses of $3,715, leaving him $1,951 extra each month. Since we have found that the trial court's finding that John earns an annual salary of $78,700 is not supported by the record, it is appropriate to remand this matter to the trial court for the reconsideration of the appropriate amount to award Peggy for spousal support. The Appellant's first assignment is Sustained.

B. Duration of award

Second Assignment of Error

{¶ 27} "THE AWARDED SPOUSAL SUPPORT TO APPELLEE WAS AN ABUSE OF DISCRETION BECAUSE THE COURT DID NOT SUFFICIENTLY EXPLAIN HOW IT DETERMINED THAT THE DURATION OF 10 YEARS WAS REASONABLE."

{¶ 28} The trial court clearly explained why it was ordering spousal support for

ten years: “The Court decided upon the duration of the spousal support by considering the twenty-four year length of the marriage, the Plaintiff's lack of current work history, and her need for additional vocational or formal training.” Aug. 6, 2009 Judgment Entry and Final Decree of Divorce, p.4. The court did not abuse its discretion by ordering support for this duration.

{¶ 29} The general rule is that where a payee spouse has the resources, ability, and potential to be self-supporting, spousal support should terminate within a reasonable time. See *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 68-69. But permanent support awards may be appropriate and reasonable in cases of long-term marriages, with parties of advanced ages, or to homemaker-spouses, spouses who have forgone the opportunity to develop meaningful employment outside the home to, for example, raise the parties’ children. See id., paragraph one of the syllabus; see also *MacMurray v. Mayo*, Franklin App. No. 07AP-38, 2007-Ohio-6998, at ¶8. It is not uncommon for a court to award permanent spousal support in marriages that have lasted 19 years or longer. See *MacMurray*; see also *Parsons v. Parsons*, Franklin App. No. 07AP-541, 2008-Ohio-1904, at ¶16; *Leopold v. Leopold*, Washington App. No. 04CA-14, 2005-Ohio-214, at ¶3; *Russell v. Russell* (1984), 14 Ohio App.3d 408, 412. One court has said that “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*.’” *Handschumaker v. Handschumaker*, Washington App. No. 08CA19, 2009-Ohio-2239, at ¶21, quoting *Vanke v. Vanke* (1994), 93 Ohio App.3d 373, 377. “Generally,” the court continued, “marriages lasting over 20 years have been found to be sufficient to justify spousal support of indefinite

duration." *Handschumaker*, at ¶21, citing *Hiscox v. Hiscox*, Columbiana App. No. 07CO7, 2008-Ohio-5209, at ¶47. See, also, *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 627; *Soley v. Soley* (1995), 101 Ohio App.3d 540, 550; *Vanke* at 376-77; *Taylor v. Taylor* (Aug. 4, 1998), Scioto App. No. 97CA2537; *Wolfe v. Wolfe* (July 30, 1998), Scioto App. No. 97CA2526. Since permanent spousal support plainly would be appropriate here, ten years of support is not unreasonable or arbitrary.

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

II

Third Assignment of Error

{¶ 31} "THE AWARD OF $19,638.00 IN ATTORNEY'S FEES WAS AN ABUSE OF DISCRETION BECAUSE THE COURT RELIED ON FINDINGS THAT THE MANIFEST WEIGHT OF THE EVIDENCE DOES NOT SUPPORT."

{¶ 32} Section 3105.73 allows courts to award attorney's fees in divorce actions. Division (A) says that "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." John argues it is not equitable to award attorney's fees, and he argues that the amount awarded is not reasonable. John also asserts that Peggy has reserved sufficient liquid assets to pay the attorney's fees. The court also noted the award was appropriate because of the peculiar circumstances of the case concerning the difficulty in obtaining the discovery needed to protect Peggy's property rights.

{¶ 33} Division (A) says that "[i]n 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). The trial court noted that Peggy was unemployed, that the marriage was of long duration, that during the marriage the parties enjoyed a comfortable standard of living, and that Peggy lost income-earning ability because of her marital responsibilities. The court also determined that John has the ability to pay the fees.

{¶ 34} The decision to award attorney's fees rests in the sound discretion of the trial court and will not be overturned on appeal absent an abuse of that discretion. *Layne v. Layne* (1992), 83 Ohio App.3d 559, 568. We cannot say that the trial court abused its discretion by ordering John to pay Peggy's attorney's fees. Based on the division of marital assets, we find that John does have the ability to pay the award. We see nothing arbitrary or unreasonable in the court's decision.

{¶ 35} "The amount of an attorney's fee award is within a trial court's discretion." *Rihan v. Rihan*, Greene App. No. 2004-CA-46, 2005-Ohio-309, at ¶37, citing *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146. We have said that "[i]mportant considerations when a trial court computes an award of attorney's fees include the time and labor involved and the fee customarily charged in the locality." Id., citing *Leffel v. Leffel* (June 15, 2001), Clark App. No. 2000 CA 78. We have also said, however, that these are only two of many factors that a trial court should consider. See *Maze v. Maze* (July 22, 1985), Montgomery App. No. 9068 ("In determining an award of attorneys fees as alimony, the time and labor of the attorney for the prevailing party is only one of the many factors to be given consideration."). The quality of work done is also a proper consideration. Id., citing *Swanson v. Swanson* (1976) 48 Ohio App 2d

85.

{¶ 36} John argues that Peggy did not present sufficient evidence to establish the reasonableness of her attorney's fees. The trial court found that Peggy's attorney, James Kirkland, has practiced law in the area for 40 years, the last 25 to 30 having been devoted to family law. The court also found that Kirkland is certified by the Ohio State Bar Association as a family-relations-law specialist. Finally, the court found that Kirkland is a recognized expert in family law, having contributed several sections to the Domestic Relations Law treatise in Baldwin's Ohio Practice series. Concerning the case itself the court had this to say:

{¶ 37} "This case is complex due to the five parcels of real property, claims of separate property, the ongoing concerns with domestic violence, and numerous marital assets. Plaintiff needed to prove by clear and convincing evidence her marital interest in the Defendant's separate property in order to protect her property rights. This burden necessitated the need for extensive discovery to trace the assets and to prepare the subpoenas needed to obtain discovery from third parties. The Defendant's retirement assets required tracing after he changed employment and rolled funds over into alternative retirement instruments. There were issues with outstanding tax liabilities and domestic violence. In order to effectively litigate the case Mr. Kirkland used paralegals to organize exhibits and assist at trial. In many ways the discovery performed in anticipation of litigation helped settled [sic] the more complex issues of the case and saved both parties money." Aug. 6, 2009 Judgment Entry and Final Decree of Divorce, p.12.

{¶ 38} An attorney who practices domestic relations law in Greene County and is

familiar with the fees customarily charged in the community testified. He said that the case was complex, requiring extensive discovery and trial preparation. He also said that the hours billed by Kirkland for his time and that of his paralegal were reasonable and necessary.

{¶ 39} John argues that Kirkland did not adequately explain in his billing statements the type of tasks he performed, often writing simply, "work on case." But we have said that "'where the amount of the attorney's time and work is evident to the trier of fact, an award of attorney fees, even in the absence of specific evidence to support the amount, is not an abuse of discretion.'" *Woloch v. Foster* (1994), 98 Ohio App.3d 806, 813, quoting *Kreger v. Kreger* (Dec. 11, 1991), Lorain App. No. 91CA005073. We think that the evidence of Kirkland's time and work is evident, and we see no reason to conclude that Kirkland's fees are unreasonable or arbitrary.

{¶ 40} John also asserts that it is questionable whether he has the ability to pay these fees in addition to the monthly spousal support payment since the trial court's calculation of his current income is wrong. Given the division of marital assets, we find that John likely has the ability to pay the fees.

{¶ 41} The third assignment of error is overruled. The judgment of the trial court is Reversed in part, Affirmed in part, and as Reversed it is Remanded to the trial court for further proceedings.

. . . . . .

FAIN and DINKELACKER, JJ., concur.

(Hon. Patrick T. Dinkelacker, First District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

James R. Kirkland
Paul J. Winterhalter
Hon. Steven L. Hurley