

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

Angela L. Hesseling,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA3034
	:	
v.	:	<u>DECISION AND JUDGMENT ENTRY</u>
	:	
James E. Hesseling,	:	
	:	
Defendant-Appellant.	:	Released 6/5/09

APPEARANCES:

Matthew S. Schmidt, Ater, Schmidt & Wissler, LLP, Chillicothe, Ohio, for Appellant.

Deborah Douglas Barrington, Chillicothe, Ohio, for Appellee.

Per Curiam

{¶1} James Hesseling appeals the trial court’s judgment in this divorce action and contends that the trial court abused its discretion in awarding Angela Hesseling spousal support because it failed to explain the basis for its award. Ms. Hesseling responds that because Mr. Hesseling never requested findings of fact and conclusions of law, the trial court provided a sufficient basis for its spousal support award as it indicated that it considered the necessary statutory factors and specifically addressed relevant ones.

{¶2} Our review of the record confirms that Mr. Hesseling did not request findings of fact and conclusions of law. Moreover, in its judgment entry the trial court discussed the disparity of the parties’ income, their relative earning abilities, their ages, and Ms. Hesseling’s education. It also listed all of the necessary statutory factors, indicated that it considered them, and then found that an award of spousal support was

appropriate, especially given the length of the marriage and the disparity in the parties' income. Thus, we conclude that the trial court sufficiently explained the reasons for its award in light of the absence of a request for findings of fact and conclusions of law.

{¶3} Mr. Hesseling also contends that the spousal support award was excessive because the court failed to give practical consideration to his ability to pay. After paying spousal support, child support, and other financial obligations under the court's order, Mr. Hesseling argues he is left with insufficient funds to meet his own living expenses. Ms. Hesseling argues that the amount of spousal support ordered was reasonable due to the disparity in their incomes and because he inflated his monthly living expenses at trial. Because the spousal support and other court ordered payments consume over 75% of Mr. Hesseling's pretax income, we conclude the award is too financially burdensome to be reasonable.

I. Procedural History and Facts

{¶4} James and Angela Hesseling married each other twice and have two minor children together. They married originally in August 1992, divorced in August 1995, and married again in July 1996. Shortly thereafter, these divorce proceedings began.

{¶5} At the final hearing, the parties entered into stipulations regarding shared parenting, the division of property, and the allocation of debt. Under their agreed terms, Mr. Hesseling would receive the marital residence, which is valued at \$165,000 but carries a total debt of \$193,000; a Ford F-250 truck, valued at \$15,000 with a debt of \$21,000; and a 1999 Ford Escort, valued at \$3,500 with a debt of \$4,000. Mr. Hesseling agreed to be responsible for the debt associated with those items of property, as well as his \$13,000 student loan debt and his \$19,000 credit card debt. To help offset this debt,

he would receive a \$500 go-cart, a \$4,500 Suzuki motorcycle, and a \$3,000 camper, which are “free and clear.” Ms. Hesseling agreed to receive a 2003 Ford Taurus, which had a value and secured debt of \$9,000. She agreed to be responsible for the debt associated with that car, as well as her own \$13,000 student loan and \$3,800 credit card debt. Finally, the parties agreed to equally divide Mr. Hesseling’s I.R.A. and 401(K) accounts, valued at \$3,500 and \$5,500 respectively.

{¶6} The parties then submitted the case to the court for its determination of weekday parenting time, child support, and spousal support. Ms. Hesseling testified that she completed high school and graduated from Lima Technical College in 1999 with an associate’s degree in early childhood development. During their marriage she also attended classes at Ohio University Chillicothe, ultimately planning to graduate with a bachelor’s degree and become an elementary school teacher. She testified that it will take her approximately two years as a full-time student to graduate and testified concerning the costs of tuition and textbooks. She also related her employment history. She stated that during their marriage she occasionally provided daycare in their home for other people. In November 2006, she took a part-time job working approximately 10 to 25 hours a week for Merry Maids, earning \$8.00 per hour; she testified that she earns an average of \$100 per week. She also testified concerning her anticipated monthly living expenses following the divorce: \$650 for housing; \$300 for utilities; \$600 for groceries; \$80 for school lunches; \$200 for clothing; \$78 for car insurance; \$250 for health insurance; \$15 for renter’s insurance; \$200 for gas; \$50 for haircuts; \$80 for the children’s music lessons; \$50 for pet care; \$50 for car repairs; \$50-100 for entertainment; and \$80-100 for cable.

{¶7} Mr. Hesselting testified he is a senior financial advisor and assistant vice president of First National Bank of Waverly. He testified that he earns approximately \$90,000 per year. He also itemized his anticipated monthly living expenses following the divorce: \$1,400 for the mortgage on the marital residence; \$500 for the second mortgage; \$550 for the Ford F-250 truck; \$150 for the Ford Escort; \$400 for food; \$200 for clothing; \$300 for utilities; \$100 for cable; \$70 for cell phone; \$218.05 for health insurance; \$35 for home insurance; \$45 for phone; and \$250 for gas. He also testified that the minimum monthly payments on his credit card debt totaled \$700 and that his monthly payment on his school loans was \$88. On cross-examination, he testified that the minimum monthly payment on two of Ms. Hesselting's three credit cards totaled approximately \$200 and that her school loan payment was \$200 per month.

{¶8} The court awarded the parties a divorce and per their agreement, awarded Mr. Hesselting the marital residence, the Ford F-250, and the Ford Escort and ordered that he assume the debt associated with the property. The court also awarded him the motorcycle, camper, and go-cart. The court awarded Ms. Hesselting the Ford Taurus and ordered that she assume that debt. The court equally divided Mr. Hesselting's retirement benefits, valued at approximately \$14,000,¹ and also divided the parties' personal property, household goods and furnishings equally. And the court ordered that each party would be responsible for the credit card debt and student loan debt in his/her respective names, as they agreed.

¹ As previously noted, the parties stipulated that the value of Mr. Hesselting's IRA and 401(K) totaled \$9,000. In its judgment entry, the court found that his retirement accounts totaled \$14,000. Because neither party raises this issue, we do not address it.

{¶19} Furthermore, the court found that an award of spousal support was “warranted” and ordered Mr. Hesseling to make six lump sum payments totaling \$35,000 over a three-year period: \$7,500 within 30 days of the judgment entry, \$7,500 within 7 months, \$5,000 within 13 months, \$5,000 within 19 months, \$5,000 within 25 months, and \$5,000 within 31 months. As additional spousal support, the court also ordered him to pay Ms. Hesseling’s college tuition for a two-year period to commence at her request, but to end no later than three years after the date of the court’s entry. Because the trial court found that tuition for full-time students costs \$1,678 per quarter, under the court’s order, Mr. Hesseling could be required to pay up to \$6,712 per year for two years. Finally, the court ordered him to pay child support. Initially, it noted that under the worksheet calculations, he had a child support obligation of \$14,373.30 per year (or \$1,204.73 per month), plus a 2% processing fee. Given the spousal support award, however, the court only ordered him to pay child support in the total amount of \$973.54 per month for 2008, \$1,063.77 per month for 2009 and 2010, and then starting in 2011, the full amount due under the worksheet.

{¶10} Mr. Hesseling now appeals and presents one assignment of error:

THE TRIAL COURT’S AWARD OF SPOUSAL SUPPORT WAS
UNREASONABLE, EXCESSIVE, AND AN ABUSE OF DISCRETION.

II. Spousal Support

{¶11} “It is well-settled that trial courts enjoy broad discretion in awarding spousal support.” *Breedlove v. Breedlove*, Washington App. No. 08CA10, 2008-Ohio-4887, at ¶19, citing *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83. Trial courts are given “wide latitude in determining the appropriateness, as well as the amount,” of spousal support. *Bolinger v. Bolinger* (1990), 49 Ohio St.3d 120, 122, 551 N.E.2d 157. A

court's decision to award spousal support will not be reversed on appeal absent an abuse of discretion. See *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 24, 550 N.E.2d 178. Under the abuse of discretion standard of review, we must affirm the decision of the trial court unless it is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 140. Under this highly deferential standard of review, we may not simply substitute our judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181. Rather, we are limited to determining whether considering the totality of the circumstances, the trial court acted unreasonably, arbitrarily or unconscionably. *Briganti v. Briganti* (1984), 9 Ohio St.3d 220, 222, 459 N.E.2d 896, citing *Blakemore* at 218-20.

{¶12} R.C. 3105.18(C)(1) provides that, in determining whether spousal support is “appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support,” the court must consider 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.

See R.C. 3105.18(C)(1).

{¶13} When making a spousal support award, a trial court must consider all statutory factors, and not base its determination upon any one of those factors taken in isolation. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 518 N.E.2d 1197, paragraph one of the syllabus. While the trial court is given broad discretion regarding the determination of the appropriateness and reasonableness of an award of spousal support, it must consider the statutory factors enumerated above and must indicate the basis for a spousal support award in sufficient detail to enable a reviewing court to determine that the award complies with the law. *Kaechele* at paragraph two of the syllabus. But, in the absence of a request for findings of fact and conclusions of law, *Kaechele* does not require the trial court to list and comment on each factor. *Brown v. Brown*, Pike App. No. 02AP689, 2003-Ohio-304, at ¶10. *Kaechele* and R.C. 3105.18(C), only require the trial court to reveal the basis for its award in either its judgment entry or

the record. *Id.*; see, also, *Carman v. Carman* (1996), 109 Ohio App.3d 698, 704, 672 N.E.2d 1093.

A. Sufficient Basis for the Spousal Support Award

{¶14} Mr. Hesseling contends that the trial court abused its discretion in awarding spousal support because it failed to indicate its basis for the award and failed to explain its reasons for the amount ordered. Ms. Hesseling argues that because Mr. Hesseling did not request findings of fact and conclusions of law, the court sufficiently identified the basis for its award when it indicated that it considered all of the statutory factors and specifically referenced the relevant ones.

{¶15} In its judgment entry, the trial court stated:

The testimony indicated that the defendant, James Hesseling, is a senior financial planner and assistant vice president at First National Bank of Waverly, Ohio. His current annual income is \$85,517 per year. Plaintiff is a high school graduate and attended Lima Technical College off and on for approximately 16 to 17 years, her last attendance being 1999 and received a two-year degree in early childhood development. She started classes at Ohio University Chillicothe in 2002, taking early education and childhood development with a goal of becoming a primary teacher. At the time of the final hearing she had two years remaining if she attended full-time at Ohio University Chillicothe to get her bachelor's degree. The testimony was that tuition for full-time students was \$1,678 a quarter with part-time attendance being approximately \$765 for five hours. Plaintiff was working as a housekeeper for Merry Maids at \$8.00 per hour.

{¶16} The court then set forth Ms. Hesseling's monthly living expenses, which totaled approximately \$2,915, and indicated that her textbooks cost about \$200 per quarter. The court also found that she was 37 years old and that Mr. Hesseling was 36 years old.

{¶17} The court also stated:

The court has considered the provisions of Ohio Revised Code Section 3105.171 and the provisions of Ohio Revised Code Section 3105.18. The

court has considered all of the factors in 3105.08(C)(1) [sic] noting the disparity in the income of the parties and their relative earning abilities at this point, their ages, their physical, mental and emotional conditions, their retirement benefits, the duration of the marriage, the situation of the parties relative to work and child care, the standard of living of the parties, their relative education, assets and liabilities, the contribution of each party to the education and training and earning ability of the other party, the time and expense necessary for plaintiff to acquire education, training or job experience, tax consequences for each party and lost income production. The court finds that an award of spousal support is appropriate especially given the length of the marriage and the disparity in the parties' income.

{¶18} The court went on to find that an award of spousal support was “warranted” and ordered Mr. Hesseling to make six lump sum payments of spousal support totaling \$35,000 over a three-year period and to pay Ms. Hesseling’s college tuition for a two-year period.

{¶19} While Mr. Hesseling argues that the court failed to sufficiently explain the basis for its award, our review of the record confirms that he did not request findings of fact and conclusions of law under Civ.R. 52. Moreover, in its entry, the trial court discussed the disparity of the parties' income, their relative earning abilities at this point, their ages, and the time and expense necessary for Ms. Hesseling to acquire education so that she will be qualified to obtain appropriate employment. The trial court then expressly reviewed the enumerated statutory factors and indicated that it considered all of them. Furthermore, it specifically found that the spousal support award was “appropriate” and stated “especially given the length of the marriage and the disparity in the parties' income.”

{¶20} Mr. Hesseling concedes that many of the statutory factors weigh in favor of an award of spousal support, i.e., his income and earning ability are substantially greater than hers, the marriage lasted 11 years, some time and expense are necessary for her to

pursue further education, and she lost income production capacity by staying at home during the marriage. Yet, he argues that the court's entry failed to indicate how it weighed these factors against the other relevant factors. However, in the absence of a request for findings of fact and conclusions of law, the trial court was not required to comment on each factor. *Brown*, supra. Nor was it required to discuss and expressly weigh each factor. It is clear from the entry that the court reviewed the statutory factors and concluded that the spousal support order was appropriate given the length of their marriage, the disparity of their income and earning abilities, their ages, and the time and expense necessary for Ms. Hesseling to acquire education to obtain appropriate employment. Thus, we reject Mr. Hesseling's contention that the trial court failed to sufficiently explain the reasons for its award.

B. Amount of the Spousal Support Award

{¶21} Next, Mr. Hesseling contends that the spousal support award was excessive because the court failed to give practical consideration to his ability to pay. He contends that, after paying spousal support, child support, and his debt obligations under the court's order, he is left with insufficient funds to meet his own expenses. In response, Ms. Hesseling claims that Mr. Hesseling inflated his monthly living expenses at trial. She also argues that the spousal support award was reasonable given the disparity in the parties' income and their relative earning abilities.

{¶22} We agree with Mr. Hesseling that in determining whether spousal support is "appropriate and reasonable," the court must consider the effect an award will have on the supporting spouse's ability to pay it. See, *White v. White*, Columbiana App. No. 02CO74, 2003-Ohio-3279, at ¶32. Under R.C. 3105.18(C)(1)(i), a court must consider

“the relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties.” However, the parties’ assets and liabilities is just one of the statutory factors a court must consider in determining the amount and duration of spousal support. See R.C. 3105.18(C)(1). A court must consider all of the necessary factors and must not base its spousal support determination upon any one of the statutory factors taken in isolation. See *Kaechele* at paragraph one of the syllabus.

{¶23} Mr. Hesseling claims that given his financial obligations under the court’s order, the spousal support award is unreasonable because it exceeds his ability to pay. He argues that while the trial court found his gross annual income to be \$85,517, his uncontroverted trial testimony indicated that his monthly living expenses, including the mortgage payments on the martial residence and the minimum payments associated with the debt he assumed, total \$4,929. And thus, he points out that under the trial court’s order, his total expenditures for 2008, for example, could be as much as \$92,542, leaving him a deficit of \$7,025.²

{¶24} Clearly, it would be inequitable to impose a spousal support obligation that Mr. Hesseling is incapable of meeting without suffering significant economic hardship. See *Hock v. Hock*, Pickaway App. No. 99CA13, 2000-Ohio-2009, 2000 WL 33226175, at *5. However, simply because the combined effects of the property allocation (which Mr. Hesseling agreed to) and the support awards result in a short-term negative cash flow does not make the spousal support award unreasonable per se. In situations where the parties live far beyond their means, the economic reality induced by divorce will often

² He arrives at this figure by adding his \$59,148 living expenses (\$4,929 per month), \$11,682 child support payments (\$973.54 per month), \$15,000 spousal support (two lump sum payments of \$7,500), and \$6,712 spousal tuition payments (\$1,678 per quarter) for a total of \$92,542.

dictate such a result. But both parties should bear the burden created by their former lifestyle.

{¶25} In making its award, the trial court found that Mr. Hesseling's gross annual income is \$85,517 (approximately \$7,126.41 per month).³ The court's spousal support award requires Mr. Hesseling to make six lump sum payments totaling \$35,000 over a three-year period. In 2008, he must pay a total of \$15,000 in spousal support (or approximately \$1,250 per month), and in 2009 and 2010, he must pay a total of \$20,000 (or approximately \$833.33 per month). During this same three-year period, he must also pay her college tuition for two years, which could cost up to \$6,712 per year (or approximately \$559.33 per month). Under the child support award, he must pay a total of \$973.54 per month for 2008 and then \$1,063.77 per month for 2009 and 2010. Based on these figures, in 2008, for example, Mr. Hesseling must pay \$1,250 for spousal support, up to \$559.33 for tuition, and \$973.54 for child support from his \$7,126.41 gross monthly income, which leaves him approximately \$4,343.54 per month before taxes to meet his other financial obligations.

{¶26} According to the court's order, Mr. Hesseling must also pay a combined first and second mortgage payment of \$1,900 per month and combined car payments of \$700 per month, i.e., an additional \$2,600 per month. Thus, the court ordered payments total \$5,384 per month out of a pretax monthly income of \$7,126. The court ordered payments are 76% of Mr. Hesseling's monthly gross (pretax) income. And this does not take into

³ In its judgment entry, the court found that Mr. Hesseling's "current annual income" is \$85,517. The child support worksheet attached as an exhibit to the court's entry confirms that this amount is his gross annual income. While there is no evidence in the record concerning his net income, we recognize that his disposable income is much less than \$85,517.

account his monthly personal expenses, which total over \$2,000 when we include his credit card debt and school loans in addition to living expenses.

{¶27} Although the trial court noted it considered the parties assets and liabilities, it is apparent that it failed to give them adequate weight when making its spousal support award. See *Stone v. Stone*, Green App. No. 2003-CA-34, 2004-Ohio-671, at ¶¶32-34, where the court found a spousal support award unreasonable where the total court ordered monthly payments consumed approximately 86% of the obligor's pretax dollars. The property distribution resulted in Mr. Hesseling receiving assets with a negative value of approximately \$54,000. Ms. Hesseling's share of the marital property provides her with a negative value of \$13,500. Clearly, the parties lived beyond their means, but there is no indication in the record that this occurred in response to unrealistic expectations solely attributable to Mr. Hesseling. Thus, both parties should equitably bear the burden of their unrealistic former lifestyle. After the spousal support award, the court has allocated Mr. Hesseling a debt total of \$85,700 in combined support and negatively valued property. Ms. Hesseling leaves the marriage with a net debt of \$12,300 but received \$35,000 in direct support and \$6,700 in tuition benefits. Thus, she leaves the marriage with assets exceeding her debt by \$38,400. And because the major assets Mr. Hesseling received all have negative equity, he would have to pay the lienholders the deficiency he incurs if he sells those assets to make the support payments. Thus, he will not only have to borrow the money to make at least the initial lump sum support payments, he will also have to try to "rollover" the negative equity in the current home. In essence, the court has ordered him to pay out more than he takes in. In the absence of any evidence to show

that he is voluntarily “under-employed” or that he is solely responsible for the couple’s unrealistic lifestyle, this is unreasonable.

{¶28} Because the spousal support award will result in significant economic hardship to one party only while the record does not indicate that party was the sole cause of the overwhelming debt incurred during the marriage, we conclude it is unreasonable. Therefore, we reverse the judgment and remand for further proceedings.

**JUDGMENT REVERSED AND
CAUSE REMANDED.**

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and the CAUSE REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J., Harsha, J., & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

BY: _____
William H. Harsha, Judge

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.