[Cite as *Brown v. Brown*, 2009-Ohio-3832.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CORI L. BROWN	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-64
JAMES H. BROWN	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Court of Common Pleas, Domestic Relations Division, Case No. 07-DR-21
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	July 23, 2009

APPEARANCES:

For Plaintiff-Appellee:

LAWRENCE A BERLIN (0002470)
6422 E. Main St.
Reynoldsburg, Ohio 43068

For Defendant-Appellant:

JOEL R. ROVITO (0064016)
7538 Slate Ridge Blvd.
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Delaney, J.

{¶1} Defendant-Appellant, James Brown, appeals from the trial court's Judgment Entry and Decree of Divorce filed on August 29, 2008. His ex-wife, Cori Brown, is the Plaintiff-Appellee.

{¶2} The parties were married on May 12, 1984, and three children were born as issue of the marriage. All three children reached the age of 18 prior to the divorce of the parties. Appellee is 54 years of age and Appellant is 62 years of age.

{¶3} On January 12, 2007, Appellee filed a Complaint for Legal Separation. Appellant was served with the Complaint on January 26, 2007.[1]

{¶4} On February 29, 2008, Appellee orally moved to convert the Complaint to a Complaint for Divorce. The matter proceeded to final hearing, with both parties agreeing that they are incompatible. The parties were the only witnesses who testified.

{¶5} Appellant is a licensed pilot with some college education and is employed by Flight Safety International as a pilot instructor. The parties stipulated that Appellant's annual income at the time of trial was $75,000.00. Over the ten years preceding trial, his income had been approximately $140,000.00 to $150,000.00 a year, but his pay had been diminished due to health issues.

{¶6} Appellee is employed at KinderCare and has been working there for approximately one and a half years on a part time basis and earns nine dollars an hour. Appellee testified that the job at KinderCare is the first job that she has held during her marriage and that she has never worked outside the home on a full time basis during her marriage because her primary responsibility was as a stay-at-home parent.

[1] The parties had previously filed for divorce several years prior, but reconciled temporarily.

{¶7} Appellee has a high school education with no post-high school job training. Appellee testified that she attempted to secure full time employment after the separation, but that she was unable to do so.

{¶8} The parties testified as to their assets, which included a residence at 56 Macfie Street in Pickerington, Ohio, two real estate lots in California, various financial accounts, and three automobiles. At trial, the parties agreed on the respective values of most of their assets and agreed on the division of many of those assets. The parties did not agree on the value of the Pickerington residence and agreed to have a real estate appraisal completed after trial. The parties agreed to file Findings of Fact and Conclusions of Law within 30 days of the appraisal being sent to the trial court and to the parties. The residence was subsequently appraised at $205,000.

{¶9} On May 16, 2008, both parties filed their proposed Findings of Fact and Conclusions of Law. On July 23, 2008, the trial court issues a fourteen page Judgment Entry. The final Judgment Entry and Decree of Divorce was filed on August 29, 2008.

{¶10} In the Judgment Entry, the trial court divided the marital property as follows:

{¶11} Various assets in the amount of $33,552.30 were awarded to Appellant, as was a 1992 Buick and a 2001 Buick, valuing $5,500.00 and $7,200.00, respectively. Financial accounts in the amounts of $103,702.00, $204,833.00, $15,259.00, and $13,000.00 were also awarded to Appellant.

{¶12} Appellee was awarded a 2002 Camaro, valued at $16,210.00, as well as the California properties, valued at $52,850.00. She was also awarded financial accounts in the amount of $45,975.07 and $6,700.00.

{¶13} Appellant was ordered to pay Appellee a cash payment of $130,655.62. The division of the property equated to a total of $504,781.37, with $252,390.69 being awarded to Appellee and $252,390.68 being awarded to Appellant.

{¶14} The court also ordered Appellant to pay Appellee spousal support in the amount of $2,000.00 per month to terminate upon the death of either party, the remarriage of Appellee, or upon Appellee's cohabitation with an unrelated male. Appellant was also ordered to pay $100.00 per month for any arrearage owing from the Temporary Spousal Support Order until the arrearage was paid in full. The Court also retained jurisdiction to modify the amount and duration of spousal support.

{¶15} Appellant raises four Assignments of Error:

{¶16} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SPOUSAL SUPPORT TO PLAINTIFF-APPELLEE.

{¶17} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO DETERMINE A TERM OF YEARS IN AWARDING SPOUSAL SUPPORT TO PLAINTIFF-APPELLEE.

{¶18} "III. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING PLAINTIFF-APPELLEE A CASH DISTRIBUTION FROM DEFENDANT-APPELLANT'S RETIREMENT; AND FOR FAILING TO HAVE PLAINTIFF-APPELLEE SHARE IN THE INVESTMENT GAIN OR LOSS UNTIL DISTRIBUTION OF DEFENDANT-APPELLANT'S RETIREMENT.

{¶19} "IV. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO IMPUTE FULL-TIME WAGES TO PLAINTIFF- APPELLEE."

I & II

{¶20} In his first assignment of error, Appellant argues that the trial court abused its discretion in awarding spousal support to Appellee. In his second assignment of error, he challenges the duration of spousal support.

{¶21} Initially, we note that an award of spousal support will be reversed on appeal only if an abuse of discretion is shown. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 24, 550 N.E.2d 178, 181. The term "abuse of discretion" connotes more than an error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary, or capricious. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. A reviewing court may not substitute its judgment for that of the trial court unless, considering the totality of circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131, 541 N.E.2d 597.

{¶22} The purpose of spousal support is not designed solely to meet the needs of the spouse receiving the support. "Spousal support is property set aside for the specific and definite purpose of supporting and maintaining the former spouse. * * * The obligation to support a spouse is based on the marriage contract and on R.C. 3103.03, which requires a married person to support his or her spouse. Awards of spousal support are not limited to meeting the needs of the requestor; rather, current Ohio law directs the trial court to use a broad standard in determining whether support is reasonable and appropriate." *Hutta v. Hutta*, 177 Ohio App.3d 414, 2008-Ohio-3756, 894 N.E.2d 1282, ¶9.

{¶23} In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, terms of payment, and duration of spousal

support, R.C. 3105.18(C)(1) directs the trial court to consider all 14 factors set forth therein:

{¶24} "(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;

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

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

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

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

{¶29} "(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;

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

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

{¶32} "(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

{¶33} "(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;

{¶34} "(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;

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

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

{¶37} "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶38} Moreover, R.C. 3105.18(C)(2) states that in determining whether spousal support is reasonable and in determining the amount and terms of payment of spousal support, each party shall be considered to have contributed equally to the production of marital income.

{¶39} Trial courts must consider all of the factors listed in R.C. 3105.18(C). However, this court has previously held that a trial court need not acknowledge all evidence relative to each and every factor listed in R.C. 3105.18(C), and we may not assume that the evidence was not considered. *Hutta v. Hutta*, supra, at ¶27, citing *Clendening v. Clendening*, Stark App. No. 2005CA00086, 2005-Ohio-6298, at ¶ 16, citing *Barron v. Barron*, Stark App. No. 2002CA00239, 2003-Ohio-649. The trial court must set forth only sufficient detail to enable a reviewing court to determine the appropriateness of the award. Id., citing *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 518 N.E.2d 1197.

{¶40} We find the trial court's award of spousal support in this case to be reasonable and appropriate. Moreover, the trial court's decision includes sufficient information to support its award.

{¶41} The record indicates that throughout the parties' 23 year marriage, Appellant was the sole economic supporter for the parties and their three children. Appellant's earnings, up until recent years, approximated $140,000.00 to $150,000.00 per year. Due to medical problems, Appellant's income has been reduced to approximately $75,000.00 per year as a pilot instructor.

{¶42} During the marriage of the parties, Appellee has not held any type of job, either part time or full time, since 1986, as her time was spent raising the parties' children. Appellee secured a part time job at KinderCare approximately one and a half years before trial at a rate of $9.00 per hour. Appellee has a high school education and has no post-high school training. The trial court found that "she has no work experience relevant to the current job market." Evidence was introduced that Appellee's annual income from KinderCare was $10,764.00; however, for purposes of calculating spousal support, the trial court imputed a full time, minimum wage income to Appellee of $14,560.00.

{¶43} The trial court stated that Appellee was 54 years old and Appellant was 61 years old at the time of the divorce and acknowledged that the parties enjoyed a "comfortable" lifestyle which allowed Appellee to remain at home and raise the parties' three children rather than be required to work outside the home.

{¶44} The court also found that Appellant has two years of college education and "obviously has skill, experience, and knowledge to be a pilot and teach others the skills and knowledge to qualify as pilots."

{¶45} The court further found that the parties "owned a home in a nice area and were able to meet their financial obligation and still accumulate investments and retirements. Other than the mortgages on the marital residence, the parties were debt free."

{¶46} Additionally, the court considered that Appellee testified that her monthly expenses were $1,290.00; however, the court found the estimate to be rather conservative, as it did not include the cost of a car payment, health insurance (which was previously provided for by Appellant), attorney's fees, or clothing allowances. The court found that Appellee appeared to be "unfocused, to have difficulty understanding and communicating except at a basic level. She was agitated throughout the proceedings. This Court doubts that she will ever be able to support herself at the standard the parties enjoyed during their marriage." The court then determined that it was "not likely that [Appellee] would be able to acquire additional education or training to obtain employment beyond minimum wage."

{¶47} Conversely, the court found Appellant's monthly expenses, as testified to at trial, to be excessive. Appellant claimed a monthly budget of $5,300.00 to $5,700.00, with a budget of $888.00 going to groceries per month. Appellant also included medical and life insurance for Appellee, which he was not required to pay. The court then found a reasonable amount for Appellant's monthly expenses to be $2,857.00.

{¶48} Based on its findings, the court determined that spousal support was appropriate and reasonable and ordered Appellant to pay spousal support to Appellee in the amount of $2,000.00 per month for an indefinite duration. The court ordered that spousal support would terminate upon the death of either party, the remarriage of Appellee or the cohabitation of Appellee with an unrelated male. The court also retained jurisdiction to modify the amount and duration of spousal support.

{¶49} Similarly, in *Wharton v. Wharton*, 5th Dist. No. 02-CA-83, 2003-Ohio-3857, this Court found that a trial court did not abuse its discretion in awarding spousal support of $1,500.00 per month for an indefinite period of time where the parties had been married for twenty-six years, the wife's only job skills were "light secretarial," she listed her income at approximately $15,800.00 from her full-time secretarial job at a realtor company, and where her husband's annual income was approximately $55,525.00. See also *Seaburn v. Seaburn*, 5th Dist. No. 2004CA00343, 2005-Ohio-4722 (finding award of spousal support of $2,867.00 per month appropriate where wife had not worked for 23 years of 30 year marriage because she raised the parties' children during that time and had no post-high school training or education); *Cope v. Cope*, 9th Dist. No. 20768, 2002-Ohio-3860 (finding indefinite spousal support of $2,500.00 per month appropriate and reasonable in 28 year marriage where wife had no post-high school training and had been stay at home mom during course of marriage).

{¶50} We find, based on the foregoing, that the trial court did not abuse its discretion in determining the amount of spousal support awarded.

{¶51} Turning to Appellant's second assignment of error, we also find that the trial court did not abuse its discretion in determining the duration of spousal support.

{¶52} While there is no statutory requirement for a trial court to make an order of spousal support indefinite in cases involving marriages of long duration, a trial court may do so under reasonable circumstances. In *Kunkle v. Kunkle*, (1990) 51 Ohio St.3d 64, 554 N.E.2d 83, the Supreme Court held that indefinite spousal support may be appropriate under circumstances similar to this case (i.e., marriage of long duration, a homemaker spouse with little opportunity to seek meaningful employment outside the home). Specifically, the Court held, "Except in cases involving a marriage of long duration, parties of advanced age or a homemaker-spouse with little opportunity to develop meaningful employment outside the home, where a payee spouse has the resources, ability and potential to be self-supporting, an award of sustenance alimony should provide for the termination of the award, within a reasonable time and upon a date certain, in order to place a definitive limit upon the parties' rights and responsibilities." *Kunkle*, supra, at paragraph one of the syllabus.

{¶53} Under the financial facts and circumstances of this case, and being mindful of the purpose of spousal support, we find that the trial court appropriately ordered the duration of spousal support to be indefinite.

{¶54} Appellant's first and second assignments of error are overruled.

III.

{¶55} In his third assignment of error, Appellant argues that the trial court abused its discretion in awarding Appellee a lump sum distribution from Appellant's retirement fund. Appellant claims that the court should have ordered a percentage of

the marital portion of the retirement and also ordered Appellee to share in the investment gains or losses until distribution of the fund at Appellant's retirement.

{¶56} Ohio Revised Code 3105.171 governs the equitable distribution of marital property. Trial courts have broad discretion in determining what is an equitable division of marital property. See *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. An appellate court reviews a trial court's property division in a divorce proceeding under an abuse of discretion standard. *Swartz v. Swartz*, 5th Dist. No. 02-CA-31, 2003-Ohio-1755, ¶15. "However, with the enactment of R.C. 3105.171, the characterization of property as separate or marital is a mixed question of law and fact, not discretionary, and the characterization must be supported by sufficient, credible evidence. *Chase Carey v. Carey* (Aug. 26, 1999), Coshocton App. No. 99CA1; see, also, *McCoy v. McCoy* (1995), 105 Ohio App.3d 651, 654, 664 N.E.2d 1012; *Kelly v. Kelly* (1996), 111 Ohio App.3d 641, 676 N.E.2d 1210. Once the characterization has been made, the actual distribution of the asset may be properly reviewed under the more deferential abuse-of-discretion standard. R.C. 3105.171(D); *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140." Id.

{¶57} R.C. 3105.171(A)(2)(a) defines the duration of the marriage for property division purposes as "the period of time from the date of the marriage through the date of the final hearing [in the divorce]."

{¶58} The decision to use the final hearing date as the valuation date or another alternative date pursuant to R.C. 3105.171(A)(2)(a) and (b) is discretionary and will not be reversed on appeal absent an abuse of discretion. *Blakemore*, supra. A review of the

record in this case does not demonstrate that this decision was unreasonable, arbitrary or unconscionable.

{¶59} In Appellant's proposed findings of fact and conclusions of law that he submitted to the trial court on May 16, 2008, he valued his own retirement accounts as follows: AIM account, $103,702.00; Lincoln Financial account, $204,833.00; Individual 401K, $15,259.00. He valued Appellee's financial accounts as follows: IRA, $6,479.39; Lincoln Financial account, $45,975.07. The trial court, in dividing the couple's property, used these figures in allocating property.

{¶60} Appellant now attempts to insert facts outside of the appellate record and argue that his accounts have depreciated and therefore the court erred in using the figures he provided. App. R. 16(A)(7) provides that his brief must contain, "An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions*, with citations to the authorities, statutes, and parts of the record on which appellant relies*." (Emphasis added). Appellant's allegation as to the present value of his financial accounts is outside the record and thus is inappropriate to consider on appellate review.

{¶61} We have previously held that our review on appeal is limited to facts within the record that were before the trial court. *W.M. Specialty Mortgage v. Mack*, 5th Dist. No. 2007CA49, citing *State v. DeMastry*, 155 Ohio App.3d 110, 119-120, 799 N.E.2d 222, 2003-Ohio-5588 and *State v. Ishmail* (1978), 54 Ohio St.2d 404, 377 N.E.2d 500. See also *State v. Showalter*, 5th Dist. No. 06CAC100081, 2004-Ohio-7166. Additionally, the Eighth District, in *Weisbarth v. The Geauga Park District*, 8th Dist. No.

2005-G-2675, 2007-Ohio-211, at ¶30, noted that appellate review is limited to the evidence and the record as it existed prior to the notice of appeal being filed.

{¶62} The divorce decree clearly divides the marital property equally between the two parties as of the date of trial. Appellee received $252,390.69 and Appellant received $252,390.68. The fact that appellant's retirement funds have suffered a decline in value does not render the terms of the divorce decree regarding the division of the retirement benefits unfair. See *Veidt v. Cook*, 12th Dist. No. CA2003-08-209, 2004-Ohio-3170.

{¶63} Appellant did not request at trial, and cannot now argue that the trial court should have valued the retirement funds based on market gains or losses between the date of trial and the time in which Appellant chooses to liquidate those funds. Had Appellant's funds increased in worth, he certainly would not be arguing to this court that his ex-wife should receive a greater portion of his retirement account based on "equities". We find it disingenuous for him to then argue that because his accounts have declined in worth since he filed his accounting in his proposed findings of fact and conclusions of law and the trial court adopted those findings with respect to the division of marital property, that the trial court erred in allocating marital property.

{¶64} As to Appellant's argument that the trial court erred by failing to take into account tax liabilities of liquidating the marital property, we find this argument to be wholly without support. The trial court ordered that "defendant shall immediately pay Plaintiff $130,655.62 [from the division of property worksheet]. If Defendant incurs any tax liability or penalty on said payment, costs shall be shared equally between the parties." The fact that Appellant did not immediately pay Appellee and thus incurred a

loss on his portion of the marital property is not for this court to revisit. Perhaps had Appellant paid Appellee immediately, as ordered by the court, the accounts would not have diminished in value quite so much and his personal loss would not be as significant.[2]

{¶65} We do not find that the trial court abused its discretion in dividing the marital property based on the evidence presented by Appellant and Appellee at trial.

{¶66} Appellant's third assignment of error is overruled.

IV.

{¶67} In his fourth assignment of error, Appellant claims that the trial court erred in failing to impute full-time wages of $20,800.00 to Plaintiff-Appellee.

{¶68} Appellant urges us to apply R.C. 3119.01(C)(11) in determining the appropriate imputed income to Appellee. R.C. 3119.01 applies strictly to child support enforcement and not to spousal support. We therefore decline to accept Appellant's argument and interpret R.C. 3119.01 to include spousal support.

{¶69} Spousal support is governed by R.C. 3105.18(C)(1)(a)-(n) and provides trial courts with discretion in determining what is reasonable and appropriate spousal support as well as in determining what income, if any, to impute to a spouse. We again review the trial court's determination under an abuse of discretion standard. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83.

{¶70} When imputing income in a divorce proceeding, trial courts consider that "earning ability involves 'both the amount of money one is capable of earning by his or

[2] We find Appellant's reliance on *Asbury v. Asbury*, 3rd Dist No. 11-08-02, 2008-Ohio-2609, to be misplaced. In *Asbury*, the trial court erred by failing to consider passive gains on the non-marital portion of retirement accounts that accrued prior to the marriage. In this case, Appellant agreed that all of the retirement funds were accumulated during the marriage. Tr. at 25.

her qualifications, as well as his or her ability to obtain such employment.' *Haniger v. Haniger* (1982), 8 Ohio App.3d 286, 288, 456 N.E.2d 1228. 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 have earned if he made the effort.' *Beekman v. Beekman* (August 15, 1991), Franklin App. No. 90AP-780, 6, unreported." *Seaburn v. Seaburn*, 5th Dist. No. 2004CA00343, 2005-Ohio-4722, at ¶32.

{¶71} As we noted in *Seaburn*, Ohio courts will often impute income to a party, even if they are not working, or if they are not working up to what the court feels is their full earning potential. Id.

{¶72} In the case at bar, the trial court determined that Appellee had not worked outside of the home from 1986 until during the divorce proceedings. At the time of trial, she earned $9.00 per hour working 22-23 hours a week at KinderCare for an annual total of $10,764.00.

{¶73} The court determined that no evidence was presented that Appellee suffered from any physical disability that would prevent her from working full time. She was able to spend many hours volunteering for her church, including doing door to door work. The court therefore found that Appellee was capable of working 40 hours per week and imputed a full time salary to her at minimum wage of $14,560.00.

{¶74} In so doing, the court noted that Appellee had only a high school education with no work experience relevant to the current job market. She appeared to the court to be unfocused and to have difficulty communicating except at a basic level.

The court then found that it is unlikely that Appellee would be able to acquire additional education or training to obtain employment beyond minimum wage.

{¶75} Accordingly, we find that the trial court acted appropriately in imputing the annual income of $14,560.00 to Appellee. Appellant's fourth assignment of error is overruled.

{¶76} For the foregoing reasons, we overrule Appellant's assignments of error and affirm the decision of the Fairfield County Court of Common Pleas.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

[Cite as *Brown v. Brown*, 2009-Ohio-3832.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CORI L. BROWN	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JAMES H. BROWN	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-64
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. JOHN W. WISE

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HON. JULIE A. EDWARDS