[Cite as *Vonderhaar-Ketron v. Ketron,* 2010-Ohio-6593.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY A. VONDERHAAR-KETRON

Plaintiff-Appellee

-vs-

DOUGLAS LEE KETRON

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 10 CA 22

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2005-DR-575
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 27, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
NANCY A. VONDERHAAR-KETRON 10455 Cooper Road Johnstown, Ohio 43031	MICHAEL P. VASKO 19 North High Street Canal Winchester, Ohio 43110

Wise, J.

{¶1} Appellant Douglas Lee Ketron appeals from his divorce in the Fairfield County Court of Common Pleas, Domestic Relations Division. Appellee Nancy A. Vonderhaar-Ketron is appellant's former spouse. The relevant facts leading to this appeal are as follows.

{¶2} Appellant and appellee were married in June 1985. Two children were born of the marriage. During the marriage, appellant began a career transition from engineer to attorney, commencing law school in the fall of 2000. By October 2004, appellant had graduated and passed the Ohio bar examination and patent bar examination.

{¶3} On November 7, 2005, appellee filed a complaint for divorce. Following three evidentiary hearings before a magistrate in July and October 2007, a magistrate's decision was issued on July 9, 2008. Appellant filed objections to the decision of the magistrate on July 23, 2008 and filed supplemental objections on November 7, 2008. Appellee responded thereto on August 8, 2008 and December 9, 2008.

{¶4} The trial court overruled all of the objections, except for altering the dependency exemptions and the amount of income imputed to appellant. Judgment Entry, September 23, 2009. A final decree of divorce was filed March 25, 2010. Among other things, the trial court imputed annual income of $73,000.00 to appellant based on his prior engineering position, resulting in a child support obligation of $469.23 per month per child.

{¶5} On April 23, 2010, appellant filed a notice of appeal. He herein raises the following four Assignments of Error:

{¶6} "I. THE TRIAL COURT ERRED IN IMPUTING INCOME TO THE APPELLANT AND IN ITS SUBSEQUENT CALCULATION OF CHILD SUPPORT.

{¶7} "II. THE TRIAL COURT ERRED IN ITS DIVISION OF PROPERTY WHEN IT FOUND THE APPELLANT'S LAW SCHOOL STUDENT LOANS WERE NOT A MARITAL DEBT TO BE ALLOCATED EQUALLY TO THE PARTIES, HENCE MAKING AN INEQUITABLE DIVISION OF THE PARTIES [SIC] DEBTS IN RELATION TO THE PARTIES [SIC] ASSETS.

{¶8} "III. THE TRIAL COURT ERRED WHEN IT FOUND THE DATE OF CLOSING FOR THE DIVISION OF THE PROCEEDS FROM THE SALE OF THE HOUSE TO BE AN EQUITABLE DIVISION AND DID NOT INCLUDE THE $20,700 APPELLEE PAID FROM THE PROCEEDS, IN VIOLATION OF THE RESTRAINING ORDER, ON A HOUSE DOWN PAYMENT AS A DIVISIBLE MARITAL ASSET, HENCE MAKING AN INEQUITABLE DIVISION OF MARITAL PROPERTY.

{¶9} "IV. THE TRIAL COURT ERRED WHEN IT IMPROPERLY IMPUTED $1,167.00 OF NONRECURRING 'OTHER INCOME' (NON-TAXABLE) TO THE DEFENDANT ON HIS CHILD SUPPORT COMPUTATION WORKSHEETS."

I.

{¶10} In his First Assignment of Error, appellant contends the trial court erroneously imputed income to him for purposes of the child support worksheet. We disagree.[1]

[1] In regard to this assigned error, appellant claims the trial judge and magistrate "having previously been employed by the Fairfield County Child Support Enforcement Agency directly before being seated on the bench revealed their biases ***." Appellant's Brief at 7. We take this opportunity to admonish appellant's counsel that these types of unsupported attacks against the integrity of the judiciary have no place in an appellate

{¶11} The imputation of income is a matter to be determined by the trial court based upon the facts and circumstances of each case. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 616 N.E.2d 218, paragraph one of the syllabus. A determination with respect to these matters will be reversed only upon a showing of abuse of discretion. Id. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶12} R.C. 3119.01(C)(5) defines "income," for purposes of calculating child support, as follows:

{¶13} " 'Income' means either of the following:

{¶14} "(a) For a parent who is employed to full capacity, the gross income of the parent;

{¶15} "(b) For a parent who is unemployed or underemployed, the sum of the gross income of the parent and any potential income of the parent."

{¶16} In turn, R.C. 3119.01(C)(11) defines "potential income" as follows:

{¶17} " 'Potential income' means both of the following for a parent who the court pursuant to a court support order, or a child support enforcement agency pursuant to an administrative child support order, determines is voluntarily unemployed or voluntarily underemployed:

{¶18} "(a) Imputed income that the court or agency determines the parent would have earned if fully employed as determined from the following criteria:

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brief. See *State v. DeMastry*, 155 Ohio App.3d 110, 799 N.E.2d 229, ¶79. If a common pleas litigant wishes to raise a challenge to a trial judge's objectivity, he or she must utilize the procedure set forth in R.C. 2701.03. See *In re Baby Boy Eddy* (Dec. 6, 1999), Fairfield App. No. 99 CA 22, 2000 WL 1410.

{¶19} “(i) The parent's prior employment experience;

{¶20} “(ii) The parent's education;

{¶21} “(iii) The parent's physical and mental disabilities, if any;

{¶22} “(iv) The availability of employment in the geographic area in which the parent resides;

{¶23} “(v) The prevailing wage and salary levels in the geographic area in which the parent resides;

{¶24} “(vi) The parent's special skills and training;

{¶25} “(vii) Whether there is evidence that the parent has the ability to earn the imputed income;

{¶26} “(viii) The age and special needs of the child for whom child support is being calculated under this section;

{¶27} “(ix) The parent's increased earning capacity because of experience;

{¶28} “(x) Any other relevant factor.

{¶29} “(b) Imputed income from any nonincome-producing assets of a parent, as determined from the local passbook savings rate or another appropriate rate as determined by the court or agency, not to exceed the rate of interest specified in division (A) of section 1343.03 of the Revised Code, if the income is significant.”

{¶30} In the case sub judice, appellant was employed as an engineer throughout most of the marriage. On occasion, appellant was required to travel to assist in various projects. In 1999, appellant and appellee agreed that appellant would commence law school, in part with the hopes that with a law career appellant could practice in the area. Appellant thus enrolled in the evening program at Capital University, graduating in the

spring of 2004. In order to study for the bar examination, he left his engineering position. He thereafter commenced a job search. However, appellant was unable to secure a full-time position with a law firm or the government; he therefore began a private legal practice.

{¶31} Appellant presents a comprehensive argument regarding his decision to take the step of starting his own law office (see Appellant's Brief at 16-32), and we have reviewed the extensive expert testimony in the record, including that of several area attorneys who recounted their experiences in commencing the practice of law in the time frame of 2004 and 2005. This Court is also well aware that new attorneys in solo practice often have to go through a start-up phase involving perhaps several years of relative economic sparseness. However, while the timing of appellant's career decisions vis-à-vis the parties' divorce appears to be rather unfortunate, the fact remains that he voluntarily quit his engineering position at EWI Corp. with an annual salary of more than $78,000.00. The record indicates that although he had received a letter of reprimand from his supervisor, he was able to clear the matter with the company president and have it removed from his file; in the meantime, appellee claims she assumed that appellant should stay with EWI and try to slowly build a law practice while remaining employed.

{¶32} Upon review, we are not inclined to substitute our judgment regarding the calculation of appellant's imputed income for that of the trial court which presided over the divorce at issue. Appellant's First Assignment of Error is overruled.

II.

{¶33} In his Second Assignment of Error, appellant contends the trial court erred in assigning the $73,000.00 in law school loans as appellant's separate debt. We disagree.

{¶34} Pursuant to R.C. 3105.171(B), "[i]n divorce proceedings, the court shall ... determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section." The party to a divorce action seeking to establish that an asset or portion of an asset is separate property, rather than marital property, has the burden of proof by a preponderance of evidence. *Zeefe v. Zeefe* (1998), 125 Ohio App.3d 600, 614, 709 N.E.2d 208. The characterization of property as separate or marital is a mixed question of law and fact, and the characterization must be supported by sufficient, credible evidence. *Chase-Carey v. Carey* (Aug. 26, 1999), Coshocton App. No. 99CA1, 1999 WL 770172. Once the characterization has been made, the actual distribution of the asset may be properly reviewed under the more deferential abuse-of-discretion standard. See R.C. 3105.171(D). Although Ohio's divorce statutes do not generally articulate debt as an element of marital and separate property, the rules concerning marital assets are usually applied to marital and separate debt as well. See *Vergitz v. Vergitz*, Jefferson App.No. 05 JE 52, 2007-Ohio-1395, ¶ 12, citing *Marrero v. Marrero,* Lorain App.No. 02CA008057, 2002- Ohio-4862, ¶ 43.

{¶35} In this Court's decision in *Day v. Day*, Ashland App.No. 04 COA 74, 2005-Ohio-4343, ¶ 24, we addressed a similar issue. In that case, the record established that

the wife had earned a bachelor's and a master's degree at Ashland University during the marriage. The additional education helped wife hold more lucrative jobs in the education field during the marriage. Additionally, wife testified that the student loan monies were partially used for transportation expenses during her clinicals, and for the family's day care expenses. The trial court in *Day* nonetheless concluded that even though the student loans at issue were taken out during the marriage, husband had not received "any real benefit" from those educational expenses. The trial court thus ordered an unequal division of marital property to reflect the total student loans to wife. On appeal, we reversed, finding the trial court's conclusion that husband derived no real benefit from wife's education expenditures "to be unreasonable and unsupported in the record."[2] Id.

{¶36} In the present case, in contrast, the record before us adequately supports the trial court's allocation of the student loan debt to appellant-husband, as appellee never saw the economic fruition of appellant's law school expenditures due to the emergence of the divorce action a little over one year after appellant's passage of the bar exam. As stated previously, we generally review the overall appropriateness of the trial court's property division in divorce proceedings under an abuse of discretion standard. See *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. We find no abuse of discretion in this instance regarding the trial court's allocation of appellant's separate student loan debt.

{¶37} Appellant's Second Assignment of Error is therefore overruled.

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[2] We additionally based our decision in *Day* on the trial court's lack of compliance with R.C. 3105.171(C)(3), which is not an issue in the case sub judice.

III.

{¶38} In his Third Assignment of Error, appellant argues the trial court erred in addressing certain proceeds from the pre-divorce sale of the marital home. We disagree.

{¶39} The pertinent section of the court's divorce decree reads as follows:

{¶40} "VI. Real Estate

{¶41} "[Appellee] after filing for divorce purchased, in her mother's name, certain real estate located at *** Johnstown, Ohio. [Appellee] paid a $20,700.00 down payment on said property from the proceeds of the sale of the marital residence. The Court finds [appellee's] interest in said property is [appellee's] separate property as it was purchased with funds equitably divided by the parties."

{¶42} "Trial court decisions on what is presently separate and marital property are not reversed unless there is a showing of an abuse of discretion." *Valentine v. Valentine,* (Jan. 10, 1996), Ashland App.No. 95COA01120, citing *Peck v. Peck* (1994) 96 Ohio App.3d 731, 734, 645 N.E.2d 1300. In order to find an abuse of that discretion, we must determine the trial court's order was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore,* supra. Furthermore, as an appellate court, we are not the trier of fact. Our role is to determine whether there is relevant, competent, and credible evidence upon which the factfinder could base his or her judgment. *Tennant v. Martin-Auer*, 188 Ohio App.3d 768, 936 N.E.2d 1013, 2010-Ohio-3489, ¶ 16, citing *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758, 1982 WL 2911.

{¶43} Appellant essentially maintains that the trial court erroneously chose a date of division of the marital home prior to the court's own finding of the end date of the marriage, and further ignored the fact that appellee had utilized the $20,700.00 amount in violation of a restraining order. He adds that it was further inequitable that he was required to use his proceeds from the sale of the marital home to pay support under the temporary orders.

{¶44} Upon review, we find appellant's arguments as to this aspect of the trial court's property division to be unpersuasive. The marital residence was sold prior to the divorce complaint, and while we do not condone appellee's expenditure in apparent violation of the restraining order, the trial court's treatment of appellee's $20,700.00 in house proceeds was not unreasonable, arbitrary, or unconscionable.

{¶45} Appellant's Third Assignment of Error is therefore overruled.

IV.

{¶46} In his Fourth Assignment of Error, appellant contends the trial court erred in utilizing an additional $1,167.00 as imputed income for child support purposes. We disagree.

{¶47} The imputation of income is a matter to be determined by the trial court based upon the facts and circumstances of each case. *Rock v. Cabral*, supra. The $1,167.00 in question stems from appellant's partial ownership in Applications Technology, a sub-chapter S corporation. The figure was taken from his 2005 federal tax return.

{¶48} The definitions of income under R.C. 3119.01 are broad and expansive to protect the child's best interests. *Bishop v. Bishop*, Scioto App.No. 03CA2908, 2004-

Ohio-4643, ¶16, citing *McQuinn v. McQuinn* (1996), 110 Ohio App.3d 296, 300-301. Upon review, we find no abuse of discretion in the trial court's inclusion of the $1,167.00 figure as part of appellant's income.

{¶49} Accordingly, appellant's Fourth Assignment of Error is overruled.

{¶50} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Fairfield County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

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JUDGES

JWW/d 1213

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY A. VONDERHAAR-KETRON	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DOUGLAS LEE KETRON	:	
Defendant-Appellant	:	Case No. 10 CA 22

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Fairfield County, Ohio, is affirmed.

Costs assessed to appellant.

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JUDGES