[Cite as *McCaulley v. McCaulley*, 2015-Ohio-3024.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SHARYN LEE MCCAULLEY	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
BRIAN SCOTT MCCAULLEY	:	Case No. 2014CA00206
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Domestic Relations Division, Case No. 2013-DR-00809
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	July 27, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
WENDY J. ROCKENFELDER 5502 Market Avenue North, Suite B Canton, OH 44721	KENNETH L. GIBSON MORA LOWRY Gibson & Lowry, LLC 234 Portage Trail Cuyahoga Falls, OH 44221

Baldwin, J.

{¶1} Defendant-appellant Brian Scott McCaulley appeals from the November 3, 2014 Judgment Entry Decree of Divorce issued by the Stark County Court of Common Pleas, Domestic Relations Division.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Brian Scott McCaulley and appellee Sharyn Lee McCaulley were married on September 28, 1996. Four children were born as issue of such marriage: Kathryn (DOB 11/16/98), Steven (DOB 12/21/00), Brendan (DOB 1/15/03), and Gavin (DOB 8/3/06).

{¶3} On July 12, 2013, appellee filed a complaint for divorce against appellant. Appellant filed an answer and counterclaim on August 1, 2013. Appellee filed a reply to the counterclaim on August 5, 2013.

{¶4} A hearing before a Magistrate was held on August 14, 2014. On such date, the parties stipulated that they were incompatible and that they had resolved all issues except for child support, spousal support, counseling expenses and Guardian ad Litem fees.

{¶5} At the hearing, appellee testified that she was 47 years old, in good health and was employed at Babcock and Wilcox as an Internal Communications Managing Advisor. She testified that she graduated from Kent State University with a Bachelor's Degree in 1989 and had been employed by Babcock and Wilcox since the time of their marriage. At the time of the hearing, appellee was earning approximately $131,000.00 a year, including an annual bonus[1], and provided the health insurance benefits. Her

[1] Appellant's average yearly bonus for the years from 2011 through 2013 was $5,186.00.

after tax income was approximately $97,511.00 and her monthly expenses, as found by the court, totaled $7,269.00.

{¶6} Appellee testified that since the marriage, appellant, who has a high school diploma and experience in welding, "has not consistently had a high work ethic… and "became extremely lackadaisical…" Transcript at 30-31. According to her, his social security earnings statement indicated that in 2010, 2011 and 2012, he earned under $5,000.00. Appellant had gastric by-pass surgery in 2010. Appellee testified that appellant had secured a full-time job in September of 2013 with Air Gas and was earning approximately $35,000.00, which was the most that he had ever made during the marriage. Appellee testified that she tried to encourage appellant to take a job at the company where she worked where he could have made $26.00 an hour as a welder, but that he did not want to drive to Barberton. Although she testified that appellant had type 2 diabetes and high blood pressure, she testified that his health had not prevented him from working.

{¶7} At trial, appellant testified that he had gone to a vocational school and had welding experience. He stipulated that his income was $35,000.00 and testified that the most he had ever made before was $21,300.00 in 1996. Appellant testified that he was off of work in 2010 for weight loss surgery and that in 2008 and 2009, work slowed down due to the recession. Appellant testified that he was leasing a home owned by his brother and that he started paying rent in June of 2014. He testified that he was obligated to pay rent and that the house was not a gift to him from his brother. According to appellant, his monthly rent was $1,500.00. Appellant submitted an affidavit of income and expenses that he signed on July 30, 2014 stating that his monthly

expenses totaled $5,207.00. Of this figure, $500.00 was for restaurant expenses and $300.00 was for groceries. The Magistrate found, based upon his testimony, that his monthly expenses were $5,157.00.

{¶8} When asked about his health, appellant testified that he had type 2 diabetes and high blood pressure. He testified that he also had joint deterioration disease, had a herniated disc in his back and had been diagnosed with depression. While appellant had sleep apnea, he testified that after his weight loss surgery in 2010, his sleep apnea was resolved. He also testified that he had a kidney stone attack before the first scheduled trial date[2] and that he had had kidney stones nine times. At trial, appellant testified that he felt "great." Transcript at 92.

{¶9} On cross-examination, appellant testified that he made $4,566.00 in 2010, $1,572.00 in 2011 and $3,060.00 in 2012. He testified that he had rotator cuff surgery in 2011 and was off of work several months after the surgery. Appellant testified that he did not apply for the welding job at Babcock and Wilcox due to his health issues and that he did not do any welding at Air Gas. When questioned about the house he was renting, appellant testified that he had signed a rental agreement on June 1, 2014 but moved into the house prior to that date. Appellant wrote two consecutive $1,500.00 checks to his brother on or about June 3, 2014, one dated June 1, 2014 and the other July 3, 2014, but testified that he asked his brother to hold them for a month while he borrowed money from his father. Appellant testified that to his knowledge, the checks had not been cashed as of the date of the trial. When asked why, on a financial statement that he signed on June 20, 2014, he listed his rent as $1,300.00 a month, appellant testified that he had made a mistake. On redirect, he testified that he had no

[2] The trial had been scheduled before June 26, 2014 before being continued.

intention of not paying rent to his brother. When the court asked him if he had paid his rent for August of 2014, appellant testified that he had not because he did not have the money.

{¶10} The Magistrate, in a Decision filed on August 27, 2014, recommended that appellee pay spousal support to appellant in the amount of $2,000.00 a month for 66 months, or until appellant died or remarried, and that the court not retain jurisdiction over the issue of spousal support. The Magistrate further recommended that appellant pay child support in the amount of $995.66 per month, which was $248.91 per child.

{¶11} Both parties filed objections to the Magistrate's Decision. Pursuant to a Judgment Entry filed on October 17, 2014, the trial court approved and adopted the Magistrate's Decision. A Judgment Entry Decree of Divorce was filed on November 3, 2014.

{¶12} Appellant now raises the following assignments of error on appeal:

{¶13} I. THE TRIAL COURT ABUSED ITS DISCRETION IN ADOPTING THE MAGISTRATE'S DECISION WHICH DID NOT RETAIN JURISDICTION TO MODIFY SPOUSAL SUPPORT.

{¶14} II. THE FINDINGS OF FACT RELATING TO HUSBAND'S HOUSING EXPENSE WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶15} III. THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THE AMOUNT OF SPOUSAL SUPPORT WHICH WAS REASONABLE AND APPROPRIATE.

{¶16} IV. THE TRIAL COURT ABUSED ITS DISCRETION IN THE DETERMINATION OF THE AMOUNT OF CHILD SUPPORT.

I

{¶17} Appellant, in his first assignment of error, argues that the trial court erred in failing to retain jurisdiction over spousal support.

{¶18} R.C. 3105.18(E)(1) states that a trial court does not have jurisdiction to modify the amount or terms of a spousal support award unless the court determines that the circumstances of either party have changed and the divorce decree contains a provision specifically authorizing the court to modify the amount or terms of the award. The decision to retain jurisdiction to modify an award of spousal support is left to the sound discretion of the trial court. *Deacon v. Deacon,* 8th Dist. No. 91609, 2009-Ohio-2491, ¶ 63, citing *Johnson v. Johnson*, 88 Ohio App.3d 329, 623 N.E.2d 1294 (5th Dist. 1993). An abuse of discretion connotes more than an error of law or judgment; it implies the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶19} "Although Ohio courts generally agree that a trial court abuses its discretion in failing to reserve jurisdiction when imposing an indefinite award of spousal support, the same does not automatically apply when the court imposes a limited time period." *Deacon at ¶ 63,* citing *Johnson,* citing *Nori v. Nori,* 58 Ohio App.3d 69, 568 N.E.2d 730 (12th Dist. 1989). Rather, an appellate court must consider the totality of circumstances and the specific facts of each case in determining whether a trial court abused its discretion in declining to retain jurisdiction. *Deacon,* citing *Nori.* A trial court abuses its discretion in failing to reserve spousal support jurisdiction where there is a substantial likelihood that the economic conditions of either or both parties may change

significantly within the period of the award. *Newman v. Newman,* 5th Dist. Licking No. 2003 CA 00105, 2004-Ohio-5363.

{¶20} We find that the trial court's decision not to retain jurisdiction over spousal support was not arbitrary, unconscionable or unreasonable. The trial court awarded spousal support for a period of 66 months. While appellant had health issues in the past that impacted his ability to work, he testified at trial that he felt "great" and that his weight loss surgery had cured his sleep apnea. Moreover, while appellant never earned more than approximately $20,000.00 a year before his current job, which paid approximately $35,000.00, there was testimony from appellee that he "has not consistently had a high work ethic… and "became extremely lackadaisical…" Transcript at 30-31. There was no evidence that there was a substantial likelihood that the economic conditions of either or both parties may change during the 66 month period.

{¶21} Based on the foregoing, appellant's first assignment of error is overruled.

II

{¶22} Appellant, in his second assignment of error, argues that the trial court findings of fact relating to his housing expense was against the manifest weight of the evidence.

{¶23} A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.,* 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson,* 66 Ohio St.3d 610, 1993–Ohio–9, 614 N.E.2d 742. "The

reason for this standard of review is that the trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260, 674 N.E.2d 1159.

{¶24} The Magistrate, in the case sub judice, found that appellant was living rent-free and that he did not have the housing costs that he claimed to have. Appellant claimed that his rent was $1,500.00 a month and that he wrote two personal checks, numerically back to back, for June and July rent. However, appellant testified that he asked his brother to hold one for awhile while he obtained money from their father to pay the rent "[c]ause I don't have it." Transcript at 102. As of the date of the trial, the two checks had not been cashed. In addition, while appellant testified that his rent was $1,500.00 a month, after he had signed his rental agreement and written the two checks, appellant, on a financial statement, listed his rent as $1,300.00 a month. When asked by the court if he had paid his August rent, appellant responded that he had not because he did not have the money.

{¶25} Based on the foregoing, we find that the Magistrate, in her Decision that was adopted by the trial court, did not err in finding that appellant was "living rent free due to the support of his family." As trier of fact, she was in the best position to assess appellant's credibility and clearly did not believe him based upon the evidence before the court.

{¶26} Appellant's second assignment of error is, therefore, overruled.

III, IV

{¶27} Appellant, in his third assignment of error, argues that the trial court abused its discretion in determining spousal support. In his fourth assignment of error, appellant contends that the trial court erred in determining child support.

{¶28} A trial court has broad discretion in determining a spousal support award. *Cherry v. Cherry*, 66 Ohio St.2d 348, 421 N.E.2d 1293 (1981). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore*, supra.

{¶29} R.C. 3105.18 governs spousal support. Subsection (C) states the following:

{¶30} (C)(1) In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

{¶31} (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;

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

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

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

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

{¶36} (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;

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

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

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

{¶40} (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;

{¶41} (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;

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

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

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

{¶45} The Magistrate, in her Decision that was approved and adopted by the trial court, stated, in relevant part, as follows: “This award of spousal support does not reflect an equalization of income, but an equitable distribution based upon the fact that

the plaintiff must still support a household of five." Appellant now specifically argues that the trial court, in determining spousal support, improperly considered such factor.

{¶46} However, as noted by appellee, under subsection (n) above, the trial court was free to consider any factor that it found to be relevant and equitable. The fact that appellee is supporting a household of five is clearly both relevant and equitable. Moreover, the Magistrate, in her Decision that was approved and adopted by the trial court, analyzed the factors set forth in R.C. 3105.18 in the context of the facts of this case and recommended that appellee be ordered to pay appellant $2,000.00 a month in spousal support. We note that appellant claimed that his monthly expenses totaled approximately $5,157.00. However, the Magistrate, as set forth above, found appellant's claim that he was paying $1,500.00 a month in rent not credible and also found that his $800.00 a month food budget was "inflated." She reduced his monthly living expenses by $1,800.00.

{¶47} While appellant argues that two of the children will be emancipated during the period of support, we note that appellant's child support obligation will be reduced upon their emancipation. In short, we find no abuse of discretion and overrule appellant's third assignment of error.

{¶48} Appellant, as is stated above, also contends that if the award of spousal support is reversed, the award of child support must also be reconsidered because the amount of spousal support is a line item on the child support worksheet. Having overruled appellant's third assignment of error, appellant's fourth assignment of error is also overruled.

{¶49} Accordingly, the judgment of the Stark County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Delaney, J. concur.