[Cite as *Garritano v. Pacella*, 2009-Ohio-2928.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Nina M. Garritano

Appellee/Cross-Appellant

v.

Robert Pacella

Appellant/Cross-Appellee

and

Jill Hayes, Esq.

Guardian Ad Litem

Court of Appeals No. L-07-1171

Trial Court No. DR2003-0833

DECISION AND JUDGMENT

Decided: June 19, 2009

* * * * *

Donna M. Engwert-Loyd, for appellee/cross-appellant.

Henry B. Herschel, for appellant/cross-appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant/cross-appellee, Robert Pacella, appeals the April 12, 2007 judgment of the Lucas County Court of Common Pleas, Domestic Relations Division,

which granted appellant and appellee/cross-appellant, Nina Garritano, a divorce, divided the parties' marital assets and liabilities, awarded appellee custody of the parties' two minor children, ordered that appellee pay spousal support, and ordered that appellee pay a portion of appellant's attorney fees. For the following reasons, we affirm, in part, and reverse, in part, the trial court's judgment.

{¶ 2} The parties were married in August 1995, and are the parents of two minor children, Olivia (1998) and Gioia (2001). At the time of the marriage, the parties resided in their hometown of Youngstown, Ohio, and appellee was a licensed medical doctor in her second year of residency to become an anesthesiologist. Appellant was employed at a trucking company. Shortly thereafter, appellant returned to college and earned a bachelor's degree in political science and then a master's degree in criminal justice.

{¶ 3} In February 1999, the parties moved to Toledo, Ohio, where appellee accepted a position with a large anesthesiology group. At the time, appellant was studying for the LSAT and desired to attend law school. Ultimately, appellant did not attend law school; he earned his real estate license and was employed by a local real estate company. At the time of trial, appellant's real estate license had expired and he had begun training in the auto sales industry in Youngstown, Ohio.

{¶ 4} Due to appellee's varying work schedule, a nanny resided in the home from Sunday until Friday. The nanny was on duty whether or not appellant was at home. Appellee relieved the nanny when she got home from work. This continued after the 2001 birth of their second daughter.

{¶ 5} On July 10, 2003, appellee filed a complaint for divorce; on July 14, 2003, appellant filed an answer and a counterclaim for divorce. On August 15, 2003, appellant was granted temporary spousal support of $2,000 per month retroactive to July 18, 2003. On February 12, 2004, the temporary spousal support order was modified to $4,500 per month retroactive to July 18, 2003.

{¶ 6} The trial was conducted on January 12, 13, and 14, 2005, and May 3, 4, and 5, 2005, and the following relevant evidence was presented. Regarding custody of the children, appellee testified that at the time of Olivia's birth she was employed in Youngstown, Ohio, at an anesthesiology group; appellee took a 14 week maternity leave. At that time, appellant was pursuing his master's degree and was not employed. When appellee returned to work she hired a full-time nanny.

{¶ 7} In February 1999, the parties moved to Toledo, Ohio. Appellee testified that in March 1999, she began her employment with Anesthesiology Consultants of Toledo ("ACT"). According to appellee, her work day generally started around 6:30 a.m., but that it was variable. Further, depending on her schedule, appellee's work day would end anywhere from 10:00 a.m. until 7:00 p.m. Occasionally, appellee would work from 4:00 p.m. until 7:00 a.m.

{¶ 8} Appellee testified that appellant stayed home with Olivia for approximately seven or eight months following their move to Toledo. Appellee stated that appellant expressed that he "couldn't stand being at home anymore" and that "his mind was dwindling away." With the agreement of appellant, in January 2000, appellee hired

nanny Melissa Cunningham; Melissa lived with the family from Sunday evening until Friday afternoon.

{¶ 9} Appellee testified that during that time she took Olivia to all her doctor and dental appointments, except one. Appellee stated that she would schedule the appointments on her days off.

{¶ 10} In January 2001, just prior to Gioia's birth, Holly Smith was hired to replace Melissa. Holly worked for the family until December 2002, when she was replaced by her mother, Frances Smith.

{¶ 11} Appellee testified that in July 2003, shortly after appellant left the marital home, Olivia began showing signs of anxiety. Appellee stated that the behaviors increased prior to and following visitation with appellant. Appellee stated that Olivia is very agitated when she returns from visitation and that both daughters are very clingy. Appellee testified that Olivia has been in counseling to help her work through issues surrounding the parties' divorce. According to appellee, Olivia is frightened that she will upset her father.

{¶ 12} Appellee further testified that during appellant's visitation there are hygiene issues with the girls, some of which have required medical attention. Appellee also stated that there have been problems with appellant administering medication to the girls.

{¶ 13} Appellee testified that after she asked appellant for a divorce he began "terrorizing" her at home. Specifically, appellee stated that appellant would follow her throughout the home and that he made threats of violence. Appellee testified regarding

some domestic violence incidents occurring prior to and following the commencement of the divorce proceedings. Appellee testified that she believes that appellant has a violence and alcohol problem.

{¶ 14} Appellant testified that during weekend visitation he frequently takes the children to Youngstown, Ohio, so they can see their extended family and some friends. Appellant indicated that he joined the YMCA in Youngstown. Appellant stated that he regularly attends Olivia's gymnastics class and eats lunch with her at school.

{¶ 15} Appellant testified that after Gioia was born he made the children breakfast every morning and took Olivia to school. Appellant stated that he made dinner every evening. Appellant testified that when appellee got home from work she would talk for hours on the telephone to her mother. Appellant stated that during the summer months, the children would frequently look out the window at the neighborhood children and remark that they were not allowed to go outside because they had been bathed and in their pajamas by 5:00 p.m.

{¶ 16} Appellant testified regarding his request for custody or, alternatively, shared parenting. Appellant stated that appellee refuses to communicate with him and intentionally prohibits his involvement with the children. The only form of communication is a "communication log" that goes back and forth during visitation.

{¶ 17} During cross-examination, appellant disputed the testimony of the nannies who both stated that he was not the primary caretaker of the children. Appellant also admitted that he called the police when appellee would not provide plastic beach toys,

swim goggles, a potty chair, and some videos for his visitation. There was also an incident where appellant demanded that appellee overnight a pair of flip flops.

{¶ 18} Appellant was also questioned about an incident where he instructed Olivia not to call her maternal grandmother "Mimi" anymore and that she should be called grandma. Appellant denied that this upset Olivia. Appellant also admitted that while the divorce was pending, he told Olivia that her mother was adopted. Appellant claimed that he had told her this previously; he denied telling Olivia that because appellee was adopted, Mimi was not her real grandmother.

{¶ 19} Appellant testified that he had been denied visitation 16 days in the summer of 2003, and two weekends and two Wednesday visitations in the preceding six weeks.

{¶ 20} The guardian ad litem testified that she had met with the parties together and individually, she had met with the children, she had spoken with nannies Holly and Frances Smith, and she had spoken with Olivia's counselor and the parties' communication counselor. The guardian testified that in her report she recommended that appellee be named the residential parent and legal custodian of the children and that appellant be entitled to visitation. The guardian based her recommendation on her belief that Olivia is more bonded with appellee and that the girls' activities are based in Toledo.

{¶ 21} The guardian stated that she put "a lot of weight" on the information provided by Holly and Frances Smith because they lived in the home and she believed that they tried to provide good, unbiased information. The guardian stressed that shared parenting was not an option for the parties because they cannot communicate with each

other. The guardian felt that the parties were equally responsible for the communication problems.

{¶ 22} The guardian stated that it appeared as though appellee ran the household and set the rules for the children. Although appellant did interact with the children on a daily basis, the guardian felt that he was not their caretaker.

{¶ 23} The following testimony was presented regarding the financial matters. Appellee testified that in 1995, when she married appellant, she was a second-year anesthesiology resident in Youngstown, Ohio, earning approximately $33,000 to $35,000 annually. Appellant was employed by a trucking company. Following her residency she was employed by an anesthesiology group for $125,000.

{¶ 24} In March 1999, appellee began her employment in Toledo, Ohio, with a base salary of $106,000, with additional compensation for overnight calls. In 2001, appellee bought in as a partner. The $100,000 buy in sum was taken from her monthly salary. At the time of trial, appellee testified that the balance of the buy in was $35,000.

{¶ 25} Appellee testified that she owns an interest in a medical billing company, Practice Management Resources ("PMR"), a subsidiary of ACT; she paid $60,000 for her interest. Appellee also testified that she has a three percent interest in an oil well that her parents purchased for her prior to the marriage.

{¶ 26} Appellee's 2004 tax return lists her taxable income as $467,896, and provides that she paid appellant $51,700 in spousal support. Appellee testified that since February 2004, she had been paying appellant $4,500 monthly in spousal support.

Previously, the monthly support order was $2,000. Appellee further testified regarding the salaries she paid the children's full time nannies; she stated that the nannies were hired with appellant's approval and support.

{¶ 27} Appellee testified that she paid all of the household bills and family expenses. Appellee stated that after appellant earned his real estate license he opened a separate checking account in order to keep track of his work expenses. Appellee testified that appellant deposited all of his earnings into that account.

{¶ 28} Prior to the marriage, appellee had a trust fund which was converted to an investment account. At the time of the marriage, the value of the account was approximately $195,000-$198,000. Appellee used $70,000 from the fund for a down payment on the marital residence. The value of the home was $370,000 and the mortgage balance on the date of trial was $230,000. Appellee further stated that during unpaid maternity leaves and when appellant was either unemployed or in school, she depleted the fund by approximately $60,000. The fund balance as of August 29, 2003, was $61,861.78. Appellee testified that she "replenished" the fund.

{¶ 29} Appellee testified that as of March 31, 2005, the value of her 401(k) was $194,317.95. Appellee also testified as to the value of two IRAs: $1,162 and $1,371, and a retirement account with a value of $1,162.35. Appellee stated that the parties have a CD with a value of $6,723.24.

{¶ 30} Appellee testified that the parties own a one-half interest in two rental properties. Appellee does not pay the mortgages for the properties, does not know what

the monthly income is for the properties, and does not pay for insurance or maintenance of the properties.

{¶ 31} Regarding the parties' debts, appellee testified that the debts include the mortgage, her car lease, and the balance of the partnership buy in. Appellee testified that her monthly expenses, including the children's, totaled approximately $12,500.

{¶ 32} Appellee acknowledged that there was an arrearage of spousal support. Appellee asked that she be entitled to a credit of $7,828.80 against the support arrearage for her payment of appellant's various expenses. Appellee testified that she believed that appellant should not receive spousal support after the divorce is final. Appellee testified that she is requesting that appellant pay child support and that she be reimbursed the money appellant took from the bank account and the cash advance from a credit card both of which were taken shortly after appellee filed for divorce. Appellee also expressed her desire for the division of the household items.

{¶ 33} During cross-examination, appellee was questioned about the May 17, 2002 sale of the condominium in Canfield, Ohio, which grossed $81,077.56. Appellee stated that a portion of the amount was gifted back to her brother who had initially given them $25,000 to purchase the condominium. The evidence in the record showed the amount to be $17,409.60. Thus, the total net was $56,961.16.

{¶ 34} Appellee was questioned about the spousal support arrearage; she denied that the total was $27,775. Appellee contended that there should have been a $4,500

credit for an extra payment that was made. Later in the proceedings, the parties stipulated that the arrearage was $11,518, though appellee still disputed that it was owed.

{¶ 35} Appellee's mother, Norma Garritano, testified regarding premarital and marital gifts given by her and her husband. Mrs. Garritano testified that the parties received a bedroom set as a wedding gift. Mrs. Garritano also testified regarding the Llardrós figurines and the Edna Hibel artwork that was gifted to appellee prior to the marriage. Mrs. Garritano testified that she gave appellee 12 place settings of Royal Crown Derby china when she was in high school; appellee also had several pieces of Portmeirion everyday china which were gifted to her upon her graduation from medical school.

{¶ 36} CPA Mary Werner testified that she prepared a valuation report for appellee's 6.25 percent ownership (ten shares) interest in PMR. Werner testified that PMR is responsible for the billing and management of appellee's anesthesiology practice, ACT. Werner testified that as of December 31, 2003, the fair market value of appellee's interest was $87,500. Werner stressed that the market is limited to the anesthesiologists in appellee's group.

{¶ 37} During cross-examination, Werner admitted that she was not aware that PMR provided services to other anesthesiology groups and that this fact may have had an effect on the fair market value. Werner stated that this fact may have actually increased the value.

{¶ 38} Appellee presented testimony of a realtor regarding the nature of the real estate business and the expected salary increases per year of experience. The realtor further set forth the process for a license renewal.

{¶ 39} CPA Dennis Snell testified that he is the accountant for ACT and PMR. Snell testified that PMR's income is variable and is dependent on maintenance of contracts that PMR has with outside entities. Snell testified that as of December 31, 2003, PMR shares were worth approximately $4,600 per share. Thus, according to Snell, the value of appellee's ten shares was $46,000.

{¶ 40} Appellant testified that he did not want to move to Toledo from Youngstown and that most of the parties' extended families live in the Youngstown area. Appellant stated that his highest income was $33,000 and was made in the Youngstown area. Appellant did state that in 2000, in Toledo, he made $31,000, while working as a realtor.

{¶ 41} Regarding the two rental properties, appellant testified he and appellee were partners with another couple and that appellee initially paid the mortgages. In 2004, appellant was court-ordered to pay the mortgages. Appellant testified that the rents received from the units were put back into "extensive remodeling" of the properties.

{¶ 42} Appellant testified that he has monthly expenses of approximately $9,772.52. Appellant also testified regarding the amount of his debts of approximately $22,000. Appellant testified that he was current on all of his payments.

{¶ 43} Appellant was questioned regarding his knowledge of appellee's transfer of funds from their joint account into appellee's Merrill Lynch account; appellant denied knowledge of the transfers. Appellant testified that the proceeds from the sale of the condominium were used for appellee to buy into PMR.

{¶ 44} Appellant testified that appellee's parents gave them the oil well contract as a wedding gift. Appellant testified that appellee put the profits from the oil well into their joint checking account. Appellant testified that there was a $19,803.61 balance owed to his attorney; appellant stated that he was requesting that appellee pay the fees.

{¶ 45} During cross-examination, appellant testified that he was currently employed with a local real estate company, though he failed to renew his real estate license, and that he was learning the automotive business from a friend who is a car dealer.

{¶ 46} Appellant testified that the rental income for 1918 Evansdale is $1,000 per month. The rent at 2051 Evansdale is $720 per month. It was initially $1,400 per month but due to a new zoning regulation which targeted student housing, only three unrelated persons were permitted to live in the residence. Appellant also testified regarding the insurance and maintenance fees.

{¶ 47} Appellant acknowledged that he had full access to the parties' National City Bank joint checking account and that appellee clearly detailed the purpose of all the activity in the account.

{¶ 48} The parties stipulated as to the division of the personal property.

{¶ 49} During rebuttal, appellee testified that she did not use the proceeds from the sale of the condominium to fund the buy in to PMR. Appellee admitted that she did not recall what was done with the money.

{¶ 50} Following trial, on March 30, 2006, appellee filed a motion to modify spousal support. Appellee requested that spousal support be terminated due to the length of time that the case had been pending. On October 17, 2006, the court denied the motion.

{¶ 51} On April 12, 2007, the court entered its judgment entry of divorce. In relevant part, the court awarded appellee custody of the children; appellant was granted visitation. The court found that of the $145,000 equity in the martial residence, $70,000 was appellee's separate property used for the down payment. Appellee was awarded the marital residence and appellant was awarded his interest in the rental properties. Appellee was awarded the gas and oil well lease as her separate property. Appellee was also awarded her interest in ACT and PMR; appellee was awarded her $60,000 buy in to PMR as separate property. Appellee was ordered to pay spousal support in the sum of $4,000 per month, for three years, beginning with the first day of trial. Appellee was given credit for payments under the July 18, 2003 temporary order. The court determined that the net spousal support arrearage was $11,518. Finally, the court ordered that appellee pay to appellant $7,500 in attorney fees and the transcript cost of $1,388. This appeal followed.

{¶ 52} Appellant now raises the following four assignments of error:

{¶ 53} "I. The court abused its discretion in awarding custody to the plaintiff.

{¶ 54} "II. The court abused its discretion in not equalizing and dividing the martial property.

{¶ 55} "III. The trial court abused its discretion in its spousal support award.

{¶ 56} "IV. The trial court abused its discretion in its attorney's fees award."

{¶ 57} Appellee raises the following assignment of error in her cross-appeal:

{¶ 58} "I. The trial court erred by failing to halt temporary spousal support pending a final judgment and to credit appellee's overpayment of temporary spousal support against the division of the marital estate."

{¶ 59} In appellant's first assignment of error, he argues that the trial court erred when it granted appellee custody of the minor children. Appellant contends that he should have been awarded custody or, at minimum, a shared parenting plan should have been ordered. Because the court has broad discretion in custody award matters, we must uphold a custody decision unless there has been an abuse of discretion. *Sayre v. Hoelzle-Sayre* (1994), 100 Ohio App.3d 203, 210. An abuse of discretion connotes more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 60} R.C. 3105.21 governs custody and support of children and states that "* * * the court of common pleas shall make an order for the disposition, care, and maintenance of the children of the marriage, as is in their best interests, and in accordance with section 3109.04 of the Revised Code." R.C. 3105.21(A). In determining parental rights and

responsibilities, R.C. 3109.04(F)(1) sets forth the following factors the trial court should consider in making its determination:

{¶ 61} "(a) The wishes of the child's parents regarding the child's care;

{¶ 62} "(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

{¶ 63} "(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

{¶ 64} "(d) The child's adjustment to the child's home, school, and community;

{¶ 65} "(e) The mental and physical health of all persons involved in the situation;

{¶ 66} "(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶ 67} "(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

{¶ 68} "(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense * * *;

{¶ 69} "(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

{¶ 70} "(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

{¶ 71} In its April 12, 2007 judgment entry of divorce, the trial court methodically reviewed the above-quoted factors and the recommendation of the guardian ad litem, and concluded that it was in the best interest of the children to name appellee as their residential parent and legal guardian. With regard to appellant's shared parenting request, the court found that the parties are unable to communicate with one another and certainly would not be able to make joint decisions with respect to the children. After careful review of the record, we find that the trial court did not err when it awarded custody to appellee. Appellant's first assignment of error is not well-taken.

{¶ 72} In appellant's second assignment of error, he contends that the trial court erred by awarding appellee an unequal share of the martial assets. Specifically, appellant argues that the $130,000 ($70,000 down payment for the house and $60,000 buy in to PMR) that appellee claimed were premarital funds could not be properly traced and, as such, the sum should be divided between the parties.

{¶ 73} Under R.C. 3105.171(A)(3)(a), "marital property" includes "[a]ll real and personal property that currently is owned by either or both of the spouses, * * * that was acquired by either or both of the spouses during the marriage * * *." It also includes "all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage * * *."

Under R.C. 3105.171(A)(6)(a)(ii), "separate property" includes "[a]ll real or personal property * * * acquired by one spouse prior to the date of the marriage."

{¶ 74} Commingling of separate property no longer automatically destroys its identity as separate property if the source of the asset can be traced back to a separate asset. R.C. 3105.171(A)(6)(b).

{¶ 75} On appeal, we review the trial court's factual determination of whether property is marital or separate property based on a manifest weight of the evidence standard. *Kelly v. Kelly* (1996), 111 Ohio App.3d 641, 642, and *Eberly v. Eberly* 3d Dist. No. 7-01-04, 2001-Ohio-2228. If the court's decision is supported by competent, credible evidence, we must affirm it on appeal. *C.E. Morris Constr. Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶ 76} In the instant case, in the trial court's April 12, 2007 judgment entry of divorce the court found that appellee wrote the $70,000 check for the down payment of the martial residence from her separate, premarital account. The court further concluded that appellee's shares in PMR were purchased from the same premarital account. In making the findings, the court noted that it found appellee's testimony to be more credible than appellant's.

{¶ 77} We first note that, as the trier of fact, the trial court was in the best position to assess the credibility of witnesses and the weight to be given their testimony and we will not substitute our judgment for that of the trial court on that issue. *Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 81. Upon review of the testimony and

exhibits presented and the arguments of the parties, we conclude that competent, credible evidence supported the trial court's finding that the sums at issue were appellee's separate, premarital property. Further, the court's decision to accept the testimony of appellee's expert, Dennis Snell, rather that appellant's expert, was not an abuse of discretion. The court clearly indicated its reasoning for its decision to use the $46,000 fair market value set forth by Snell. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 78} Appellant's third assignment of error challenges the amount of the spousal support award. Appellant contends that based on the evidence presented at trial, he was entitled to "an approximate sum of $6,500" per month for 36 months from the date of the final hearing. Appellant argues that the court's award of $4,000 per month results in him actually owing appellee money for the amount she paid under the temporary order and wipes out any arrearages.

{¶ 79} Appellate review of a court's decision to grant or deny requested spousal support is limited to a determination of whether the court abused its discretion. *Bowen v. Bowen* (1999), 132 Ohio App. 3d 616, 626. Absent an abuse of that discretion, a reviewing court may not substitute its judgment for that of the trial court. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131. An abuse of discretion is more than an error of law or judgment; it implies that the trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d at 219.

{¶ 80} A trial court's broad discretion in awarding spousal support is controlled by the R.C. 3105.18(C)(1) factors. *Carmony v. Carmony*, 6th Dist. No. L-02-1354, 2004-Ohio-1035, at ¶10. The trial court is not required to comment on each factor. Instead, the record need only show that the court considered each factor in making its spousal support award. *Tallman v. Tallman*, 6th Dist. No. F-03-008, 2004-Ohio-895; *Stockman v. Stockman* (Dec. 15, 2000), 6th Dist. No. L-00-1053.

{¶ 81} R.C. 3105.18(C)(1) provides:

{¶ 82} "(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:

{¶ 83} "(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;

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

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

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

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

{¶ 88} "(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;

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

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

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

{¶ 92} "(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;

{¶ 93} "(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;

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

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

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

{¶ 97} In this case, in making appellant's spousal support award the trial court stated that it considered R.C. 3105.18(C)(1) factors and set appellee's income at

$467,000, and that appellant "was not employed to his full capacity." The court found that appellee's earning capacity was maximized but that, though appellant has a master's degree, his earning potential is uncertain. Appellant's income prior to and at one point during the marriage was about $30,000. The court noted that appellant's main, if not only, source of income during the pendency of the divorce was through the $4,500 per month temporary spousal support award.

{¶ 98} The court found that the parties were both healthy and that appellant had no retirement benefits other than those divided as martial property. The court found that the length of the marriage was nine years and five months. The court concluded that the child care responsibilities were largely attributed to appellee. The court found that the parties enjoyed an upper middle class standard of living and that appellee's monthly expenses were $12,493.89; appellant's monthly expenses were $10,447.52 (though the court noted that his rent was $1,250, not $2,500, and $770 per month was for unsubstantiated costs for maintenance of his rental properties.) Each party was to receive approximately $219,000 from the division of the marital estate.

{¶ 99} The court noted the educational background of the parties. Appellee had completed her medical training prior to the marriage. Appellee paid for appellant to complete his bachelor's degree and to obtain a master's degree. The court observed that appellant simply needed to drive to Columbus, Ohio, to renew his real estate license and he would be qualified to obtain employment.

{¶ 100} Based on the foregoing, we find that the trial court made a careful and thorough spousal support determination; thus, the court did not abuse its discretion in making such an award. Appellant's third assignment of error is not well-taken.

{¶ 101} In appellant's fourth and final assignment of error, he argues that the trial court abused its discretion when it awarded only a portion of his total attorney fees. The trial court's decision regarding attorney fees must be equitable, fair, and serve the ends of justice. *Bowen v. Bowen*, 132 Ohio App.3d at 642. An appellate court will only disturb a trial court's decision as to attorney fees if the trial court abused its discretion. Id.

{¶ 102} In making its award of $7,500 and transcript costs in the sum of $1,388, the court, citing newly enacted R.C. 3105.73,[1] noted that the divorce had been very litigious and, after considering the conduct of the parties, especially appellant's, determined the amount awarded to appellant. Reviewing the arguments of the parties, the court's decision, and the relevant statutory law, we cannot say that the trial court's award was an abuse of discretion. Appellant's fourth assignment of error is not well-taken.

{¶ 103} We will now address appellee's cross-appeal. In her sole assignment of error, appellee argues that the trial court erred by failing to halt her payment of the

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[1]R.C. 3105.73(A) provides:

"In an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, 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. In 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."

temporary spousal support order pending appeal and to credit her with $26,382 in spousal support overpayments. Appellant does not dispute that, under the court's spousal support order, appellee overpaid.

{¶ 104} In its April 12, 2007 judgment entry of divorce, the court awarded appellant $4,000 monthly in spousal support for three years, beginning with the first date of trial. The amount totals $144,000. The court further stated that appellee "shall be given credit against this amount for payments under the temporary order, effective July 18, 2003."

{¶ 105} As stated by appellee, and set forth in the record, appellee made the following temporary spousal support payments during the pendency of the divorce proceedings: 2003, $13,200; 2004, $51,700; 2005, $54,000; 2006, $54,000; 2007, $9,000. According to appellee, the amounts totaled $170,382, which would result in an overage of $26,382.

{¶ 106} Although we cannot say that the trial court abused its discretion when it denied appellee's motion for modification of spousal support, we find that based on the court's spousal support award, appellee is entitled to a credit for her overpayment of spousal support. Accordingly, appellee's cross-assignment of error is well-taken.

{¶ 107} On consideration whereof, we find that substantial justice was not done the appellee, and the judgment of the Lucas Count Court of Common Pleas, Domestic Relations Division, is affirmed, in part, and reversed, in part. The matter is

remanded for a recalculation of appellee's credit for spousal support overpayments.

Pursuant to App.R. 24, costs of this appeal are assessed to appellant.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE