[Cite as *Stamm v. Stamm*, 2009-Ohio-4924.]

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

Jan H. Stamm	Court of Appeals No. F-08-009
Appellee/Cross-Appellant	Trial Court No. 05DV229
v.	
Teresa Ferner Stamm	**DECISION AND JUDGMENT**
Appellant/Cross-Appellee	Decided: September 18, 2009

* * * * *

Martin J. Holmes, for appellee/cross-appellant.

Beverly J. Cox, for appellant/cross-appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This matter concerns an appeal and cross-appeal from a judgment of the Fulton County Court of Common Pleas, Domestic Relations Division, in an action for divorce. Teresa Ferner Stamm is the appellant/cross-appellee. Jan Stamm is the

appellee/cross-appellant. The parties appeal the trial court's judgment of July 16, 2008. The issues on appeal relate to child support, spousal support, and attorney fees.

{¶ 2} The parties were married on September 25, 1982, and have four children of their marriage. Two of the children were minors at the time of the divorce hearing of June 4, 2008. Of the two, one became emancipated during the summer of 2008. Appellee/cross-appellant is the residential parent and legal custodian of the remaining unemancipated minor child. The judgment requires monthly child support payments by appellant/cross-appellee of $537.32 for one child.

{¶ 3} The parties stipulated at the hearing on the divorce as to the fair market value of most marital assets. In the July 16, 2008 judgment, the trial court ordered $713,536.66 in marital assets distributed to appellant/cross-appellee and assets totaling $716,536.66 to appellee/cross-appellant. Neither party claims, in either the appeal or cross-appeal, any error with respect to the trial court's ruling on distribution of marital assets.

{¶ 4} The judgment awarded appellant/cross-appellee spousal support, on an indeterminate basis, of $3,000 per month.

{¶ 5} Appellant/cross-appellee assigns three errors in her appeal:

{¶ 6} "Assignments of Error

{¶ 7} "I. The trial court abused its discretion in calculating defendant's income for child support and spousal support purposes.

{¶ 8} "II. The trial court abused its discretion in only awarding defendant $3,000 per month in spousal support given the factors enumerated in R.C.§3105.18, in conjunction with defendant's child support obligation and medical insurance costs, housing needs and legal fees.

{¶ 9} "III. The trial court abused its discretion in failing to award defendant attorney fees."

{¶ 10} "In order to compute an obligor's spousal support and child support obligations, a trial court must determine both parties' annual income. See R.C. 3105.18 and R.C. 3119.02." *Bils v. Bils*, 6th Dist. No. WD-07-043, 2008-Ohio-4125, ¶ 29. We consider appellant/cross-appellee's objection to consideration of undistributed IRA, pension, and profit sharing income in determining child support and spousal support first.

Calculation of Income for Purposes of Determining
Child Support and Spousal Support

{¶ 11} Under Assignment of Error No. I, appellant/cross-appellee claims that the trial court erred in calculating expected yearly income she will receive from the marital assets distributed to her under the judgment. Such income is specifically identified in R.C. 3105.18(C)(1)(a) as a factor to be considered in determining spousal support:

{¶ 12} "(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:

{¶ 13} "(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* * * *." R.C. 3105.18(C)(1)(a). (Emphasis added.)

{¶ 14} Under R.C. 3119.18(C)(d), the court is also to consider "[t]he retirement benefits of the parties."

{¶ 15} Under R.C. 3119.01(C)(7), gross income includes interest and dividend income "from all sources" and "whether or not the income is taxable." R.C. 3119.01(C)(7). Gross income under R.C. 3119.01(C)(7) also includes "potential cash flow from any source." Id.

{¶ 16} Under the judgment, appellant/cross-appellee received $713,536.66 in distributed marital assets. The trial court identified the assets as nearly all being cash or cash like in nature. The trial court found that yearly income to appellant/cross-appellee from the distributed assets would total $32,278.20.

{¶ 17} The yearly income from the distributed assets was calculated based upon a 4.69 percent return against that portion of the assets that the court determined were income producing. The court determined that $688,234.66 of the assets distributed to appellant/cross-appellee were income producing assets. The trial court used the published rate of 20 year Treasury bills on June 2, 2008 of 4.69 percent in arriving at the anticipated yearly rate of return.

{¶ 18} Appellant/cross-appellee claims error both as in the identification of income producing assets as well as the choice of the rate of return used to calculate future

income from them. She argues first that the maximum total value of distributed assets that can be treated as income producing for purposes of estimating yearly income is $409,522.24, not $688,234.66 as found by the trial court. She claims that $29,077.93 of assets held in IRAs, $11,450.50 held in her share of appellee's PERS retirement account, and $223,908.99 held in a profit sharing account should not be considered in calculating yearly income. She also asserts that the trial court mistakenly included the value of her 2005 automobile (valued at $14,245) in the $688,234.66 total of income producing assets.

{¶ 19} Appellant/cross-appellee does not argue that the IRA, pension, or profit sharing accounts are not income producing. Rather, she argues that they should not be treated as income producing because she has no present access to the accounts without incurring "significant penalties and tax consequences." At the time of judgment, appellant/cross-appellee was age 51 and the appellee/cross-appellant was age 54. Appellant/cross-appellee argues that these assets will be unavailable, without penalty, until age 59 ½.

{¶ 20} The definition of gross income for purposes of child support provides that gross income includes income "from all sources," "whether taxable or not," and including "potential cash flow from any source." R.C. 3119.01(C)(7). The statutory definition has been interpreted to include income generated in IRA accounts and other retirement accounts even before such income is actually distributed to the account holder. *Albertson v. Ryder* (June 30, 1992), 11th Dist. No. 91-L-103; *Pelikan v. Pelikan* (July 1, 1993), 8th Dist. No. 62962. Accordingly, we conclude that the trial court did not abuse its

discretion in treating undistributed IRA, pension, and profit sharing income as gross income for purposes of calculating appellant/cross-appellee's child support obligations.

{¶ 21} As to income considered for purposes of spousal support, R.C. 3105.18(C)(1) sets forth factors to be considered in determining spousal support including income from distributed marital assets:

{¶ 22} "(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:

{¶ 23} "(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;

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

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

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

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

{¶ 28} "(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;

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

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

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

{¶ 32} "(j) The contributions 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;

{¶ 33} "(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;

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

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

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

{¶ 37} A trial court has broad discretion in determining spousal support. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67. A trial court's judgment concerning spousal support is reviewed on appeal under an abuse of discretion standard. Id. A trial court must demonstrate, however, that it considered all the "relevant factors" under R.C. 3105.18(C)(1) in awarding spousal support. *Schoren v. Schoren*, 6th Dist. No. H-04-019, 2005-Ohio-2102, ¶ 11; *Stockman v. Stockman* (Dec. 15, 2000), 6th Dist. No. L-00-1053.

"And with respect to the relevant factors, 'the trial court's judgment must contain sufficient detail to enable a reviewing court to determine that the spousal support award is "fair, equitable and in accordance with law."' *Crites v. Crites*, 6th Dist. Nos. WD-04-034, WD-04-042, 2004-Ohio-6162, at ¶ 27, quoting *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 97, 518 N.E.2d 1197." *Schoren v. Schoren* at ¶ 11.

{¶ 38} We conclude that the trial court did not abuse its discretion in considering income from IRAs, the PERS retirement pension, and profit sharing accounts in determining spousal support in this case even though the income cannot be distributed from the accounts without penalty before age 59½. Consideration of the income from the IRA, pension, and profit sharing accounts (as distributed marital property) is appropriate under R.C. 3105.18(C)(1)(a) and (d) in determining spousal support. Substantial other cash or cash equivalent marital assets were also distributed to appellant/cross-appellee under the judgment. Appellant/cross-appellee has these other assets available upon which to draw until appellant can withdraw from the IRAs, pension, and profit sharing accounts without penalty. Accordingly, we deem appellant/cross-appellee's objection to consideration of IRA, pension, and profit sharing account income in calculating spousal support is without merit.

{¶ 39} Appellant/cross-appellee also claims under Assignment of Error No. I that the trial court erred by mistakenly including the value of her automobile in the trial court's calculation of income producing property. The record reflects marital assets totaling $713,536.66 were distributed to appellant/cross-appellee. Marital assets to be

distributed to her under the judgment were itemized in the final judgment, including her automobile that was valued at $14,245.

{¶ 40} Appellant/cross-appellee's argument that the value of her automobile was mistakenly included in the trial court's total of income producing assets is without support in the record. Other than the automobile, the marital assets distributed to appellant/cross-appellee are all financial, income producing assets. The record discloses that, even without consideration of the value of the automobile, the distributed assets include assets of an income producing value equal to or greater than the total found by the trial court of $688,234.66.

{¶ 41} In her final argument under Assignment of Error No. I, appellant/cross-appellee argues that the trial court erred in using a 4.69 percent yearly rate of return on income producing distributed assets for purposes of determining income from the assets for purposes of determining child support and spousal support. Appellant/cross-appellee argues that there is no evidence in the record supporting a 4.69 percent rate of return.

{¶ 42} The trial court used the 20 year treasury bill rate of June 2, 2008 to secure the 4.69 percent interest rate. Appellant/cross-appellee argues that the rate used is not supported by the evidence and "could not be reasonably anticipated."

{¶ 43} Here the court employed the rate on 20 year treasury bills on June 2, 2008, to determine future income from income producing marital assets distributed to the parties under the judgment. The issue is distinct and different from a trial court's determination of imputed income from *nonincome-producing assets* under R.C.

3119.01(11)(b) of a parent who has been found to be voluntarily unemployed or voluntarily underemployed. In such circumstances there is statutory authority for a court to impute income from nonincome-producing assets based on local passbook savings rates or other appropriate rate as determined by the court.[1]

{¶ 44} In *Smart v. Smart*, 3d Dist. No. 17-07-10, 2008-Ohio-1996, the Third District Court of Appeals considered a trial court's calculation of interest income from an investment account for purposes of child support. The court magistrate took judicial notice that the appellant/cross-appellee could realize a return of 5 percent or more if he were to invest his assets in a certificate of deposit. Id. at ¶ 9. The magistrate then calculated anticipated yearly interest income from the investment account based upon the 5 percent rate. Id.

{¶ 45} The Third District Court of Appeals held that projected income from the investment account should be treated as "potential cash flow" for purposes of determining gross income under R.C. 3119.01(C)(7) for child support. Id at ¶ 21-26. The court of appeals upheld use of a certificate of deposit interest rate in calculating the anticipated income from the investment account. The court stated two grounds for its ruling: first, that there was evidence in the record that local banks were paying 4.8 percent-5 percent

[1]Where R.C. 3119.01(11)(b) applies a trial court is authorized by the statute to determine such income through use of "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 * * *." R.C. 3119.01(11)(b).

interest on certificates of deposit, and, second, judicial notice of published rates of interest. Id. at ¶ 38. The court approved use of a certificate of deposit rate to determine future income from the investment account over objections by the appellant/cross-appellee that use of the rate was "arbitrarily imposed" by the trial court. Id.

{¶ 46} Judicial notice of adjudicative facts is governed by Evid.R. 201. Under Evid.R. 201(C) "[a] court may take judicial notice, whether requested or not." The kind of facts subject to judicial notice include those facts "capable of accurate and ready determination" by sources "whose accuracy cannot reasonable be questioned." Evid.R. 201(B)(2). Daily interest rates on treasury bills are published and readily available to anyone. Accordingly, judicial notice affords an evidentiary basis for consideration of the treasury rate used by the trial court.

{¶ 47} In our view, the trial court's decision to use a federal treasury bill rate to calculate an estimate of future income from distributed income producing marital assets for purposes of determining both child support and spousal support was not unreasonable and was not an abuse of discretion. We conclude that the manner used to calculate future income from income producing assets in this case is consistent with determination of gross income under R.C. 3119.01(C)(7) for purposes of child support, as well as, under R.C. 3105.18(C)(1)(a), determination of income from distributed marital assets for purposes of spousal support.

{¶ 48} We find that appellant/cross-appellee's Assignment of Error No. I is not well-taken.

Amount Awarded for Spousal Support

{¶ 49} Under Assignment of Error No. II, appellant/cross-appellee asserts that the trial court abused its discretion in setting spousal support at $3,000 per month.

{¶ 50} At the time of judgment, appellant/cross-appellee was age 51 and appellee/cross-appellant, age 54. They married in 1982. The trial court found that in 2005, appellee/cross-appellant reported gross income of $232,750 and adjusted gross income of $178,706. In 2006, he reported gross income of $145,707 and adjusted income of $111,957. The court concluded that income producing assets distributed to appellee/cross-appellant totaled $154,000 and that the assets would produce yearly income of $7,222.60 employing the same 4.69 percent interest rate used as distributed assets held by appellant/cross-appellee. The trial court calculated appellee/cross-appellant's yearly income to be $152,929.60.

{¶ 51} Appellant/cross-appellee holds a baccalaureate degree in English. The trial court found that she has not held significant employment outside the home during the marriage and that she presently works for ten hours per week at a kitchen and earns an hourly wage of $8.17. Appellant/cross-appellee stipulated in the trial court that she is able to work full time.

{¶ 52} However, the trial court found that appellant/cross-appellee has experienced profound mental health issues and was committed, at least once, to psychiatric care during the time this litigation has remained pending. Neither party offered expert medical or expert mental health testimony at trial concerning appellant/cross-appellee's

mental health. The trial court concluded that she "is either eligible for Social Security Disability benefits due to her mental condition or she is capable of working and earning minimum wage if she is not actively engaged in a process of training or further education."

{¶ 53} The court found that appellant/cross-appellee would earn an income of $14,560 a year through full time employment at a minimum wage of $7. The trial court calculated her yearly income to include employment earnings of $14,560, interest earnings of $32,278.20, trust income of $1,850 for a yearly income total of $48,688.20. Spousal support of $3,000 a month raises the yearly total to $84,688.20.

{¶ 54} Marital assets totaling $713,536.66 were distributed to appellant/cross-appellee under the judgment. By agreement, the marital residence was awarded to appellee/cross-appellant. The trial court reserved jurisdiction to modify the amount and term of spousal support in the future.

{¶ 55} The trial court considered the R.C. 3105.18(C)(1) factors in determining spousal support. Under the totality of the circumstances, we conclude that the trial court did not abuse its discretion in awarding spousal support of $3,000 per month. There is competent and credible evidence in the record supporting a conclusion that the award is fair and equitable.

{¶ 56} Appellant/cross-appellee's Assignment of Error No. II is not well-taken.

{¶ 57} In her Assignment of Error No. III, appellant/cross-appellee argues that the trial court abused its discretion in requiring the parties to pay their own legal fees and

expenses. The decision on whether to award attorney fees is a matter committed to the discretion of a trial court. *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359.

{¶ 58} "The general rule is that the payment of attorney fees is primarily the function of the party who retains the attorney. *Farley v. Farley* (1994). 97 Ohio App.3d 351, 646 N.E.2d 875. A trial court may award reasonable attorney's fees to either party if the other party has the ability to pay and if a party would be unable to fully litigate the issues. R.C. 3105.19(H). The trial court must consider the same factors considered when making an award of spousal support. *Cooper v. Cooper*, 6th Dist. No. L-02-1163, 2002-Ohio-7105, ¶ 15, citing *Williams v. Williams* (1996), 116 Ohio App.3d 320, 328, 688 N.E.2d 30." *Meyer v. Meyer*, 6th Dist. No. L-04-1359, 2005-Ohio-6249, ¶ 41.

{¶ 59} Appellant/cross-appellee argues that given her housing, insurance, and other necessary expenses, including obligation to pay child support, that she is not in a position to pay her entire legal fees. She requested an award of $20,000 toward payment of her legal fees incurred at trial. The trial court found "that both parties are leaving the marriage with considerable assets and that both parties will have sufficient income to pay their own legal fees. Furthermore, the Plaintiff has paid all or most of the legal fees and expenses to date."

{¶ 60} We find competent and credible evidence in the record supporting the trial court's conclusion that the parties hold considerable assets and income from which to pay their own fees. We find no abuse of discretion in failing to award appellant/cross-

appellee fees in this case. Accordingly, we find that appellant/cross-appellee's Assignment of Error No. III is not well-taken.

Cross Appeal

{¶ 61} In his cross-appeal, appellee/cross-appellant argues that the trial court erred in failing to specify a termination date for spousal support:

{¶ 62} "Cross-Assignment of Error

{¶ 63} "Cross-Assignment of Error No. 1: The court erred in not providing a determinate date to end Mr. Stamm's spousal support obligation."

{¶ 64} In *Kunkle v. Kunkle* at paragraph one of syllabus, the Supreme Court of Ohio recognized a general rule that spousal support awards should include terms that specify that spousal support payments will terminate on a date certain:

{¶ 65} "1. 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 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."

{¶ 66} Appellee/cross appellant argues that appellant/cross-appellee has the resources, ability and potential to be self-supporting and that therefore, under *Kunkle v. Kunkle* analysis, the trial court erred in failing to order termination of spousal support upon a date certain and within a reasonable time. In response, appellant/cross-appellee

argues that under an exception identified in *Kunkle*, the requirement to provide termination of spousal support on a date certain does not apply 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." *Kunkle* at paragraph one of the syllabus. Appellant/cross-appellee argues that the facts of this case fall within the exception.

{¶ 67} The marriage was of long duration—26 years. Appellant/cross-appellee was age 51 as of the date of trial. The trial court concluded that she did not hold significant employment during the marriage. The trial court also concluded that without additional training, appellant/cross-appellee is "either eligible for Social Security disability benefits due to her mental condition or she is capable of working and earning minimum wage."

{¶ 68} In its findings, the trial court found that appellant/cross-appellee has received mental health care for years, "experienced profound mental health issues" since the parties separated, and had been committed for psychiatric care "at least once during the pendency of the case." Appellant/cross-appellee stipulated that she could work full time at minimum wage type work.

{¶ 69} In view of the length of the marriage, appellant/cross-appellee's age at the time of trial, and the limited employment prospects determined by the trial court that exist for appellant/cross-appellant without additional education and training, we conclude that the trial court did not abuse its discretion in awarding spousal support on an

indeterminate basis. We therefore find that appellee/cross appellant's assignment of error is not well-taken.

{¶ 70} On consideration whereof, this court finds that substantial justice was done the parties and that the judgment of the Fulton County Court of Common Pleas, Domestic Relations Division, is affirmed. Pursuant to App.R. 24, the parties are ordered to pay costs on an equal basis.

JUDGMENT AFFIRMED.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

John R. Willamowski, J. _____
CONCUR.
JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.