

[Cite as *Dunagan v. Dunagan*, 2010-Ohio-5232.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93678

MARYDENISE DUNAGAN

PLAINTIFF-APPELLEE/
CROSS-APPELLANT

vs.

TIMOTHY DUNAGAN

DEFENDANT-APPELLANT/
CROSS-APPELLEE

**JUDGMENT:
AFFIRMED AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Domestic Relations Division
Case No. D-314627

BEFORE: Boyle, P.J., Celebrezze, J., and Cooney, J.

RELEASED AND JOURNALIZED: October 28, 2010

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MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant/cross-appellee, Timothy Dunagan (“Timothy”), and plaintiff-appellee/cross-appellant, Marydenise Dunagan (“Marydenise”), both appeal from the trial court’s judgment relating to its order of spousal support and attorney’s fees. Whereas Timothy complains that he is required to pay too much, Marydenise complains that it is too little. Timothy also challenges the trial court’s order relating to his child support obligation and the trial court’s separate finding that he owes an arrearage. Marydenise separately challenges the trial court’s denial of her motion to show cause and refusal to hold Timothy in contempt for failing to pay temporary support. Aside from the trial court’s minor oversight in failing to credit Timothy \$1,500, which we order to be corrected on remand, we affirm the trial court’s decision.

Procedural History

{¶ 2} The parties were married on March 16, 1991 and have four minor children together. In February 2007, Marydenise filed her complaint for divorce, which Timothy answered and asserted his counterclaim. The parties stipulated that the basis for divorce was incompatibility and that their marriage lasted for 16 years, ending on February 17, 2007, when Marydenise filed for divorce. The case was tried to a magistrate, who heard five days of evidence related to issues including, inter alia, child support, spousal support, attorney's fees, arrears, and any contempt of the prior temporary support order. The parties reached an agreement as to both their parental rights and responsibilities and the division of marital property; those issues were not before the court at trial. Following the conclusion of trial, the magistrate issued her decision, to which both parties filed objections. The trial court granted some of the objections, correcting clerical errors, decreasing the duration of the spousal support, retaining jurisdiction over the amount and duration of spousal support, and reducing the amount of attorney's fees owed. Both parties appeal.

Timothy's Appeal

{¶ 3} Timothy raises the following five assignments of error:

{¶ 4} "[I.] The trial court erred and abused its discretion in the amount and duration of spousal support awarded to the appellee.

{¶ 5} "[II.] The trial court erred and abused its discretion in its calculation

of child support, by failing to deviate Timothy's child support obligation.

{¶ 6} “[III.] The trial court erred and abused its discretion by finding that Timothy owes an arrearage.

{¶ 7} “[IV.] The trial court erred and abused its discretion by awarding attorney fees as additional spousal support to the appellee.

{¶ 8} “[V.] The trial court erred and abused its discretion by adopting the magistrate's decision without entering its own judgment on the issues.”

Marydenise's Cross Appeal

{¶ 9} “[I.] The trial court erred and abused its discretion in failing to find Timothy R. Dunagan in contempt of court.

{¶ 10} “[II.] The trial court erred and abused its discretion in reducing the duration of spousal support and in reducing the amount of attorney fees.”

{¶ 11} For ease of discussion, we will address some of these assignments of error together where appropriate.

Standard of Review

{¶ 12} The Ohio Supreme Court has long recognized that a trial court must have discretion to do what is equitable upon the facts and circumstances of each divorce case. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. Thus, when reviewing a trial court's determination in a domestic relations case, an appellate court generally applies an abuse of discretion standard. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 130, 541 N.E.2d

597. An abuse of discretion “implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Under this deferential standard, we may not freely substitute our judgment for that of the trial court. *Soulsby v. Soulsby*, 4th Dist. No. 07CA1, 2008-Ohio-1019, citing *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181. If the trial court’s determination is supported by some competent, credible evidence, this court will not disturb the decision below. *Deacon v. Deacon*, 8th Dist. No. 91609, 2009-Ohio-2491, ¶14.

{¶ 13} With this deferential standard of review in mind, we proceed to address the assignments of error.

Spousal Support

{¶ 14} In his first assignment of error, Timothy argues that the trial court abused its discretion in ordering him to pay six years of spousal support. Conversely, Marydenise contends in her second cross-assignment of error that the trial court committed reversible error in reducing the duration of spousal support from seven years, as deemed appropriate by the magistrate, to only six years. We find both arguments unpersuasive.

{¶ 15} In determining whether to grant spousal support and in determining the amount and duration of the payments, the trial court must consider the factors listed in R.C. 3105.18(C)(1)(a)-(n). *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 518 N.E.2d 1197, paragraph one of the syllabus. The goal of

spousal support is to reach an equitable result. *Id.* at 96. And while there is no set mathematical formula to reach this goal, the Ohio Supreme Court requires the trial court to consider all 14 factors of R.C. 3105.18(C) and “not base its determination upon any one of those factors taken in isolation.” *Id.*

{¶ 16} Timothy contends that the appropriate duration is only two years given that (1) they were married for only 16 years; (2) Marydenise “is able to be self-supporting given her qualifications and credentials as a teacher”; (3) Marydenise was awarded “all of the parties’ liquid assets totaling approximately \$93,000”; and (4) he has to pay the bulk of the parties’ marital debt. He contends that the trial court’s award is arbitrary and contrary to the evidence presented at trial. We disagree.

{¶ 17} The record reflects that the court clearly considered the factors contained in R.C. 3105.18(C). In applying these factors, the court made the following relevant findings, which were consistent with the stipulations of the parties and the evidence presented at trial: (1) the parties are in their mid-forties and in good health; (2) Marydenise, who has a master’s degree in elementary education and is employed as a parochial school teacher, earns an annual income of \$28,650; (3) Marydenise returned to work after the proceedings for divorce commenced and has been out of the workforce for more than 13 of her 16 years of marriage; (4) Timothy, who has a master’s degree in business administration and is employed by Amsted Industries, earns an annual income

of \$150,000; (5) Timothy has the greater earning ability; (6) the parties' retirement assets are being divided consistent with the parties' agreed division of property, but that the resulting division will be insufficient to support either party; (7) the parties have enjoyed an upper middle class standard of living during the marriage; (8) the parties have divided their assets and liabilities to their mutual satisfaction; and (9) the spousal support award is taxable to the person who receives it and deductible to the person who pays it.

{¶ 18} After making these findings, the court concluded that Marydenise is entitled to spousal support in the amount of \$2,000 per month for a period of six years. Notably, the court specifically retained jurisdiction over the award in the event that modification is necessary. Based on the facts of this case, we find the award to be equitable and reasonable.

{¶ 19} First, as noted by the trial court, Marydenise's income is considerably less than Timothy's, and Timothy has the much greater earning ability. Second, although Timothy complains that he is saddled with more debt and that Marydenise received all the liquid assets, thereby favoring a reduced spousal support award, the distribution of property and assumption of debts were mutually agreed upon by the parties. Timothy cannot now collaterally attack the property distribution when he specifically negotiated for it. Indeed, there was no stipulation that the division of property was contingent on a reduced spousal support award. Moreover, the parties enjoyed an upper

middle class standard of living during the 16-year marriage. The spousal support award will assist Marydenise in sustaining a more comparable standard of living while raising their four minor children and is an award that Timothy has the ability to pay. See *Gallo v. Gallo*, 11th Dist. No. 2000-L-208, 2002-Ohio-2815, ¶ 40 (“To be equitable, the parties should, if feasible, enjoy a standard of living comparable to that enjoyed during the marriage, adjusted by the factors set forth in R.C. 3105.18.”).

{¶ 20} Relying on *Straube v. Straube* (Aug. 10, 2001), 11th Dist. No. 2000-L-074, Timothy argues that six years is contrary to Ohio law when the parties have been married for only 16 years. We find his reliance on *Straube* misplaced. The significant factor in *Straube* that led the court to conclude that six years was too long for spousal support was the trial court’s failure to reserve jurisdiction over the award. In this case, the trial court specifically retained jurisdiction over both the amount and duration of the award. Therefore, if either party’s circumstances change, Timothy can move the court for a modification.

{¶ 21} We likewise find no merit to Marydenise’s claim that the trial court abused its discretion in reducing the duration of spousal support. She argues that the trial court relied on the same findings that the magistrate made but simply reached a different conclusion. Contrary to Marydenise’s assertion, the trial court is free to do so. Given the broad discretion afforded the trial court and the evidence contained in the record, we cannot say that the trial court

abused its discretion simply because it found six years to be more equitable than seven.

{¶ 22} Timothy's first assignment of error is overruled, and Marydenise's second cross-assignment of error as to spousal support is overruled.

Child Support

{¶ 23} In his second assignment of error, Timothy argues that the trial court abused its discretion in refusing to deviate downward from the amount of child support computed under the basic child support schedule "based upon the fact that [he] has the minor children half the time according to the parties' shared parenting plan and that he incurs significant expenses to travel from Arkansas to Ohio in order to exercise his visitation." We disagree.

{¶ 24} Initially, we note that R.C. 3119.04(B) expressly prohibits a trial court from awarding less than the amount computed under the basic child support schedule and applicable worksheet corresponding to a combined gross income of \$150,000 unless the court finds that "it would be unjust or inappropriate and would not be in the best interest of the child, obligor, or obligee to order that amount." This court has consistently held that in determining child support obligations pursuant to R.C. 3119.04, trial courts must proceed on a case-by-case basis and generally do not have to state reasons for doing so. *Keating v. Keating*, 8th Dist. No. 90611, 2008-Ohio-5345, ¶84. Further, "the statute does not require any explanation of its decision unless it

awards less than the amount awarded for combined incomes of \$150,000.” *Cyr v. Cyr*, 8th Dist. No. 84255, 2005-Ohio-504, ¶25. See, also, *Pruitt v. Pruitt*, 8th Dist. No. 84335, 2005-Ohio-4424; *Seibert v. Tavaréz*, 8th Dist. No. 88310, 2007-Ohio-2643.

{¶ 25} Here, the trial court adopted the magistrate’s recommendation relating to child support and ordered Timothy to pay the presumed statutory amount calculated in accordance with R.C. 3119.022 and 3119.023 for a combined income of \$150,000. Specifically, the court ordered Timothy to pay \$417.61 per child, plus a two percent processing fee, for a total monthly child support obligation of \$1,703.84. Notably, the magistrate specifically declined to include Marydenise’s income, recognizing that “an extrapolated child support amount would be significantly higher.” The court further noted that “[i]n light of the needs and the standard of living of the Dunagan children and their parents, the basic child support amount should be ordered.”

{¶ 26} And while Timothy argued below that he should pay less based on the expense he incurs in traveling to facilitate visitation, and based on the almost equal amount of parenting time that he will have, the trial court found neither reason persuasive. Indeed, Marydenise presented evidence at trial that Timothy had cancelled many of his scheduled visits during the pendency of the litigation, failing to exercise all of the visitation time that he was entitled. The trial court may have been unconvinced that Timothy would actually exercise all

of his parenting time under the agreement to warrant a reduced award of child support.

{¶ 27} Based on the record before us, we find no abuse of discretion in the trial court's refusal to deviate downward in the amount of child support calculated under the basic child support schedule and applicable worksheet for a combined gross income of \$150,000. Accordingly, the second assignment of error is overruled.

Arrears

{¶ 28} In his third assignment of error, Timothy argues that the trial court erred and abused its discretion in finding that he owes an arrearage in the amount of \$15,824.17. He contends that (1) the record does not support such a finding, (2) the trial court failed to credit him with payments that he made from February through July 2007, and (3) the court failed to make any specific findings as to why he should pay temporary spousal support from January through August 2008. We find his arguments lack merit.

{¶ 29} The arrearage that the trial court ordered Timothy to pay primarily arose out of the parties' own Agreed Journal Entry for Payment of Temporary Support reached on August 22, 2007. Under the parties' agreement, Timothy agreed to pay spousal support in the amount of \$1,200, commencing on July 9, 2007 and continuing until "further order of court." Under the agreement, Timothy also agreed, inter alia, to pay for all the children's medical expenses

and extracurricular activities. At trial, the evidence revealed that, although Timothy paid six months of spousal support, i.e., July through December 2007, he stopped paying temporary spousal support in January 2008 and never resumed making any payments. This resulted in an arrearage of \$8,400 in spousal support. Similarly, Marydenise's exhibits 8, 9, and 12 reflected expenses totaling \$1,424.17 paid by Marydenise during the pendency of the litigation that related directly to the children's medical and extracurricular activities for which she had not been reimbursed. Relying on these exhibits and Marydenise's testimony, the trial court found these expenses to be arrears under the Agreed Journal Entry. We cannot say that the trial court abused its discretion in ordering Timothy to pay for items that he had already agreed upon.

{¶ 30} The Agreed Journal Entry also specifically reserved jurisdiction for the trial court to determine if temporary support should be ordered for the period from February 16, 2007 through July 9, 2007. The trial court found that Marydenise was entitled to spousal support for this period and ordered Timothy to pay the same amount of spousal support for these five months that he had recognized as a reasonable amount for spousal support commencing on July 9, 2007, thereby finding an additional arrearage of \$6,000. Likewise, although Timothy presented evidence that he had made one deposit of \$4,400 in the parties' joint bank account during the first five months of the litigation, the trial court obviously found that such deposit alone did not diminish Marydenise's

right to temporary spousal support for this period. We cannot substitute our judgment for the trial court's, absent an abuse of discretion. Under these circumstances, we cannot say that such determination amounts to an abuse of discretion.

{¶ 31} We do note, however, that the record reflects that a stipulation was entered between the parties during trial that Timothy would be credited \$1,500 to be applied against any future or past support owed. The trial court failed to incorporate this stipulation into its order. We therefore order that such credit be applied on remand, resulting in a total arrearage of \$14,324.17.

{¶ 32} The third assignment of error is overruled, but we remand for the trial court to incorporate the stipulations of parties and apply the \$1,500 reduction.

Attorney's fees

{¶ 33} Timothy argues in his fourth assignment of error that the trial court abused its discretion in awarding Marydenise attorney's fees. Marydenise likewise argues that the trial court abused its discretion in reducing the amount of attorney's fees that the magistrate found to be reasonable.

{¶ 34} R.C. 3105.73 sets forth the trial court's authority to award attorney's fees in a divorce proceeding and provides in relevant part:

“(A) 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."

{¶ 35} The statute also recognizes that an award of attorney's fees and litigation expenses under the statute may be designated as spousal support. See R.C. 3105.73(D).

{¶ 36} Marydenise presented competent, credible evidence that she incurred \$45,429.31 in attorney's fees. At the conclusion of trial, she still owed her attorney \$15,863.70 as part of the fees incurred. The magistrate found that Timothy's conduct in failing to comply with the temporary support order, coupled with the disparity in income and earning ability, warranted an order requiring Timothy to pay \$25,000 toward Marydenise's attorney's fees "as and for additional spousal support." The trial court subsequently reduced the amount by \$5,000, ordering Timothy to pay \$20,000 toward Marydenise's attorney's fees.

{¶ 37} Relying on this court's decision in *Farley v. Farley* (1994), 97 Ohio App.3d 351, 646 N.E.2d 875, Timothy argues that the court abused its discretion in awarding attorney's fees when the record fails to establish that Marydenise needed the assistance. He contends that the fact that she has already paid for the majority of her attorney's fees negates any claim that she needs the assistance. We find his argument misplaced.

{¶ 38} First, the record reflects that Marydenise relied on money loaned by her parents to pay her attorney's fees. Indeed, Marydenise only recently reentered the workforce in the summer of 2008; she was unemployed at the time of the filing. Although Timothy relies heavily on the fact that Marydenise has no legal obligation to repay the loans, Marydenise testified that she had a moral obligation and wanted to reimburse her parents. Second, the facts of *Farley* are completely distinguishable from the instant case. Unlike the facts of *Farley*, the court herein had ample evidence as to the reasonableness of the attorney's fees as well as the parties' income and ability to pay.

{¶ 39} And to the extent that Timothy again implies that Marydenise received a more favorable property division, which should alleviate any obligation on his part to pay attorney's fees, we note that Timothy agreed to the property division.

{¶ 40} Here, we find that the court carefully considered the parties' positions, including Timothy's ability to pay the award and Marydenise's needs, and properly ordered the \$20,000 award. We therefore find no merit to Marydenise's cross-assignment of error that the trial court abused its discretion in reducing the amount by \$5,000. The trial court found that a reduction of \$5,000 was more equitable; we cannot substitute our judgment on appeal, absent a showing of an abuse of discretion. Marydenise has failed to demonstrate any abuse of discretion.

{¶ 41} Timothy’s fourth assignment of error and Marydenise’s second cross-assignment of error as to attorney’s fees are overruled.

Independent Review

{¶ 42} In his final assignment of error, Timothy argues that the trial court’s order should be reversed because it failed to “undertake a thorough independent review of the magistrate’s decision” as required under Civ.R. 53. We disagree. We find no basis to conclude that the trial court did not engage in an independent, thorough review of the magistrate’s decision in rendering its own 12-page Judgment Entry of Divorce, wherein it sustained some of Timothy’s objections. The mere fact that the trial court agreed with most of the magistrate’s decision and did not agree with all of Timothy’s objections does not mean that it failed to independently review the issues.

{¶ 43} Timothy’s final assignment of error is overruled.

Contempt of Court

{¶ 44} In her first cross-assignment of error, Marydenise argues that the trial court abused its discretion in failing to find Timothy in contempt of court despite its recognition that he failed to comply with the temporary support order.

She contends that the court’s refusal to make a contempt finding is an abuse of discretion because it essentially condones a party’s failure to comply with a court order. She cites no authority in support of her position. See App.R. 16(A)(7). Further, her argument is belied by the record. The magistrate

specifically factored Timothy's noncompliance in the temporary support order in assessing whether an award of attorney's fees was appropriate. The trial court in turn agreed with the magistrate and awarded Marydenise attorney's fees. We therefore cannot say that the trial court abused its discretion in refusing to find Timothy in contempt.

{¶ 45} Marydenise's first cross-assignment of error is overruled.

{¶ 46} In summary, we remand the case for the trial court to credit \$1,500 toward Timothy's order of arrearages as stipulated by the parties. We otherwise affirm the trial court's decision.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
COLLEEN CONWAY COONEY, J., CONCUR