[Cite as *Ballinger v. Ballinger*, 2015-Ohio-590.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 100958, 101074, 101655, and 101812

BETTY J. BALLINGER

PLAINTIFF-APPELLEE

vs.

NORMAN D. BALLINGER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-12-343703

BEFORE: Blackmon, J., S. Gallagher P.J., and E.T. Gallagher, J.

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PATRICIA ANN BLACKMON, J.:

{¶1} In this consolidated appeal,[1] appellant Norman D. Ballinger ("Norman") appeals from the domestic relations court's divorce decree and assigns seven errors for our review.[2] Appellee Betty J. Ballinger ("Betty") cross-appeals and assigns one error for our review.[3]

{¶2} After reviewing the record and relevant law, we affirm the trial court's decision. The apposite facts follow.

Facts

{¶3} The parties were married on February 8, 1969. At the time, Betty (d.o.b. 12/6/1945) was 24 years old and Norman (d.o.b. 9/7/1948) was 21 years old. They have one adult child who was born on June 24, 1971.

{¶4} Prior to marrying Norman, Betty lived with her parents and earned money by babysitting and working at a dentist's office. Betty was a stay-at- home mother while their child was young, but then proceeded to work as a nursing assistant. She worked until 2008, when she lost her job as a nursing home representative. She made a few attempts at finding a new job, but without a nursing degree, she was unsuccessful. She subsequently took an early retirement at age 62 so that she could receive social security payments. Betty has fairly good health, but does

[1]We have consolidated four appeals by Norman. Appeal No. 100958 is an appeal from the original divorce decree; Appeal No. 101074 is an appeal from a nunc pro tunc entry of the original divorce decree; Appeal No. 101655 is an appeal from a QDRO as it relates to the 401K at Kichler Lighting; and Appeal No. 101812 is an appeal from a QDRO as it relates to the 401K at Esterline Technologies. We will address the assigned errors from the multiple appeals in consecutive numerical form for ease of discussion.

[2]See appendix.

[3]See appendix.

suffer from hypertension and takes medicine for an overactive thyroid condition. She has also been diagnosed with pre-diabetes.

{¶5} Prior to their marriage, Norman had served time in the military. He then married Betty and proceeded to obtain an associates degree in accounting, a B.A., an M.B.A., and became a certified public accountant ("CPA"). Throughout the years he worked at several different manufacturing companies as the Chief Financial Officer. At the time of the divorce, he had recently retired at age 65. Norman suffers from COPD and had a heart attack at the age of 52.

{¶6} The parties' marriage, as testified to by the parties and their adult son, was a strained one. Norman admitted that he had several affairs, and he was rarely home except for weekends because he traveled extensively for work and lived in other states while working. Betty also had an affair during the marriage.

{¶7} In 2005, Norman moved to Arkansas for a new job and his longtime girlfriend joined him. Norman and his girlfriend subsequently moved to Mississippi in 2009, because Norman had obtained another job. In spite of the move, he continued to provide support to Betty and helped her pay the mortgage on the marital home, and provided extra financial support when she lost her job. Norman contended at trial that the parties had entered into a separation agreement in 2005 when he moved from Ohio in which he had agreed to help pay for the mortgage on the marital home until he retired. However, Betty denied they had an agreement. The copy of the agreement that Norman produced at trial was unsigned and undated.

{¶8} It is undisputed that after the separation, the parties led drastically different lifestyles. Norman and his girlfriend purchased a home in Mississippi, where he installed a $30,000 garage and a $25,000 swimming pool. He also uses a tractor to maintain the property

due to its size. With his last bonus from his employment, Norman paid the mortgage in full on the Mississippi home.

{¶9} Norman also owns two luxury cars. A 2010 Porsche and a 2012 Audi 6. Prior to the divorce, he transferred title of these vehicles into his girlfriend's name. He traded in two Harley Davidson motorcycles to buy one Harley Davidson motorcycle, which is also titled in his girlfriend's name. He also had sufficient funds to travel to Europe for two weeks the September prior to the divorce proceedings.

{¶10} At the time of the divorce proceedings, Norman had recently retired. Prior to his retirement, he had earned $188,866 for the year 2013, excluding bonuses.

{¶11} Betty still lives in the marital home located in Strongsville, Ohio. An appraiser testified that the value of the marital home is approximately $220,000. It could be worth more, but is in need of repairs that Betty cannot afford to make. It is heavily mortgaged as the parties refinanced the home in 2005 to pay off marital debts. To reduce the monthly mortgage amount, the parties entered into an interest-only mortgage.

{¶12} Betty lives frugally because since 2008 she has lived solely on social security and any financial help that Norman would give her. In 2008, the last year she collected a salary, she earned $28,484. In 2013, she received approximately $12,816 in social security payments. She testified that she keeps the heat in the house low and is careful in how much she spends on food.

{¶13} In 2013, Norman filed a complaint for divorce in Mississippi. In response, Betty filed a complaint for divorce in Cuyahoga County and also requested temporary spousal support. The Mississippi court deferred to the Cuyahoga County court and the matter proceeded in Cuyahoga County.

{¶14} While the matter was pending, the trial court granted Betty's motion for temporary support. Norman was ordered to pay $3,500/month in spousal support and ordered to pay the $976 monthly mortgage on the Strongsville home. This was while Norman was still employed and making significant sums of money including bonuses. Although he made some of the payments, he had an arrearage at the time of trial.

{¶15} In the divorce decree, the trial court divided the marital assets of the marriage, and considering the lengthy separation of the parties, awarded Norman 68 percent of the assets and Betty 32 percent. Norman's pension plans were split evenly with Betty, and Norman was ordered to pay Betty $459 per month for spousal support until Betty remarried or upon the death of either party. Norman was also ordered to pay his arrears and $30,000 of Betty's attorney fees.

Marriage Termination Date

{¶16} In his first assigned error, Norman argues that the trial court erred by using the final hearing date as the date the marriage terminated. He argues that the marriage ended eight years earlier when he moved from Ohio and ceased living with Betty.

{¶17} The date of the final hearing is presumed to be the appropriate termination date of the marriage. *O'Brien v. O'Brien*, 8th Dist. Cuyahoga No. 89615, 2008-Ohio-1098, ¶ 40. However, when a court determines that a de facto termination of the marriage occurred at an earlier time, and that using the date of the final hearing as the termination date would be inequitable, the court may in its discretion, select a date it considers equitable. *Berish v. Berish*, 69 Ohio St.2d 318, 321, 432 N.E.2d 183 (1982). A de facto date should not be used unless the evidence clearly and bilaterally shows that it is appropriate based upon the totality of the circumstances. *Brown v. Brown*, 8th Dist. Cuyahoga No. 100499, 2014-Ohio-2402, ¶ 9, quoting *O'Brien* at ¶ 41. The trial court has broad discretion in choosing the appropriate marriage

termination date and this decision should not be disturbed on appeal absent an abuse of that discretion. *Berish* at 321.

{¶18} Norman argues that since 2005, the parties have lived separate and apart, did not engage in any marital relations, and maintained separate financial accounts, and paid their own expenses. He also argues that since 2005, he has lived with his long-time girlfriend in a relationship that was similar to a marital one. The parties filed separate tax returns from 2005 through 2008. Although from 2009 to 2011, the parties again filed a joint tax return, Norman contends it was so that Betty would not have to disclose the "spousal support" payments he made to her. He also contends that the parties entered into a separation agreement in 2005 that he drafted.

{¶19} This court in *Saks v. Riga,* 8th Dist. Cuyahoga No. 101901, 2014-Ohio-4930, addressed the determination regarding whether a de facto termination date should be used. We agreed that the fact that the parties were "separated, made no effort to reconcile, and maintained separate bank accounts, weighs in favor of an earlier de facto termination date." *Id.* at ¶ 10. We, however, went on to hold that:

> [T]he presence or absence of reliable data concerning the value of the parties' assets is probably *the most significant factor* the court must consider when selecting a de facto termination date. Thus, it would have been unreasonable for the court to select an earlier date if the necessary information to make an equitable distribution was not available at the time. (Emphasis added.)

Id. at ¶ 10. Thus, merely because the parties lived separate and apart does not dictate that a de facto date be used.

{¶20} In the instant case, the trial court held as follows in paragraph 27 of the judgment entry:

> The Court also finds the trial date should be used as the termination date of the marriage because the Court cannot determine what the division of assets should have been for those earlier years. No documents were produced or submitted as to what the value of their 401(K)s or 403(B)s were at the time of the separation in 2005 or in 2007. All we have is the testimony of Mr. Ballinger who made it difficult and was reluctant to provide documents during the discovery part of the case.

{¶21} In so holding the court noted that there was no evidence as to the value of the wife's 401(K). The only evidence of the wife's 403(B) was that it was worth $49,990 in June 2007. There were no documents regarding Norman's Kichler retirement funds in 2005/2007.

{¶22} Although Norman refers to the alleged separation agreement, the trial court concluded that it was not valid, nor complied with by either party. The court stated:

> 19. Mr. Ballinger stated he left the State of Ohio in March of 2005 and did not return. He claims that the separation was done by agreement of both parties. He submitted a draft of an agreement that he says was signed by the parties, which Mrs. Ballinger denies. No document was ever produced at trial indicating the parties had prepared it as a separation agreement and that it had been signed. In fact, the document Mr. Ballinger claims was their "agreement" was not produced until March 7, 2013 because the Mississippi court was determining whether or not to go forward in Mississippi or let the Ohio courts handle the divorce. In addition, neither Mr. Ballinger nor Mrs. Ballinger complied with this "so called" agreement.

{¶23} A separation agreement is a contract and contract principles apply. *Forstner v. Forstner*, 68 Ohio App.3d 367, 372, 588 N.E.2d 285 (11th Dist.1990).Because the agreement was unsigned and Betty denied signing or agreeing to the document, the trial court did not err in concluding the document had no persuasive value. *See Bolden v. Bolden*, 11th Dist. Geauga No.

2006-G-2736, 2007-Ohio-6249 (the court found an unsigned separation agreement that was not filed with the court was invalid).

{¶24} In addition, the trial court found a de facto termination date was not equitable when, despite the fact the parties lived separate and apart, the parties still had financial assets intertwined. They shared ownership of the marital premises, and Betty signed the mortgage on Norman's house that he purchased in Mississippi in 2009. Although Norman argues that Betty signed a document waiving her right to ownership of the home, no document was presented showing this. Norman also admitted at trial that Betty was liable on the mortgage until it was paid off in full.

{¶25} Also, throughout the separation, Norman gave Betty money to pay the Strongsville mortgage; Norman invested Betty's 401(K) money for her when she lost her job; Norman and Betty had a joint checking account with KeyBank until the divorce proceedings when Betty had Norman removed; in 2009, Norman had listed Betty as the sole beneficiary of his pension account with VT Halter Marine; and, in 2009, was paying for life insurance for Betty as part of his VT Halter Marine benefits; and Norman helped Betty financially when she lost her job.

{¶26} For the last couple of years prior to the divorce, the parties also filed joint tax returns. Although Norman said it was to help Betty so she would not have to pay tax on the money he gave her, the court noted that as a CPA, Norman should have known Betty would not have to pay a tax for money that was not court ordered because they were still married. The court stated that the only person who benefitted from the joint filing was Norman because he could then take the deductions for the Strongsville marital property. We have no reason to conclude the trial court erred in making this finding. Norman cites to the Ninth District case, *Wells v. Wells*, 9th Dist. Summit No. 25557, 2012-Ohio-1392, for the proposition that filing of

joint tax returns does not weigh against using a de facto termination date. However, in *Wells*, the court held that the filing of joint tax returns was beneficial to both parties. In the instant case, it was only beneficial for Norman.

{¶27} Norman also argues the trial court erred by relying on Betty's testimony regarding their relationship because Betty was not credible. Betty had testified that she did not want to divorce Norman and believed they would eventually get back together. She also testified that she and Norman had sexual relations when he came to visit for Christmas in 2007. The same year he bought her a dog and named him after his old boss. The court noted that both parties had credibility issues:

> 14. The credibility of both the husband and wife became an issue in this case. In fact, Mr. Ballinger in his post trial briefs spent a great portion discussing the testimony of Mrs. Ballinger. Mrs. Ballinger in her brief also set forth facts that indicated Mr. Ballinger was not forthcoming in his testimony.
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> 15. As far as the Court's findings, the court was well aware that Mrs. Ballinger's testimony at times contradicted itself. However, the "untruthful" testimony often arose as a result of the harsh, often continuous cross-examination of her, where she became so detached that she would say anything to end the questioning.
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> 16. Mr. Ballinger delivered his testimony very clearly, but made statements that were not necessarily true since they were put forth to justify his actions. Two examples of this was his testimony, as a certified public accountant, indicating that he filed a joint tax return to help Mrs. Ballinger so she would not have to claim as income the money he was giving to her. Mr. Ballinger should know that it was not necessary for Mrs. Ballinger to report his funds since there was no court order or signed agreement that the funds he sent Mrs. Ballinger (which often varied) were spousal support and required her to pay taxes. Another indication of his lack of credibility was his testimony as to why he transferred title of his motor vehicles to Ms. Logston when it was clear that he wanted to take as many assets out of his name with the upcoming divorce action and trial.

17. After six days of trial in which the court observed the parties and listened to their testimony, the court is well aware of the credibility of both parties and has come to this decision after much thought and review.

{¶28} When there are two versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Rather, we defer to the factfinder who was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1994); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). The trial court concluded both parties had credibility issues and relied upon its observance of the parties in determining their credibility.

{¶29} Norman spends a great deal of his argument trying to argue this case is analogous to other cases with similar facts where a de facto date was used. However, in determining whether a de facto date should apply is a decision that imbues the trial court with much discretion as the use of a de facto date is an equitable principle. *Berish v. Berish*, 69 Ohio St.2d 318, 320, 432 N.E.2d 183 (1982). That is, it is presumed the termination date of a marriage is the date of the final hearing, unless it would be more equitable to use a de facto date. No case is going to be exactly similar, thus, the court's discretion should not be restricted by facts of other cases that only apply in part. For instance, in *Gullia v. Gullia*, 93 Ohio App.3d 653, 639 N.E.2d 822 (8th Dist.1994), the parties lived separate and apart for three years. However, did they file joint tax returns? Did the husband continue to give the wife financial support? Did he use her name on a mortgage document? Did he place her name as the beneficiary on his pension plan? Did he continue to help pay the mortgage on the marital home? Did he present evidence of the value of

the property at the time of the separation? These were all considerations this court took into account that do not appear to be facts in *Gullia*.

{¶30} The case that would be most analogous to this case, *Dill v. Dill*, 179 Ohio App.3d 14, 2008-Ohio-5310900 N.E.2d 654 (3d Dist.), was rejected by the trial court in the instant case. The trial court stated that it disagreed with the conclusion in *Dill* and would have applied the final hearing date. We agree. Given the facts in that case, there was more than sufficient evidence to reject a de facto hearing date. In *Dill*, although the parties lived separately, the husband was still supporting his wife and children financially, gave the wife money to pay the utility bills, took out a home equity loan to pay off marital debt, and he frequently visited the wife and the children. Because it is a Third District case we are not bound by its holding. This court has repeatedly held that where the parties' finances are intertwined, the presumptive date of termination is the final hearing date. *See O'Brien v. O'Brien*, 8th Dist. Cuyahoga No. 89615, 2008-Ohio-1098; *Carreker v. Carreker*, 8th Dist. Cuyahoga No. 93313, 2010-Ohio-3411. We have also found that a de facto date was not appropriate when the parties live separate and apart, but the spouse is financially dependent on the other spouse. *Keating v. Keating*, 8th Dist. Cuyahoga No. 90611, 2008-Ohio-5345.

{¶31} Finally, as the trial court notes, although Norman insists the marriage was over when he left Ohio in March 2005, the question remains why he did not attempt to divorce at any point during the previous nine years. Norman's claims that he did not seek a divorce because Betty would not consent or that he could not afford an attorney to do so, does not make sense. As the trial court stated, he had grounds for divorce after being separated for a year and was earning over $100,000 per year.

{¶32} Based on the circumstances of the case, we cannot say that the trial court's choice of the final hearing date as the termination date was arbitrary or unreasonable. Accordingly, Norman's first assigned error has no merit and is overruled.

Division of Assets and Liabilities

{¶33} In his second assigned error, Norman argues that the trial court erred by not using the date of March 30, 2005, when it divided the assets and liabilities. Norman contends that by using the later date of the final hearing, instead of the 2005 date, the trial court included separate property and debts into the division of the marital property, instead of allocating it to the respective parties.

{¶34} A trial court's characterization of property as marital or separate property is a mixed question of law and fact, and we will not reverse the trial court unless its decision is against the manifest weight of the evidence. *Williams v. Williams*, 8th Dist. Cuyahoga No. 95346, 2011-Ohio-939, ¶ 8, citing *Torres v. Torres*, 8th Dist. Cuyahoga Nos. 88582 and 88660, 2007-Ohio-4443, ¶ 14. Once the property is characterized as either marital or separate, the actual distribution will not be disturbed absent an abuse of discretion. *Williams* at ¶ 8, citing *Larkey v. Larkey*, 8th Dist. Cuyahoga No. 74765, 1999 Ohio App. LEXIS 5174 (Nov. 4, 1999).

{¶35} Marital property includes "[a]ll real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(i). Separate property includes "[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage." R.C. 3105.171(A)(6)(a)(ii).

{¶36} The party asserting that an asset is separate property has the burden of proving that claim by a preponderance of the evidence. *Hall v. Hall*, 2d Dist. Greene No. 2013 CA 15, 2013-Ohio-3758, ¶ 14, citing *Peck v. Peck*, 96 Ohio App.3d 731, 734, 645 N.E.2d 1300 (12th Dist.1994).

{¶37} Here, the trial court stated that it was using the final hearing date as the date of termination. Therefore, any property accumulated before that time, was marital property, except, of course, the husband's inheritance from his mother, which was kept separate.

{¶38} Further, although the trial court did not use the March 30, 2005 date as the de facto termination date of the marriage, the court did state that it would consider the lengthy separation when dividing the assets:

> 71. In dividing the assets of the parties, the court is taking into account that a number of the assets of this marriage were acquired by Mr. Ballinger after the parties separated. As stated above, the court is, therefore, not going to necessarily do an equal division of the assets as it would normally do on a case that doesn't have the facts of this case. However, since it would be so difficult to determine a de facto termination date given the financial intermingling to the parties, the court will adjust for that in the division of assets. There is no question with respect to the assets and liabilities that Mr. Ballinger will be awarded more assets than Mrs. Ballinger.

Judgment entry, ¶ 71. In fact, the trial court awarded 68 percent of the assets to Norman while Betty only received 32 percent of the assets. Norman received his half interest of the Mississippi house that he shared with his girlfriend, received all his luxury vehicles, gun and pen

collections. The only thing he did not receive 100 percent of was his retirement accounts, and the Strongsville home was given to Betty.

{¶39} The trial court separately addressed each of the factors specified in R.C. 3105.171(F) in setting forth its division of the parties' marital property. Competent, credible evidence supports each of the trial court's findings under R.C. 3105.171(F). Nonetheless, Norman claims that the trial court should not have included his half of the Mississippi house as a marital asset. However, as the court stated, "The court is finding that this half interest is a marital asset since he could not have purchased [the Mississippi property] without Mrs. Ballinger signing the mortgage and loan." The evidence clearly supports this, thus, we conclude the trial court did not err by including the property as marital property.

{¶40} As to the Strongsville property, Norman contends the trial court should have used the appraisal of the home, which he obtained to refinance the home in 2005. The 2005 appraisal valued the home at $260,000. At trial, an expert, who recently appraised the home, testified that the home was now worth $220,000. He attributed the decline in value due to the disrepair of the home due to lack of maintenance. The trial court found the expert's testimony to be well-reasoned and credible. Norman failed to offer any recent evidence of the value of home to rebut the expert. Thus, the trial court did not err by accepting the lower value of the home.

{¶41} In addition, Norman contends that the parties had agreed pursuant to the alleged 2005 separation agreement that when Norman turned 65 years old, the parties would sell the residence and divide the equity. However, in making the distribution of the property, the trial court again stressed that the separation agreement was not valid:

> 79. Mr. Ballinger has argued that they had an agreement when the parties separated in 2005 or 2007. He produced a typed copy; however, it had no indication that both parties had agreed to it or not even signed it. Mrs. Ballinger denies she agreed to this paper introduced by Mr. Ballinger. It

> involved some very important issues, and ultimately neither party adhered to its terms. As a result, there is no agreement.

{¶42} We agree. There was no evidence that Mrs. Ballinger agreed to the terms of the agreement.

{¶43} As to his pensions, Norman argues that in 2005, the value of both parties' pension plans were nearly equal; therefore, the trial court should have found the plans to be separate property. He also contends the Esterling and VT Halter 401(K)s were acquired after 2005, and, therefore, are clearly separate property.

{¶44} The court found that although Norman claimed that his 401(K) with Kichler Lightning was worth $54,000 in 2005/2007, he provided no documentation as to its worth. Therefore, the trial court ascribed to its current value of $104,319. Given the lack of evidence, the trial court was left without any other recourse. As to his other pensions, Norman only provided the current values. So again, the trial court did not abuse its discretion by using those values.

{¶45} Norman contends the Esterling and VT Halter Marine pensions were not acquired until after 2005. However, as we stated above, the trial court did not err by refusing to accept the 2005 de facto date. Moreover, when he cashed out a portion of his Esterling pension, he reported the income on the joint return that he filed with Betty. As to his VT Halter Marine pension, he identified Betty as his spouse on the retirement plan beneficiary designation form, assigning her 100 percent of his benefits.

{¶46} Norman argues that Betty's credit card debt was not a marital debt because they had paid off all the debt in 2005 by refinancing the home. The court concluded that the debt was incurred by Betty due to her limited funds. As the court stated, the debt would be considered a marriage liability "since she was receiving limited financial support while Mr. Ballinger was

earning a significant salary and was spending freely on luxury cars, motorcycles, guns, and pens." Judgment Entry, ¶ 66.

{¶47} Norman also argues the trial court erred by dividing the tax refunds from 2009, 2010, and 2011. He claims the only reason they filed jointly was for Betty's benefit so that she did not have to report the money he gave to her. However, as the trial court stated, Betty would not have had to pay taxes on money given to her by her husband. Instead, by filing jointly with Betty he could claim the real estate taxes and mortgage interest on the Strongsville home as deductions on his tax returns, which resulted in him paying less taxes. However, he retained the entire refunds for himself. The trial court did not err by ordering him to pay Betty half the refunds for those years. Accordingly, Norman's second assigned error is overruled.

Spousal Support

{¶48} In his third assigned error, Norman argues that the trial court erred by ordering him to pay temporary and permanent spousal support. He argues he has given Betty substantial support since April 2005 and the marriage ended in March 2005. He paid over $134,000 from 2005 until divorce proceedings.

{¶49} A trial court has broad discretion in determining proper spousal support based on the facts and circumstances of each case. *Comella v. Parravano*, 8th Dist. Cuyahoga No. 100062, 2014-Ohio-834, ¶ 8. We will not substitute our judgment for that of the trial court absent an abuse of discretion. *Id*. The trial court's judgment will be affirmed so long as there is competent, credible evidence in the record to support its decision. *Id*.

{¶50} In determining whether spousal support is appropriate and reasonable, the trial court must consider the factors set forth in R.C. 3105.18(C)(1). *Kaletta v. Kaletta*, 8th Dist. Cuyahoga No. 98821, 2013-Ohio-1667, ¶ 22. No single factor, by itself, is determinative. *Id*.

The factors the trial court must consider include: each party's income, earning capacity, age, retirement benefits, education, assets and liabilities, and physical, mental, and emotional condition; the duration of the marriage; their standard of living; inability to seek employment outside the home; contributions during the marriage; tax consequences; and lost income due to a party's fulfillment of marital responsibilities. R.C. 3105.18(C)(1)(a)-(m). The trial court may also consider any other factor that it finds to be "relevant and equitable." R.C. 3105.18(C)(1)(n). The trial court is not required to expressly comment on each factor, but it must indicate the basis for an award of spousal support in sufficient detail so as to enable a reviewing court to determine whether the award is "fair, equitable, and in accordance with the law." *Walpole v. Walpole*, 8th Dist. Cuyahoga No. 99231, 2013-Ohio-3529, citing *Kaletta*.

{¶51} In the instant case, the trial court stated that it had considered the R.C. 3105.18(C)(1) factors and gave a detailed discussion as to how those factors applied in this case. After considering those factors, the trial court determined that spousal support was appropriate and reasonable, and ordered Norman to pay spousal support in the amount of $459 per month. The order further provided that spousal support would terminate upon the death of either party or upon Betty's remarriage.

{¶52} The trial court did not abuse its discretion in making this award because it considered the relevant factors, such as: Norman made significantly more money than Betty throughout the marriage. His salary at the time the marriage ended was $180,000 per year (excluding bonuses); the wife's only income was social security benefits, Betty has not been employed for 8 years and was 68 years old; Norman's earning ability far exceeds Betty's; Norman will be receiving twice the amount of social security benefits; their marriage was 44 years long and they were married 36 years at the time of the alleged separation; Norman has a

lavish lifestyle with a luxurious home with a swimming pool and needs a tractor because of the size of the property; Norman paid off the mortgage on his home and paid a year of the Porsche note a year in advance; Betty lives frugally in the marital home that is in need of repair; Betty has a high school degree, while Norman has a B.A., M.B.A., and is a licensed CPA; and Norman is receiving significantly more of the assets than Betty.

{¶53} After going through the above factors, the trial court stated:

> 108. When you look back on what occurred to these parties during the period of 2005 to present, Mr. Ballinger, while it was not easy, went from job to job, each job paying quite well due to his background. It was clear he no longer wanted to stay in Cleveland, but wanted to be in the south. He had a very good lifestyle and has his partner/girlfriend with him. Today because of the huge bonuses he received in 2012, his home is paid off in full, he has a partner/girlfriend that he shares expenses with, he actually traveled to Europe in September for two weeks, and he continues to spend money on expensive vehicles even though he has signed them over and titled them in his partner's name. Mrs. Ballinger lives very modestly, struggles every month as she testified. She is very careful in buying food; she keeps the heat in her house low; and she has no money to fix up the house. The court is taking into account all these factors.

{¶54} Given the court's well reasoned opinion, we find no abuse of discretion in awarding Betty spousal support in the amount of $459 per month.

{¶55} Although it is true that Norman helped Betty financially from 2005 until the divorce was filed, they were still married. Therefore, the court did not have to take this into consideration when determining his future support. Moreover, during those years, Norman's income was substantial. For the years 2005 to 2012, Norman made $1,312,135. Of this, Betty received $90,939. If the parties had divorced in 2005, it does not take too much speculation to conclude that she would have received more than this in support. Accordingly, Norman's third assigned error is overruled.

Attorney Fees

{¶56} In his fourth assigned error, Norman argues that the trial court erred by ordering him to pay $30,000 of Betty's attorney fees, which totaled $45,500.

{¶57} We review a domestic relations court's decision to grant attorney fees for an abuse of discretion. *Dureiko v. Dureiko*, 8th Dist. Cuyahoga No. 94393, 2010-Ohio-5599, ¶ 26. Under R.C. 3105.73(A), a court may award all or part of reasonable attorney fees and litigation expenses to either party if the court finds the award equitable. In determining whether such 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." R.C. 3105.73(B).

{¶58} Norman again argues that the null and void 2005 separation agreement should have been enough to terminate their marriage and avoid the cost of a divorce. However, there is no proof that Betty agreed to the terms and it is unsigned. Norman also contends Betty failed to comply with discovery and was untruthful, which prolonged the litigation. However, Norman also failed to turn over documents and was not truthful.

{¶59} The court specifically found as follows:

> 117. As Ms. Stanard testified, this case was complicated since Mr. Ballinger was living in Mississippi, there was another action filed for divorce in which the Mississippi court deferred to Ohio, that Mr. Ballinger was not forthcoming in producing documents which required Ms. Stanard to subpoena records from all third parties, banks, credit cards, his employers, etc. The parties could not stipulate the value of the Strongsville property requiring the plaintiff to hire an appraiser even though the defendant and his attorney did not hire their own appraiser.

{¶60} Based on these findings in support of fees, the trial court did not err by awarding Betty a portion of her fees. Accordingly, Norman's fourth assigned error is overruled.

Nunc Pro Tunc Entry

{¶61} In his fifth assigned error, Norman argues the trial court erred by issuing a nunc pro tunc order while the matter was pending on appeal.

{¶62} Civ.R. 60(A) provides:

> (A) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

{¶63} "Nunc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide." *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 164, 1995-Ohio-278, 656 N.E.2d 1288.

{¶64} This court addressed a similar situation in *Doe v. Catholic Charities,* 158 Ohio App.3d 49, 2004-Ohio-3470, 813 N.E.2d 977 (8th Dist.) Along with acknowledging Civ.R. 60(A) we also noted that App.R. 9(E) provides:

> "If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be * * * settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals,* * * may direct that the omission or misstatement statement be corrected* * *." [App.R. 9(E)].

We then concluded as follows:

> Thus, even while a case is pending on appeal, the trial court retains jurisdiction to enter nunc pro tunc orders so that the record will conform to what occurred in the trial court. *State v. Hankerson* (Aug. 5, 1981), Hamilton App. No. C-800542.
>
> In the instant case, the nunc pro tunc entries do not change the substance of the previous orders * * *. The nunc pro tunc entries simply add additional information concerning what happened in the trial court * * *. Doe does not dispute that the entries accurately reflect what happened. * * * Therefore, the trial court had jurisdiction to enter the nunc pro tunc entries, and we find the entries were proper.

Id. at ¶ 17-19.

{¶65} Likewise, in the instant case, the nunc pro tunc entry did not change the substance of the previous order. The previous order throughout the decision stated that the marital home would be given to Betty. The nunc pro tunc order simply provided the language in the order section of the opinion along with the address of the house. Therefore, the trial court had jurisdiction to issue the order and no error occurred. Accordingly, Norman's fifth assigned error is overruled.

QDRO

{¶66} We will address Norman's sixth and seventh assigned errors together because in both he argues the trial court did not have jurisdiction to issue two qualified domestic relations orders ("QDRO") while the case was pending on appeal.

{¶67} The Ohio Supreme Court in *State ex rel. Sullivan v. Ramsey*, 124 Ohio St.3d 355, 2010-Ohio-252, 922 N.E.2d 214 held as follows:

> "The QDRO implements a trial court's decision of how a pension is to be divided incident to divorce or dissolution." *Wilson v. Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, 878 N.E.2d 16, ¶ 7. "[A] divorce decree is a final, appealable order, regardless of whether it calls for a QDRO that has not yet issued; the

> QDRO merely implements the divorce decree." *Id.* at ¶ 15. Consequently, "[a] QDRO is merely an order in aid of execution on the property division ordered in the divorce or dissolution decree. So long as the QDRO is consistent with the decree, it does not constitute a modification, which R.C. 3105.171(I) prohibits, and the court does not lack jurisdiction to issue it." (Emphasis sic.) *Bagley v. Bagley*, 181 Ohio App.3d 141, 2009-Ohio-688, 908 N.E.2d 469, ¶ 26. Therefore, when a divorce decree is appealed and there is no stay of the judgment pending appeal, the trial court is not divested of jurisdiction to issue a QDRO consistent with the decree because the order merely executes orders previously specified in the divorce decree.

{¶68} In the case herein, the trial court stated that it would stay the matter pending appeal on the condition that Norman file a supersedeas bond in the amount of $50,057. Norman failed to file the bond; therefore, the matter was not stayed. Thus, the trial court had jurisdiction to issue a QDRO as long as it was consistent with the decree, because as the Ohio Supreme Court held above, such an order "merely executes orders previously specified in the divorce decree." Norman does not argue that the QDRO varies from that which the trial court ordered in the divorce decree. Therefore, because no stay was in effect, the trial court had jurisdiction to issue the QDROs pending appeal. Accordingly, Norman's sixth and seventh assigned errors are overruled.

Cross-Appeal

{¶69} Betty filed a cross-appeal and alleges in her assigned error that the trial court erred in dividing the marital assets. She contends the trial court's division of the assets was inequitable because it gave Norman 68 percent of the assets and only gave her 32 percent.

{¶70} As we stated above, the trial court found an unequal division to be equitable given the amount of time that the parties lived separately. Nonetheless, Betty argues that the trial court should have found that Norman owned the entire house located in Mississippi instead of only half because the girlfriend was never on the mortgage and there was no evidence that the girlfriend helped to pay for the house. There was no evidence that Betty ever contributed

financially to the purchase or upkeep of the home. Although her name was placed on the mortgage because the lending bank insisted that Norman's spouse be listed as a borrower, Betty never had to make any payments. More importantly, Norman's girlfriend is listed as co-owner on the deed.

{¶71} Betty also claims the court should have given her half the value of the equity in Norman's vehicles, the 2010 Porsche and the 2012 Audi 6. The trial court gave Norman the full equity value of both vehicles. Although these vehicles were purchased during the marriage, they were also purchased in 2012, well after the 2005 separation date. Therefore, because the court took into consideration the length of separation in dividing the assets, we cannot say the court erred by awarding the equity value in the vehicles to Norman. Accordingly, Betty's sole cross-assigned error is overruled.

{¶72} Judgment affirmed.

It is ordered that the parties pay their respective 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.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR

APPENDIX

Assigned Errors:

I. The trial court erred and/or abused its discretion by failing to find that the Ballinger marriage terminated on March 30, 2005. (Appeal No. 100958)

II. The trial court erred and/or abused its discretion in the division of property by failing to divide the parties' assets and liabilities as of March 30, 2005. (Appeal No. 100958)

III. The trial court erred and/or abused its discretion by awarding temporary spousal support and permanent spousal support to Betty. (Appeal No. 100958)

IV. The trial court erred and/or abused its discretion by awarding attorney fees to Betty. (Appeal No. 100958)

V. The trial court erred and/or abused its discretion by issuing a nunc pro tunc judgment entry of divorce after Norm filed the notice of appeal which divested the trial court of jurisdiction to make further orders. (Appeal No. 101074)

VI. The trial court erred and/or abused its discretion by issuing two (2) Qualified Domestic Relation Orders after Norman D. Ballinger had filed a notice of appeal which divests the trial court of jurisdiction to make further orders. (Appeal No. 101655)

VII. The trial court erred and/or abused its discretion by issuing a Qualified Domestic Relations Order after Norman D. Ballinger had filed a notice of appeal which divests the trial court of jurisdiction to make further orders. (Appeal No. 101812)

Cross Appeal:

I. The trial court erred and/or abused its discretion by failing to equitably divide the marital assets.