[Cite as *Barlow v. Barlow*, 2009-Ohio-3788.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

DONALD SACKETT BARLOW	C. A. No. 08CA0055
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
WENDY LEIGH BARLOW	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellee	CASE No. 07-DR-0042

DECISION AND JOURNAL ENTRY

Dated: August 3, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Donald Barlow, appeals from the decision of the Wayne County Court of Common Pleas. This Court affirms.

I.

{¶2} Appellant, Donald Barlow ("Husband"), and Appellee, Wendy Barlow ("Wife"), were married on July 2, 1977. It is undisputed that Husband brought approximately $11,000 worth of bank stock to the marriage. The parties purchased a summer cottage at Chippewa Lake in 1983 as well as their marital home in Wooster. The parties lived together in the marital home until Husband moved out on May 21, 2006. Husband filed for divorce on January 22, 2007. During this time, Husband maintained the expenses associated with the marital residence and due to temporary orders issued by the trial court on February 1, 2007, Husband paid Wife $910 per month for spousal support. The temporary orders also required Husband to pay the first

mortgage for the marital residence, the real estate taxes, the homeowner's insurance and all of the utilities associated with the home.

{¶3} On May 6, 2008, a magistrate heard the matter and on May 21, 2008, issued his decision. On June 3, 2008, both parties entered objections to the decision. With regard to the present appeal, Husband objected to the magistrate's determination of marital and separate property, in particular, the magistrate's decision that the Chippewa property was marital property. Husband also objected to the magistrate's division of his 401k and Employee Stock Ownership Plan ("ESOP"). Wife objected to the amount and duration of spousal support and the magistrate's valuation of Husband's ESOP. On October 6, 2008, the trial court overruled Husband's objections relevant to this appeal, sustained Wife's objection and modified the magistrate's proposed spousal support award. The trial court adopted the remainder of the magistrate's decision and entered its decree of divorce. It is from this decision that Husband timely appealed. He has raised three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THE 'CHIPPEWA LAKE PROPERTY' TO BE MARITAL PROPERTY, AS OPPOSED TO [HUSBAND'S] SEPARATE PROPERTY, AND UTILIZED IT'S (SIC) VALUE IN ARRIVING AT THE DIVISION OF THE BARLOW'S MARITAL PROPERTY PURSUANT TO [R.C. 3105.171]."

{¶4} In his first assignment of error, Husband contends that the trial court erred when it found the Chippewa property to be marital property as opposed to his separate property.

{¶5} This appeal arises from the trial court's adoption and modification of the magistrate's decision. Generally, the decision to adopt, reject, or modify a magistrate's decision lies within the discretion of the trial court and should not be reversed on appeal absent an abuse

of discretion. *Kalail v. Dave Walter, Inc.*, 9th Dist. No. 22817, 2006-Ohio-157, at ¶5, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion is more than a mere error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. "In so doing, we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18.

{¶6} "The characterization of property as either marital or separate is a factual inquiry, and we review such characterization under a manifest weight of the evidence standard." *Morris v. Morris*, 9th Dist. No. 22778, 2006-Ohio-1560, at ¶23, citing *Boreman v. Boreman*, 9th Dist. No, 01CA0034, 2002-Ohio-2320, at ¶7-8. As such, we will affirm the trial court's characterizations if they are supported by competent, credible evidence. Id., citing *Boreman* at ¶7.

{¶7} As Husband contends that the Chippewa property is his separate property, the focus of the inquiry is whether the separate property is traceable. *Hirt v. Hirt*, 9th Dist. No. 03CA0110-M, 2004-Ohio-4318, at ¶19. "The party seeking to have the commingled property deemed separate has the burden of proof, by a preponderance of the evidence, to trace the asset to his or her separate property." Id., citing *West v. West*, 9th Dist. No. 01CA0045, 2002-Ohio-1118 at ¶11-12. The only issue, then, is whether the record contains competent, credible evidence that Husband satisfied his burden to trace his separate property to the Chippewa property. We conclude that the record does not contain such evidence.

{¶8} The trial court adopted the magistrate's findings with regard to the Chippewa property. The magistrate noted that Husband contended that he purchased the Chippewa property for $11,000 in May of 1983 with stock that he had been gifted prior to the marriage.

Therefore, Husband argued, the Chippewa property was separate property. Wife stated that she recalled Husband having stock at the time of the marriage, but could not recall if the stock was used to purchase the Chippewa lake property. Wife indicated that in May of 1983, the couple had other assets available to purchase the property. These findings are all supported by the record.

{¶9} The magistrate specifically determined that Husband "had no documentation with regard to the bank stock and therefore was not able to establish a paper trail of tracing. It comes down to the weight of the evidence based upon verbal testimony only." When reviewing a judgment under the manifest weight of the evidence standard, the Ohio Supreme Court has recognized that

> "a court has an obligation to presume that the findings of the trier of fact are correct. This presumption arises because the trial judge had an opportunity to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." (Internal citations and quotations omitted.) *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio- 2202, at ¶24.

{¶10} The magistrate determined that

> "[b]ased upon [Husband's] lack of documentation and based upon the availability of other assets in 1983 to purchase the property for $11,000, [I find] the Chippewa Lake property to be marital. [Husband] attempts to point out that [Wife's] testimony at deposition is at odds with her testimony at the final hearing on her memory as to whether or not other funds were available for this purchase. The burden is on [Husband]. With [Wife's] sworn testimony that there were other assets available to make this purchase, [I feel] the burden has not been met."

{¶11} Clearly, the magistrate determined that Wife's testimony on this issue was more credible than Husband's. As the record supports the magistrate's conclusion that Husband did not provide any documentary evidence to support his burden, the magistrate was left to base his

decision on the credibility of the witnesses. Again, "[a] finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Wilson*, supra, at ¶24. Accordingly, we conclude that the trial court did not abuse its discretion when it overruled Husband's objection to the magistrate's decision with regard to the Chippewa property. Husband's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED IT'S (SIC) DISCRETION WHEN IT GRANTED [HUSBAND] HIS ENTIRE 401K ACCOUNT AND HIS ENTIRE ESOP AS OPPOSED TO DIVIDING THE BENEFITS EQUALLY WITH [WIFE]."

{¶12} In his second assignment of error, Husband contends that the trial court erred and abused its discretion when it granted him his entire 401k account and his entire ESOP as opposed to dividing the benefits equally with Wife. We do not agree.

{¶13} As we set forth above, we review the trial court's decision overruling an objection to a magistrate's decision for an abuse of discretion. *Kalail*, supra, at ¶5. The trial court maintains "broad discretion when fashioning its division of marital property." *Bisker v. Bisker* (1994), 69 Ohio St.3d 608, 609. R.C. 3105.171(B) and (C)(1) provide that in a divorce proceeding, all marital property is to be divided equally unless an equal division would be inequitable. If an equal division would be inequitable, that marital property is to be divided in an equitable manner. Upon review, this Court must consider the distribution in its entirety under the totality of the circumstances. *Jelen v. Jelen* (1993), 86 Ohio App.3d 199, 203.

{¶14} The trial court must "indicate the basis for its [marital property division] in sufficient detail to enable a reviewing court to determine that the award is fair, equitable and in accordance with the law." *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 97. "As long as the record contains some indication that the trial court considered the factors listed in [R.C.

3105.171(F)], the statute is satisfied." *Kellar v. Kellar*, 9th Dist. No. 03CA0124-M, 2004-Ohio-3425, at ¶6.

{¶15} Specifically, Husband contends that the trial court failed to consider the factors set forth in R.C. 3105.171(F) when it divided the property, particularly arguing that the trial court did not consider "[t]he tax consequences of the property division upon the respective awards to be made to each spouse[.]" R.C. 3105.171(F)(6). Because of this omission, Husband contends that the trial court's failure to divide his 401k and ESOP was inequitable.

{¶16} While the trial court should not speculate as to potential tax consequences, there are times when it is necessary to ascertain these consequences. *Syslo v. Syslo*, 6th Dist. No. L-01-1273, 2002-Ohio-5205, at ¶72. "'For example, if the award is such that, in effect, it forces a party to dispose of an asset to meet obligations imposed by the court, the tax consequences of that transaction should be considered.'" Id., quoting *Day v. Day* (1988), 40 Ohio App.3d 155, 159. If the record does not suggest that an asset must be liquidated or the appellant failed to produce evidence of any tax consequences, "tax consequences are speculative and need not be considered." Id., citing *White v. White* (Feb. 18, 1998), 9th Dist. No. 18275.

{¶17} Nothing in the record indicates that Husband was required to liquidate his 401k or his ESOP. Further, the record does not indicate that Husband presented any evidence of any potential tax consequences. Therefore, "any attempt by the trial court to consider the tax consequences of its division would be speculative and without evidentiary support. Because the parties essentially had no assets requiring liquidation, they would not incur any adverse tax consequences." *Syslo* at ¶73. Accordingly, the trial court did not abuse its discretion when it overruled Husband's objection.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED IT'S [SIC] DISCRETION IN ORDERING [HUSBAND] TO PAY SPOUSAL SUPPORT TO [WIFE] IN THE SUM OF $2,500.00 PER MONTH THROUGH AUGUST, 2014."

{¶18} In his third assignment of error, Husband contends that the trial court erred and abused its discretion when it ordered him to pay spousal support to Wife in the sum of $2,500 per month through August of 2014.

{¶19} Again, we review the trial court's decision to modify the magistrate's decision for an abuse of discretion. *Kalail,* supra, at ¶5. The trial court had broad discretion to determine whether to award spousal support and in what amount. See *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 24. Spousal support is governed by R.C. 3105.18.

{¶20} R.C. 3105.18(B) allows a trial court to "award reasonable spousal support to either party" in a divorce proceeding. R.C. 3105.18(C)(1) provides that, in determining whether spousal support is "appropriate and reasonable," and in determining the amount, terms, and duration of the support, the trial court must consider the following factors:

> "(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;
>
> "(b) The relative earning abilities of the parties;
>
> "(c) The ages and the physical, mental, and emotional conditions of the parties;
>
> "(d) The retirement benefits of the parties;
>
> "(e) The duration of the marriage;
>
> "(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;
>
> "(g) The standard of living of the parties established during the marriage;

> "(h) The relative extent of education of the parties;
>
> "(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
>
> "(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
>
> "(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;
>
> "(l) The tax consequences, for each party, of an award of spousal support;
>
> "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
>
> "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶21} Husband contends that the trial court failed to consider Wife's separate property in determining an appropriate and reasonable amount of spousal support and failed to set forth with reasonable specificity or detail the basis for its determination. We do not agree.

{¶22} With regard to his contention that the trial court did not set forth the basis of its determination with reasonable specificity, the trial court need not comment on each factor, but the record must demonstrate that the court considered each factor in making its spousal support award. *Kreilick v. Kreilick*, 161 Ohio App.3d 682, 2005-Ohio-3041, at ¶24. In the instant case, the trial court modified the magistrate's determination with regard to spousal support, awarding Wife $2,500 per month. The trial court stated that

> "*[t]here are several reasons for this change.* This is a marriage of over 30 years. [Husband] earns over $100,000 per year. [Wife] is self-employed as a musician. Her income is insignificant. She gave up her career to raise the parties' child. At age 55 she has no employment prospects that would pay much more than minimum wage. Given these factors, the Court believes $2,500 per month is a more equitable amount." (Emphasis added.)

{¶23} Husband contends that in modifying the magistrate's proposed spousal support award, "the trial court apparently dismissed the specific issues considered and clearly addressed by the Magistrate and issued only a brief and general statement justifying the spousal support award." We do not agree with this contention.

{¶24} While it is clear that the magistrate placed great weight on Wife's separate property and her inheritance, this does not lead to the conclusion that, in modifying the spousal support award, "the trial court apparently dismissed the specific issues considered and clearly addressed by the Magistrate[.]" Instead, the trial court simply disagreed with the magistrate's conclusion that Wife was capable of finding employment and opted to consider other factors as well as the factors indicated by the magistrate. This is clearly evidenced by the trial court's use of the language "[t]here are several reasons for this *change.*" (Emphasis added.) The word "change" does not indicate that the trial court simply ignored the reasoning of the magistrate. Instead, the use of the word indicates that the trial court did not agree with some of the conclusions reached by the magistrate. Notably, the trial court disagreed with the magistrate's determination that "there was no evidence [Wife] could not be employed and at least make minimum wage in additional (sic) to the other passive income." Instead, the trial court pointed to the evidence that indicated the unreasonableness of requiring Wife to obtain work outside the home, e.g., the duration of the marriage, the disparity in the parties' salaries, Wife's sacrifice of her career to raise the parties' child and her age. There is nothing in the record to indicate that the trial court did not consider all the factors pursuant to R.C. 3105.18(C)(1).

{¶25} As we explained above, the trial court has broad discretion to award spousal support and to determine the amount. See *Bechtol*, 49 Ohio St.3d at 24. We do not find that the

trial court's decision to award Wife $2500 per month in spousal support was an abuse of discretion. Accordingly, Husband's third assignment of error is overruled.

III.

{¶26} Husband's assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶27} I concur in the majority's judgment and in its opinion relating to Mr. Barlow's second and third assignments of error. In regard to his first assignment of error, the machinations of the majority's attempt to apply the so called "civil-manifest-weight-of-the-evidence standard" adopted in *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, at ¶26, again demonstrate that it is impossible to apply that standard as written when the party who succeeded in the trial court was the party who did not have the burden of proof. *Huntington Nat'l Bank v. Chappell*, 9th Dist. No. 06CA008979, 2007-Ohio-4344, at ¶17-75 (Dickinson, J., concurring). Mr. Barlow had the burden of tracing his separate property into the cottage and presented evidence in an attempt to do so. The trial court apparently did not believe that evidence, as it should have been free to do. The "civil-manifest-weight-of-the-evidence standard," however, does not recognize that freedom. Rather, it instructs us to look for evidence supporting the judgment. Since the burden was on Mr. Barlow, however, Mrs. Barlow was not required to present any evidence to succeed, as long as the trial court did not believe the evidence Mr. Barlow presented. Because the trial court did not create a manifest miscarriage of justice by not believing Mr. Barlow's tracing evidence, I concur in the overruling of the first assignment of error.

APPEARANCES:

CHRISTOPHER A. SCHMITT, Attorney at Law, for Appellant.

RANDALL M. PERLA, Attorney at Law, for Appellee.