[Cite as *Syverson v. Syverson*, 2009-Ohio-6701.]

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

HEIDI E. SYVERSON	C. A. No. 09CA009527
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
KYLE R. SYVERSON	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 07 DU 068461

DECISION AND JOURNAL ENTRY

Dated: December 21, 2009

CARR, Judge.

{¶1} Appellant, Kyle Syverson, appeals the judgment of the Domestic Relations Division of the Lorain County Court of Common Pleas. This Court reverses, in part, and affirms, in part.

I.

{¶2} Appellee, Heidi Syverson (hereinafter referred to as "Heidi"), and Kyle Syverson (hereinafter referred to as "Kyle") were married on July 5, 1993. The couple had a daughter, who was born on November 19, 1994, and a son, who was born on July 1, 1999. On October 29, 2007, Heidi filed for a divorce. The case proceeded to trial on October 27, 2008. Both parties admitted they were incompatible and that the marriage could not endure. No other grounds for divorce were established.

{¶3} The trial court requested that the parties provide the court with a proposed decree of divorce, any possible proposed qualified domestic relations orders, and a proposed shared parenting plan. The parties were to make these filings by December 1, 2008.

{¶4} Kyle filed a shared parenting plan on March 13, 2008. The record indicates that Heidi never properly filed a shared parenting plan with the clerk of courts. In her submissions to this Court, Heidi has maintained that she emailed a proposed shared parenting plan to the trial court. However, Heidi's purported shared parenting plan is not in the record. On December 30, 2008, the trial court entered judgment by granting the parties a divorce, establishing spousal support, child support, and adopting a shared parenting plan. The shared parenting plan adopted by the trial court was not the plan submitted by Kyle.

{¶5} On appeal, Kyle has raised four assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN ADOPTING A SHARED PARENTING PLAN THAT WAS NOT PROPOSED BY EITHER PARTY IN ACCORDANCE WITH O.R.C.[]3109.04(G)[.]"

{¶6} Kyle argues the shared parenting plan adopted by the trial court was not proposed in accordance with the parameters set forth in R.C. 3109.04(G). This Court agrees.

{¶7} Generally, an appellate court reviews a trial court's decision on custody matters pursuant to an abuse of discretion standard of review. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. However, the question of whether the trial court complied with statutory mandates in adopting a shared parenting plan is a question of law. This Court reviews questions of law under a de novo standard of review. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-

Ohio-829, at ¶11. When reviewing a matter de novo, this Court does not give deference to the trial court's decision. Id.

{¶8} The trial court's judgment entry designated both Heidi and Kyle as residential parents and legal custodians of the children. Such a designation must be made under the authority of R.C. 3109.04. If at least one party submits a plan for shared parenting which is deemed in the best interest of the children, and the plan is approved by the trial court, the trial court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order. R.C. 3109.04(A)(2). Under the statute, the shared parenting plan must be proposed and approved in accordance with R.C. 3109.04(D)(1)(a)(i), (ii) or (iii).

{¶9} R.C. 3109.04(D)(1)(a)(i) deals with shared parenting plans which are jointly requested by the parties. The trial court's judgment entry states that the parties agreed on the plan adopted by the court. However, the record does not support this conclusion. Neither party signed the shared parenting plan. Without a signed agreement by the parties or consistent testimony indicating that an agreement with regard to shared parenting had been reached, this Court concludes that the plan adopted by the trial court was not a shared parenting plan proposed pursuant to R.C. 3109.04(D)(1)(a)(i).

{¶10} R.C. 3109.04(D)(1)(a)(ii) sets forth the method for the parties to propose a shared parenting plan when each party wishes to submit their own plan. Under this approach, either each party makes a request in their pleadings or each party files a motion with their own shared parenting plan. The filing of a shared parenting plan must comport with R.C. 3109.04(G), which states:

> "Either parent or both parents of any children may file a pleading or motion with the court requesting the court to grant both parents shared parental rights and

> responsibilities for the care of the children in a proceeding held pursuant to division (A) of this section. If a pleading or motion requesting shared parenting is filed, the parent or parents filing the pleading or motion also shall file with the court a plan for the exercise of shared parenting by both parents. If each parent files a pleading or motion requesting shared parenting but only one parent files a plan or if only one parent files a pleading or motion requesting shared parenting and also files a plan, the other parent as ordered by the court shall file with the court a plan for the exercise of shared parenting by both parents. The plan for shared parenting shall be filed with the petition for dissolution of marriage, if the question of parental rights and responsibilities for the care of the children arises out of an action for dissolution of marriage, or, in other cases, at a time at least thirty days prior to the hearing on the issue of the parental rights and responsibilities for the care of the children. A plan for shared parenting shall include provisions covering all factors that are relevant to the care of the children, including, but not limited to, provisions covering factors such as physical living arrangements, child support obligations, provision for the children's medical and dental care, school placement, and the parent with which the children will be physically located during legal holidays, school holidays, and other days of special importance."

Sending a shared parenting plan to the court via email would not satisfy the requirements of R.C. 3109.04(G). There would be no record of the submission with the clerk of courts and the opposing party would not have notice of the submission. Because only Kyle properly filed a proposed shared parenting plan, the procedure set forth in R.C. 3109.04(D)(1)(a)(ii) is not applicable to the facts of this case.

{¶11} The final method available to establish a shared parenting plan is set forth in R.C. 3109.04(D)(1)(a)(iii). This method applies if only one parent requests shared parenting in their pleadings or if only one parent proposes a shared parenting plan. As noted above, Kyle filed a shared parenting plan on March 13, 2008. Heidi did not properly file a shared parenting plan. The shared parenting plan which was attached to the trial court's judgment entry is separate and distinct from the plan submitted by Kyle. Under R.C. 3109.04, a trial court may accept or reject shared parenting plans proposed by the parties. A trial court may also accept or reject plans which have been revised by the parties after the trial court has recommended modifications. Id.

However, this Court has held that a trial court cannot reject the shared parenting plans filed by the parties and subsequently order its own shared parenting plan. *McClain v. McClain* (1993), 87 Ohio App.3d 856, 857. Therefore, the trial court erred in adopting a shared parenting plan which was not properly filed in accordance with R.C. 3109.04.

{¶12} Kyle's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED BY ESTABLISHING A SCHEDULE OF FATHER'S PARENTING TIME THAT MADE NO ACCOMMODATION FOR HIS WORK SCHEDULE, WHICH INCLUDES WORK ON SOME WEEKENDS."

{¶13} In his second assignment of error, Kyle argues the trial court failed to adequately account for his work schedule in adopting the shared parenting plan. Because our resolution of the first assignment of error is dispositive of this issue, this Court declines to address the Kyle's second assignment of error as it is rendered moot. See App.R. 12(A)(1)(c).

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN AWARDING WIFE $1,250.00/MONTH PLUS PROCESSING FEE IN SPOUSAL SUPPORT[.]"

{¶14} In his third assignment of error, Kyle argues the trial court erred in calculating spousal support. Specifically, Kyle argues the trial court erred in ordering him to pay $1,250 per month spousal support while also ordering him to be accountable for a disproportionate amount of the marital debt. This Court disagrees.

{¶15} A trial court has wide latitude in awarding spousal support. *Vanderpool v. Vanderpool* (1997), 118 Ohio App.3d 876, 878. An appellate court reviews a trial court's decision of spousal support using an abuse of discretion standard of review. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218. An abuse of discretion is more than an error of

judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. Id. at 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶16} While a trial court is given broad discretion in awarding spousal support, it still must comply with R.C. 3105.18(C)(1),which provides:

> "In determining whether spousal support is appropriate and reasonable, *** the court shall consider all of the following factors:
>
> "(a) The income of the parties[;]
>
> "(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[;]
>
> "(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."

{¶17} Kyle contends that the trial court erred in its consideration of R.C. 3105.18(C)(1)(i). While he concedes that the trial court properly considered each of the other factors in the statute, Kyle asserts that the trial court improperly considered the relative assets and liabilities of the parties as set forth in R.C. 3105.18(C)(1)(i) because the trial court ordered him to bear the burden of approximately 70 percent of the marital debt in addition to his court-ordered monthly spousal support payments. Pursuant to a jointly-filed exhibit by the parties, the trial court found that the marital debt consisted of two separate lines of credit with KeyBank, which combined to equal $10,278.57; a debt to Home Depot in the amount of $673.10; a debt to Chase Bank in the amount of $9,822.88; and a debt to Citibank in the amount of $4,875.82. The trial court ordered that Heidi be responsible for the two lines of credit totaling $10,278.57, as well as any other debt in her name only. Kyle was ordered to be responsible for the remaining $15,371.80 in marital debt in addition to any other debt in his name only.

{¶18} Kyle was also ordered to be accountable for the debt against his Federal Thrift Savings Plan in the approximate amount of $8,500. In its journal entry, the trial court made specific findings, pursuant to an agreement by the parties, as to the items which constituted the marital debt. The Federal Thrift Savings Plan was not among the enumerated items found to constitute a portion of the marital debt. Earlier in the judgment entry, the trial court had addressed the fact that Kyle was a participant in the Federal Employees Retirement System and the Federal Thrift Savings Plan by awarding 50 percent of the marital portion to Heidi. The remaining 50 percent of the marital portion, as well as the non-marital portion of the plan, was

awarded to Kyle. Thus, Kyle was awarded a greater total share of the Federal Thrift Savings Plan than Heidi by virtue of his interest in the non-marital portion of the plan. Because the trial court did not find that the debt associated with the Federal Thrift Savings Plan constituted marital debt, the trial court, did not have to account for that debt in equitably dividing the marital debt. The Supreme Court of Ohio has held that the division of property need not be equal in order to be equitable. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355. The same logic can be applied in assigning responsibility for marital debt. Therefore, the trial court's decision to allocate $10,278.57 of the marital debt to Heidi and $15,371.80 of the marital debt to Kyle was not unreasonable. Kyle suggests that because he had to assume a greater amount of marital debt, the trial court erred in awarding $1,200 per month in spousal support. However, the trial court was required to evaluate all of the factors set forth in R.C. 3105.18(C)(1), not R.C. 3105.18(C)(1)(i) in isolation. In light of the wide latitude given to trial courts in awarding spousal support, this Court declines to hold that the trial court abused its discretion in awarding spousal support on the ground that Kyle ultimately assumed more total debt than Heidi.

{¶19} It follows that the third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

"THE JUDGMENT OF THE TRIAL COURT WITH RESPECT TO TEMPORARY ORDERS LACKS SUFFICIENT DETAIL TO BE ENFORCEABLE[.]"

{¶20} Kyle argues that the portion of the judgment entry which refers to temporary orders in the case lacks sufficient detail to be enforceable. This Court agrees.

{¶21} The last line of the December 30, 2008 judgment entry reads, "That all temporary orders in this matter are ordered to be brought current and are not waived." In support of his

argument that this language lack sufficient detail to be enforceable, Kyle points to the Supreme Court of Ohio's holding in *Colom v. Colom* (1979), 58 Ohio St.2d 245, syllabus, which states:

> "In a domestic relations action, interlocutory orders are merged within the final decree, and the right to enforce such interlocutory orders does not extend beyond the decree, unless they have been reduced to a separate judgment or they have been considered by the trial court and specifically referred to within the decree."

The *Colom* court stated that "the final judgment should replace all that has transpired before it." Id. at 247. Kyle also cites to an Eleventh District decision, which states:

> "There are three ways to protect temporary arrearages and insure their inclusion in the final judgment: (1) reduce the arrearage to a judgment prior to the final decision, (2) move to have the arrearages included in the final judgment and (3) file a Civ.R. 60(B) motion to vacate the final judgment if the arrearages are mistakenly omitted." *Blais v. Blais*, 11th Dist. No. 2005-T-0139, 2006-Ohio-4662, at ¶11, citing *Colom*, 58 Ohio St.2d at 247-248.

Kyle contends that because Heidi did not file any documents which would require the trial court to address the temporary orders in the final judgment entry, the language dealing with temporary orders lacks the detail necessary to constitute an enforceable order.

{¶22} Heidi does not dispute that she did not move the trial court to have the temporary orders included in the final judgment. However, Heidi argues that the language of the judgment entry relating to temporary orders was not intended to preserve and include temporary orders in the final judgment entry. Rather, Heidi asserts that the language was included in the judgment entry as a precautionary measure so that she would not be left without a means of enforcement in case the temporary orders were violated between the date of trial, October 27, 2008, and the date of the judgment entry which was December 30, 2008.

{¶23} A review of the record indicates that the issue of arrears was not litigated at the trial level. When Heidi filed her original complaint on October 29, 2007, she also filed a motion

for temporary orders. On October 30, 2007, the trial court issued a judgment entry on restraining orders, stating:

> "1. Each party is hereby restrained from annoying, harassing, molesting or otherwise interfering with the other, or causing others to do so.
>
> "2. Each party is hereby restrained from concealing, selling, transferring, encumbering, or otherwise disposing of the assets of the parties without prior Court order.
>
> "3. Each party is hereby restrained from incurring further charges upon the credit of the other.
>
> "4. Each party is hereby restrained from causing or attempting to cause the alienating of the children's affection for the opposite parent.
>
> "All continuing until further Order of the Court."

The record further indicates that on January 3, 2008, a magistrate's order was issued that addressed parental visitation for the holiday season. A separate magistrate's order was issued on January 3, 2008, that outlined a visitation schedule for the parties. On January 16, 2008, a magistrate's order was issued which ordered Kyle to pay $1750 per month to Heidi for temporary support. On January 22, 2008, Heidi moved the court for an order requiring Kyle to show cause for failing to abide with the January 3, 2008 magistrate's order. Heidi subsequently withdrew the motion.

{¶24} After a review of the record and the language of the judgment entry in this case, this Court is reluctant to assign a specific meaning to the final sentence of the December 30, 2008 judgment entry. As noted above, temporary orders merge into the final judgment entry unless they are reduced to a separate judgment entry or they are specifically addressed in the final judgment entry. *Colom*, supra, at syllabus. Given the language that has been brought into question, it is clear that the trial court did not intend for the temporary orders to simply merge into the final judgment entry. However, the final judgment entry in this case does not

specifically indicate which temporary orders it intended to remain in place. Because there were multiple temporary orders issued and this Court is uncertain whether the parties have complied with the orders, the specific meaning of the language in the judgment entry relating to the temporary orders must be clarified on remand.

{¶25} The fourth assignment of error is sustained.

III.

{¶26} The first and fourth assignments of error are sustained. This Court declines to address the second assignment of error as it is moot. The third assignment of error is overruled. The judgment of the Domestic Relations Division of the Lorain County Court of Common Pleas is affirmed, in part, and reversed, in part, and the cause remanded for further proceedings consistent with this decision.

Judgment affirmed, in part,
reversed, in part,
and cause remanded.

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 Lorain, 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 equally to both parties.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

DOUGLAS C. BLACKBURN, Attorney at Law, for Appellant.

MICHAEL D. ILLNER, Attorney at Law, for Appellee.