

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LUANNE J. DEMCHAK

C. A. No. 09CA0076-M

Appellee

v.

MARK S. DEMCHAK

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 07CR0702

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 16, 2010

Per Curiam.

{¶1} Appellant, Mark Demchak, appeals the judgment of the Medina County Court of Common Pleas, Domestic Relations Division. This Court reverses.

I.

{¶2} Luanne Demchak (“Wife”) filed a complaint for divorce from Mark Demchak (“Husband”) on December 12, 2007. Husband answered and filed a counterclaim for divorce on January 8, 2008. Wife answered the counterclaim.

{¶3} Husband is a fifty percent shareholder in Total Quality Testing, Inc. (“TQT”), a business he runs with another fifty percent shareholder. TQT is an S corporation, which enjoys the tax benefits of such an entity. Husband also owns a fifty percent interest in Iron Properties, Ltd. (“Iron Properties”), a partnership which owns the building utilized by TQT and which collects rents from TQT.

{¶4} On March 31, 2009, the court issued a final judgment entry of divorce, attributing \$76,070.00 in income to Husband and ordering him to pay spousal support to Wife in the amount of \$1700.00 per month until either party's death or Wife's remarriage. Husband filed a notice of appeal. In the meantime, the domestic relations court filed a nunc pro tunc final judgment entry of divorce on May 7, 2009, signed by the judge to whom the case had been assigned. This Court dismissed Husband's appeal for lack of jurisdiction because the trial court had failed to fully divide the parties' property. *Demchak v. Demchak* (July 13, 2009), 9th Dist. No. 09CA0027-M.

{¶5} On October 14, 2009, the domestic relations court issued an amended final judgment entry of divorce, fully dividing the parties' property. Husband appealed, raising two consolidated assignments of error for review. This Court separates and rearranges the assignments of error for purposes of review.

II.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING APPELLANT-HUSBAND TO PAY ARREARAGES TO APPELLEE-WIFE FOR TEMPORARY SPOUSAL SUPPORT, WHERE THE MAGISTRATE INCORRECTLY CALCULATED THE MONTHLY TEMPORARY SPOUSAL AMOUNT BY INCLUDING ALL OF THE PASS-THROUGH OR FLOW-THROUGH INCOME FROM THE APPELLANT-HUSBAND'S TWO BUSINESSES – AN S-CORPORATION AND A PARTNERSHIP – REFLECTED ON FORM 1040, SCHEDULE E, LINE 17 OF APPELLANT-HUSBAND'S TAX RETURNS AS BEING PART OF HIS PERSONAL INCOME.”

{¶6} Husband argues that the domestic relations court abused its discretion by attributing pass-through income from his partnership and S corporation to his personal income for purposes of determining Husband's income. This Court agrees although for reasons other than those advanced by Husband.

{¶7} The domestic relations court used income information from the parties' 2007 tax returns to determine their respective incomes. In determining spousal support, R.C. 3105.18(C)(1)(a) requires the trial court to consider "[t]he 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[.]"

{¶8} Husband argues that the domestic relations court erred in its determination regarding R.C. 3105.18(C)(1)(a) when it included his businesses' pass-through income as "income of the parties, from all sources," because those monies do not constitute actual personal income to him.

{¶9} 26 U.S.C.A. 1361 et seq. provides a framework by which an S corporation is not subject to taxation. Rather, the business income is passed through to the shareholders and is taxable to them on a pro rata basis. This same type of pass-through taxation is also applicable to partners in a business partnership. Husband argues, however, that corporation and partnership income attributed to him for purposes of taxation should not be included for purposes of R.C. 3105.18(C)(1)(a) income in determining spousal support. Specifically, Husband argues that the domestic relations court should not have considered the following types of business income for purposes of determining his support obligation: working capital in the businesses; federal and state taxes paid on the business entities' incomes; health insurance premiums paid on behalf of the business' employees; life insurance premiums paid on behalf of the two corporate officers; and mileage, gasoline, and reimbursements for meals as part of ordinary and necessary business expenditures.

{¶10} Husband cites *Riepenhoff v. Riepenhoff* (1990), 64 Ohio App.3d 135, for the proposition that it is inequitable to include earnings which are retained by a corporation as

income to the shareholders. As to the working capital in the businesses, the domestic relations court did not consider this as income to Husband for purposes of determining his spousal support obligation. Rather, the trial court divided the business entities' capital accounts, valued as of October 23, 2008, as part of the division of marital property. Accordingly, the trial court treated the working capital as a marital asset, rather than income.

{¶11} Husband cites *El-Badewi v. El-Badewi*, 5th Dist. No. 2006CA00122, 2007-Ohio-3800, for the proposition that it is error to include corporation pass-through income for purposes of determining spousal support. The Fifth District, however, favorably acknowledged the trial court's explanation of the husband's income, which *included* "\$45,219 of pass-through income from his corporation." *Id.* at ¶76.

{¶12} He further cites *Kamm v. Kamm* (1993), 67 Ohio St.3d 174, and *Woods v. Woods* (1994), 95 Ohio App.3d 222, for the proposition that any costs associated with acquiring income-producing business assets cannot be considered as income for purposes of determining support. Both cases, however, are inapposite to the instant case. First, both *Kamm* and *Woods* involve self-employed obligors. Husband, however, is employed by TQT, a corporation which pays him a salary. More significantly, both *Kamm* and *Woods* involve the determination of income for purposes of determining child support, rather than spousal support. Both cases addressed the issue from the perspective of R.C. 3113.215, since repealed, which expressly exempted "ordinary and necessary expenses incurred by the [self-employed] parent in generating the gross receipts" from income to be considered for purposes of determining child support. R.C. 3105.18(C)(1)(a), applicable here, does not contain any analogous provision. Accordingly, his argument in this regard is not well taken.

{¶13} As to the pass-through income, it is unclear from the trial court's entry, which specific items of Husband's and the companies' incomes were used to compose the \$44,670 figure that the trial court added to Husband's \$31,200.00 salary to arrive at his total income of \$76,070.00.¹ Thus, we are unable to discern how the trial court ultimately calculated Husband's total gross income. Accordingly, we necessarily conclude that the domestic relations court abused its discretion in its calculation of Husband's income for purposes of determining spousal support. Husband's second assignment of error is sustained.

ASSIGNMENT OF ERROR I

“THE DOMESTIC RELATIONS COURT ABUSED ITS DISCRETION IN AWARDING SPOUSAL SUPPORT TO APPELLEE-WIFE IN THE AMOUNT OF \$1700 PER MONTH UNTIL THE DEATH OF EITHER PARTY OR HER REMARRIAGE, WHERE (1) THE COURT INCORRECTLY CALCULATED THE MONTHLY SPOUSAL SUPPORT AMOUNT BY INCLUDING ALL OF THE PASS-THROUGH OR FLOW-THROUGH INCOME FROM APPELLANT-HUSBAND'S TWO BUSINESSES – AN S-CORPORATION AND A PARTNERSHIP – REFLECTED ON FORM 1040, SCHEDULE E, LINE 17 OF APPELLANT-HUSBAND'S TAX RETURNS AS BEING PART OF HIS ACTUAL PERSONAL INCOME; AND (2) THE AMOUNT AND DURATION OF THE SPOUSAL SUPPORT AWARD WAS GREATER THAN THAT REQUESTED BY APPELLEE-WIFE.”

{¶14} Husband argues that the domestic relations court erred by awarding spousal support to Wife in an amount and duration in excess of her request. This Court declines to address the assignment of error as it is not ripe for review.

{¶15} “This Court reviews the trial court's determination of spousal support for an abuse of discretion.” *Miller v. Miller*, 9th Dist. No. 07CA0061, 2008-Ohio-4297, at ¶40. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable,

¹ This Court notes that combining the incomes attributed to Husband from his salary and business income results in a total of \$75,870. It is unclear how the domestic relations court arrived at a total amount \$200.00 in excess of that.

arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 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.

{¶16} Before the domestic relations court may determine whether spousal support is appropriate and reasonable, and if so, the nature, amount, terms, and duration of support, it must consider certain enumerated factors, including the parties’ incomes. R.C. 3105.18(C)(1). It is axiomatic that, before it may consider the parties’ incomes for purposes of spousal support, the trial court must have determined the actual amount of each spouse’s income. This Court has sustained Husband’s second assignment of error with respect to the calculation of his income. Because this matter must be remanded for a determination of Husband’s income, any determination regarding the amount or duration of spousal support is premature. Accordingly, we decline to address Husband’s assigned error regarding the amount and duration of spousal support as that issue is not ripe.

III.

{¶17} Husband’s second assignment of error is sustained. We decline to address the first assignment of error because it is not ripe. The judgment of the Medina County Court of Common Pleas, Domestic Relations Division, is reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
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 Medina, 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 Appellee.

EVE V. BELFANCE
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

CARR, J.
CONCURS, SAYING:

{¶18} I concur with the majority's conclusion that the domestic relations court abused its discretion in its calculation of Husband's income for purposes of determining spousal support. I further agree with the majority's recitation of law and I would apply the same in my analysis. I write separately, however, because I believe that the record supports the trial court's attribution of a specific and substantial portion of the business pass-through income as part of Husband's income for purposes of determining spousal support.

{¶19} I agree that the issue in this case is whether the domestic relations court properly attributed Husband's business pass-through income as "income of the parties, from all sources," for purposes of determining spousal support pursuant to R.C. 3105.18(C)(1)(a).

{¶20} I believe that the trial court properly included a portion of what Husband erroneously construes as working capital on hand for Iron Properties as income. Husband testified that the additional rent monies (\$12,000.00) transferred in 2007 from TQT to Iron Properties was for a down payment on a new roof on the TQT property. He testified, however, that the businesses were unable to obtain financing for the \$65,000.00 roof due to the pending divorce action. Therefore, Iron Properties gave each of the partners an \$8,000.00 loan instead since the inability to secure financing foreclosed their ability to use that money as a down payment on a new roof. Because that money was distributed to Husband, I believe it was properly considered as part of his income.

{¶21} In addition, Schedule K-1, identifying Husband's share of current year income for Iron Properties for 2007, indicates that Husband received a distribution of \$1,424.00 that year. Accordingly, \$9,424.00 (the \$8,000.00 loan plus the \$1,424.00 distribution) of the partnership's 2007 rental income of \$12,654.00 was properly included within Husband's income for purposes of determining his spousal support obligation. There was no clear testimony, however, that the remaining \$3230.00 was distributed to Husband from Iron Properties so that that amount could be included in his income pursuant to R.C. 3105.18(C)(1)(a).

{¶22} The domestic relations court included in Husband's income the full \$12,654.00 noted on the 2007 Schedule K-1 for Iron Properties. It also included \$32,016 from TQT's ordinary business income (\$33,507.00 minus an itemized \$1,491.00 deduction) for a total of \$44,670. When combined with Husband's \$31,200 salary, the domestic relations court

calculated Husband's total income pursuant to R.C. 3105.18(C)(1)(a) at \$76,070, while calculating Wife's income at \$25,500.00 based on her W-2 income. I agree with the majority that the trial court inexplicably added \$200.00 when it added Husband's salary and pass-through income.

{¶23} Jamie Kotris, a certified public accountant with experience working with closely-owned family businesses, testified that he prepared the 2006 and 2007 tax returns for TQT, Iron Properties, and Husband. Mr. Kotris testified that business income was used to pay all federal and state income taxes; health and life insurance premiums; and mileage, gasoline, and meal reimbursement costs for Husband. He testified that those monies were paid in the form of distributions from the businesses to Husband and that they constituted income to the partners. He testified that the \$1424.00 distribution from Iron Properties was used to pay Husband's personal home equity loan which he had taken out for a down payment on the partnership's property. He testified that \$20,818.00 identified on Line 16C of the corporation's 2007 Schedule K-1 was distributed to Husband from TQT for expenditures. Mr. Kotris estimated that Husband received distributions in the approximate amounts of \$12,000 for personal debt repayment for Iron Properties property, \$10,000.00 for hospital premiums, and \$9,000.00 for federal and state income tax payments. In addition, Mr. Kotris testified that he believed the Husband received a "true cash distribution" of \$2,000.00 in 2007. These amounts appear to account for the entire \$32,016 attributed as income to Husband from TQT.

{¶24} The only amounts that remain unaccounted for are the \$3230.00 from Iron Properties and the \$200.00 arbitrarily added to Husband's income in its calculation of his income. The remaining \$72,440 constitutes income to Husband from salary and distributions from which he derived a benefit.

{¶25} In conclusion, I believe that the domestic relations court properly considered certain pass-through income from TQT and Iron Properties as income attributable to Husband for purposes of determining his spousal support obligation pursuant to R.C. 3105.18(C). All business income in the form of distributions to Husband was properly included because he derived a benefit from those distributions, even though many were used to pay specific debts such as a home equity loan, insurance premiums, taxes, gasoline, and meals. Had the corporation not paid those costs by way of distribution, Husband would have been obligated to pay them out of his other income. Moreover, Mr. Kotris testified that Husband realized additional tax savings by taking distributions to pay these costs in lieu of increasing his salary due to resulting lower FICA and Medicare deductions from his pay.

{¶26} The problem in this case arises, however, due to the domestic relations court's failure to account for the entire \$44,670.00 of business income passed through to Husband on his 2007 tax return. It is unclear how \$3230.00 constituted a distribution to him. In addition, there is nothing to support the trial court's addition of \$200.00 to Husband's income when it added his salary and pass-through income. In the absence of proof to support Husband's beneficial receipt and use of such income, I would conclude that the domestic relations court was unreasonable in attributing that specific amount of income to him. Accordingly, I agree that the domestic relations court abused its discretion in calculating Husband's income for purposes of determining spousal support.

{¶27} Moreover, I agree with the majority that, because the proper amount of Husband's income has not yet been determined, any assigned error regarding the amount of spousal support awarded is not yet ripe for review.

APPEARANCES:

JOSEPH F. SALZGEBER, Attorney at Law, for Appellant.

LINDA HOFFMAN, Attorney at Law, for Appellee.