[Cite as *Budd v. Budd*, 2011-Ohio-565.]

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

ROBERT J. BUDD Appellee v. LINDA M. BUDD Appellant	C.A. No. 25469 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2004-09-3850

DECISION AND JOURNAL ENTRY

Dated: February 9, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, Linda Budd ("Wife"), appeals from the terms of the divorce decree entered by the Summit County Court of Common Pleas, Domestic Relations Division. This Court affirms in part, reverses in part, and remands for further proceedings consistent with this opinion.

I

{¶2} Plaintiff-Appellee, Robert Budd ("Husband"), and Wife were married in May 1976 and had three children together, all of whom where emancipated at the time the parties' divorce proceeding commenced. At the time of the divorce, Wife, who was 51 years old, was employed as a computer teacher in Garfield Heights City School District. Husband, who was 56 years old at the time, worked as a beer delivery driver for The House of LaRose in Akron.

{¶3} In September 2004, shortly after Wife had left the marital residence, Husband filed for divorce and Wife filed an answer and counterclaim for the same. The trial court held a

hearing in September 2005, at which point the parties agreed to a division of property and waived any request for spousal support. After several unsuccessful attempts to obtain Wife's approval, Husband submitted an entry to the court, without Wife's signature, purporting to represent the parties' agreement from the September 2005 hearing. The trial court entered the order as submitted and granted the parties a divorce on March 1, 2006.

{¶4} Shortly thereafter, Wife filed a motion for relief from judgment, arguing that the trial court had entered the terms of the parties' divorce decree without giving her the opportunity to be heard on her objections to the proposed entry. Specifically, Wife complained that Husband's entry failed to incorporate information related to his Social Security and retirement health insurance benefits, in addition to a certificate of deposit held in his name. The trial court granted Wife's motion to vacate and held a new trial in the matter on November 9, 2006. Later that month, the trial judge recused himself from the case before issuing a decision because he had received of an ex parte communication from Wife. Wife's attorney also withdrew based on the contents of the letter she submitted to the trial court about his performance. A new judge was assigned to the case, and Wife obtained a new attorney. Husband requested the division of property be decided based on the transcript of the November 2006 hearing, which Wife opposed. Wife then filed a motion for a new trial, which Husband opposed. The matter was reset for trial on May 20, 2008. The trial court received updated pension information in June 2008, and in October 2008, issued a decision dividing the parties' assets and ordering Wife to pay $400 per month in spousal support to Husband for a period of ten years.

{¶5} Wife appealed from the trial court's decision, and this Court reversed after concluding that the trial court had not specified the precise date upon which the marriage was terminated for purposes of valuing the marital assets. *Budd v. Budd*, 9th Dist. No. 24485, 2009-

Ohio-2674. Upon remand, the trial court issued a revised decision in which it reached the same division of assets and established the final hearing date of May 20, 2008, as the termination date of the marriage. Wife again appealed. This Court reversed the trial court's decision because, despite the trial court's assertion that it valued the assets as of the date of the final hearing, the record demonstrated otherwise. *Budd v. Budd*, 9th Dist. No. 24899, 2010-Ohio-55. We held that, to the extent that the trial court chose different valuation dates for some of the parties' marital assets, it failed to explain its reasoning for doing so. Therefore, we remanded the matter for the requisite findings to support the trial court's division of marital assets. Id. at ¶7. Upon remand, the trial court indicated that it relied upon the valuation evidence as presented at the May 20, 2008 hearing, but noted that, where the parties were able to update the information with their testimony at the hearing, it used the updated values for several assets, rather than the amounts indicated on past account statements that were introduced into evidence.

{¶6} Wife appeals from the trial court's decision, asserting twelve assignments of error for our review. We have rearranged and consolidated her assignments of error for ease of analysis.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING MAY 20, 2008, THE DATE OF THE SECOND TRIAL, AS THE DATE OF TERMINATION OF THE MARRIAGE."

Assignment of Error Number Two

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN VALUING THE VARIOUS ASSETS AT DIFFERENT DATES WITHOUT SPECIFIC FINDINGS AS TO THE RATIONALE FOR THE VALUATION INCONSISTENCIES."

Assignment of Error Number Three

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY NOT EQUALLY DIVIDING THE ASSETS OF THE MARRIAGE AS OF THE DATE OF THE FIRST TRIAL."

Assignment of Error Number Four

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN VALUING THE RETIREMENT ASSETS OF THE PARTIES AS OF JUNE OF 2008 WHEN APPELLEE HAS BEEN 'SPENDING DOWN' HIS RETIREMENT ASSETS DURING THE PENDENCY OF THE ACTION WHILE APPELLANT HAS BEEN INCREASING THE VALUE OF HERS AS SHE CONTINUED TO WORK THROUGHOUT THE PENDENCY OF THE ACTION."

{¶7} In her first and third assignments of error, Wife argues that the trial court erred in determining the duration of the parties' marriage when it established May 20, 2008, the date of the final hearing in this matter, as the termination date of the marriage. Wife argues that the trial court failed to support its decision to use that date with any findings of fact, and that principles of equity dictate that the court should have established a de facto termination date of November 9, 2006, the date the trial court first heard the contested matters in the parties' divorce proceeding. Wife asserts that she and Husband had been living apart since August 2004, a month before Husband filed for divorce. She argues that, in addition to living separately, the parties were financially independent from one another from that point forward. Thus, Wife argues that the trial court should have established November 9, 2006, the date of the parties' first hearing, as a de facto termination date, because the parties' marriage was, in effect, over at that point. In her second and fourth assignments of error, Wife argues that valuing the marital assets as of the May 20, 2008 hearing was inequitable and was unsupported by any findings of fact that the marital property was equitably divided, as is required by R.C. 3107.171(G). We agree.

{¶8} "[T]he decision to use the final hearing date or another date when valuing property in a divorce action is a discretionary matter. The decision must reflect an unreasonable,

arbitrary or unconscionable attitude before this [C]ourt will reverse." *Schrader v. Schrader* (Jan. 21, 1998), 9th Dist. No. 2664-M, at *3. See, also, *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319-20 (applying an abuse of discretion standard when establishing the duration of a marriage for purposes of valuation). Under R.C. 3105.171(A)(2)(a), the term "duration of the marriage" is defined as "the period of time from the date of the marriage through the date of the final hearing in an action for divorce." We have previously noted that the statute "creates 'a presumption that the proper date for termination of marriage is the date of the final divorce hearing.'" *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 630, quoting *Kohler v. Kohler* (Aug. 14, 1996), 9th Dist. No. 96CA006313, at *5. If the trial court determines that use of the final hearing date would be inequitable given the circumstances of the parties, however, the statute permits the court to "select dates that it considers equitable in determining marital property." R.C. 3105.171(A)(2)(b). "[W]hile the statute permits the trial court to select the date of separation as a de facto termination date in place of the statute's presumption, such action is clearly not mandated[.]" *Bowen*, 132 Ohio App.3d at 630. A trial court should only impose a de facto termination where the evidence "clearly and bilaterally shows that it is appropriate based on the totality of the circumstances." *Boggs v. Boggs*, 5th Dist. No. 07CAF020014, 2008-Ohio-1411, at ¶66.

{¶9} A trial court can abuse its discretion "by failing to use a de facto termination-of-marriage date when the parties have (1) separate residences, (2) separate business activities, (3) separate bank accounts, and (4) made no attempt at reconciliation." *Dill v. Dill*, 3d Dist. No. 8-08-02, 2008-Ohio-5310, at ¶12. See, also, *Nitschke v. Nitschke*, 11th Dist. No. 2006-L-198, 2007-Ohio-1550, at ¶26. In addition, the use of a de facto termination date can be warranted if a substantial length of time passes between the time of separation and the final hearing. *Dill* at

¶12. See, also, *Crouso v. Crouso*, 3d Dist. No. 14-02-04, 2002-Ohio-3765, at ¶9 (noting that courts have found an abuse of discretion where there has been "a significant time lapse between separation and final hearing" and a de facto termination date was not employed).

{¶10} Our review of the record reveals that the parties were living in separate residences shortly after the time Wife left the marriage and Husband filed for divorce. Compare *Dill* at ¶32-36. At the May 2008 hearing, Wife testified that, since she had left the house in August 2004, she was living in a rental unit in Cleveland near her work and had only returned to the marital residence twice. The first time Wife returned was in September 2004, within days of her leaving, when she went to obtain some personal items she was unable to take when she left originally. At that point, Husband had already changed the locks, which caused Wife to use force to enter the house. The second time Wife returned to the house was in May 2008, through an agreement of the parties, because Husband had relocated to Florida and the home was vacant. Though Wife attempted to re-enter the house in September 2005 following the parties' first hearing in this matter, Husband refused to let her into the house and had police escort her from the property. Thus, it is apparent that both parties were acting consistent with a desire to permanently separate and live apart from one another shortly after Wife left the marriage in August 2004. Additionally, there was no evidence that the parties had attempted to reconcile, sought counseling, or engaged in martial relations after Wife had left the marital residence. See *Dill* at ¶32 (noting that the trial court should look at objective evidence of reconciliation when considering whether a de facto termination date might be appropriate); *Crowder v. Crowder* (Aug. 5, 1999), 10th Dist. No. 98AP-1124, at *2 (employing a de facto termination date where husband and wife's uncontroverted testimony reflected that they were no longer living as a marital unit). Instead, the evidence suggests that each party sought the aid of an attorney and

pursued divorce proceedings against the other shortly after Wife left the marital residence. See *Murphy v. Murphy* (June 22, 1988), 9th Dist. No. 2345, at *2 (relying on employment of legal counsel and filing of divorce proceeding in support of the use of a de facto termination date). The parties' actions demonstrate that there was a clear and bilateral agreement between them to terminate their marital relationship well in advance of May 20, 2008. *Boggs* at ¶66; *Crowder*, at *2.

{¶11} The record further evidences that the parties were financially independent from one another for years before the final hearing was held in this matter. Though Wife did not work outside the home when the parties' three children were younger, she had returned to teaching in 1995. Once she and Husband separated, Wife relied on her income of approximately $60,000 as a computer teacher to support herself while she lived in Cleveland. Husband was high school educated and worked as a beer delivery driver for The House of LaRose where he was earning approximately $50,000. Just months before the divorce, the delivery drivers went on strike and remained on strike until April 2005. During that time, Husband testified he received strike pay and unemployment as his sole source of income. As a part of the union's negotiated settlement, Husband was given the choice between accepting a severance package or taking a position at The House of LaRose's new location in Brecksville. Husband accepted the severance package, which began in April 2005 and was paid for sixty-six weeks, ending in mid-2006. Husband received nearly $688 per week, after taxes, during that time. Shortly before his severance pay ended, he received a $10,000 workers' compensation award which he used to subsidize his living expenses. Though Husband requested temporary spousal support at various points while the divorce was pending, the trial court denied his requests. Once his severance pay ceased, he began to draw upon his retirement benefits for income, while the divorce remained pending.

Based on the record, the parties were clearly financially independent and self-supporting long before the May 20, 2008 hearing. In addition, bank records introduced by Husband demonstrate that, at some point prior to January 2006, he had established his own bank account, separate and apart from Wife. Similarly, Wife testified that she had her name removed from various utility bills associated with the marital residence shortly after she left. The foregoing evidence establishes that not only were the parties living separately, but that they were financially independent from one another while the divorce was pending and that they shared a mutual desire to end their relationship and acted in accordance with that goal, ceasing to interact as a marital unit for years prior to the May 20, 2008 hearing. See *Rogers v. Rogers* (Sept. 2, 1997), 10th Dist. Nos. 96APF10-1333 & 96APF01-67, at *7 (concluding that a de facto termination date was warranted because "the mutual and bilateral actions of the parties evidenced an irretrievable breakdown and termination of the marriage four years prior to the date of the final hearing [and] [t]he parties ceased contributing to each other for each other's benefit as would partners in a joint undertaking"). Compare *Farley v. Farley* (Aug. 31, 2000), 10th Dist. Nos. 99AP-1103 & 99AP-1282, at *6-7 (concluding that the use of a de facto termination date was unnecessary largely because the parties, even though separated for fifteen years before the time of their divorce, had "complex, ongoing financial entanglement" which served to the financial benefit of both parties during their lengthy period of separation).

{¶12} Finally, we note that there was over a three and one-half year delay from the point at which Husband initially sought a divorce, until the point at which the final hearing was held in this matter. See *Dill* at ¶12; *Crouso* at ¶9. It appears, however, that both parties have contributed to the protracted divorce proceedings before the trial court. Although they had purportedly reached an agreement as to the terms of their divorce as early as September 2005,

when Husband attempted to memorialize that agreement, Wife objected. Shortly after the trial court entered Husband's order documenting the purported agreement of the parties despite Wife's objections, the trial court granted her motion to vacate. In doing so, the trial court found that Husband failed to disclose several assets, including his Social Security and retirement health insurance benefits. The trial court also found that Husband's attempt to bind Wife to the terms of a divorce decree which she had not approved, while simultaneously refusing to allow her access to the marital residence in order to retrieve the personal property she was awarded under the terms of that decree, constituted misconduct under Civ.R. 60(B)(3). After a new trial was held in November 2006, this proceeding was further delayed when Wife submitted an ex parte communication to the trial judge, causing him to recuse himself and Wife's attorney to withdraw from the case. Wife then requested, and received, a new trial in this matter.

{¶13} While the matter remained pending based on these delays, the parties' lives did not. Between the time this proceeding was initiated and the time of the final hearing, Wife's teaching income had increased nearly $10,000 from just over $61,000 in 2004 to approximately $70,000 in 2008, due in large part because she had completed her master's degree just before the parties separated. During that same time, however, Husband's income had decreased based on a series of events at work, from a pre-divorce income of $50,000 per year, to a retirement income in 2008 projected to be less than $26,000. As a result of the changes that occurred throughout this four-year span, Wife had continued to contribute to her retirement plan during a period in which she reached her highest income-earning years, while Husband stopped contributing to his retirement plan, and instead, began to draw upon it.

{¶14} Part and parcel to establishing the proper termination date for a marriage is to consider the effect that date will have upon the equitable division of assets. See R.C.

3105.171(A)(2)(b); *Berish*, 69 Ohio St.2d at 319-20. The Supreme Court has directed that use of a de facto termination date for this purpose "must be dictated largely by pragmatic considerations" because "the precise date upon which any marriage irretrievably breaks down is extremely difficult to determine." *Berish*, 69 Ohio St.2d at 319-20. In determining the appropriate termination date, however, the *Berish* Court reiterated that "[m]arriage is a union of equals[, therefore] [n]either party should make a profit at the expense of the other." *Berish*, 69 Ohio St.2d at 320, quoting *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355. As indicated, based on the changes in the employment circumstances of both parties over the course of the delayed divorce proceedings, the parties' most significant marital asset, their pensions, changed significantly. The marital portion of Wife's State Teachers' Retirement benefits increased in value from $167,106 at the November 2006 hearing, to $210,303 at the time of the May 2008 hearing. In turn, the marital portion of Husband's pension benefit decreased during that same time from a value of $432,314 to $307,771, and the marital portion of his Social Security benefits decreased from a value of $244,074 to $226,146. Moreover, for nearly every other marital asset at issue, including the marital residence, the trial court employed the asset values established at the November 2006 hearing. Use of the latter valuation amounts for the pension assets resulted in a division of martial assets that clearly benefited Husband, as it valued his contributions to the marital assets at their lowest point, and Wife's contributions at their highest. Scenarios such as this are precisely the reason a trial court is imbued with the authority to use a de facto termination date in certain cases, where principles of equity dictate that use of the final hearing date is inappropriate. *Berish*, 69 Ohio St.2d at 319-20. See, also, *Dill* at ¶46 (noting that during the ten-year delay between the time of separation and the final hearing date, several financial, health, and familial changes had occurred which weighed in favor of establishing a de

facto termination date for the marriage); *Zimon v. Zimon*, 9th Dist. No. 04CA0034-M, 2005-Ohio-271, at ¶28-30 (remanding to the trial court to establish a de facto date of termination based on the inequity of distributing to wife assets accumulated in the two-year period after she left the marriage and during which time she was receiving significant child and spousal support).

{¶15} With these equitable considerations in mind, we conclude that the trial court abused its discretion in establishing the final hearing date of May 20, 2008, as the termination date of the parties' marriage. Instead, the evidence indicates that the parties had bilaterally agreed that their marriage had ended and had acted to unwind their personal, financial, and living arrangements at a point well in advance of the May 20, 2008 hearing. Though the exact date a marriage ends is "extremely difficult to determine," the practical considerations of this case require us to conclude that the marriage was terminated as of the date of the first hearing in this matter, November 9, 2006. *Berish*, 69 Ohio St.2d at 320. Thus, the trial court abused its discretion in concluding otherwise and is directed to divide the parties' marital assets according to the values established at the November 2006 hearing. Accordingly, Wife's first, second, third, and fourth assignments of error are sustained.

Assignment of Error Number Ten

> "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO FIND THE SEVERANCE PACKAGE PAID TO APPELLEE TO BE A MARITAL ASSET AND EQUITABLY DIVIDING OR APPORTIONING ITS VALUE IN THE DIVISON OF ASSETS."

Assignment of Error Number Eleven

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO FIND THE WORKER'S (sic) COMPENSATION AWARD RECEIVED BY APPELLEE TO BE A MARITAL ASSET AND EQUITABLY DIVIDING OR APPORTIONING ITS VALUE IN THE DIVISION OF ASSETS."

Assignment of Error Number Twelve

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE ACCOUNT CLOSED BY APPELLEE WAS THE ASSET OF THE PARTIES' EMANCIPATED SON."

{¶16} In the foregoing assignments of error, Wife essentially argues that the trial court erred by not characterizing several funds as marital assets subject to division. Specifically, Wife argues that the severance package Husband received from his employer and the workers' compensation award he received as part of an injury settlement should have been considered marital property. Wife also argues that two withdrawals totaling over $5,500 made by Husband from the marital bank account also should have been considered marital property. We disagree.

{¶17} "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. In a civil context, "[j]udgments supported by some competent, credible evidence *** will not be reversed by a reviewing court as being against the manifest weight of the evidence." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶24, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Marital property is defined to include "[a]ll real and personal property that currently is owned by either or both of the spouses *** and that was acquired by either or both *** during the marriage[.]" R.C. 3105.171(A)(3)(a)(i). We address Wife's assignments of error in the context of our

previous determination that the trial court should have established November 9, 2006, as the proper termination date of the marriage. With that date established as the end point of the marriage, it is evident that all of the assets about which Wife complains were assets that were acquired, or existed, "during the marriage." R.C. 3105.171(A)(3)(a)(i). That is, Husband was receiving his severance pay between April 2005 and July 2006, was paid his workers' compensation award in February 2006, and had made the contested bank withdrawals in September 2004 and November 2004. Wife argues that the trial court erred by not crediting her in the division of property with half of these assets because they were marital property.

{¶18} "[S]everance packages are intended to compensate employees for prospective, not retrospective, lost wages." *Puls v. Puls*, 2d Dist. No. 20487, 2005-Ohio-1373, at ¶10. "[S]everance pay received during the marriage is marital property to the same extent that wages paid during the marriage are marital property." *McKenzie v. McKenzie*, 2d Dist. No. 2006-CA-34, 2006-Ohio-6841, at ¶15, quoting *McClure v. McClure* (1994), 98 Ohio App.3d 27, 41.

{¶19} As mentioned, Husband went on strike in June 2004, just months before he filed for divorce, and remained on strike until April 2005. At that time, Husband was receiving $703 per week in strike pay and unemployment benefits, and was residing in the mortgage-free marital home. Husband requested temporary orders for spousal support. The trial court considered both Husband and Wife's affidavits of income and their respective expenses at the time, and denied Husband's motion for support. After the strike ended in April 2005 and Husband separated from The House of LaRose, he began receiving severance pay of $688 per week, after taxes. His severance pay continued through mid-2006 and again, despite his request, was not subsidized by any spousal support. Much like Wife was able to use her income to support herself during this pending divorce, the evidence reveals that Husband used his severance pay to support himself

during that same time. For these reasons, there was competent, credible evidence to support the trial court's decision not to award Wife a portion of Husband's severance pay.

{¶20} With respect to workers' compensation awards, this Court has previously explained that "separate property" as related to divorce proceedings is defined to include "[c]ompensation to a spouse for the spouse's personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets[.]" *Bartram v. Bartram* (Oct. 2, 1991), 9th Dist. No. 2001, at *1, quoting R.C. 3105.171(A)(6)(a)(vi). Because "the [workers' compensation] statute replaced common law personal injury damage remedies[,]" we have concluded that "[receipt of such] benefits equate[s] to compensation for personal injury, which is separate property according to R.C. 3105.171(A)(6)(a)(vi)." *Bartram*, at *2. Wife argues that the award was based on Husband's lost marital earnings and, therefore, it should be subject to division.

{¶21} The record reveals that Husband received his workers' compensation award in February 2006, at which time his only other source of income was his severance pay. The total settlement award was $15,000, of which, Husband received $10,000. Husband testified that the settlement was for pain and suffering related to a work related injury to his rotator cuff that occurred in 2003 and resulted in surgery. Additionally, as part of accepting the settlement award in 2006, Husband agreed that he would be barred from seeking further employment with The House of LaRose. The record further reveals that: (1) Husband's severance pay concluded in mid-2006 shortly after receiving the workers' compensation award; (2) Husband had no other source of income at that time and was not granted spousal support; (3) Husband had not yet begun to receive any retirement benefits; and (4) Husband relied on the settlement proceeds as a means of helping provide for his living expenses throughout this time, when he otherwise had no

source of income. Based on Husband's testimony on this topic and the related evidence in the record, we conclude that there was competent, credible evidence to support the trial court's decision to consider Husband's workers' compensation award his separate property, not subject to division.

{¶22} Finally, Wife argues that Husband made two withdrawals of marital funds totaling just over $5,500 from two different bank accounts just as the parties separated. Specifically, she asserts that Husband withdrew approximately $3,000 from the parties' Ohio Savings account shortly after he filed for divorce, and another $2,500 from a Charter One account at approximately the same time. At the May 2008 hearing, Husband testified that he had withdrawn $3,000 in order to purchase a new furnace for the marital residence. Though the purchase was delayed and a furnace was not immediately installed, the record reveals that Husband later purchased and installed a new furnace at the marital residence. Accordingly, there was competent credible evidence to support the trial court's decision in this regard.

{¶23} With respect to the remaining funds, the trial court concluded that the money was not a marital asset, but was the property of their son, Michael Budd. At the final hearing in this matter, Husband testified that he and Wife agreed to hold approximately $8,000 in their bank account for their son while he served in the military in Iraq. Michael testified that he had given his parents between $7,000 and $8,000 to keep for him while he was overseas and had asked them to use the money to pay bills for him while he was away. Michael stated that, upon returning to Ohio, he and his father went to the bank in September or October 2004 to withdraw the remaining balance of his money, approximately $2,500. Though Wife disputed the amount of money Michael left in his parents' care and how much of it remained when he returned, there

was competent, credible evidence to support the trial court's conclusion that the funds at issue were not marital property.

{¶24} For the foregoing reasons, Wife's tenth, eleventh, and twelfth assignments of error are overruled.

Assignment of Error Number Nine

> "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT APPELLEE CONTRIBUTED TO APPELLANT'S EDUCATION WHEN THE MANIFEST WEIGHT OF THE EVIDENCE DEMONSTRATED THAT APPELLANT HAD RECEIVED SCHOLARSHIPS AND GRANTS AND ALSO INCURRED SUBSTANTIAL STUDENT LOAN OBLIGATIONS TO ACQUIRE HER EDUCATION."

{¶25} In her ninth assignment of error, Wife argues that there was a lack of evidence to support the trial court's finding that Husband had contributed to her education before the parties separated. She further asserts that the trial court abused its discretion by failing to account for the educational debt she incurred as a result of continuing her education. We disagree.

{¶26} As previously stated, this Court cannot reverse a trial court's finding of facts if there is some competent, credible evidence in the record to support it. *Bucalo v. Bucalo*, 9th Dist. No. 05CA0011-M, at ¶44. At trial, Husband testified that once their children were out of elementary school, Wife pursued both her undergraduate and graduate degrees in education. Husband stated that while she was in school, he helped care for the children, pay for her tuition and books, and transport her to and from class. Wife testified that she also wrote grants and received scholarships to offset the cost of her education, therefore, "a lot" of her tuition was paid for because "[she went] looking for money." She further testified that once she obtained her master's degree, she received a $5,000 raise at work, "so in five years *** [she] paid for [her] masters." Wife testified that she received both degrees before she left the marital residence in September 2004 and that she had no student loans at that time. Since then, she has returned to

school to pursue her doctorate in education and in doing so, has incurred approximately $26,000 in student loan debt. Based on the foregoing testimony, we conclude that there is competent, credible evidence to support the trial court's finding that Husband contributed to Wife's education while the parties were married. Though Wife might not be of the same mindset with respect to Husband's contributions, the trial court was free to credit his testimony over that of hers. *Saluppo v. Saluppo*, 9th Dist. No. 22680, 2006-Ohio-2694, at ¶56.

{¶27} To the extent Wife argues that the trial court abused its discretion by failing to address her student loan debt in its decision, it is apparent the trial court did not incorporate into the terms of the parties' divorce decree the separate debt obligations that either Husband or Wife made after the two were separated. Much like the $15,000 car loan Husband stated he initiated in September 2005, which is also not mentioned in the divorce decree, Wife sought the aid of student loans to pursue her doctorate after the parties were separated, and without the consent of her spouse. Consequently, the trial court did not abuse its discretion in failing to mention her separate debt obligation for her student loan under the terms of the parties' divorce decree. Accordingly, Wife's ninth assignment of error is overruled.

Assignment of Error Number Five

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FINDING DIFFERENT 'MARITAL ASSETS' IN THIS DECISION THAN THE PRIOR TWO DECISIONS AND NOT EQUALLY DIVIDING THE ASSETS OF THE MARRIAGE."

Assignment of Error Number Six

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY AWARDING SUBSTANTIALLY MORE MARITAL PROPERTY TO APPELLEE BASED UPON SOME HYPOTHETICAL FUTURE SPOUSAL SUPPORT CREDITED TO HIM."

Assignment of Error Number Seven

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ORDERING APPELLANT TO PAY SPOUSAL SUPPORT WITHOUT THE REQUISITE FINDINGS REQUIRED BY STATUTE."

Assignment of Error Number Eight

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO FIND THE APPELLEE TO BE VOLUNTARILY UNEMPLOYED/UNDEREMPLOYED."

{¶28} In her fifth assignment of error, Wife asserts that upon remand by this Court in her second appeal, the trial court erroneously arrived at a different division of assets in its June 3, 2010 order, than it had in its two prior orders. In her sixth and seventh assignments of error, Wife argues that the trial court failed to properly consider the statutory mandates of R.C. 3105.18 when it arrived at the amount of spousal support due to Husband and erred by considering the division of property award in the calculation of support. In her eighth assignment of error, Wife argues that the trial court should have considered Husband voluntarily unemployed and imputed income to him for the purposes of calculating spousal support.

{¶29} Having concluded that the trial court abused its discretion in establishing May 20, 2008, as the termination date for the marriage, Wife's fifth, sixth, seventh, and eighth assignments of error are moot, as the trial court will be required to recalculate spousal support given the difference in the duration of the marriage and the corresponding change in the division of marital assets based on the use of this date. App.R. 12(A)(1)(c). See, also, *Dill* at ¶49.

III

{¶30} Wife's first, second, third, and fourth assignments of error are sustained. Wife's fifth, sixth, seventh, and eighth assignments of error are moot. Wife's ninth, tenth, eleventh, and twelfth assignments of error are overruled. The judgment of the Summit County Court of

Common Pleas, Domestic Relations Division, is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

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 Summit, 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.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

MARGARET E. STANARD, Attorney at Law, for Appellant.

RANDAL A. LOWRY, Attorney at Law, for Appellee.