[Cite as *Palazzo v. Palazzo*, 2015-Ohio-1254.]

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

CYNTHIA L. PALAZZO	C.A. No. 27332
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JOHN W. PALAZZO	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. 2012-04-1249

DECISION AND JOURNAL ENTRY

Dated: March 31, 2015

SCHAFER, Judge.

{¶1} Plaintiff-Appellant Cynthia L. Palazzo ("Wife") appeals from the decree of divorce entered by the Summit County Court of Common Pleas, Domestic Relations Division. For the reasons set forth below, we affirm in part, and reverse in part.

I.

{¶2} Wife and John W. Palazzo ("Husband") married on October 6, 1984. Three children were born during the marriage, all of whom were emancipated at the time of trial. At the time of the trial, Husband was 52 years old and had earned a bachelor's degree in mechanical engineering along with a master's degree in business administration. In 2000, he started a business, known as Frontline International, Inc. ("Frontline"), which he solely owned. Frontline was the source of income for the parties from its inception. The parties both also used company funds and credit cards to pay for personal expenses. Frontline manufactures and distributes equipment used in the storage, handling, and disposal of cooking oil. Its customers include

restaurant chains and companies that collect cooking oil. One of its most important customers is located in California; however, it also services international customers as well. In 2012, Frontline expanded operations into Puerto Rico.

{¶3} Frontline is headquartered in Cuyahoga Falls on premises that it leases from JZM Properties, L.L.C. ("JZM"), an entity that Wife was the sole owner of until title was transferred to Husband in December 2013 by an agreed judgment entry.

{¶4} Wife was 53 years old at the time of trial and was a high school graduate. Prior to the birth of her three children, Wife worked in retail sales, attaining the level of store manager before leaving the workforce to care for the parties' children. In 2003, Wife was diagnosed with stage III breast cancer and underwent a mastectomy, hysterectomy, chemotherapy, and radiation. The treatment led to a condition known as lymphedema, which causes Wife's arm, chest, and back to swell and become uncomfortable and painful. Wife received subsequent treatment to try to address the lymphedema but continued to suffer from its symptoms at the time of trial. Thereafter, Wife became an employee of Frontline. Wife would perform various tasks including office, bookkeeping, and customer service related tasks; however, the hours Wife worked for Frontline were part-time and were not consistent. In 2011, Wife stopped performing work for Frontline, but continued to receive a salary as part of the temporary orders.

{¶5} The parties began living separate and apart in July 2010. Wife filed for divorce in April 2012, and Husband counterclaimed for a divorce in June 2012. The matter proceeded to a trial that lasted several days. The contested matters included, inter alia, the de facto termination date of the marriage, the value of Frontline, Husband's income capacity, whether the marital home constituted marital property, whether there had been financial misconduct on the part of Husband, and the level and appropriateness of spousal support. At the conclusion of the trial, the

trial court requested that the parties submit proposed findings of fact and conclusions of law. Both parties complied, and the trial court entered the divorce decree on March 25, 2014.

{¶6} The trial court found the marriage terminated December 31, 2012. It accepted Husband's expert's valuation of Frontline ($730,000), found Husband's income capacity to be $184,000, concluded that the home was marital property, and found that there had been no financial misconduct. It ordered Husband to pay Wife $372,251.50 as a property division, with an initial sum of $6,355.30 to be paid in 30 days and the remaining balance to be paid at the rate of $3,000 per month with no interest accruing.[1] The martial home (stipulated value of $350,000) was to be sold and the proceeds split; however, prior to sale, each party had the opportunity to buy out the other party for the sum of $175,000. The trial court ordered Husband to pay $1,500 per month in spousal support until either party's death or Wife's remarriage and reserved jurisdiction to modify that amount under certain express circumstances.

{¶7} Wife has appealed, raising six assignments of error for our review. While Husband also filed a notice of cross-appeal, he subsequently filed a motion to dismiss it, which this Court granted.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE OFFICER LOAN OWED BY FRONTLINE TO HUSBAND IN DIVIDING MARITAL PROPERTY.

[1] By this Court's calculation the amount awarded to Wife by the trial court as part of the property division would total $374,421.30, not $372,251.50. In other words, this Court is uncertain how the trial court arrived at a total award of $372,251.50. This discrepancy can be addressed on remand.

{¶8} Wife asserts in her first assignment of error that the trial court erred in failing to divide the $40,185.25 balance remaining on the Frontline officer loan as of December 31, 2012. Additionally, Wife asserts that the trial court erred in failing to find that Husband committed financial misconduct by withdrawing $195,000 from the officer loan and placing the money in three 529 accounts for the parties' children without needing to do so and without Wife's consent. Wife argues that she is entitled to half of the $195,000 placed in the 529 accounts due to Husband's misconduct. We agree in part.

{¶9} "In any divorce action, the starting point for a trial court's analysis is an equal division of marital property." *Daniel v. Daniel*, 139 Ohio St.3d 275, 2014-Ohio-1161, ¶ 7, citing R.C. 3105.171(C). "However, R.C. 3105.171(C) clearly provides that where an equal division would be inequitable, a trial court may not divide the marital property equally but instead must divide it in the manner that the court determines to be equitable." *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶ 5. "In order to determine what is equitable, a trial court must consider the factors set forth in R.C. 3105.171(F). Since a trial court has broad discretion in the allocation of marital assets, its judgment will not be disturbed absent an abuse of discretion." *Id.*

{¶10} Marital property includes "[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 of the spouses during the marriage[,]" as well as "[a]ll interest that either or both of the spouses currently has in any real or personal property * * * and that was acquired by either or both of the spouses during the marriage[.]" R.C. 3105.171(A)(3)(a)(i),(ii). Marital property does not include separate property. R.C. 3105.171(A)(3)(b).

{¶11} Husband testified that early on in Frontline's history, Husband loaned Frontline money ("officer loan"). He indicated that the loan to Frontline was recorded in the corporate

minutes and that the funds came from personal funds, the children's accounts, and gifts from his father. Over time the balance owed to Husband would change. The parties would charge various expenses against the loan balance, as well as deposit funds that would increase the loan balance. As of January 2006, the balance on the loan owed to Husband was $384,389. On December 15, 2011, January 25, 2012, and April 2, 2012, Frontline wrote three checks to Husband, each for $65,000, which Husband stated he used to create 529 accounts for the children's college expenses. Thus, the amount due to Husband under the officer loan decreased by $195,000. As of the date of termination of the marriage, December 31, 2012, Frontline owed $40,185.25 to Husband under the officer loan.

{¶12} The parties do not dispute the amount remaining on the officer loan as of December 31, 2012; instead, they dispute whether, because, the officer loan was taken into consideration in valuing Frontline, it is unnecessary or duplicative to consider the officer loan as a separate marital asset subject to division.

{¶13} The trial court found that, because the value of Frontline's assets and liabilities was included in the business valuation and the officer loan reduced the value of Frontline, if the trial court were to consider the $40,185.25 officer loan as a marital asset it would be disregarding the parties' valuations of Frontline. We do not agree with the trial court's reasoning. The officer loan was not only a debt of the company, it was also an asset of the parties' marriage. *See Rosenberger v. Rosenberger*, 11th Dist. No. 2005-G-2653, 2006-Ohio-3410, ¶ 6, 16, 19; 2 Brett R. Turner, *Equitable Distribution of Property*, Section 6:100 (3d Ed.2014).

{¶14} Here, the decrease in valuation of Frontline caused by the outstanding officer loan impacted both parties in the division of Frontline's equity. Husband received a company worth less than it otherwise would have been if it had not had the officer loan, and, likewise, Wife

received a smaller property settlement amount than she otherwise would have if there had been no officer loan. Notwithstanding, Husband is still owed the $40,185.25 from Frontline. If the officer loan is not considered separately in the property division, Husband would be disproportionately benefited. In light of the trial court's equal division of the other assets, we see no logical reason that the $40,185.25 amount remaining on the officer note should not also be subject to equal division. Accordingly, we agree that the trial court abused its discretion in failing to consider the $40,185.25 officer loan as a separate marital asset subject to division.

{¶15} Wife also argues that the trial court erred in failing to find that Husband committed financial misconduct in removing $195,000 from Frontline pursuant to the officer loan and putting the money into three 529 accounts for the parties' children. Wife notes that two of the three children had already finished school at the time of trial, that the parties' had never before paid for college expenses in this manner, that she was not consulted about the withdrawal, and that the timing of Husband's actions (i.e. subsequent to the parties living separate and apart) suggests that Husband was intentionally trying to decrease Frontline's value. Accordingly, Wife asserts that the trial court should have ordered Husband to account for the funds and divide those funds not used for tuition with Wife. Despite acknowledging that only approximately $116,000 of the funds remained at the time of trial, Wife seeks half of the $195,000 originally placed in the 529 accounts.

{¶16} While we understand Wife's position and find Husband's behavior concerning, we cannot say the trial court abused its discretion in failing to find financial misconduct with respect to the officer loan withdrawals deposited into the 529 accounts or in failing to award Wife half of the $195,000 in light of Wife's proposed findings of fact and conclusions of law submitted to the trial court.

{¶17} In her proposed findings of fact and conclusions of law, Wife did seek a finding of financial misconduct with respect to the checks Husband wrote to himself from the JZM member account; however, Wife did not expressly seek a similar finding with respect to the officer loan withdrawals. She did note that Husband withdrew the $195,000 without her permission, but did not specifically seek a finding of financial misconduct. Moreover, while Wife did request that the officer loan balance be declared a marital asset and equally divided, she requested that it be so divided based on the balance on the date that the trial court determined was the de facto termination date. If the trial court found that date to be December 31, 2012, which it did, Wife only requested half of the balance on that date, or half of $40,185.25. With respect to the 529 accounts, Wife specifically requested that "[a]ll funds in the 529 account(s) shall be used exclusively for the college education of the parties' children. Husband shall provide [Wife] with quarterly account statements from the institution(s) holding said funds and shall immediately inform Wife of any withdrawals by e-mail on the same day as the withdrawal." Wife did not seek a disbursement of the funds in those accounts. The trial court in its decree concluded that the 529 accounts "shall be used for the benefit of each child[,]" that "[b]oth parties shall be custodians on each account[,]" and that [a]ny expenditures must be agreed to by both parties."

{¶18} Certainly the trial court's judgment on this point does not mirror Wife's proposed entry; nonetheless, it is much closer to Wife's proposal than what Wife currently seeks on appeal. While Wife's proposal in her proposed findings of fact and conclusions of law may not amount to invited error, *see Wood v. Wood*, 10th Dist. Franklin No. 10AP-513, 2011-Ohio-679, ¶ 46 ("[A] litigant cannot induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible."), we do

conclude that Wife has forfeited this issue for purposes of appeal. *See Colley v. Colley*, 10th Dist. Nos. 09AP-333, 09AP-335, 09AP-336, 2009-Ohio-6776, ¶ 47; *Campanale v. Campanale*, 9th Dist. Summit No. 14663, 1990 WL 209690, *1-*2 (Dec. 19, 1990) (applying forfeiture where plaintiff failed to specifically address the issue below, failed to file a post-hearing brief, and failed to file proposed findings of fact and conclusions of law after being instructed to do so); *Teeter v. Teeter*, 7th Dist. No. 485, 1984 WL 7754, *1 (June 29, 1984) (affirming trial court's decree that allegedly omitted two assets from the decree when those assets could have been discussed in appellant's proposed finding of fact and conclusions of law but were not); *Teeter v. Teeter*, 18 Ohio St.3d 76, 77 (1985) (concluding the court of appeals "committed no error by reviewing that record to determine whether appellant had brought an alleged fact to the trial court's attention[,]" as the proposed findings of fact and conclusions of law not adopted by the trial court were still part of the original papers filed in the trial court and were thus part of the record on appeal); *see also Colley* at ¶ 58.

{¶19} We remain mindful that this was a lengthy trial that occurred over an extended period of time and involved over 1400 pages of testimony and hundreds of pages of exhibits. The trial court specifically ordered the parties to submit proposed findings of fact and conclusions of law, and both parties complied. Wife's claim on appeal was not part of her proposed findings of fact and conclusions of law below and thus was not brought to the attention of the trial court at the point in time it should have been. *See Teeter* at *1; *Teeter* at 77. Under the circumstances of this case, we cannot find an abuse of discretion on the part of the trial court.

{¶20} To the extent Wife asserts that the trial court erred in failing to consider the remaining $40,185.25 officer loan balance a marital asset, we agree and sustain that portion of

Wife's assignment of error. However, the remaining portion of Wife's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE MEMBER DRAWS TAKEN FROM JZM BY HUSBAND IN DIVIDING MARITAL PROPERTY.

{¶21} Wife argues in her second assignment of error that the trial court erred in failing to consider the funds that Husband withdrew from JZM in issuing its decree. Given the circumstances of this case, we agree.

{¶22} In her proposed findings of fact and conclusions of law discussing JZM, Wife noted that while JZM had little equity, Husband testified on the first day of trial that he wrote checks to himself from the JZM member draw accounts totaling $38,453.24. Wife additionally pointed the trial court to the relevant exhibit numbers related to this issue. Wife asserted that Husband wrote and cashed the checks without Wife's permission and did not account for the funds. Additionally, Wife sought a finding that Husband committed financial misconduct by removing the funds from the JZM member draw account.

{¶23} The trial court in its entry broadly dealt with the issue of financial misconduct and concluded that there was none by either party and that neither party could account for how all the funds were spent. Additionally, specifically with respect to the JZM member draw account, the trial court found that it "was not provided with any evidence with respect to a member draw account of JZM."

{¶24} Because the trial court's finding that there was no evidence concerning the JZM member draw account is entirely unsupported by the record, we agree that its judgment on this point must be reversed. Wife submitted an exhibit which Husband identified as a list of checks

written by JZM from its account and which Husband characterized as member draws. He stated that, as JZM was an LLC, funds withdrawn from it would be considered member draws. Husband testified he would remove money from this member draw account to cover his personal expenses or whatever the parties needed, including the children's tuition. There was evidence presented that between January 24, 2011, and April 12, 2011, Husband withdrew $38,453.24 from the JZM member draw account. Husband could not account for the use of the funds in much detail. Wife testified that, at the time of the withdrawals, Wife was the sole member of JZM, that she did not know that Husband was making the withdrawals, and that she did not authorize the withdrawals. Additionally, Wife averred that it was not the parties' custom to use JZM to pay for personal expenses. Husband testified that he did not put the cash into checking accounts because "with all the document requests and everything else, [he] got tired of somebody snooping about all [his] personal business. Because [he had] produced every document [Wife] wanted and [he] needed some privacy."

{¶25} Accordingly, despite the trial court's finding to the contrary, there was evidence in the record pertaining to Husband's withdrawals from the JZM member draw accounts. Further, given the foregoing evidence, which the trial court must not have considered in light of its finding, and the trial court's statement at trial that it found the parties equally credible, there is evidence from which the trial court could find that Husband's withdrawals amounted to financial misconduct. *See Havrilla v. Havrilla*, 9th Dist. Summit No. 27064, 2014-Ohio-2747, ¶ 47 (noting the requirement of wrongful intent and that the time frame of the actions may demonstrate wrongful intent). Upon reversal, the trial court can consider the evidence in the record with respect to the withdrawals from the JZM member draw accounts to determine how to treat these funds. Moreover, the trial court should also reconsider whether the standard for

financial misconduct has been met and whether Wife is entitled to a distributive award. *See id* at ¶ 46-47 (outlining the law concerning financial misconduct); R.C. 3105.171(E)(4).

{¶26} Thus, to the extent Wife has asserted that the trial court erred in its treatment of the JZM member draw account, we agree. Wife's second assignment of error is sustained. Upon remand, the trial court must examine the evidence and determine how to treat these funds and whether a finding of financial misconduct is warranted and, if so, whether a distributive award should be made.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED IN FAILING TO IDENTIFY AND TO DIVIDE EQUITABLY ALL OF THE MARITAL ASSETS AND BY FAILING TO ACCOUNT FOR HUSBAND'S FINANCIAL MISCONDUCT IN APPROPRIATING JOINT ASSETS.

{¶27} Wife asserts in her third assignment of error that the trial court failed to identify and divide certain assets of the marriage. Specifically, Wife points to an ongoing loss carry forward claimed by Husband on his taxes, money and credit card points that Wife alleges Husband spent on his girlfriend's residence in California which Husband also used as an office, Husband's $9,126 withdrawal from the joint Fidelity account, and the $195,000 Husband withdrew from Frontline that was subtracted from the officer loan balance and placed in the 529 accounts for the parties' children.[2] With respect to all of the items aside from the $195,000 placed in the 529 accounts, Wife did not assert that these were assets of the marriage in her proposed findings of fact and conclusions of law, or even mention them. Thus, we cannot say that the trial court abused its discretion with respect to its failure to identify and divide these items as assets of the marriage. *See, e.g., Teeter*, 1984 WL 7754, at *1; *Teeter*, 18 Ohio St.3d at

[2] While Wife also mentions the JZM member draw account withdrawals again, this issue has been addressed in assignment of error two.

77. Therefore, for reasons similar to those discussed in the second portion of the resolution of Wife's first assignment of error, we likewise overrule this assignment of error as well.

{¶28} With respect to the $195,000 Husband placed in the 529 accounts, we previously overruled Wife's argument on that point in her first assignment of error. Wife's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> THE TRIAL COURT ERRED IN FAILING TO ORDER ANY SECURITY FOR OR INTEREST ON HUSBAND'S PROPERTY DIVISION PAYMENTS OR TO ORDER HIM TO HOLD WIFE HARMLESS ON FRONTLINE AND JZM DEBTS.

ASSIGNMENT OF ERROR V

> THE TRIAL COURT ERRED IN ITS AWARD OF SPOUSAL SUPPORT BY IMPUTING EMPLOYMENT INCOME TO WIFE AND BY FAILING TO CONSIDER HER PERSONAL SITUATION, AND BY FAILING TO INCLUDE AS HUSBAND'S INCOME SUBSTANTIAL PERSONAL EXPENSES PAID BY HIS BUSINESS.

ASSIGNMENT OF ERROR VI

> THE TRIAL COURT ERRED IN ITS AWARD OF SPOUSAL SUPPORT BY CONSIDERING AS WIFE'S INCOME THE PROPERTY DIVISION PAYMENTS TO BE MADE BY HUSBAND.

{¶29} Wife argues in her fourth assignment of error that the trial court erred in failing to order any security or interest on Husband's property division payments to Wife.[3] Wife argues in her fifth assignment of error that the trial court erred in determining the parties' income

[3] While Wife mentions in her fourth assignment of error that the trial court erred in failing to order that Wife be held harmless on Frontline and JZM debts, Wife does not mention this in the body of her argument or provide any further elaboration. We note that the decree does provide that "Husband and Wife shall each pay, indemnify and hold the other harmless on the following debts: Husband shall pay the first mortgage, SBA mortgage and land contract in connection with JZM. Each shall pay other debts in his or her own name." As Wife has not further elaborated her concerns, we decline to address the issue. *See* App.R. 16(A)(7).

capacities for purposes of awarding spousal support. Wife asserts in her sixth assignment of error that the trial court erred by considering the property division payments to Wife as income in determining spousal support. We conclude that each of these arguments is premature.

{¶30} Because we sustained a portion of Wife's first assignment of error and her second assignment of error, both of which relate to the property division, the trial court will necessarily have to recalculate the property division and evaluate how it is to be paid and whether security would be appropriate. Accordingly, addressing Wife's fourth assignment of error would be premature at this time. *See Fetzer v. Fetzer*, 9th Dist. Wayne No. 12CA0036, 2014-Ohio-747, ¶ 59.

{¶31} Wife's fifth and sixth assignments of error related to spousal support are also premature. R.C. 3105.171(C)(3) states that "[t]he court shall provide for an equitable division of marital property under this section prior to making any award of spousal support to either spouse under section 3105.18 of the Revised Code and without regard to any spousal support so awarded." Accordingly, the trial court will be required to reconsider its spousal support award after it conducts an equitable property division in accordance with our resolution of Wife's first and second assignments of error. *See Uphouse v. Uphouse*, 9th Dist. Summit No. 27057, 2014-Ohio-2514, ¶ 9-10; *Budd v. Budd*, 9th Dist. Summit No. 26132, 2013-Ohio-2170, ¶ 14.

{¶32} Wife's fourth, fifth, and sixth assignments of error are premature and we decline to address them.

III.

{¶33} In light of the foregoing, we sustain in part and overrule in part Wife's first assignment of error, sustain her second assignment of error, and overrule her third assignment of error. We decline to address Wife's fourth, fifth, and sixth assignments of error at this time. The

judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for 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(C). 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.

JULIE SCHAFER
FOR THE COURT

WHITMORE, J.
CONCURS.

HENSAL, P. J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶34} I agree with the majority's conclusions regarding whether the record supports the finding that there was no evidence in the record about JZM member draws. I do not, however, agree with its conclusion regarding the officer loan from Frontline. In light of the parties' extensive involvement with the company and the shared benefits that they enjoyed from their investment into it, I cannot say that the trial court abused its discretion when it declined to consider the officer loan as an additional marital asset separate and apart from the business valuation.

APPEARANCES:

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