[Cite as *Kolar v. Kolar*, 2018-Ohio-2559.]

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

BERNADETTE M. KOLAR	C.A. No. 28510
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DAVID M. KOLAR	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 2012-07-2214

DECISION AND JOURNAL ENTRY

Dated: June 29, 2018

TEODOSIO, Presiding Judge.

{¶1} David M. Kolar appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division, entered on January 4, 2017. We reverse and remand in part, and affirm in part.

I.

{¶2} Bernadette M. Kolar filed a complaint for divorce in July 2012. A trial was held in August and October 2016, and the trial court entered a decree of divorce on January 4, 2017. Mr. Kolar now appeals, raising four assignments of error.

II.

ASSIGNMENT OF ERROR ONE

THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING $90,000 OF ATTORNEY FEES TO APPELLEE.

{¶3} In her first assignment of error, Mr. Kolar argues the trial court erred in its award of attorney fees to Ms. Kolar. Specifically, Mr. Kolar argues the trial court failed to determine

the reasonableness of the award and failed to provide him the opportunity to cross-examine opposing counsel as to his attorney fees affidavit.

{¶4} R.C. 3105.73(A) provides:

> In an action for divorce * * * a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate.

Under R.C. 3105.73, a trial court has broad discretion in determining attorney fees and its award will not be disturbed on appeal absent a showing of a clear abuse of discretion. *Miller v. Miller*, 9th Dist. Wayne No. 07CA0061, 2008-Ohio-4297, ¶ 71. 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. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying this standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶5} Although Loc.R. 25.02 of the Court of Common Pleas of Summit County, Domestic Relations Division, contemplates a hearing at which "either party shall present evidence or stipulations sufficient for the court to make a decision[,]" we have previously stated that there is no *requirement* under R.C. 3105.73 or the local rule that a hearing must be held regarding attorney fees. *Manos v. Manos*, 9th Dist. Summit No. 24717, 2010-Ohio-1178, ¶ 36. We have previously stated that a "trial court must determine the reasonableness of the time spent on the matter and the reasonableness of the hourly rate." *Miller v. Miller*, 9th Dist. Wayne No. 09CA0025, 2010-Ohio-1251, ¶ 32. As to the determination of the reasonableness of fees, Loc.R. 25.04(B) provides:

(1) Expert testimony is not required to prove the reasonableness of attorney's fees.

(2) In determining the reasonableness of attorney's fees requested, the court shall consider the affidavit of the attorney concerning fees and expenses, and Rule 1.5(a) of the Rules of Professional Conduct.

Prof.Cond.R. 1.5(a) of the Rules of Professional Conduct provides that the factors to be considered in determining the reasonableness of a fee include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

{¶6} At the end of trial, the court went over the exhibits with counsel for each of the parties and requested that they submit trial briefs. The following exchange occurred:

MR. RICH: Okay. And we're putting the attorney fees – I think –

MR. LOWRY: Attorney's fees.

THE COURT: Yeah, and attorney's fees affidavits.

MS. GLOWACKI: On the attorney fees component affidavit, do you need bills in support?

THE COURT: Yeah. What I like is the affidavit, you know, stating your hourly fees and, you know, your hourly rate and your experience, just to get through the reasonable –

> MR. RICH: As well as the payments, right, because I don't know if you guys got that money out of the trustee money. Did you get that?
>
> MR. LOWRY: Yeah, we got some of that money. Yeah.
>
> THE COURT: Right. I want to see the billing and the payments and the balance.
>
> (WHEREUPON, the proceedings were concluded.)

{¶7} In November 2016, Mr. Kolar filed a post-trial "closing argument" brief and addressed the issue of attorney fees, setting forth factors under R.C. 3105.73 for the trial court's consideration in his argument against awarding attorney fees to Ms. Kolar. Mr. Kolar did not request a hearing on the issue of attorney fees either during the discussion at the close of trial or in his post-trial brief to the court. Consequently, as to Mr. Kolar's contention that he was not afforded an opportunity to cross-examine opposing counsel at hearing, we conclude that argument was forfeited.

{¶8} We further note our decision in *Collette v. Baxter*, cited by Mr. Kolar in his brief to this Court, is distinguishable from the present case. *Collette v. Baxter*, 9th Dist. Summit No. 25821, 2012-Ohio-1333. In *Collette*, a contempt hearing was held, and the defendant objected to going forward with the issue of attorney fees at said hearing, and also objected to the introduction of an affidavit of attorney fees. *Id*. at ¶ 20. The trial court accepted the affidavit, but stated that the defendant could have a separate hearing on the issue. *Id*. We concluded that the trial court had, in effect, granted a continuance with regard to the issue of attorney fees, thereby allowing the defendant the opportunity to make his arguments at a later hearing. *Id*. at ¶ 21. As a result, we concluded it was error for the trial court to summarily award attorney fees based solely on the affidavit. *Id*. Unlike *Collette*, the trial court in this matter did not indicate its intent to go forward with a hearing on the issue of attorney fees.

{¶9} Our discussion does not end there, however, as we must also address Mr. Kolar's argument regarding the issue of the reasonableness of the award of attorney fees. Both parties submitted briefing on the issue of attorney fees after the trial had concluded. Ms. Kolar's post-trial brief set forth an examination of the fees incurred under the factors listed under Prof.Cond.R. 1.5(a). Attorney Lowry attached his affidavit to the brief, setting forth his qualifications, and averring that his fees were based upon the factors set forth in Prof.Cond.R.1.5(a) and that his fees were fair and reasonable.

{¶10} Although the trial court's journal entry addressed equitable considerations in making an award of attorney fees, it did not make any determinations as to the reasonableness of those fees, neither as to the reasonableness of the time spent on the matter, nor to the reasonableness of the hourly rate. Ms. Kolar contends that this Court should apply our holding in *Witmer-Lewis v. Lewis*, where we stated that a trial court is not obligated to provide a detailed analysis or express statements that the trial court made the necessary determination under R.C. 3105.18(H). *Witmer-Lewis v. Lewis*, 9th Dist. Summit No. 23262, 2007-Ohio-240, ¶ 50. Mr. Kolar argues that *Miller v. Miller* applies, where we stated that a "trial court must determine the reasonableness of the time spent on the matter and the reasonableness of the hourly rate." *Miller*, 9th Dist. Wayne No. 09CA0025, 2010-Ohio-1251, at ¶ 32.

{¶11} We conclude that our decision in *Miller*, coupled with the requirements of Loc.R. 25.04(B) of the Court of Common Pleas of Summit County, Domestic Relations Division, required the trial court to make a finding as to the reasonableness of the award of attorney fees by determining the reasonableness of the time spent on the matter and the reasonableness of the hourly rate. We distinguish *Lewis* on several grounds. First, *Lewis* addressed a prior version of R.C. 3105.18; subsection (H) no longer stands. Although R.C. 3105.73(A) now addresses the

issue of attorney fees, it is substantially different from R.C. 3105.18(H). Second, our decision here expressly acknowledges the language of Loc.R. 25.04(B)(2) of the Court of Common Pleas of Summit County, Domestic Relations Division, which provides: "*In determining the reasonableness* of attorney's fees requested, the court shall consider the affidavit of the attorney concerning fees and expenses, and Rule 1.5(a) of the Rules of Professional Conduct." (Emphasis added.) Implicit in this language is the notion that there will be a "determination of reasonableness." Finally, in *Lewis*, we noted that the appellant had not provided us with any authority in support of his argument; in our present case, Mr. Kolar has directed us to *Miller*, which had not been decided at the time of our decision in *Lewis*.

{¶12} We therefore conclude the trial court abused its discretion when it failed to make a finding of the reasonableness of the award of attorney fees by determining the reasonableness of the time spent on the matter and the reasonableness of the hourly rate. Mr. Kolar's first assignment of error is sustained.

ASSIGNMENT OF ERROR TWO

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO SET A SPECIFIC AND CERTAIN TERMINATION DATE FOR ITS MONTHLY SPOUSAL SUPPORT AWARD.

{¶13} In his second assignment of error, Mr. Kolar argues the trial court erred by failing to set a specific and certain termination date for the award of spousal support. We disagree.

{¶14} The Supreme Court of Ohio has stated that spousal support awards should generally terminate upon a date certain in order to place a definitive limit on the party's rights and responsibilities. *Kunkle v. Kunkle*, 51 Ohio St.3d 64 (1990), paragraph one of the syllabus. An award of indefinite duration may be appropriate, however, in cases involving a marriage of long duration, parties of advanced age, or where a spouse has limited earning capacity. *Id.* This

Court "continues to be guided by the considerations listed in *Kunkle* when determining the reasonableness of the duration of a spousal support order." *Uphouse v. Uphouse*, 9th Dist. Summit No. 27623, 2016-Ohio-95, ¶ 6. "If any one of the exceptions set forth in *Kunkle* is present, then the trial court's decision to refrain from setting a termination date for spousal support will rarely be deemed an abuse of discretion." *Mahoney v. Mahoney*, 9th Dist. Medina No. 16CA0061-M, 2017-Ohio-7917, ¶ 14.

{¶15} This Court has previously indicated that a marriage of long duration allows a trial court to award spousal support of indefinite duration without abusing its discretion or violating the principles of *Kunkle*. *Bowen v. Bowen*, 132 Ohio App.3d 616, 627 (9th Dist.1999). In *Bowen*, this Court determined that a marriage of twenty years constituted a marriage of long duration that qualified as an exception to the requirement of a definite termination date. *Id*.

{¶16} In the present case, the parties were married on June 20, 1992, with the trial court finding the termination date of the marriage to be August 23, 2016, for a duration of over 24 years. Ms. Kolar filed her complaint for divorce in July 2012, after 20 years of marriage. The trial court awarded spousal support commencing on November 1, 2016, and subject to the continuing jurisdiction of the court. The trial court stated the "award shall sooner terminate upon the death of either party or the remarriage of [Ms. Kolar]. This award is modifiable upon a showing of a substantial change of circumstances by either party including but not limited to voluntary retirement by either party at age 62 years or older."

{¶17} Under these circumstances, where the duration of the marriage was for 20 years prior to the filing of the complaint for divorce, we conclude the trial court did not abuse its discretion by refraining from placing a termination date on the spousal support payments. Furthermore, the trial court retained continuing jurisdiction to modify the award upon a showing

of a substantial change in circumstances. As we have previously stated, the failure to assign a termination date is not an indefinite award where the court retains continuing jurisdiction to modify spousal support based upon a change in circumstances. *Mahoney* at ¶ 14; *Bowen* at 627. The trial court could revisit, at a later hearing, the question of whether it would be appropriate to set a termination date based upon a substantial change in either party's circumstances. *See Mahoney* at ¶ 14.

{¶18} Mr. Kolar's second assignment of error is overruled.

ASSIGNMENT OF ERROR THREE

> THE TRIAL COURT ERRED BY FAILING TO DIVIDE OR OTHERWISE ACCOUNT FOR THE 2015 INCOME TAX LIABILITY IN ITS DIVISION OF PROPERTY OR SPOUSAL SUPPORT AWARD.

{¶19} In his third assignment of error, Mr. Kolar argues the trial court erred because it did not consider the 2015 income tax liability when allocating the parties' assets or when determining spousal support. We disagree.

{¶20} R.C. 3105.171(B) provides that the trial court shall divide marital property equitably between the parties. "A trial court enjoys broad discretion in fashioning an equitable division of marital property." *Stepp v. Stepp*, 9th Dist. Medina No. 03CA0052-M, 2004-Ohio-1617, ¶ 10. "We review a property division in a divorce proceeding to determine whether the trial court abused its discretion." *Id*.

{¶21} An agreed entry signed by the parties and filed on October 24, 2016, states "[t]he parties shall file joint federal, state, and local income tax returns for the taxable year ending December 31, 2015." The entry further provides: "Defendant, David Kolar, shall assume, be solely responsible for, and pay all tax liabilities associated with the federal, state, and local

income tax returns for the taxable year ending December 31, 2015[,] and indemnify and hold Plaintiff, Bernadette Kolar, absolutely harmless thereon."

{¶22} With regard to the allocation of assets, in light of the parties' agreement that Mr. Kolar would assume and be solely responsible for the 2015 taxes and indemnify and hold Ms. Kolar harmless, it was not unreasonable, arbitrary, or unconscionable for the trial court to not include the 2015 income tax liability in the allocation of assets and liabilities. Had the trial court chosen to include the tax liability in its allocation, Ms. Kolar would have ultimately shared responsibility for the debt from her part of the divided marital property. We therefore conclude the trial court did not abuse its discretion.

{¶23} Mr. Kolar also argues the trial court erred by failing to consider the 2015 tax liability in determining spousal support. R.C. 3105.18(B) provides that, "[i]n divorce and legal separation proceedings, * * * the court of common pleas may award reasonable spousal support to either party." In determining whether spousal support is appropriate and reasonable, the court must consider the factors listed in Section 3105.18(C)(1)(a-n). R.C. 3105.18(C)(1). Among these factors are "[t]he relative assets and liabilities of the parties." R.C. 3105.18(C)(1)(i). "This Court reviews a spousal support award under an abuse of discretion standard." *Hirt v. Hirt*, 9th Dist. Medina No. 03CA0110-M, 2004-Ohio-4318, ¶ 8. "The burden is on the party challenging the award to show that the award is unreasonable, arbitrary, or unconscionable in order for this Court to overturn the award." *Gregory v. Gregory*, 9th Dist. Wayne No. 98CA0046, 2000 Ohio App. LEXIS 3013, *10 (July 5, 2000).

{¶24} Mr. Kolar's contention that the trial court failed to consider the tax liability when determining spousal support is not supported by the record. In its discussion of spousal support in the decree of divorce, the court stated that Mr. Kolar was "requesting to pay spousal support in

the amount of $3,000 per month" and that he cited "his large monthly expenses as the reason for a lower award of spousal support." The trial court further stated: "[Mr. Kolar] also cites his tax liabilities as a reason to diminish the award of spousal support. He indicated that he owes $199,683 in income taxes and penalties for 2015. * * * It should be noted however that [Mr. Kolar] agreed to pay all of these taxes as part of the property division in this case." Finally, in making an award of spousal support, the trial court stated: "Having considered all the statutory factors under R.C. 3105.18, this court concludes that an award of spousal support from [Mr. Kolar] to [Ms. Kolar] is appropriate and reasonable."

{¶25} We conclude that the trial court did not fail to consider the 2015 tax liability in determining spousal support. Mr. Kolar has failed to demonstrate that the award was unreasonable, arbitrary, or unconscionable.

{¶26} Mr. Kolar's third assignment of error is overruled.

ASSIGNMENT OF ERROR FOUR

> THE TRIAL COURT ERRED BY FAILING TO AWARD THE APPELLANT THE SECURITIES AMERICA ACCOUNTS AS HIS SEPARATE PROPERTY UNDER R.C. 3105.171(A)(6).

{¶27} In his fourth assignment of error, Mr. Kolar argues the trial court erred by not designating any of the funds in the Securities America accounts as his separate property. We disagree.

{¶28} R.C. 3105.171(B) provides that, in a divorce proceeding, the trial court must make a determination of what is marital property and what is separate property and divide such property equitably. "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[.]" R.C. 3105.171(A)(3)(a)(i). "Marital property" does not include

separate property. R.C. 3105.171(A)(3)(b). Separate property includes "[a]ny gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse." R.C. 3105.171(A)(6)(a)(vii). R.C. 3105.171(H) states: "the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property."

{¶29} "The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." R.C. 3105.171(A)(6)(b). "The party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property." *Eikenberry v. Eikenberry*, 9th Dist. Wayne No. 09CA0035, 2010-Ohio-2944, ¶ 19. The burden to prove the separate identity of property can be met with documents or testimony, but "merely claim[ing] that the property * * * constitutes * * * separate property does not make it so." *Eikenberry* at ¶ 27-28. The proponent must demonstrate the amount of separate property traced. *See Morris v. Morris*, 9th Dist. Summit No. 22778, 2006-Ohio-1560, ¶ 26; *see also Measor v. Measor*, 160 Ohio App.3d 60, 2005-Ohio-1417, ¶ 55 (11th Dist.) (finding funds not adequately traced when proponent failed to provide documentation of the exact amount or source of the funds).

{¶30} Because the determination of whether property is marital or separate is a fact-based determination, we review a trial court's decision under a manifest-weight-of-the-evidence standard. *Morris*, 9th Dist. Summit No. 22778, 2006-Ohio-1560, at ¶ 23. When reviewing the manifest weight of the evidence, the appellate court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts

in the evidence, the [finder of fact] clearly lost its way * * *." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115 (9th Dist.2001). "Only in the exceptional case, where the evidence presented weighs heavily in favor of the party seeking reversal, will the appellate court reverse." *Boreman v. Boreman*, 9th Dist. Wayne No. 01CA0034, 2002-Ohio-2320, ¶ 10.

{¶31} Mr. Kolar contends that all funds in two Securities America accounts, which are in his name, should have been designated as his separate property by the trial court. Mr. Kolar testified:

> The Securities America account originally was money that I had before I got married. I had $800,000 in securities when I got married. So, that was ultimately rolled into that account. * * * Over time, I used those funds to -- to -- you know, I cashed out or put money back in in order to finance operations of the company.
>
> Starting in 2008, in order – because financing got so much more difficult, we added funds to that.

{¶32} The trial court found as follows:

> [Mr. Kolar] clearly commingled premarital and marital money within these accounts. The court finds that defendant has not shown by a preponderance of the evidence that any monies within the Securities America[] accounts are his traceable separate property. The court finds the Securities America[] accounts to be marital property subject to division by this court. Defendant however testified that he needs to maintain $700,000 in the Securities America[] accounts to satisfy certain liquidity provisions that he has with First Merit Bank. * * * He argues that if he fails to maintain $700,000 in liquidity in the Securities America[] accounts, he will be in default on his loan covenants. He states that the loans on his various Business Entities are cross-collateralized. He further argues that if he is in default on one loan it will cause a default on all loans. The court finds defendant's testimony credible in this regard and will take into account the liquidity requirement of First Merit Bank in determining how to deliver to plaintiff her one-half share of the Securities America[] accounts.

{¶33} Mr. Kolar fails to point us to evidence that establishes the traceability of any separate property presently within the Securities America fund. We therefore conclude the trial court did not err in determining that Mr. Kolar had failed to meet his burden to show by a

preponderance of the evidence that any funds within the Securities America accounts were traceable separate property.

{¶34} Mr. Kolar also contends that the trial court gave little or no consideration to the restrictions on the Securities America accounts, in contradiction of R.C. 3105.171(F)(5), which provides that "[i]n making a division of marital property and in determining whether to make and the amount of any distributive award under this section, the court shall consider * * * [t]he economic desirability of retaining intact an asset or an interest in an asset[.]" This argument is not supported by the record, and as recounted above, the trial court gave consideration to Mr. Kolar's testimony with regard to the accounts.

{¶35} Mr. Kolar's fourth assignment of error is overruled.

III.

{¶36} Mr. Kolar's first assignment of error is sustained. Mr. Kolar's second, third, and fourth assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is reversed and remanded in part, and affirmed in part.

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

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.

THOMAS A. TEODOSIO
FOR THE COURT

CARR, J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

JONATHAN A. RICH and VICTORIA A. GLOWACKI, Attorneys at Law, for Appellant.

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

KENNETH L. GIBSON, Attorney at Law, for Appellee.