[Cite as *Ostry v. McCarthy*, 2021-Ohio-2228.]

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

RONALD OSTRY	C.A. No. 29753
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
PAULA MCCARTHY	
Appellant	CASE No. DR 2018-07-1830

DECISION AND JOURNAL ENTRY

Dated: June 30, 2021

CARR, Presiding Judge.

{¶1} Defendant-Appellant Paula McCarthy appeals from the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court affirms.

I.

{¶2} Ms. McCarthy and Plaintiff-Appellee Ronald Ostry married January 22, 1983. The parties had no minor children at the time of the proceedings. In July 2018, Mr. Ostry filed a complaint for divorce. Ms. McCarthy filed an answer and counterclaim.

{¶3} The matter proceeded to a hearing in July 2019 before the trial court. Relevant to this appeal, the parties contested whether $42,000 provided by Mr. Ostry's mother in 2004 was Mr. Ostry's separate property. That money was used as a down payment to purchase the couple's home on Sun Valley Drive. In addition, the parties differed as to how much spousal support Ms. McCarthy should receive.

{¶4} The parties provided the trial court with findings of fact and conclusions of law. Thereafter, the trial court issued a decree of divorce. Inter alia, the trial court concluded that the $42,000 from Mr. Ostry's mother was a gift to Mr. Ostry and his separate property. In addition, the trial court "imputed" $17,784 in income to Ms. McCarthy and awarded her $1,246.33 per month in spousal support.

{¶5} Ms. McCarthy has appealed, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN FINDING THAT $42,000 USED TO PURCHASE THE MARITAL PROPERTY WAS APPELLEE'S SEPARATE PROPERTY AS THE TRIAL COURT'S FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN FINDING THAT $42,000 USED TO PURCHASE THE MARITAL PROPERTY WAS TRACED AS APPELLEE'S SEPARATE PROPERTY WITHOUT DOCUMENTARY EVIDENCE AS THE TRIAL COURT'S FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]

{¶6} As Ms. McCarthy combined her discussion of her first two assignments of error in her brief, so do we. Ms. McCarthy argues in her first assignment of error that the trial court's finding that the $42,000 from Mr. Ostry's mother was Mr. Ostry's separate property is not supported by the weight of the evidence. Specifically, she maintains that the $42,000 was marital property and that the record does not support that Mr. Ostry's mother's donative intent was to give the money only to Mr. Ostry. Ms. McCarthy asserts in her second assignment of error that Mr. Ostry failed to trace the property as he did not provide any documentary evidence in support of the claim.

{¶7} "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." *Kolar v. Kolar*, 9th Dist. Summit No. 28510, 2018-Ohio-2559, ¶ 30. "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 * * *.'" *Id.*, quoting *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).

{¶8} R.C. 3105.171(B) states that, "[i]n divorce proceedings, the court shall, and in legal separation proceedings upon the request of either spouse, the court may, determine what constitutes marital property and what constitutes separate property." 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). It does not include any separate property. R.C. 3105.171(A)(3)(b). Separate property includes "all real and personal property and any interest in real or personal property that is found by the court to be * * * [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). "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 spouse seeking to identify, and protect, his or her own separate property bears the burden of tracing the existence of the separate property, within the otherwise commingled property." *Swick v.* Swick, 9th Dist. Wayne No. 20AP0009,

2020-Ohio-6884, ¶ 15, quoting *Salmon v. Salmon*, 9th Dist. Summit No. 22745, 2006-Ohio-1557, ¶ 9. "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." (Internal quotations and citations omitted.) *Kolar* at ¶ 29.

{¶9} Here, the trial court concluded that Mr. Ostry's mother gifted $42,000 only to Mr. Ostry in 2004, and that, therefore, the money represented a separate property interest. After reviewing the record, we conclude that Ms. McCarthy has not demonstrated that that determination is against the weight of the evidence.

{¶10} In the course of the proceedings, the money from Mr. Ostry's mother was sometimes described as a pre-inheritance, sometimes as an inheritance, and sometimes as a gift. First, we note that in his affidavit of property, which was admitted as an exhibit, Mr. Ostry listed as his separate property an inheritance of $42,000 from his mother. Ms. McCarthy also submitted an affidavit of property as an exhibit, wherein she also listed in the separate property category a $40,000 inheritance from Mr. Ostry's mother. There is a notation that implies that the money was used as a down payment on a house. It is unclear from the exhibit whether Ms. McCarthy was asserting that the inheritance should be characterized as her separate property or Mr. Ostry's. Either way, the exhibit does evidence that, at least when she completed the form, Ms. McCarthy believed that the money from Mr. Ostry's mother was separate property.

{¶11} In addition, to support his separate property claim, Mr. Ostry presented his affidavit and the affidavit of his mother. His mother's affidavit states as follows:

> 1. I, Rita D. Ostry, ("Affiant") am the mother of three children: Edward S. Ostry; Ronald J. Ostry; and Randi M. Ostry;
>
> 2. In 2004, I entered into a Purchase Agreement and sold my residence * * * to move in with my daughter;

> 3. From the proceeds of the sale of my Residence, and because I was moving in with my daughter, I gave to each of my children a pre-inheritance of $42,000.00 each for their use in purchasing new homes;
>
> 4. My son, Ronald Ostry, together with his wife, Paula B. Ostry, used this pre-inheritance amount towards their purchase of a new home located [on Sun Valley Dr.]; they could not have afforded this home without my bequest.

The affidavit was dated subsequent to Mr. Ostry's filing for divorce and was notarized by his sister, who is an attorney.

{¶12} Mr. Ostry also submitted a similar affidavit that was also admitted as an exhibit. It provides in relevant part:

> 3. From the proceeds of the sale of my Mother's Residence, and because she was moving in with my sister, my Mother gave me and my sister and brother, Edward S. Ostry, a pre-inheritance of $42,000.00 each for our use in purchasing new homes in early 2004;
>
> 4. I, together with my estranged wife, Paula B. Ostry * * * used this pre-inheritance amount in June 2004 towards our purchase of a new home located [on Sun Valley Dr.]

It is dated the same date as Mr. Ostry's mother's affidavit.

{¶13} Moreover, Mr. Ostry presented the testimony of his mother, brother, and himself in support of his assertion that the $42,000 from his mother was his separate property. Mr. Ostry's mother testified that, in 2004, she gave $42,000 to her son. She gave it to Mr. Ostry in approximately $9,000 increments to avoid tax consequences. Contrary to her affidavit, she asserted at trial that she did not know how Mr. Ostry used the money. The checks were only made out to Mr. Ostry and Mr. Ostry's mother did not say anything to Ms. McCarthy about the money. However, Mr. Ostry's mother no longer had copies of the checks. Mr. Ostry's mother gave the same amount to her two other children, Mr. Ostry's sister and brother. Mr. Ostry's mother testified that she was giving the money to Mr. Ostry to do whatever he wanted to do with it. She gifted the money to her three children because she sold her home to move in with Mr. Ostry's sister and

wanted to share the proceeds with her three children. Mr. Ostry's mother agreed that the only document evidencing her intent was the affidavit.

{¶14} Mr. Ostry's brother testified to receiving $40,000 from Mr. Ostry's mother in approximately $9,000 increments. At the time Mr. Ostry's brother was not married and the checks were just made out to him. He confirmed that Mr. Ostry's mother gave money to all three children after she sold her house as a gift/pre-inheritance.

{¶15} Mr. Ostry testified that his mother gave him $42,000 and that that money, along with money from the sale of a previous house, was used for the down payment on the marital home on Sun Valley Drive. He confirmed that his mother wrote the checks to him alone and that there were several of them. During the divorce proceedings, Mr. Ostry was living in a home that the couple previously rented on Harcourt Drive.

{¶16} In her testimony, Ms. McCarthy testified that she listed the $40,000 from Mr. Ostry's mother, which she labeled an inheritance, in her affidavit of property because it was from his mother for both Ms. McCarthy and Mr. Ostry. Ms. McCarthy initially claimed that she copied down what Mr. Ostry put in his affidavit; however, during cross-examination, she acknowledged that she put $40,000, whereas Mr. Ostry listed $42,000 and some bedroom furniture as separate property.

{¶17} After considering all the evidence presented, we cannot say that Ms. McCarthy demonstrated that the trial court's finding that the $42,000 from Mr. Ostry's mother was Mr. Ostry's separate property is against the manifest weight of the evidence. Ms. McCarthy focuses on the paragraph of the affidavit that indicates that the money was used by both Mr. Ostry and Ms. McCarthy to purchase a house, which they could not afford to purchase without that money. However, this ignores the prior paragraph of the affidavit which specifically states that Mr. Ostry's

mother gave the money to her children, not to her children and their spouses. Further, there was testimony that Mr. Ostry's mother wrote the checks only to Mr. Ostry and did not tell Ms. McCarthy about the gift. While there was evidence that both Mr. Ostry and Ms. McCarthy benefited from the gift, we cannot say that Ms. McCarthy has demonstrated that the weight of the evidence supports that Ms. Ostry's mother intended to give the gift to both Mr. Ostry and Ms. McCarthy. Nor has Ms. McCarthy pointed to any evidence that Mr. Ostry made an inter vivos gift of his separate property interest to Ms. McCarthy. *See Salmon*, 2006-Ohio-1557, at ¶ 19. Further, Ms. McCarthy has not demonstrated that the evidence was insufficient to trace the property. Ms. McCarthy points to the lack of documentary evidence, such as cancelled checks; however, this Court has concluded that the proponent's burden can be met with documents or testimony. *Kolar*, 2018-Ohio-2559, at ¶ 29.

{¶18} Overall, we cannot say that Ms. McCarthy met her burden on appeal to demonstrate that the trial court's finding that the money from Mr. Ostry's mother was Mr. Ostry's separate property is against the weight of the evidence. Ms. McCarthy's first two assignments of error are overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION WHEN IT IMPUTED INCOME TO WIFE WITHOUT AN OCCUPATIONAL WAGE EVALUATION AND ORDERED HUSBAND TO PAY WIFE $1,246.33 IN SPOUSAL SUPPORT WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶19} Ms. McCarthy argues in her third assignment of error that the trial court abused its discretion in imputing income to her and ordering Mr. Ostry to pay $1,246.33 in spousal support. Ms. McCarthy maintains that the trial court erred in conducting "its own appraisal of [her] future

earning potential contrary to evidence[]" and that the amount it ordered as spousal support was against the manifest weight of the evidence.

{¶20} "As a general rule, a spousal support award is reviewed for an abuse of discretion." *Lee v. Lee*, 9th Dist. Lorain No. 17CA0011235, 2019-Ohio-61, ¶ 8. However, challenges to factual findings can necessitate that the Court evaluate the weight of the evidence. *See id.*

{¶21} "A trial court must consider the factors set forth in R.C. 3105.18(C)(1)(a)-(n) '[i]n determining whether spousal support is appropriate and reasonable,' and in determining the nature, amount, terms, and duration of a spousal support payment." *Lee* at ¶ 9, quoting R.C. 3105.18(C)(1). "These factors include '[t]he income of the parties, from all sources' and '[t]he relative earning abilities of the parties[.]'" *Lee* at ¶ 9, quoting R.C. 3105.18(C)(1)(a) and (b). In considering R.C. 3105.18(C)(1)(a), "the court is charged with examining the actual income of the parties from all sources and income derived from any divided property. Unlike the child support statute, the spousal support statute does not direct the court to consider the 'potential income' of a spouse when considering the 'income of the parties, from all sources.'" *Collins v. Collins*, 9th Dist. Wayne No. 10CA0004, 2011-Ohio-2087, ¶ 16. "With respect to the earning abilities of the parties, this Court has noted that '[t]he end result is * * * to consider and weigh the spouses' relative earning abilities along with the other factors in arriving at reasonable spousal support both as to amount and term.'" *Lee* at ¶ 9, quoting *Collins* at ¶ 19. "Unlike the child support statute, there is no language in R.C. 3105.18 that directs the trial court to 'impute' income. Instead, the court is directed to examine the relative earning ability of each party." *Collins* at ¶ 19.

{¶22} Here, the trial court set forth an analysis of each of the factors in its judgment entry. Thereafter, the trial court awarded Ms. McCarthy $1,246.33 per month for an indefinite duration due to the length of the marriage. The award would terminate upon the death of either party or the

remarriage of Ms. McCarthy. The trial court retained jurisdiction to modify spousal support as to the amount upon a showing of a substantial change of circumstances by either party.

{¶23} Ms. McCarthy does not challenge the income that the trial court established for Mr. Ostry. Instead, she maintains that the trial court abused its discretion in imputing her with $17,784 annually, which was equivalent to minimum wage. While we agree that the trial court's choice of the word "imputed" is unfortunate, we nonetheless cannot say that Ms. McCarthy has demonstrated that the trial court committed reversible error in concluding her income approximated minimum wage. *See Collins* at ¶ 19.

{¶24} Both parties were around 60 years old at the time of the hearings. The trial court determined that Mr. Ostry's income, which is also listed as "imputed" was $57,518. This amount has not been challenged on appeal. It included overtime that Mr. Ostry testified that he did in order to keep up with all of the expenses, including spousal support, which he began paying in December 2018. Five months prior to the hearing, Mr. Ostry had bilateral partial knee replacements. This surgery kept him home from work for five weeks. Following his surgery, Mr. Ostry was able to switch to a sit-down job, building airplane brake valves. He acknowledged that he had the ability to perform different jobs, had a retirement account, paid vacation, and medical insurance available to him.

{¶25} In addition, there was evidence presented that Mr. Ostry had a deck cleaning business on the side, which he did not include in his affidavit of income and expenses. He indicated that he could not kneel anymore and was not doing it much at the time of trial. Mr. Ostry testified that he typically made anywhere from $1,000 to a few thousand dollars a year doing the deck work.

{¶26} At the time of the hearing, Mr. Ostry was living in the parties' former rental property and Ms. McCarthy was living in the marital residence on Sun Valley Drive. Mr. Ostry

desired to retain the home he was living in and Ms. McCarthy wished to keep the marital home. Ms. McCarthy testified that because of her lack of credit history, she hoped to use money from Mr. Ostry's 401(k) to pay off the balance of the marital home. At the time of trial, both of the parties' adult children were living with Ms. McCarthy in the marital home. Ms. McCarthy testified that neither her son nor her daughter was providing any money to Ms. McCarthy.

{¶27} Early in the marriage, Ms. McCarthy worked as a dental assistant for 6 to 8 years. After her daughter was born, because Ms. McCarthy is agoraphobic, she stopped working outside of the home. She began babysitting in the home to supplement her income in 1987 or 1988. As recently as December 2018, Ms. McCarthy testified she was babysitting five to seven children and earning between $500 to $700 per week. Despite this, Ms. Ostry listed her income on her affidavit of income and expenses as zero. Worsening medical issues caused Ms. McCarthy to decrease the number of children she was babysitting. Ms. McCarthy testified that she was on medication for anxiety, depression, and high blood pressure among others. Ms. McCarthy had also been in need of a double knee replacement for several years but has not been able to get one due to her babysitting and her A1c levels. Her A1c levels were related to her diabetes, a condition which she has had for 15 years. Ms. McCarthy maintained that she could not work as she could not stand for long periods and had a hard time walking. She stated that she has 80 percent neuropathy in her feet and could not feel her toes. While Ms. McCarthy maintained that she had thousands of dollars in medical bills, a patient ledger that she submitted as an exhibit indicated that her total balance due was less than $200. After the divorce, Ms. McCarthy would also have to supply her own medical insurance, which she estimated the cost to be from $565 to 709 a month.

{¶28} The last time Ms. McCarthy babysat five children was in March or April 2019. At the time of trial, she testified that she was earning $120 a week from one child, which would

amount to the $6,240 a year that she believes should be utilized as her income for spousal support purposes. She acknowledged that she did not report the income from babysitting on her taxes. While she applied for Social Security Disability, her application was denied, and she did not appeal the ruling or seek guidance from an attorney.

{¶29} While Ms. McCarthy was asked to supply four years of bank statements; instead, she only provided a few months of statements from late 2018 into 2019. The records evidence Ms. McCarthy's January, February, and March 2019 statements demonstrated thousands of dollars in deposits that she could not fully explain; however, she did admit that at least some of the money came from babysitting. While Ms. McCarthy maintained that all of the money did not come from babysitting, she did not offer a source as to where it came from. Irrespective, the deposits, aside from spousal support totaled over $2,000 per month for the first three months of the year.

{¶30} After a thorough review of the record, we cannot say that Ms. McCarthy demonstrated that the trial court's decision amounts to an abuse of discretion, or that it is against the weight of the evidence. The trial court noted that it did not find Ms. McCarthy's testimony credible in several respects. Many of the items the trial court pointed to related to issues concerning Ms. McCarthy's income. Here, there was evidence in the record that during 2019 Ms. McCarthy was somehow earning over $2,000 per month. Assuming that were to continue through the year, Ms. McCarthy would make $24,000 a year. While Ms. McCarthy maintained that she could no longer babysit multiple children at a time, the trial court was not required to find her testimony credible. Notably, Ms. McCarthy had previously babysat five to seven children all while suffering from the same health conditions she had at the time of trial. Thus, we cannot say that the trial court's conclusion that Ms. McCarthy's income for spousal support purposes was $17,784 annually amounts to reversible error. If there is any error, it appears to be an error in her favor.

While Ms. McCarthy asserts that the trial court could not conduct its own appraisal of her income and instead could only do so if there was expert testimony presented, she has provided no legal authority in support of her claim. *See* App.R. 16(A)(7). Nor does the record demonstrate that the trial court actually conducted an appraisal.

{¶31} The trial court provided a detailed analysis of the factors set forth in R.C. 3105.18(C)(1) and expressly considered both parties' positions. In awarding spousal support, the trial court nearly equalized the parties' incomes. While the amount awarded would not cover the amount of expenses listed on Ms. McCarthy's affidavit of income and expenses, her expenses should decrease if she chooses to pay off the debt on the marital home after the property division is complete as she indicated was her intention. Further, the award anticipates that Ms. McCarthy will be providing some income to cover her expenses. Accordingly, we cannot say that Ms. McCarthy has demonstrated the trial court abused its discretion in its spousal support award.

{¶32} Ms. McCarthy's third assignment of error is overruled.

III.

{¶33} Ms. McCarthy's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed.

Judgment affirmed.

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 to Appellant.

DONNA J. CARR
FOR THE COURT

CALLAHAN, J.
SUTTON, J.
CONCUR.

APPEARANCES:

NICHOLAS KLYMENKO, Attorney at Law, for Appellant.

BRENDON J. KOHRS, Attorney at Law, for Appellee.